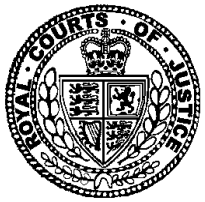

Neutral Citation Number: [2021] EWHC 2330 (Comm)

Case No: CL-2020-000561

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Double-click to add Judgment date

Before:

Peter MacDonald Eggers QC
(sitting as a Deputy Judge of the High Court)

- -

Between:

(1) VARIOUS AIRFINANCE LEASING COMPANIES (listed at Schedule A to the Claim Form) (2) ALIF SEGREGATED PORTFOLIO COMPANY (for and on behalf of itself and each of ALIF Segregated Portfolio Company 2, ALIF Segregated Portfolio Company 4 and ALIF Segregated Portfolio Company 5)	**Claimants**
- and -	
SAUDI ARABIAN AIRLINES CORPORATION	**Defendant**
- and -	
INTERNATIONAL AIR FINANCE CORPORATION	**Third Party**

- -

Tom Sprange QC and Kabir Bhalla (of **King & Spalding International LLP**) for the **Claimants**
Charles Béar QC and Giles Robertson (instructed by **Norton Rose Fulbright LLP**) for the **Defendant**

Hearing date: 23rd July 2021

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 18 August 2021 at 2.00 pm.

Peter MacDonald Eggers QC:

Introduction

1. The Claimants and the Third Party ("the IAFC Parties") apply for permission to amend their Particulars of Claim and their Reply and Defence to Counterclaim. The Defendant ("Saudia") also applies for permission to amend its Defence and Counterclaim. The applications for permission to amend are made under CPR rule 17.1(2)(b). Each of the applications is resisted by the respondent to the application.

2. This action concerns the proper construction of certain provisions contained in Lease Agreements signed in 2015 relating to 50 Airbus aircraft, originally between the Third Party as Lessor and Saudia as Lessee. Twenty of the Lease Agreements relate to A330-300 Regional Aircraft ("A330") and thirty of the Lease Agreements relate to Airbus A320-200 ("A320").

3. The First Claimants are the current Lessors of the aircraft (to whom the leases were novated by the Third Party) and the Second Claimants are suing in their representative capacity as the parent portfolio companies of the Lessors.

4. Under clause 4(a)(i) of the Lease Agreements, Basic Rent is payable by Saudia at the rate of US$640,000 per month for the A330 aircraft and US$318,000 per month for the A320 aircraft ("the Basic Rent").

5. The Basic Rent is subject to two escalation factors:

   (1) The "*Airbus Escalation Formula Adjustment*" ("the Airbus Escalation"), by which the Basic Rent would be escalated in accordance with the Airbus Price Revision

Formula ("the APRF") from January 2014 to the Delivery Date for each Aircraft (to produce "*the Airbus Escalated Rent*"); and

(2) The "*LIBOR Escalation of Basic Rent*" ("the LIBOR Escalation"), by which the then current Basic Rent as escalated in accordance with the Lease Agreements would be further escalated on the first Basic Rent Payment Date and each third Basic Rent Payment Date thereafter.

6. The parties' dispute concerns both the Airbus Escalation and the LIBOR Escalation.

7. The IAFC Parties' position is that the LIBOR Escalation creates a ratchet pegged to LIBOR, by which any positive amount generated pursuant to the escalation mechanism is added to the then current Basic Rent (as already escalated by the Airbus Escalation and any previous LIBOR Escalation), which then sets a new floor for the Basic Rent for the remainder of the Lease Agreements.

8. Saudia's position is that the LIBOR Escalation rises and falls with LIBOR.

9. At the time of the Reply and Defence to Counterclaim, the IAFC Parties calculated that on their case Saudia had underpaid US$38.7 million. The IAFC Parties maintain that the amount increases each month because the conditions for "*ratcheting up*" are satisfied, and Saudia is now paying only what it says is due and not what the IAFC Parties say the Claimants are owed under the Lease Agreements.

10. Saudia's case is that it has overpaid US$21.9 million, but that amount does not change with time, because Saudia has elected to pay the Basic Rent on the basis of its own construction of the LIBOR Escalation.

11. The IAFC Parties contend that in the negotiations that in 2016 led to the Memorandum of Understanding dated 8th August 2016 ("the MOU") agreed between the parties, Saudia had agreed (1) that the APRF would always be composed of the "*Airframe Price Revision Formula*" rather than (as set out in the Lease Agreements) a combination of that formula and the "*Propulsion Systems Price Revision Formula*"; and (2) to use the APRF for the month following the delivery month of each aircraft. The IAFC Parties contend that the applicable APRF was thereafter set out in each of the Notices of Assignment of Sub-Lease, each of the Acknowledgements of Assignment of Sub-Lease (the latter of which were signed, on all fifty occasions, by Saudia) and each of the Lease Supplements (signed on all fifty occasions by Saudia).

12. Saudia disagrees with the IAFC Parties' case. Saudia's case is that the only agreement was that (as it says was recorded in the MOU) the APRF for 2016 would be 1.053228, that the various documents signed at delivery do not provide as the IAFC Parties allege, and that from December 2017 it was signing those documents under protest. It says in consequence it has overpaid the Basic Rent, but that it does not know by how much.

13. The IAFC Parties' applications for permission to amend their statements of case relate to the LIBOR Escalation and the Airbus Escalation.

The principles applicable to the applications for permission to amend

14. Mr Tom Sprange QC, who appeared with Mr Kabir Bhalla on behalf of the IAFC Parties, outlined the principles to be applied by the Court in disposing of an application for permission to amend a statement of case. I did not understand Mr Charles Béar QC who appeared with Mr Giles Robertson on behalf of Saudia fundamentally to dispute these principles. I have borne these principles in mind in considering the parties' applications and expand upon them below.

15. In considering the applications, the following principles guide the Court in the exercise of its discretion whether or not to allow the proposed amendments, where the application is made, as here, prior to the commencement of the trial:

    (1) The Court has a discretion to permit an amendment in accordance with the overriding objective to deal with cases justly and at proportionate cost. To this end, the Court will weigh the relative injustice to the applicant if the amendment is refused against any prejudice to the respondent if the amendment is permitted (*Quah Su-Ling v Goldman Sachs* [2015] EWHC 759 (Comm), para. 38; *Parris v Ajayi* [2021] EWHC 285 (QB), para. 45).

    (2) The proposed amendments should be properly and clearly formulated. By properly formulated, I take this to mean that the proposed amendment must be appropriately particularised and must disclose reasonable grounds for bringing or defending a claim or allegation and not constitute an abuse of process. By clearly formulated, I take this to mean that the proposed amendment must be readily understandable by the respondent in order to enable it to appreciate, evaluate and answer the case being advanced by the applicant. In *Scott v Singh* [2020] EWHC 1714 (Comm), at para. 18, His Honour Judge Eyre QC said:

> "*… the proposed amendment must be properly formulated in the sense of being comprehensible and setting out clearly the case which the other party is to meet. The proposed amendment must satisfy the requirements of the CPR in terms of the proper particularisation and pleading of any cause of action asserted in the amended pleading*."

