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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:*	**08/10/2024**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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COMMERCIAL DIVISION

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Between:

SHORT BROTHERS PLC

Plaintiff

and

AAR CORP.

Defendant

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Mr Coghlin KC and Ms Rowan (instructed by Carson McDowell LLP Solicitors) for the Plaintiff
Mr Dunlop KC, Mr Thompson KC with Mr Hopkins (instructed by Tughans LLP Solicitors) for the Defendant

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McBRIDE J

Introduction

[1] There are two applications for discovery, one issued by each of the parties, which mirror each other.

[2] The plaintiff's summons seeks an order pursuant to Order 24 Rule 2(5) that:

(i) Discovery be limited to the list of issues formulated by the plaintiff.

(ii) Discovery be "standard discovery."

(iii) Discovery in respect of the plaintiff's financial data be limited to samples in accordance with a protocol to be agreed by the parties' respective expert witnesses or as ordered by the court.

(iv) The date ranges and custodians proposed by the plaintiff be approved.

(v) A confidentiality club be granted in respect of the commercially sensitive documents.

(vi) An order pursuant to Order 24 Rule 7 requiring the defendant to make and file an affidavit stating whether any document specified or described in the schedule attached to the summons has at any time been in its possession, custody or power.

[3] The defendant's summons seeks an order pursuant to Order 24 Rule 2(5) that:

(i) The plaintiff make discovery of the list of issues set out in the schedule attached to the summons.

(ii) The defendants are not required to make discovery of the documents within the custody of Aeromatrix composite.

(iii) Inspection be granted pursuant to Order 24 Rule 11(1) requiring the plaintiff to produce the documents specified in Schedule 2 attached to the summons.

Representation

[4] The plaintiff was represented by Mr Coghlin KC and Ms Rowan. The defendant was represented by Mr Dunlop KC, Mr Thompson KC and Mr Hopkins.

[5] Airbus Canada Partnerships (Airbus) sought to intervene to made representations about protection of its commercially sensitive information.

[6] The court received an affidavit from Mr Leibor setting out Airbus's position regarding the alleged confidentiality and commercial sensitivity of the information sought by way of discovery. The court adjourned the application to permit Airbus to intervene until after hearing the parties' submissions on the need for a confidentiality ring.

Background

The parties

[7] The plaintiff, Short Brothers Plc (Shorts), is a manufacturer of aircraft parts and structures mostly manufacturing wings. Shorts is a wholly owned subsidiary of Bombardier and is registered and incorporated in Northern Ireland.

[8] The defendant is a company registered in the State of Delaware, and is a holding company of subsidiaries that provide aviation parts and services.

[9] AAR Composites is a subsidiary of the defendant. It designs, fabricates and assembles composite aerospace products.

The dispute

[10] The dispute concerns a flap track fairings procurement contract ("the procurement contract") entered into between AAR Composites and Shorts.

Chronology

[11] AAR Composites entered into the procurement contract with Shorts on 30 September 2009. Under the terms of the contract AAR Composites agreed to, inter alia, design, develop, test, certify, manufacture and supply flap track fairings ("FTFs") to Shorts or to any other supplier as may be directed by Shorts.

[12] FTFs are component parts of the wings which Shorts manufactured initially for Bombardier C-Series and later for Airbus.

[13] On 2 November 2009, pursuant to the terms of the procurement contract the defendant executed a performance guarantee which made the defendant liable to secure AAR Composites' performance in undertaking certain works and supplying the FTFs to Shorts.

[14] In June 2020, AAR Composites sold its assets to Aeromatrix and on 23 June 2020 AAR Composites novated the procurement contract to Aeromatrix by way of a deed of novation ("the deed of novation"). As part of this transfer, the defendant provided a performance guarantee ("the 2020 guarantee") in respect of Aeromatrix's performance of the contract.

[15] The plaintiff alleges that Aeromatrix failed to provide conforming products in accordance with its contractual obligations under the procurement contract from in or around April 2021. At that time Bombardier had sold its interest in the C-Series to Airbus who had now converted this programme to the A220 Aircraft programme.

[16] On 25 March 2022, Aeromatrix filed for relief under Chapter 11 of the US Bankruptcy Code and filed a motion to reject the procurement contract.

[17] On 14 April 2022, the plaintiff wrote to the defendant requesting the defendant indemnify it in respect of all losses and expenses sustained because of Aeromatrix's failure to perform the procurement contract.

[18] On 6 June 2022, the plaintiff wrote to the defendant confirming that it was willing to facilitate the defendant stepping in and performing the extant obligations.