    (3) As regards particularisation of a plea which is sought to be introduced by way of an amendment, it is the absence of any particulars which is a cause for concern. The other extreme is a fully particularised plea. However, many pleas are not fully particularised, but provide some particulars to varying degrees. Where a proposed amendment is particularised, but perhaps not to the extent a purist would wish, the Court must decide whether the particularisation is adequate to allow the amendment. Where the particularisation is just adequate, but the particulars of the plea could be further developed, the solution which the Court could opt for is to allow the amendment, but on condition that further particulars will be provided by the applicant, or to permit the respondent to request further information as to the plea and to require the applicant to provide the further information as requested insofar as the information can be provided.

(4) If the amendment raises a substantive new claim or defence or other allegation, an applicant must demonstrate that the proposed new claim or defence or allegation has a real prospect of success (within the meaning adopted in CPR rule 24.2); the Court may reject an amendment seeking to advance a case which is "*inherently implausible or self-contradictory*" or insupportable based on any evidence (*Quah Su-Ling v Goldman Sachs* [2015] EWHC 759 (Comm), para. 36; *Scott v Singh* [2020] EWHC 1714 (Comm), para. 19).

(5) Particularly in complex litigation, it is not unusual for amendments to be made to the statements of case to reflect changes in the parties' understanding of the issues and the other party's case, the emergence of new evidence, or developments in the law. The parties may also wish to amend the statements of case to reflect the evidence that they have served for adduction at trial or to narrow or perhaps to reformulate the issues in the action. This is a consideration which the Court should take into account in deciding how to dispose of the application having regard to principles of active case management and the furtherance of the overriding objective. See *Terre Neuve Sarl v Yewdale Ltd* [2020] 7 WLUK 73, para. 16.

(6) A relevant factor to be taken into account is the fact that the case sought to be advanced by the applicant by the proposed amendment is one which the parties had already been addressing whether by other pleas or in evidence, although this consideration will be less material where the new case has received only peripheral attention to date. See *Toucan Energy Holdings Ltd v Wirsol Energy Ltd* [2021] EWHC 895 (Comm), Annex, para. 9-10.

(7) An amendment may be timely or late. An application is timely if the proposed amendment should not reasonably have been made at an earlier time (for example, if the evidence on which the proposed amendment was based was not reasonably available to the applicant at an earlier time or if the significance of the proposed plea was not reasonably understood at an earlier time) or if the subject matter of the amendment should not reasonably have been included in the original statement of case (*CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd* [2015] EWHC 1345 (TCC); (2015) 160 Con LR 73, para. 19). Lateness in this context is a relative concept. In this respect, the Court must have regard to the stage of the proceedings at which the amendment is sought to be made, the proximity to the trial date (if fixed), the reasons for the timing of the application, and the impact of allowing the application upon the parties' preparations for trial. See *Quah Su-Ling v Goldman Sachs* [2015] EWHC 759 (Comm), para. 38; *Scott v Singh* [2020] EWHC 1714 (Comm), para. 20).

(8) An application that is not timely will be treated as late. The lateness of the application will weigh as one factor against the applicant in the Court's consideration of the application, especially if it will result in additional or wasted expenditure in the pursuit or defence of the action.

(9) That notwithstanding, it has also been said that an application may be treated as late if the introduction of the amendment would involve "*the duplication of cost and*

effort, or if it requires the resisting party to revisit any of the significant steps in the litigation" (*CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd* [2015] EWHC 1345 (TCC); (2015) 160 Con LR 73, para. 19). That may be so in some cases, although if the applicant could not reasonably have made the application earlier, the Court should be prepared to consider the application as a timely application, unless the application is "*very late*", meaning that even if the application could not reasonably have been made earlier, the timing of the application is such that it will interfere with the parties' legitimate expectation that the date fixed for trial will be adhered to.

(10) An application will be treated as "*very late*" if a trial date is fixed and the allowance of the application will lead to the adjournment of the trial. In the case of a very late application, a heavy burden lies on the applicant to demonstrate "*the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission*" (*Quah Su-Ling v Goldman Sachs* [2015] EWHC 759 (Comm), para. 38).

16. In the present case, neither of the parties suggested that allowing the relevant amendments would imperil the trial date, which has been fixed to commence on an expedited basis in March 2022. Accordingly, none of the applications can be said to be "*very late*".

The applications for permission to amend

17. There are three applications which require determination by the Court:

(1) The IAFC Parties' application for permission to amend the Particulars of Claim to introduce an estoppel by convention case in respect of the LIBOR Escalation.

(2) The IAFC Parties' application for permission to amend the Reply and Defence to Counterclaim to introduce a case of variation and estoppel in respect of the Airbus Escalation.

(3) Saudia's application to amend its Defence and Counterclaim to expand on its defence to the Late Payment Amounts claim (a claim which is at least superficially wholly discrete from the LIBOR Escalation and the Airbus Escalation).

IAFC Parties' application: the LIBOR Escalation Amendments

18. The IAFC Parties apply for permission to introduce an estoppel by convention case as regards the LIBOR Escalation, based on an alleged common understanding as to how the LIBOR Escalation would work that was shared between the parties during the negotiations of the Lease Agreements.

19. The LIBOR Escalation is explained in the Lease Agreements as follows:

"*The then current Basic Rent as escalated pursuant to sub-paragraph (a) above [the Airbus Escalation] shall be further escalated pursuant to this sub-paragraph (b) on the first Basic Rent Payment Date and each third Basic Rent Payment Date thereafter as follows:*

> *if L [LIBOR] on such date is greater than the Base Rate [100 bp], the Basic Rent will increase by $325 for each basis point that L is greater than the Base Rate; or*
>
> *if on such date L is less than or equal to the Base Rate, the Basic Rent for the Rent Period will not be escalated in accordance with this sub-paragraph (b)*"

20. The proposed amendment is to be understood in the context of the IAFC Parties' case on the construction of the Lease Agreements, in particular that "*by the LIBOR Escalation and the formula at sub-paragraph (b), Basic Rent is escalated pursuant to a 'ratcheting' mechanism pegged to LIBOR, by which any positive amount generated by operation of sub-paragraph (b) is added to the then-current Basic Rent (as already escalated by the Airbus Escalation and any previous LIBOR Escalation), and sets a floor for Basic Rent for the remainder of the Lease Agreements*" (paragraph 8 of the Particulars of Claim).

21. Saudia's case on construction is that the effect of this provision is that every three months, the formula is applied afresh to the Basic Rent, with the result that if LIBOR is then above the 1% Base Rate, the Basic Rent increases; but if LIBOR then falls again, the next recalculation of Basic Rent will be on the basis of the lower LIBOR figure.