[19] The plaintiff alleges that when the defendant failed to indemnify it and failed to perform Aeromatrix's obligations, the plaintiff took steps to mitigate its losses which included entering into several agreements with Aeromatrix in August 2022,

including a Bill of Sale, a Transitional Services Agreement and a Covenant not to sue ("the 2022 agreements").

[20] Pursuant to the 2022 agreements, the plaintiff initially provided staff and resources for the ongoing manufacture of the FTFs at the Aeromatrix plant in Florida. Thereafter, it moved production of the FTFs to Belfast and then later transferred the work to a new supplier.

The plaintiff's claim

[21] The plaintiff claims that the defendant guaranteed the performance in full of the obligations of Aeromatrix under the procurement contract and the defendant is, therefore, obliged to indemnify the plaintiff in respect of all loses it has sustained because of Aeromatrix's failure to deliver in a timely manner conforming products, namely FTFs.

[22] The plaintiff claims an unquantified amount of costs and losses which is currently estimated at not less than US $32m. Details of the losses claimed are set out in a schedule of losses attached to the statement of claim.

[23] As appears from the schedule, the plaintiff claims actual losses between April 2022 and February 2023 in respect of the following items:

- Direct labour
- Overhead costs in Belfast
- Total material costs
- Expedited costs
- Supplier payments to AMX
- Pre-petition costs
- On-site support
- Carriage
- TSA costs
- Travel
- Working Party
- Consumables

[24] It further claims "estimated costs" in respect of these items between March 2023 and December 2023. The total amount claimed for actual and estimated costs is $41,000,443.00. In additional it claims for: the cost of maintaining the fabrication facility in Belfast; recovery of Airbus's claim for late delivery fees; tools; disruption costs for relocation to Belfast factory; claim for a contractual cost to Aeromatrix and a claim for incremental costs to Short Brothers. The schedule additionally contains a note outlining that the claim does not include legal and other potential costs and expenses relating to rates and insurance and Airbus's claim for late deliveries post June 2022. The total loss claimed for late deliveries is $2.5m but the pleadings indicate

it could amount to $3.8m by 2023. As appears from the statement of claim a large part of the claim for loss relates to taking over production of FTFs and relocating the facility from Florida to Belfast.

[25] In addition to the claim for losses and damage, the statement of claim seeks rectification of the guarantee, if necessary, to ensure that the definition of the "supplier" means Aeromatrix and not AAR Composites as stated in the guarantee.

The defence

[26] Paras [18] and [25] of the defence particularise the main grounds of defence.

[27] At para [18] the defendant avers that the 2020 guarantee has been discharged and it is not liable on foot of the 2020 guarantee due to material variations in the terms of the procurement contract brought about by the 2022 agreements.

[28] At para [25] it avers that since the execution of the procurement contract there have been a number of material variations which changed the entire basis on which the defendant agreed to provide any guarantee. At sub-paras (a)-(o) it then sets out these changes which largely relate to changes of ownership of the plaintiff from being a subsidiary of Bombardier to being acquired by Spirit and also details of changes in the supply of aircraft wings from the C-Series to Airbus A220. Although para [25] does not explicitly state that these are material changes which discharge it from liability, it is clear that this is the thrust of para [25] and, if necessary the court would allow para [25] to be amended to make this explicitly clear.

[29] In addition to the defences relating to liability, the defendant takes issue with the quantum claim.

Contested discovery issues

[30] The court is asked to rule on the following issues:

(i) Relevance of issues identified by the parties: The parties have isolated 15 issues set out in Schedule 1 to the defendant's summons which are in dispute. The court is asked to rule on the relevance of each issue.

(ii) The scope of discovery: The defendant seeks full Peruvian Guano discovery, whilst the plaintiff contends that standard discovery is appropriate with the possibility further applications can be made for specific discovery, if necessary.

(iii) Discovery of financial data by way of samples: The plaintiff contends it should only be required to provide samples of its financial data due to the quantity of the material and the way in which it is electronically stored. It proposes that discovery should be provided after experts instructed by each party agree a

protocol regarding sampling relating to plaintiff's financial data. The defendant seeks full Peruvian discovery of the plaintiff's financial data.

(iv) Confidentiality ring: The parties dispute the need for a confidentiality ring in respect of the documents set out in Schedule 2 to the defendant's summons, and in respect of other documents Airbus claims are confidential. The defendant contends that the documents are not confidential and further submits that even if they are confidential redaction would provide sufficient protection.

(v) Liquidator's documentation - The dispute about whether documents held by Aeromatrix's liquidator in USA should be discovered has now been resolved.

Question 1 - Relevance of issues 1-15

[31] The court has had the benefit of extensive affidavit evidence which addresses the competing position of the parties regarding each of these issues. I do not intend to rehearse this evidence, but consideration has been given to all the competing arguments set out in the various lengthy affidavits. I further note that the parties have now agreed issues 7, 11-13, and 15 subject only to the dispute about the standard of discovery.

[32] The main disputed issues, therefore, are issues 1 and 5 which conveniently can be dealt with together, and issues 2, 3, 4, 6, 8, 9, 10 and 14.

[33] Order 24 rule 2(1) states that a party is required to make and serve a list of documents:

> "which are or have been in his possession, custody or power relating *to any matter in question between them* in the action."

[34] In *Yorkshire Provident Life Assurance Co v Gilbert & Rivington* [1895] 2 QB 148 Lindley LJ observed:

> "The defendant's right, then, is to have discovery of all matters relating to the questions in issue as narrowed by the particulars."

Accordingly, to determine whether documentation is relevant the court must be satisfied that it relates to a "matter in question" between the parties as defined by the pleadings. If the documentation relates to issues not in dispute between the parties then it is not discoverable.

Issues 1 and 5

[35] The plaintiff seeks documentation relating to the negotiation of the deed of novation and 2020 guarantee and seeks to identify the parties' subjective understanding of the terms of the 2020 guarantee and the deed of novation. Issue 5 relates to the nature of the defendant's obligations under the 2020 guarantee.

[36] The defendant concedes that it is not seeking to argue that the subjective understanding of the parties is relevant to the construction of the guarantee. Rather, the defendant is only contending that changes made to the procurement contract after it provided the guarantee, with the consent of the defendant, render the 2020 guarantee unenforceable.

[37] Accordingly, I do not consider the subjective understanding of the parties in respect of the guarantee or deed of novation is a "matter in question" between the parties and therefore, there is no basis upon which the court should order discovery of documentation relating to it.

[38] Even if the defendant sought to rely on its subjective understanding of the guarantee, I would not order discovery on this issue as the guarantee was a written guarantee, and as Lord Morris said in *Bank of Australasia v Palmer* [1897] AC 540 at 545:

> "… Parole testimony cannot be received to contradict, vary, add to or subtract from the terms of a written contract…"

Chitty on Contracts, Volume 1, Chapter 16-013 elaborates:

> "This rule is usually known as the "Parole Evidence" rule… The rule has been justified on the ground that it upholds the value of written proof, effectuates the finality intended by the parties when recording their contract in written form and eliminates 'great inconvenience and troublesome litigation in many instances."

[39] The defendant submitted the court must order discovery on all contested pleaded matters and in the absence of an application to strike out any part of the defendant's pleadings under Order 18 rule 19 on the basis it is "unarguable or almost uncontestably bad" (as per *Lonrho v Fayed* [1992] 1 AC 448) the court could not refuse discovery on this basis. I consider the court can and should refuse to give discovery where, without the need for detailed arguments or considering contested affidavit or oral evidence, the court concludes the pleaded case is obviously legally unsustainable, as this is part of the court's role in achieving the overriding objective.

[40] In its statement of claim the plaintiff has sought rectification of the guarantee based on a mistake in the definition of "supplier" in the 2020 guarantee. The plaintiff

contends that the guarantee erroneously refers to AAR Composites as the supplier and not, as was the understanding of all the parties, Aeromatrix. The defendant now accepts that this is a mistake in the guarantee and, therefore, there is no longer any dispute between the parties in this respect. Rectification accordingly is no longer required and there is therefore no need for discovery relating to this matter. Any dispute about the nature of the obligations of the defendant under the guarantee will be a matter of construction which the court will conduct having regard to the written contract and without the need for parole evidence.

[41] I, therefore, order that neither the plaintiff nor the defendant are required to provide discovery on either issue 1 or issue 5.

Issue 2

[42] In respect of issue 2, the defendant seeks discovery from the plaintiff of, "all documents, notes, emails and other records regarding the nature and terms of the trading relationship and the supply of FTFs and further details of the value of and volume of the product supplied under the procurement contract together with the identity of the plaintiff's customers" from January 2010 to date.

[43] The defendant seeks to examine the development of the procurement contract over time, by reference to four specific dates, namely:

(a) When the procurement contract was executed.