22. The difference between the parties may be said to reside in the principal consideration that on the IAFC Parties' case, the Basic Rent cannot fall even if LIBOR falls, but on Saudia's case, the Basic Rent can fall if LIBOR falls.

23. The IAFC Parties already plead that Saudia is estopped from contending that the Lease Agreements are not to be interpreted in the way that Saudia contends by convention and/or conduct, by reason of Saudia's satisfaction of 776 invoices in respect of the Basic Rent in which the ratchet was applied under the Lease Agreements, from July 2018 to June 2020, consistently with the interpretation advanced by the IAFC Parties (paragraph 22.2 of the Particulars of Claim).

24. The proposed amendment is to add an alternative case based on an estoppel by convention at paragraphs 22.2 and 23 of the Particulars of Claim. The proposed amendment reads as follows:

> "*22.2 … Alternatively, or in addition, Saudia is estopped by convention from contending otherwise by reason of a common assumption, established during the negotiation of the Lease Agreements. The common assumption was that the purpose of the LIBOR Escalation mechanism was to increase rent by reference to the highest LIBOR rate during the course of the Lease Agreements (i.e. that it would function as a ratchet). As to this estoppel by convention, the parties understood and accepted that:*

22.2.1 the LIBOR Lease rates would impact upon the financing arrangements that the Claimants and Third Party would enter into, given the reliance on LIBOR by financer to set the terms of finance arrangements;

22.2.2 That finance costs would accordingly be directly impacted by increases in the LIBOR rate and that required related increases in the LIBOR Lease rates to reflect the impact on finance costs which the parties acknowledged would not necessarily be linear;

22.2.3 That LIBOR rates were low and had the potential to increase;

22.2.4 That Saudia would, consistently with its commercial objectives, receive a discounted rent amount from that originally proposed along with concessions regarding maintenance, at the outset

22.2.5 That in return for the Claimant and Third Party's concessions on rent and maintenance, the low LIBOR Rates in existence at the time and the non-linear impact on finance costs that would result from an increase in the LIBOR Rates, that the LIBOR Escalation would function as a ratchet.

23. As to the formation of this estoppel by convention, it was formed and communicated between the parties as follows:

23.1 The LIBOR Escalation mechanism was inserted following Saudia's insistence (through Mr Salah Al Jasser) on a significantly discounted Basic Rent: USD 640,000 for A330s, instead of the USD 850,000 originally proposed, and USD 318,000 for A320s, instead of the USD 385,000 originally proposed, as well as other concessions on maintenance.

23.2 The common understanding was reached, and communicated between the parties, at meetings between the parties from May-June 2015, including (i) a meeting at the offices of Mr Hashim Koshak (Saudia's then Head of Legal) with the attendance of Mr Abdullah Al Gahtani, Mr Ashraf Suleman, Mr Syed Bokhari and Mr Abdulgader Bujabair (from Saudia) and Dr Idriss Ghodbane and Mr Moulay Omar Alaoui of IAFC; and (ii) a meeting at the offices of Mr Saleh Al Jasser, attended by Mr Koshak and Mr Abdulrahman Al Tayeb of Saudia and Dr. Idriss Ghodbane and Mr Moulay Omar Alaoui of IAFC, at which the ratchet range was fixed.

23.3 The common understanding was further reflected in other communications between the parties, including in an email and attached 'commentary document' sent by Mr Koshak of Saudia to IAFC on 26 May 2015, in which Saudia expressed its understanding

of the LIBOR Escalation consistently with the interpretation set out at paragraphs 7-8 above."

25. In support of the IAFC Parties' application, Mr Sprange QC submitted that:

(1) The LIBOR Amendments seek to introduce an estoppel by convention claim that there was a common assumption or understanding, communicated between the parties during the course of the negotiations of the Lease Agreements, that LIBOR Escalation would function as a ratchet.

(2) Whilst the IAFC Parties accept that this is technically a new point, it is not one that Saudia can properly say has taken it by surprise. The original plea, made in the context of the IAFC Parties' arguments on construction, was that the LIBOR Escalation ratchet mechanism was introduced in exchange for other concessions at the time, including lower lease rates than were initially proposed. Saudia is therefore familiar with the nature of the case, and the factual basis for it.

(3) Saudia cannot plausibly say that the introduction of an estoppel by convention claim relating to the negotiation of the Lease Agreements prejudices its defence of the Claimants' claims. There is an existing estoppel plea in respect of the LIBOR Escalation by reference to the payment of invoices. The extension of the estoppel by convention claim to the negotiation of the Lease Agreements will, at worst, require very limited further witness evidence and disclosure, for a defined short time period, to deal with the shared assumption which gives rise to the alleged estoppel. This cannot be said to amount to any meaningful prejudice to Saudia.

(4) Saudia rightly does not appear to dispute that the proposed amendment has real prospects of success.

(5) Saudia's principal objections are based on the lack of particulars in the proposed amended plea. However, Saudia is in a position to understand the case being advanced by the IAFC Parties. The essence of the alleged common understanding was that the Claimants would accept lower rent rates than those initially proposed (US$640,000 instead of the US$850,000 originally proposed for the A330s, and US$318,000 instead of the US$385,000 originally proposed for the A320s), in exchange for the inclusion of the ratchet. The ratchet represented a commercial risk for each party, but these risks were known and accepted by both parties as they had the potential to benefit both.

26. Mr Béar QC on behalf of Saudia submitted that permission should be denied to the IAFC Parties for the following reasons:

(1) The IAFC Parties had previously sought to rely on pre-contractual negotiations as an aid to the contractual construction of the LIBOR Escalation formula and their plea in this respect had been struck out by Ms Sonia Tolaney QC (sitting as a Deputy High Court Judge) on 10th May 2021. The new estoppel by convention plea

sought to be introduced by the IAFC Parties seeks to "*recast their plea relating to the pre-contractual negotiations as an estoppel by convention*".

(2) A disputed claim based on an estoppel should be carefully pleaded (*ING Bank NV v Ros Roca SA* [2011] EWCA Civ 353; [2012] 1 WLR 472, para. 77). Further, the "*pleading should state with clarity and precision all the matters relied upon, including detriment*": *Magrath v Parkside Hotels Ltd* [2011] EWHC 143 (Ch), para. 32. These requirements are more pressing when made in the context of a late amendment.

(3) The Claimants' pleading does not meet the requisite standard because:

(a) It is unclear how the alleged estoppel is supposed to work in that the amendment pleads the "*purpose of the LIBOR Escalation*", not the alleged common assumption.

(b) The other factors alleged at paragraphs 22.2.1-22.2.4 have no necessary connection to the apparent core "*ratchet*" allegation.

(c) The "*common understanding*" is said to have been communicated at "meetings between the parties" (paragraph 23.2), but no specifics are given as to who is alleged to have used what words.

(d) The understanding is also said to be reflected "*in other communications between the parties including …*", but reference is made to only one email.

(e) There is no plea as to how Saudia assumed responsibility for the Claimants' reliance on the alleged common understanding (*Revenue and Customs Commissioners v Benchdollar Ltd* [2009] EWHC 1310 (Ch); [2010] 1 All ER 174, para. 52).

(f) There is no explanation of whether or how the Claimants relied on the alleged common assumption (*Keen v Holland* [1984] 1 WLR 251). Something more has to be identified than that the Claimants entered into the Lease Agreements on the basis of the alleged common assumption. It is not sufficient for the Claimants to rely on the same reliance plea which has been deployed for the existing estoppel case based on Saudia paying the invoices.

27. In addressing this application, both parties accepted the statement of principle applicable to establishing an estoppel by convention set out in the decision of Briggs, J in *Revenue and Customs Commissioners v Benchdollar Ltd* [2009] EWHC 1310 (Ch); [2010] 1 All ER 174, para. 52:

> "*52. In my judgment, the principles applicable to the assertion of an estoppel by convention arising out of non-contractual dealings, to be derived from Keen v. Holland, and the cases which comment upon it, are as follows: (i) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them. (ii) The*

expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it. (iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter. (iv) That reliance must have occurred in connection with some subsequent mutual dealing between the parties. (v) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position."

28. Subsequently, in *Stena Line Ltd v Merchant Navy Ratings Pension Fund Trustees Ltd* [2010] EWHC 1805 (Ch); [2010] Pens LR 411, at para. 137, Briggs, J amended the first of the requirements of an estoppel by convention stated in para. 52 of *Revenue and Customs Commissioners v Benchdollar Ltd* to include the statement that "*the crossing of the line between the parties may consist either of words or conduct from which the necessary sharing can properly be inferred*". A similar modification to the statement of principle was approved by the Court of Appeal in *Blindley Heath Investments Ltd v Bass* [2015] EWCA Civ 1023; [2017] Ch 389, at para. 92, where the Court said that "*we do not think there must be expression of accord: agreement to the assumption (rather than merely a coincidence of view, with both proceeding independently on the same false assumption) may be inferred from conduct, or even silence … However, something must be shown to have "crossed the line" sufficient to manifest an assent to the assumption*".

29. This statement of principle, as amended, was very recently approved by the Supreme Court in *Tinkler v Commissioners for Her Majesty's Revenue and Customs* [2021] UKSC 39, which decision was handed down after the oral hearing of the application, and as to which I invited the parties to make submissions in writing. In that case, Lord Burrows said at para. 51-53:

"*51. It may be helpful if I explain in my own words the important ideas that lie behind the first three principles of Benchdollar. Those ideas are as follows. The person raising the estoppel (who I shall refer to as "C") must know that the person against whom the estoppel is raised (who I shall refer to as "D") shares the common assumption and must be strengthened, or influenced, in its reliance on that common assumption by that knowledge; and D must (objectively) intend, or expect, that that will be the effect on C of its conduct crossing the line so that one can say that D has assumed some element of responsibility for C's reliance on the common assumption.*

52. It will be apparent from that explanation of the ideas underpinning the first three Benchdollar principles that C must rely to some extent on D's affirmation of the common assumption and D must (objectively) intend or expect that reliance. This is in line with the paragraph from Spencer Bower, The Law Relating to Estoppel by Representation, 4th ed (2004) p 189, which was cited by Briggs J just before his statement of principles:

> *"In the context of estoppel by convention, the question here is whether the party estopped actually (or as reasonably understood by the estoppel raiser) intended the estoppel raiser to rely on the subscription of the party estopped to their common view (as opposed to each, keeping his own counsel, being responsible for his own view)."*
>
> *For a similar statement, using the same wording of C's reliance on "the subscription" of D to the common assumption, see the present edition of that work, Spencer Bower: Reliance-Based Estoppel, 5th ed (2017), para 8.26. But this is not to suggest that C must be relying solely on D's affirmation of, or subscription to, the common assumption as opposed to C relying on its own mistaken assumption. It is sufficient that, as D intended or expected, D's affirmation of, or subscription to, the common assumption strengthened, or influenced, C in thereafter relying on the common assumption.*
>
> *53. As I have already said, both counsel submitted that the Benchdollar principles, subject to the Blindley Heath amendment to the first principle, applied in this case. I agree. This judgment therefore affirms that those principles, as amended by Blindley Heath, are a correct statement of the law on estoppel by convention in the context of non-contractual dealings. What I have also sought to do is to explain the ideas underpinning the first three principles which may provide assistance in the understanding and application of those principles*."

30. It is also worth observing that the case which Lord Burrows was considering in *Tinkler v Commissioners for Her Majesty's Revenue and Customs* and Briggs, J was considering in *Revenue and Customs Commissioners v Benchdollar Ltd* were non-contractual cases and dealings. However, Lord Burrows said at para. 78:

> "*… While it is possible that there may be some differences required by the relevant contractual or non-contractual context …, it would appear that the Benchdollar principles are being viewed as general principles applicable to estoppel by convention. It is significant in this respect, that the present edition of Spencer Bower: Reliance-Based Estoppel, 5th ed (2017), chapter 8, centres its whole analysis of estoppel by convention on the Benchdollar principles. Although it is unnecessary to decide this in this case - and we heard no submissions on it - there appears to be no good reason to confine them to non-contractual dealings. In my view, the five Benchdollar principles, with the Blindley Heath amendment to the first principle, comprise a correct statement of the law on estoppel by convention for contractual, as well as non-contractual, dealings*."

31. With this statement of principle in mind, I also have regard to the salutary requirement that a case of an estoppel should be properly pleaded meaning that the party alleging the estoppel should articulate (a) the relevant assumption, (b) the means by which the assumption was shared and crossed the line between the parties, (c) the manner in which the party alleging the estoppel has relied on the common assumption in connection with its

dealings with the party alleged to be estopped, and (d) the detriment suffered by the party alleging estoppel by reason of such reliance.

32. Briggs, J stated that in establishing an estoppel by convention "*The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it*". Lord Burrows explained this to mean that the party alleged to be estopped must have objectively intended or expected that the effect of its conduct crossing the line was that the party alleging the estoppel will have relied on the relevant assumption. In my judgment, this element of an effective estoppel by convention, being an objective factor, is likely to be implicit in the means by which the relevant conduct crosses the line and/or in the manner of the relevant party's reliance on the relevant assumption. As such, it is not an element which may require separate pleading. A statement of case which properly pleads the communication of the relevant assumption and the reliance on that assumption by the party alleging the estoppel could be taken as alleging (even if only implicitly) that the party alleged to be estopped assumed responsibility for the common assumption. I do not consider that necessarily requires a separate plea by way of a formulaic refrain, because it is not a separate fact requiring pleading, but merely an evidential conclusion to be drawn from the facts alleged in support of the plea of estoppel by convention. There may well, however, be cases where the assumption of responsibility in this respect is a matter of fact which requires separate pleading.