(b) When it was novated to Aeromatrix.

(c) Following the execution of the deed of novation and the sale of the plaintiff to Spirit.

(d) After the 2022 agreements were executed.

[44] The defendant sets out in summary two grounds on which it submits it is entitled to the documentation. Firstly, the defendant relies on its pleaded case at paragraphs [18] and [25] of its defence. The defence at paragraph [25] avers that since the date of the procurement contract there were material changes to the supplier's obligations under the procurement contract which related to the volume and value of FTFs to be supplied and changes to the identity of the end customer. At paragraph [18] it avers that since the date of the 2020 guarantee there have been further material changes to the agreement, including the 2022 agreements, which were not agreed by the defendant. The defendant alleges that these changes constitute material changes to the procurement contract and in accordance with the rule in *Holme v Brunskill* the defendant is discharged from liability under the 2020 guarantee.

[45] Secondly, the defendant submits the performance obligations are so fundamentally different to what was originally agreed, any loss flowing from them is

too remote to be recoverable. The defendant submits that the type of loss claimed by the plaintiff involves "the interpretation of the contract as a whole against its commercial background" – as per Lord Hoffman in *Transfield Shipping Incorporated v Mercator Shipping Inc* [2008] UKHL 48 at para [25] and therefore it is entitled to discovery of documents showing the commercial background.

[46] The defendant therefore submits that the court can only properly determine whether its defences to liability under the guarantee are made out by considering the obligations imposed by the procurement contract having regard to the factual matrix over time. It submits that the performance obligations imposed by the procurement contract are far from transparent and, it is therefore necessary to obtain discovery to determine how the procurement contract operated in practice and changed over time with regard to the production rate of FTFs required, and time given for delivery of FTFs. It further submits that information regarding the identity of the end users is relevant to ascertain whether the obligations owed, and the potential penalties, could be imposed by such end users.

Consideration

[47] The defendant's defence is based on the rule in *Holme v Brunskill* [1878] 3 QBD 495, which sets out the well-known principle that any material variation in the terms of the agreement between the creditor and the debtor which could prejudice the surety will, unless the surety consents, discharge him from liability. The defendant claims that amendments prior to the 2020 guarantee discharged the guarantee and further argues that amendments made after the 2020 guarantee were material changes which discharge it from liability.

[48] In the 2020 guarantee the defendant guaranteed the performance of Aeromatrix's obligations under the deed of novation dated 23 June 2020.

[49] The deed of novation recites that AAR Composites, being the transferor, agreed to "novate all of its obligations, rights and liabilities under the contract to Aeromatrix being the transferee." The contract is defined in the deed of novation as "the procurement contract … 'as amended from time to time.'"

[50] By the deed of novation, Aeromatrix agreed to "assume all rights, obligations and liabilities" of AAR Composites as transferor. These obligations and liabilities included the obligation of AAR Composites under the procurement contract dated 30 September 2009 as "amended from time to time." The obligations and liabilities assumed by Aeromatrix, and guaranteed by the defendant, therefore, included those obligations which had arisen from amendments to the procurement contract.

[51] In *Triodos Bank v Dobbs* [2005] EWCA Civ 630, at para [14], Longmore LJ made clear that a new guarantee was an answer to material changes in the contract between the creditor and principal debtor:

> "It is, of course, the law that a material variation in the contract between the creditor and the principal debtor will discharge the guarantor, unless the variation is one to which he assented, or which is provided for in the contract of guarantee.
>
> … If a new contract is to be secured there must be a new guarantee."

[52] Accordingly, I consider that there is no legally sustainable case that any amendments to the procurement contract made prior to the 2020 guarantee discharged the defendant from liability under the 2020 guarantee. The issue the court must determine is the nature of the defendant's obligations in accordance with the various written contracts. This is a question of interpretation of the written contracts and therefore a question of law rather than a question of fact. Accordingly, the court will not have regard to parole evidence. Consequently, documentation relating to the matters sought in the period prior to the 2020 guarantee is not relevant.

[53] I further consider that documentation during this period should not be provided based on a remoteness of damages defence. No such case is pleaded in the defence and no viable submissions have been made that the "type of loss" claimed by the plaintiff is different to that which Aeromatrix would have understood was likely to ensue if the contract was breached. (See para 21 and 22 of *Transfield Shipping Inc v Mercator Shipping* [2008] UKHL 48.) As Lord Hoffman observed at para [25]:

> "…the question of whether a given type of loss is one for which a party assumed contractual responsibility involves the interpretation of the contract as a whole against its commercial background, and this like all questions of interpretation, is a question of law."

Accordingly, I do not consider the documentation sought is relevant.

[54] The defendant's pleaded case also relies on the *Holme v Brunskill* rule to submit that material changes in the trading relationship between the parties post the 2020 guarantee, and in particular the 2022 agreements, all made without the defendant's consent discharge it from liability under the guarantee.

[55] No new guarantee was entered into after 2020 by the defendant. In determining whether any material changes were made to the procurement contract without the defendant's consent, after 2020 which would invoke the rule in *Holme v Brunskill,* documentation about whether there were material changes in the trading relationship; documentation about level of supply of FTFs and the identity of end user, are all relevant as they speak to a matter in dispute between the parties. Discovery should therefore be granted in respect of all documentation which speaks to the trading relationship between the parties; the volume and value of the products

supplied and the identity of the end customers. Such discovery should be provided from 23 June 2020, being the date of the 2020 guarantee to date.

Issue 3

[56] This is linked to issue 2 as the defendant submits changes in the relationship between the plaintiff and its parent company influences the quantum of the claim. The defendant therefore seeks discovery regarding the plaintiff's commercial obligations to third parties in relation to the supply of FTFs as at the four dates previously outlined.

[57] The plaintiff claims damages for loss and damage sustained by reason of breaches of the procurement contract post April 2021. The plaintiff therefore submits documentation relating to the plaintiff's contractual obligations to third parties prior to this date are not relevant and discovery should only be provided after July 2021.

[58] I consider the defendant is entitled to all documentation which supports or undermines the plaintiff's claim for damages and the defendant is therefore entitled to documentation which details the obligations imposed upon the plaintiff by Bombardier including the level of liquidated damages due in the event of default. Discovery should therefore be provided from the of date of alleged breach namely April 2021 and I order accordingly.

Issue 4

[59] Issue 4 relates to the defendant's knowledge of the plaintiff's business and its contractual obligations to third parties in relation to the supply of FTFs. This issue is agreed save as to the date range. For the reasons already set out, I consider discovery should be provided from the date of the guarantee, namely June 2020.

Issue 6

[60] Issue 6 contained sub-issues (a) to (d) all of which related to breaches of the procurement contract by Aeromatrix and the response to those breaches by various parties. There is no dispute between the parties as to the relevance of issue 6(a) to (d). The dispute relates to two matters. First, the date when the search for all the documents under issue 6 should commence and second whether the documents sought at sub-issues (e) and (f), namely the financial impact to Shorts of alleged non-performance under its contract with Airbus and discussions between the defendant's shareholder Spirit, in view of Spirit's much larger commercial relationship with Airbus, are relevant.

[61] Determination of the question whether Aeromatrix breached its obligations under the procurement contract is a question of both law and fact. First the court must determine the nature of the obligations Aeromatrix owed. This is a question of interpretation of the contract and therefore a question of law and no discovery is

required in respect of this issue. Secondly, the court must consider whether Aeromatrix breached its contractual obligations. The plaintiff alleges Aeromatrix breached the procurement contract from in or around April 2021. Determining whether Aeromatrix were in breach of the procurement contract from April 2021 is a question of fact and to resolve it the court needs to consider the factual evidence from April 2021. I, therefore, do not consider the standard of performance prior to the alleged date of breach is relevant. The issue the court has to determine is whether Aeromatrix breached its contractual relationships from in or around April 2021 and not before. Accordingly, I consider discovery obligations commence from April 2021.

[62] Additionally, April 2021 is prior to the date of bankruptcy and therefore requiring discovery from this date captures the negotiations and discussions between the parties before Aeromatrix entered into bankruptcy. I, therefore, order discovery of documents in 6(a)–(d) from April 2021.

[63] The second element of dispute concerns the defendant's request for documents held by the plaintiff's parent company Spirit. The defendant alleges these documents are relevant as the plaintiff was under a duty to mitigate its loss.

[64] The plaintiff has conceded the relevance of discussions between the plaintiff and Airbus as to Aeromatrix's failings, namely issue 6(c). It objects to the documentation sought at paras (e) and (f) on the basis that any input by Spirit is not pleaded in the defence and, therefore, the documentation sought amounts to a fishing expedition.

[65] As appears from the pleadings and replies to the notice for further and better particulars, Spirit supplied employees to support the plaintiff after Aeromatrix's breach. These have been charged back as part of the plaintiff's claim.