33. The careful pleading of an estoppel by convention enables the other party alleged to be estopped to understand the case made against it, which invariably attributes to it the making and expression of or assent to a common assumption, and to plead to it so that it is clear what facts are or are not in dispute (*ING Bank NV v Ros Roca SA* [2011] EWCA Civ 353; [2012] 1 WLR 472, para. 77-78).

34. Considering the proposed amended pleading (paragraphs 22.2 and 23 of the Particulars of Claim), I observe as follows:

    (1) The relevant assumption is adequately pleaded, namely "*The common assumption was that the purpose of the LIBOR Escalation mechanism was to increase rent by reference to the highest LIBOR rate during the course of the Lease Agreements (i.e. that it would function as a ratchet)*". The relevant assumption is further particularised at paragraphs 22.2.1-22.2.5. Saudia objects that paragraphs 22.2.1-22.2.4 have no necessary connection to the apparent core "*ratchet*" allegation. That may or may not be so, but that is a matter to be contested at trial.

    (2) The means by which the assumption was shared and crossed the line is pleaded in paragraphs 23.2-23.3 in that it is alleged that the common understanding was communicated at meetings between the parties "*from May-June 2015, including*" a meeting at the offices of Mr Hashim Koshak and a meeting at the offices of Mr Saleh Al Jasser, "*at which the ratchet range was fixed*", and "*in other communications between the parties, including in an email … sent by Mr Koshak … to IAFC on 26 May 2015*". During his oral submissions, I asked Mr Sprange QC

whether the use of the word "*including*" was intended to indicate that there were other instances of oral and written communication between the parties. Mr Sprange QC said that the IAFC Parties were not intending to rely on any meetings at which the common assumption was communicated other than the two referred to, but in respect of written communications, Mr Sprange QC said that the email referred to was only an "*example*" and that there might be other documents which reflect the common understanding which the IAFC Parties have not yet seen. The proposed pleading is not as complete as it should be in that, although it is alleged that the common assumption was communicated at two meetings, it is not made clear which person or persons attending the meeting expressed the common assumption by words or conduct. As far as other documents are concerned, as I understand it, the only document of which the IAFC Parties are aware in which the common assumption was communicated has been identified. If further documents come to light, it would be open to the IAFC Parties to apply for permission to amend to introduce such a reference if it was thought appropriate or necessary. I do not consider that this element of the estoppel by convention case is insufficiently pleaded. If Saudia desires further information as to what was said to whom at the two meetings, and if thought relevant as to the circumstances which objectively demonstrate Saudia's appreciation that the IAFC Parties should rely on the common assumption, further information can be requested and, if it is requested, it should be provided insofar as it can be.

(3) The most serious objection raised by Saudia to the proposed amendment is the possible absence of any detrimental reliance on the common assumption. In *Magrath v Parkside Hotels Ltd* [2011] EWHC 143 (Ch), at para. 32, His Honour Judge Mackie QC said that the pleading "*should state with precision and clarity all the matters relied upon, including detriment, to make good its case*".

(4) Initially, I was of the mind that there was no such pleaded detrimental reliance. This is because there is no overt and unambiguous statement to that effect. Further, insofar as it was suggested by the IAFC Parties that there was already a pleaded case of detrimental reliance by reason of the existing plea of estoppel based on Saudia's payment of 776 invoices, I do not accept that there is such a plea of reliance already catered for in the existing statement of case. When it pleaded to the existing plea of estoppel (based on Saudia's payment of invoices), Saudia contended at paragraph 33(b)(iv) of the Defence and Counterclaim that "*neither reliance nor detriment is alleged, and in circumstances where the Claimants' allegation is no more than that they were paid what they claim to be owed, it is denied any reliance or detriment could be alleged*". In answer to this plea, the IAFC Parties pleaded at paragraph 26 of the Reply and Defence to Counterclaim that "*The Claimants have relied on Saudia's payments on the proper construction of the Basic Rent LIBOR Escalation mechanism in the performance of their obligations under the Lease Agreements, and in its interactions with financing banks and investors. It was reasonable to rely on Saudia's conduct and representation as to the amount of Basic Rent that was due, and the IAFC Parties would be exposed to serious detriment (not least as regards its financing arrangements) should Saudia be permitted to resile from it*". This plea is limited to the Claimants having relied

on the payment of invoices by Saudia, not on the alleged "LIBOR Escalation" assumption. However, as explained below, there is a similar plea of reliance in respect of the alleged "LIBOR Escalation" assumption.

(5) The IAFC Parties' proposed amendment includes a plea (quoted above) at paragraphs 22.2.1 and 22.2.2 that "*the parties understood and accepted that: 22.2.1 the LIBOR Lease rates would impact upon the financing arrangements that the Claimants and Third Party would enter into, given the reliance on LIBOR by financer to set the terms of finance arrangements; and 22.2.2 That finance costs would accordingly be directly impacted by increases in the LIBOR rate and that required related increases in the LIBOR Lease rates to reflect the impact on finance costs which the parties acknowledged would not necessarily be linear*". During oral argument, Mr Sprange QC indicated that this was a plea of detrimental reliance. Mr Béar QC disputed this and submitted that this was not a plea of actual reliance, but merely a record of the parties' understanding.

(6) There is a difficulty with Mr Sprange QC's submission in that paragraphs 22.2.1 and 22.2.2 do not contain a perfectly clear statement of detrimental reliance, not least because the words "*reliance*" and "*detriment*" are not used, unlike for example in respect of the proposed amendment to the Airbus Escalation discussed below. Furthermore, the pleas are introduced by reference to what the parties understood and accepted, as Mr Béar QC indicated. Nevertheless, it seems to me that this is in essence a plea of detrimental reliance in that it is being alleged that, by reason of the shared assumption as to how the LIBOR Escalation functioned as a ratcheting mechanism upwards, the IAFC Parties entered into financing arrangements which were likewise influenced by increases in the LIBOR rate. This is similar to the case of detrimental reliance advanced by the IAFC Parties in their proposed amendment relating to the Airbus Escalation and in their existing plea of reliance in respect of the payment of the 776 invoices. That is not to say that the allegation is necessarily well-founded, but I can understand how the plea operates as a plea of detrimental reliance. Moreover, the allegation that the parties understood and accepted that this would be the consequence of the common assumption being relied on merely indicates that the IAFC Parties' case is that the consequence was apparent to all concerned. This is also a matter for which, on the IAFC Parties' case, Saudia is alleged to have assumed responsibility.

35. In these circumstances, and against my initial inclination, I allow the IAFC Parties' application for permission to amend in respect of the allegation of estoppel by convention in respect of the LIBOR Escalation. In granting such permission, I have regard to the fact that the issues being litigated are complex and it is not unexpected that the parties' cases may require refinement by way of amendment to the statements of case. Further, I do not understand that there is any actual prejudice which would be suffered by Saudia if the proposed amendments were allowed. That said, the permission is granted on condition that:

(1) The amendment should be limited to the particular instances of communication of the alleged shared assumption set out in the current drafts of paragraphs 23.2 and 23.3 and the reference to "*including*" should be deleted to avoid any suggestion of

an allegation that there were other instances of communication of the shared assumption.