[66] I consider documentation about the plaintiff's discussions with Spirit as to new arrangements for the supply of FTFs are relevant to the question whether the plaintiff properly mitigated its loss and the documentation requested is also relevant to ascertain whether the actual loss claimed by the plaintiff for employee support from Spirit can be sustained. Accordingly, I order discovery of documents set out in (e) and (f) from April 2021 to date.

Issue 9

[67] Issue 9 relates to claims asserted or threatened by Airbus in respect of late delivery of items which should have been produced by Aeromatrix under the procurement contract, any settlement of those claims, correspondence between Aeromatrix and Airbus and other complaints including renegotiation of the contractual arrangements between the plaintiff and Airbus in respect of the delay/liquidated damages.

[68] This issue is agreed, save as to the appropriate date range and as to the issue whether a confidentiality ring is required in respect of some of these documents.

[69] The defendant contends that discovery should be provided from June 2020 when Aeromatrix took over the production of the FTFs, whereas the plaintiff suggests that 1 January 2022 is the appropriate date range in respect of this issue as this is the date Airbus made its first claim.

[70] I do not consider that limiting discovery from January 2022 captures all threatened claims by Airbus and accordingly I consider the appropriate date range is from April 2021, the date of the alleged breach of the procurement contract.

Issue 10

[71] This issue relates to the plaintiff's decision to support Aeromatrix's continued performance of the procurement contract and entering into the 2022 agreements. This issue is agreed save as to the date ranges.

[72] Aeromatrix entered into bankruptcy on 25 March 2022. The defendant seeks documentation relating to the plaintiff's decision to support Aeromatrix's continued performance of the procurement contract arising from the threat and actual bankruptcy of Aeromatrix.

[73] The plaintiff submits documentation should only be provided from July 2021 which is nine months prior to bankruptcy and such documentation therefore encompasses all discussions leading up to that event. The defendant seeks discovery from July 2020 when Aeromatrix took over productions of FTFs.

[74] The plaintiff alleges Aeromatrix were in breach of the procurement contract from in or around April 2021 which may have been linked to Aeromatrix going into bankruptcy. I consider the defendant is therefore entitled to discovery of discussions which took place between the plaintiff and Aeromatrix from this date. Accordingly, I order discovery from April 2021.

Issue 14

[75] Under issue 14 the defendant seeks discovery of any benefits accruing to the plaintiff or its shareholder Spirit, as a result of the plaintiff's mitigation efforts.

[76] The plaintiff submits that the defendant has not pleaded any case based on collateral benefits accruing to Spirit or set out any basis upon which such benefits

should be taken into account. Otherwise, the plaintiff takes no issue with disclosing documents relating to benefits accruing to it from July 2021.

[77] The defendant contends that mitigating measures taken by the plaintiff which resulted in savings or other benefits being passed up to Spirit mean that those documents are material and relevant and ought to be discovered. The defendant seeks discovery from June 2020 onwards.

[78] The plaintiff and Spirit are separate legal entities and Spirit is not party to this action. I consider the defendant is only entitled to discovery of documents in respect of the plaintiff and not Spirit. The issue in dispute is whether the plaintiff took appropriate mitigation steps. In respect of this it is not relevant that such mitigation steps may or may not have had a benefit for a third party. The task of the court is to consider whether reasonable mitigation steps were taken by the plaintiff. Accordingly, I consider that discovery should only be made against the plaintiff in this regard and not against Spirit. The appropriate date for the discovery, I consider, is from April 2021.

Question 2 – The scope of discovery – Peruvian Guano v Standard Discovery

Legal principles

[79] In accordance with Order 24 Rules 1 and 2, when pleadings have closed the parties must make discovery by exchanging lists of documents. The list consists of:

> "documents which are or have been in his possession, custody or power relating to any matter in question between them in the action."

[80] Under Order 24 rule 2(5), the court has power to define specific issues upon which discovery ought to be provided. Further under Order 24 rule 2(5)(b):

> "if satisfied that discovery by all or any of the parties is not necessary, or not necessary at that stage of the action, order that there shall be no discovery of documents by any or all of the parties either at all or at that stage; and the court shall make such an order and so far as it is of the opinion that discovery is necessary either for disposing fairly of the action or for saving costs."

[81] The parties have already isolated 15 specific issues in dispute and the court has further refined these issues and provided a date range within which discovery is to be provided in respect of each issue.

[82] The dispute between the parties now relates to whether the court should direct Peruvian Guano discovery or standard discovery in respect of these issues.

[83] The term "Peruvian Guana discovery" comes from the case of the *Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Company* (1882) 11 QBD 55, when Brett LJ stated at page 63:

> "It seems to me that every document relates to the matters in question in the action, which not only would be evidenced upon any issue, but also which, is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words 'either directly or indirectly', because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of this adversary, if it is a document which may fairly lead him to a train of enquiry, which may have either of these two consequences."

[84] In contrast, standard discovery is defined in the Commercial Hub Practice Direction at para [28] sub-para (iii) as follows:

> "(iii) discovery which is limited to those documents upon which the party relies, and which are necessary for the other parties to understand the case against them ("standard discovery")."

[85] The Commercial Hub Practice Direction further states that the court can direct discovery on:

> "an issue-by-issue basis, which may be on a different basis depending on the issue, for example, for certain issues no discovery, and other issues standard discovery and on remaining issues full Peruvian Guano discovery."

[86] At para [29] the Commercial Hub further provides a costs sanction when a party unreasonably seeks Peruvian Guano discovery. It states:

> "… where full discovery is sought unilaterally, and the discovery exercise is subsequently shown to be of marginal or limited or no assistance in the resolution of the dispute, the commercial judge may award the costs of the discovery process against the party insisting on full discovery, regardless of the outcome of the proceedings."

[87] As appears from Order 24 Rule 2(5)(b) that there can be a staged approach to discovery whereby the court can direct that discovery is not necessary "at that stage", thereby allowing the court to direct discovery at a later stage if the circumstances have changed. Invariably, this is provided for by a party bringing an application for specific discovery.

[88] In accordance with the rules, in determining which order to make, the court must consider whether discovery is:

> "necessary either for disposing fairly of the action or for saving costs."

[89] The most significant change to the Rules has been the introduction of Order 1 Rule 1A, which introduced the overriding objective. In addition, there has been the Gillen Review of Civil Justice in 2017. This recommended the adoption of the principle of standard disclosure with the safeguard of an application for specific discovery on Peruvian Guano lines, if appropriate. The Gillen Review also noted that:

> "The present system, based largely on the concept of relevance, encourages ever increasing searches for any document which might be relevant to the issues, placing an inordinate and disproportionate burden in terms of time and cost on parties to litigation."

[90] In *Flynn v Chief Constable of Northern Ireland* [2018] NICA 3, the Court of Appeal considered discovery principles in light of the overriding objective and the Gillen Report. At para [28] Morgan LCJ stated:

> "[28] … We consider, therefore, that in any case where the existing approach to discovery or disclosure may give rise to onerous obligations or would prevent a case being dealt with expeditiously and fairly the court should intervene with a view to finding a proportionate response, saving expense and ensuring that the parties are on an equal footing. The nature of that intervention will respond to the particular circumstances of the case ..."

[91] The court further noted that these principles have been developed in the context of voluminous and complex clinical negligence and commercial cases and held that their application is clearly appropriate in any case in which the Peruvian Guano approach is likely to prevent the case being dealt with expeditiously and fairly.

[92] In *Flynn*, the proceedings had been issued almost 10 years prior to this hearing and the material involved was of a sensitive and voluminous nature. In that case the court held that a proportionate approach would be to initially provide discovery on a standard basis. The court noted at para [34]:

> "The identification of a proportionate approach in each of these cases will be fact sensitive."

Consideration of Question 2 – Scope of Discovery

[93] As appears from *Flynn* the existing approach in this jurisdiction to discovery is the Peruvian Guano test. The court will only intervene if this approach "may" give rise to onerous obligations or otherwise prevent a case being dealt with expeditiously or fairly. If intervention is merited the court then seeks to find a proportionate response having regard to the need to save expense and to ensure the parties are on an equal footing.

Does Peruvian Guano discovery give rise to an onerous obligation in this case?

[94] Whether the obligation to provide Peruvian Guano discovery amounts to an "onerous obligation" is context specific. Determining what amounts to an "onerous" obligation therefore requires consideration of all the circumstances of the case including the nature and size of the claim, the number of contested issues, the nature of the parties and the resources open to the parties to search for and produce the documentation.

[95] It has long been recognised that many cases in the commercial court are of a voluminous and complex nature and consequently the Commercial Court Hub Practice Direction has implicitly recognised that the requirement to provide Peruvian Guano discovery in such cases creates an onerous obligation and accordingly para [28] of the Commercial Hub Practice Direction encourages practitioners to agree a discovery plan which achieves effective savings in terms of time and costs. In this regard, "the parties are to work collaboratively to agree the issues in dispute and also to consider upon which issues standard discovery may be appropriate and also giving regard to using electronic discovery by way of search words where appropriate" and para [28] imposes a costs sanction on parties who unreasonably seek Peruvian Guano discovery.