(2) The proposed amendment should be modified to include an unambiguous statement of detrimental reliance of the nature set out in paragraphs 22.2.1 and 22.2.2.

(3) If Saudia chooses to request further information in respect of the IAFC Parties' case on estoppel by convention, in particular in respect of the manner in which the alleged common assumption was communicated or crossed the line and the IAFC Parties' detrimental reliance on the alleged common assumption, such further information should be provided by the IAFC Parties insofar as they are able to do so.

IAFC Parties' application: the Airbus Escalation Amendments

36. The APRF was defined by the Lease Agreements to mean the Airframe Price Revision Formula and the Propulsion Systems Price Revision Formula.

37. The IAFC Parties have calculated the Basic Rent by reference to their calculation of the APRF. In the Particulars of Claim, it is pleaded that Saudia agreed to the escalation rate in the MOU with the Third Party and this was applied to all aircraft delivered in and after 2016.

38. Paragraphs 7-8 of the MOU provide that:

> "*7. Final Reconciliation: There shall be a final reconciliation to apply in respect of all Aircraft relating to the changes in Lessee Requested SCN and the final escalation based on the Airbus Price Revision Formula, with the settlement of the final reconciliation taking place on the final Delivery of the last A320 Aircraft.*
>
> *8. 2016 Escalation: For all Aircraft Delivered in 2016, the Airbus Price Revision Formula to be applied is 1.053228*."

39. Saudia's case is that the APRF was altered by the MOU only for aircraft delivered in 2016, but not otherwise. However, the IAFC Parties contend that the APRF must be calculated using the Airframe Price Revision Formula alone, leading to a higher escalation.

40. Against this background, the IAFC Parties seek to amend their Reply and Defence to Counterclaim to introduce two pleas:

(1) That the MOU represented a variation to the Lease Agreements by amendments to paragraph 10 and to paragraph 38 by the introduction of sub-paragraph (b).

(2) That Saudia is estopped by convention or conduct from resiling from the APRF figures by the introduction of sub-paragraph 38(c).

41. Paragraph 10 of the Reply and Defence to Counterclaim denies paragraph 14(d) of Saudia's Defence and Counterclaim, which pleads that "*The MoU set the APRF for aircraft*

delivered in 2016, but not otherwise, and even then subject to a final reconciliation after the last A320 aircraft was delivered".

42. The proposed amendment to the Reply and Defence to Counterclaim is sought to be made by the following addition to paragraph 10:

> "*Construed by reference to its language and the factual matrix, including but not limited to the fact that the post-2016 figures were not yet available from Airbus (as pleaded in paragraph 6 (d) above) and the designated formula itself, the MoU recorded and reflected the agreement between the parties to use only the Airframe Price Revision Formula, and not the Propulsion Systems Revision Formula*"

43. Paragraph 38 of the Reply and Defence to Counterclaim already contains the following plea:

> "*a. Pursuant to the commercial agreement reached at the meeting of 8 August 2016 with Mr Saleh Al Jasser on behalf of Saudia, and in return for the parties agreeing that there would be no Event of Default in relation to Saudia's failure to provide unaudited financial statements for a 24-month period, Saudia agreed that the APRF in respect of all Aircraft deliveries would only include the Airframe Price Revision Formula, and not the Propulsion Systems Price Revision Formula, and that the subsequent month's formula would be used for each delivery. The price escalation indices used for the purposes of the Airframe Price Revision Formula are publicly available*."

44. The IAFC Parties seek permission to include the following plea at sub-paragraph (b) of paragraph 38:

> "*b. That agreement was reflected and recorded in writing (in respect of each Aircraft, and each amounting to a formal variation of each of the Lease Agreements) in:*
>
> *i. the fifty Lease Supplements, signed by Mr Al -Jasser as the then-Director General of Saudia, which set out the applicable APRF figure at paragraph 4;*
>
> *ii. paragraphs 7 and 8 of the MoU (as pleaded at paragraphs 6(d) and 10 above), which was signed by Mr Al-Jasser; and*
>
> *iii. paragraph 6(v) of and Appendix 1 to the fifty Notices of Assignment and paragraph 4(j) of the corresponding fifty Acknowledgements of Assignment of Sub-Lease, the latter of which were signed by Mr Al-Jasser*."

45. In addition, the IAFC Parties wish to advance a case of estoppel by convention or conduct in sub-paragraph 38(c), which pleads:

> "*c. In addition, or alternatively, Saudia is estopped by convention and/or by representation from resiling from the APRF figures which it agreed and paid, alternatively waived its right to advance to insist on any rival figure for APRF, by reason of:*
>
> *i. Saudia's conduct in signing the MoU, each of the fifty Lease Supplements and each of the fifty Acknowledgements of Assignment of Sub-Lease and/or its payment of invoices as pleaded at paragraphs 21 and 23 of the Particulars of Claim, amounts to a representation that it was agreeing to the APRF figures contained in those documents and actually invoiced, alternatively gave rise to a common understanding that Airbus Escalation was to be calculated on that basis.*
>
> *ii. The Claimants and Third Party have reasonably relied on that representation or common understanding, in that they have relied on the sum of prevailing rent payments in their interactions with banks, including in a refinancing agreement with Alinma Bank (as set out at paragraph 10 of their Response to the Request for Further Information dated 9 April 2021). They would suffer detriment if Saudia were permitted to resile from that representation or common understanding, in that (inter alia) this would potentially require the restructuring of the financing agreements, and cause harm to their relationships with those banks (including Alinma Bank).*"

46. Saudia objected to these proposed amendments relating to the Airbus Escalation essentially on two grounds. First, the IAFC Parties' reliance on the MOU as varying the Lease Agreements is not arguable, *i.e.* this case has no real prospect of success. Second, the new estoppel case does not adequately identify how the IAFC Parties relied on the alleged representation or common understanding to their detriment.

47. As to the first of these objections, that the case based on the MOU is not arguable, Mr Béar QC submitted that the relevant words in the MoU make no reference to the Airframe formula, and reading in the IAFC Parties' proposed case on construction is simply not an available meaning of the words, even with a strained construction, because the language of the MOU does not support this construction (*Arnold v Britton* [2015] UKSC 36; [2015] AC 1619, para. 17); as Sir Kim Lewison stated in *The Interpretation of Contracts*, (7th ed., 2020), at para. 3.167, "*It is not permissible to construct from the background a meaning that the words of the contract will not legitimately bear*". See also *National Commercial Bank Jamaica Limited v Guyana Refrigerators Limited* [1998] 3 WLUK 459, para. 12 (Privy Council, 23rd March 1988).

48. Mr Sprange QC submitted in support of the IAFC Parties' application that:

(1) The simple answer to Saudia's objection to the MOU amendment is that it does not introduce a substantive new claim or defence, and so the "real prospects of success" test is inapplicable. The case that the agreement the IAFC Parties say was reached on the Airbus Escalation is reflected and recorded in the MOU and was pleaded in the Reply and Defence to Counterclaim in February 2021. Mr Sprange QC relied on paragraph 6(c), which pleads that a Side Letter Agreement dated 8th August 2016 was concluded to the effect that "*the APRF in respect of all aircraft deliveries after 2016 would only include the Airframe Price Revision Formula, and not the Propulsion Systems Price Revision Formula, and the parties further agreed to use the APRF for the month following the delivery month of each Aircraft*" and paragraph 6(d) that "*Clause 8 of the MoU recorded the Airbus Escalation Figure for 2016, because the Director General of Saudia insisted on the provision of a single figure, rather than a formula, and because at that time the figures for 2017 (and thereafter) were not available from Airbus*".

(2) The purpose of the amendments at paragraph 10 and 38(b)(ii) of the proposed amended Reply and Defence to Counterclaim is simply to make the point plain.

(3) Even if the real prospects of success test were applicable to the MOU amendment, on the basis that it introduces a new substantive claim (which it does not) the IAFC Parties have a real prospect of success in advancing the argument, and Saudia (again) cannot complain that it would cause it any meaningful prejudice:

(a) There is or should be no dispute that paragraph 8 of the MOU represents only the Airframe Price Revision Formula, and not the Propulsion Systems Revision Formula, consistently with the IAFC Parties' explanation of the agreement reached.

(b) It is properly arguable that this contractual language reflects a broader agreement to vary APRF either by way of an implied term or as a matter of construction to that effect.

49. As to the second of Saudia's objections, *i.e.* that there is an adequate plea of reliance in respect of the estoppel case sought to be introduced, Mr Béar QC submitted that:

(1) In order to establish a case of estoppel case, the IAFC Parties must establish reliance. Their current plea is obviously insufficient to do so because the only reliance actually alleged, a refinancing agreement with Alinma Bank, took place in November 2019. This cannot assist the IAFC Parties' case on reliance, because:

(a) It is irrelevant to rent payments made before November 2019 (see the third witness statement of Mr Robin Springthorpe of Norton Rose Fulbright LLP, Saudia's solicitors, at para. 26-27, 29).

(b) From December 2017 to November 2019, Saudia had made it clear to the IAFC Parties that it did not agree with the IAFC Parties' APRF calculation and was paying under a reservation of rights, in which case there cannot have been any reliance on a representation or convention in relation to the

APRF from November 2019 (see Mr Springthorpe's third witness statement, at para. 30).

(c) The refinancing agreement with Alinma Bank related to only eight of the 50 Lease Agreements (see Mr Springthorpe's third witness statement, at para. 28).

(2) Therefore, the only specific reliance plea made by the IAFC Parties cannot succeed and fails the test of a real prospect of success.

(3) In order to plead a properly particularised case of estoppel, the IAFC Parties must plead (see Mr Springthorpe's third witness statement, at para. 32): (i) each financing agreement relied on; (ii) the aircraft to which it relates; (iii) the date it was entered into; (iv) its duration and the terms of any termination rights and (v) how it is said to depend on the APRF or LIBOR calculations.

50. Mr Sprange QC submitted in response and in support of the IAFC Parties' application:

(1) The IAFC Parties' position with respect to reliance will be further developed and set out by way of witness evidence.

(2) A schedule setting out the particulars of reliance in relation to each aircraft and each alleged date of reliance does not make sense and would be wholly disproportionate. The proposed plea of reliance applies generally to all of the aircraft; to the extent that there is complexity this can be dealt with in witness evidence. Furthermore, this is not the approach that has been taken for the presently pleaded LIBOR Escalation estoppel claim.

(3) The plea of reliance is not limited to the Alinma Bank refinancing example referred to in the proposed paragraph 38(c)(ii), but extends to reliance "*on the sum of prevailing rent payments in their interactions with banks … They would suffer detriment if Saudia were permitted to resile from that representation or common understanding, in that (inter alia) this would potentially require the restructuring of the financing agreements, and cause harm to their relationships with those banks (including Alinma Bank)*". That plea is intended to reflect the fact that each of the aircraft was subject to financing agreement and hedge agreements, which were structured by reference to an assumed fixed rent and fixed rate payable by Saudia which (it was assumed) would not decrease, and which provided for relevant Events of Default in the event that it did. There is therefore nothing in Saudia's point on timing, because the relevant acts of reliance pre-dated the alleged reservation of rights in August 2018.

51. I will address each of the objections advanced by Saudia.

52. First, I am not in a position to conclude that the case being advanced on construction or variation by the MOU is unarguable. As far as paragraph 8 of the MOU is concerned, there is an attractive simplicity to the argument advanced by Mr Béar QC, but given the nature of the contractual documents to be considered and the matters pleaded at paragraph 6(c)

and (d) of the Reply and Defence to the Counterclaim, the issue is too complex to be resolved at a hearing of an application for permission to amend. Further, as the issue is substantively already pleaded and there is no application to strike out the existing pleas, it would be inappropriate to dismiss the application. Accordingly, I allow the IAFC Parties' application for permission to amend in respect of paragraphs 10 and 38(b) of the Reply and Defence to Counterclaim. There is, in my judgment, no prejudice to Saudia upon the granting of this application.

53. Second, in my judgment, there is a plea by the IAFC Parties as to detrimental reliance insofar as the estoppel case sought to be advanced in paragraph 38(c) of the Reply and Defence to Counterclaim in that it is pleaded that "*The Claimants and Third Party have reasonably relied on that representation or common understanding, in that they have relied on the sum of prevailing rent payments in their interactions with banks*" and that "*They would suffer detriment if Saudia were permitted to resile from that representation or common understanding, in that (inter alia) this would potentially require the restructuring of the financing agreements, and cause harm to their relationships with those banks*". It is not fully particularised in that only one refinancing agreement with Alinma Bank is identified and that agreement relates only to eight aircraft; nevertheless, in my judgment, the case is reasonably plain, as the essence of the IAFC Parties' case is pleaded. If Saudia requires further information, it can request the same and the IAFC Parties should provide such information insofar as they can. I therefore allow the IAFC Parties' application for permission to introduce the amendment at paragraph 38(c) of the Reply and Defence to Counterclaim, there being no consequential prejudice to Saudia.

Saudia's application: defence to the Late Payment Amounts claim

54. Under clause 4(f) of each Lease Agreement, Saudia owes the Claimants "*Late Payment Amounts*" when amounts which are due and payable are paid late. The Late Payment Amounts claim was US$384,086 as at 7th December 2020. Under clause 4(f)(ii), the Claimants (as the Lessors) "*shall distribute the Late Payment Amount (after deducting its actual costs and expenses, including without limitation any third party expenses) to such charitable foundations as the Lessor may elect*".

55. At paragraph 37.3 of the Particulars of Claim, the Claimants plead that:

> "*The Claimants are also entitled to and claim in debt and/or damages for breach of contract (without prejudice to their right to claim further or alternative loss and damage in due course): …*
>
> *37.3 Payment of all Late Payment Amounts in respect of Unpaid Amounts, in the sum of USD 364,086 (as at 7 December 2020) …*"

56. At paragraph 44(b) of the Defence and Counterclaim, it is currently pleaded that:

> "*In circumstances where the Lessors must pay Late Payment Amounts to charity:*

(i) *They are not entitled to claim damages (as opposed to debt) for non-payment of those sums unless they allege and prove, as they have not, they had costs against which they could legitimately have retained portions of the Late Payment Amounts.*

(ii) *Any order requiring Saudia to pay any Late Payment Amounts should require the Lessors to pay such payments over to charity in accordance with clause 4(f)(iii).*"

57. According to Saudia, the rationale behind this defence is that other than for its "*actual costs and expenses*", the Claimants cannot benefit from the Late Payment Amounts, consistent with the intended Sharia compliance of the Lease Agreements.

58. Saudia proposes an amendment to paragraph 44(b) by correcting the reference to clause 4(f)(ii) in substitution for clause 4(f)(iii) (to which the IAFC Parties do not object), and to add at the end "*and the Lessors are required to identify and prove any expenses they claim they are entitled to withhold from such payments to charity, and identify the charities to which they are paid*".

59. Mr Béar QC on behalf of Saudia supported this amendment by submitting that:

(1) When the Disclosure Review Document was drawn up, Saudia sought disclosure of the expenses the Claimants might seek to deduct. In response, the IAFC Parties said that the issue was not pleaded but agreed at the CMC in May 2021 to give disclosure on the issue after Saudia said it would amend its Defence and Counterclaim to put it in issue.

(2) The IAFC Parties' position appears to be that Saudia cannot under the Lease Agreements police the deductions they make from Late Payment Amounts. As to that:

(a) The principle of whether Saudia can require compliance with the Late Payment Amounts clause is already in issue in paragraph 44(b) of the Defence and Counterclaim, and disclosure on this issue was ordered at the CMC in May 2021.

(b) Saudia's case is plainly arguable. The charitable foundations cannot enforce the clause: they are unidentified and the Lease Agreements provide, at clause 20(r), that such third parties are not entitled to enforce the provision pursuant to the Contracts (Rights of Third Parties) Act 1999. Nor can Saudia sue for substantial damages, because it has suffered or will suffer no financial loss, although it can sue for specific performance.

60. Mr Sprange QC on behalf of the IAFC Parties made the following submissions in support of their objection to the proposed amendment:

(1) Saudia has been unable to articulate with any precision how the obligation to "*identify and prove*" the expenses deducted from Late Payment Amounts arises as a matter of law. There is nothing in clause 4(f)(ii) of the Lease Agreements to that effect. Saudia attempted to do so for the first time in its evidence at Part C of Saudia's Application Notice: "*The position is akin to one where a promise [sic] seeks specific performance of an obligation to pay a third party*". There is no basis to imply any such obligation, particularly where clause 20(r) of the Lease Agreements seeks to restrict the ability of any third party (including the charities) to sue on the Lease Agreements. As set out in the ninth witness statement dated 21st July 2021 of Ms Sarah Walker of King & Spalding International LLP (the IAFC Parties' solicitors), at paragraph 6.1, this presupposes both that (i) there is a need to police deductions from Late Payment Amounts (which there is not, because the Claimants intend to make them properly); and (ii) the parties intended that Saudia should have that the right to "*police*" the obligation (which they did not). The point is unarguable.

(2) Saudia's position is premised on an inference that the Claimants will not properly deduct expenses from the Late Payment Amounts. That is not only pure speculation; it is also not pleaded (nor sought to be pleaded by way of amendment now) and is flatly contradicted by the evidence. Ms Walker has sought specific instructions on this issue and confirms that the IAFC parties intend to comply with their obligations (see paragraph 6.4 of Ms Walker's ninth witness statement).

(3) The IAFC Parties have sought to deal with this issue pragmatically, by (i) agreeing to this as an Issue for Disclosure; (ii) more recently, offering to disclose the identities of the charities to whom payments are made and the value of such payments from which Saudia could readily identify the sum of expenses deducted; and (iii) offering an undertaking in those terms, should the Late Payment Amounts be ordered. Saudia has refused to either accept these proposals or present revised proposals along these lines.

61. I can deal with Saudia's application shortly. I do not understand the IAFC Parties' objection. Saudia's case is clearly identified and puts the IAFC Parties to proof as to the costs and expenses to be deducted from the Late Payment Amounts before distribution to charity. Similarly, if relief is sought in respect of Late Payment Amounts by the IAFC Parties, Saudia is entitled to advance a case that the charities to whom the Late Payment Amounts (after deductions) are to be distributed should be identified. I do not consider that the proposed case is unarguable. Nor can I discern any prejudice to the IAFC Parties in allowing the application. I therefore allow Saudia's application to amend paragraph 44(b)(ii) of the Defence and Counterclaim.

Conclusion

62. For the reasons explained above, I dispose of the parties' applications as follows:

(1) I allow the IAFC Parties' application for permission to amend to introduce the plea of an estoppel by convention at paragraphs 22.2 and 23 of the Particulars of Claim on the following conditions, namely that:

(a) The amendment should be limited to the particular instances of communication of the alleged shared assumption set out in the current drafts of paragraphs 23.2 and 23.3 and the reference to "*including*" should be deleted to avoid any suggestion of an allegation that there were other instances of communication of the shared assumption.

(b) The proposed amendment should be modified to include an unambiguous statement of detrimental reliance of the nature set out in paragraphs 22.2.1 and 22.2.2.

(c) If Saudia chooses to request further information in respect of the IAFC Parties' case on estoppel by convention, in particular (but not only) in respect of the manner in which the alleged common assumption was communicated or crossed the line and the IAFC Parties' detrimental reliance on the alleged common assumption, such further information should be provided by the IAFC Parties insofar as they are able to do so.

(2) I allow the IAFC Parties' application for permission to amend in respect of paragraphs 10, 38(b) and 38(c) of the Reply and Defence to Counterclaim. It is not fully particularised in that only one refinancing agreement with Alinma Bank is identified and that agreement relates only to eight aircraft. If Saudia requires further information in respect of the reliance alleged by the Claimants in paragraph 38(c)(ii), it can request the same and the IAFC Parties should provide such information insofar as they can.

(3) I allow Saudia's application to amend paragraph 44(b)(ii) of the Defence and Counterclaim.

63. I am very grateful to both counsel for their very helpful submissions.