[96] I am satisfied that the Peruvian Guano discovery in the present case is onerous for the following reasons. Firstly, this is a complex and voluminous commercial case and its very nature implies that Peruvian discovery is likely to impose an onerous obligation.

[97] Secondly, although the parties have worked collaboratively to agree the issues in dispute this exercise has not operated to significantly reduce the areas of dispute and consequently the volume of potential discovery has not been significantly reduced given that there remain a large number of areas of dispute between the parties.

[98] Thirdly, I am satisfied having read the affidavit evidence of Mr Guzhar that providing discovery on a Peruvian Guano basis will take extensive time and employ extensive resources which will involve huge expense.

[99] Therefore, having regard to all the circumstances in this case I consider, notwithstanding the size of the claim and the resources open to the parties, the obligation to provide Peruvian Guano discovery on all the issues in dispute is an onerous obligation.

What is a proportionate response in this case?

[100] A proportionate response must have regard to the need to save expense and delay whilst ensuring the parties remain on an equal footing. What is a proportionate response is always case sensitive but will involve achieving a result which balances on one side the need for discovery against the time and expense involved in obtaining the discovery. The need for discovery includes consideration of the nature of the claim, the quantum of the claim; the importance of discovery to making or defending the claim and the resources available to the requesting party and the impact the proceedings could have on them, which is part of the requirement to ensure equality of arms. On the other side of the balance the court must weigh the need for expedition in the particular case and generally in litigation together with the burden the order for discovery places on the party having regard to its size and resources in the context of the size and nature of the claim made.

[101] The present claim is extremely large and involves complex questions of law and fact. I consider that discovery will be of the utmost importance to enable the defendant to defend this case particular as this is a case where the defendant acted as a guarantor and was therefore somewhat removed from the details of the interaction between the parties to the procurement contract. I am also satisfied that both parties are large commercial entities and there is equality of arms in respect of resources open to them and the impact proceedings will have on each.

[102] On the other side of the balance I take into account the fact it is now over 18 months since proceedings were issued and I consider there is a clear need for expedition both in this case and more generally the courts should seek to deal with litigation between commercial entities expeditiously. Further, I am satisfied that although the plaintiff is a large commercial entity and has significant resources both in-house and external available to it to provide discovery, I recognise that an order for full Peruvian Guano discovery would involve significant expense on the part of the plaintiff and would take a significant time to obtain.

[103] In accordance with John Gillen's Report's recommendation and in line with the provisions of the Commercial Hub Practice Direction, I consider that a fair and proportionate response in the present case is to order a staged approach in respect of discovery. I consider that standard discovery should be provided in the first instance and thereafter the parties can apply for specific discovery. Such an approach will

reduce the risk recognised by John Gillen and the Commercial Hub Practice Direction that ordering full Peruvian Guano discovery at the outset can lead to large volumes of material being provided which are later shown to be of "marginal or limited or no assistance in the resolution of the dispute." Secondly this approach reduces delay and expense as the limited discovery required in standard discovery can be provided by the parties in a more timely and cost-efficient manner than Peruvian Guano discovery. Thirdly, the ability of the parties to apply for specific discovery of documents after standard discovery is supplied, enables then to focus on the real issues in dispute and I consider this places each party on an equal footing in terms of making or defending the claim.

[104] Accordingly, I order standard discovery in respect of the issues set out above with the safeguard that there can be subsequent applications for specific discovery.

Question 3 – Should only a sample of the plaintiff's financial data be provided?

[105] Mr Guzhar, on behalf of the plaintiff has averred that providing full discovery of all financial data held by it and allowing inspection thereof would be extremely difficult and expensive. This is largely because the plaintiff's data is held in several systems, many of which are old and do not interact with each other. Accordingly, the extraction of the information would be very time consuming and, in some instances, may not produce meaningful documentation.

[106] The plaintiff submits that a proportionate response and one which would save costs and time is to allow sampling with experts from each side agreeing a protocol, under the supervision of the court, by which samples of the data held by the plaintiff can be provided, and then expert evidence developed in respect of quantification of the plaintiff's losses.

[107] The plaintiff's claim is for $41m. In addition, there are several other costs set out in the schedule attached to the statement of claim, which costs are ever increasing.

[108] The only document produced by the plaintiff in support of its losses to date is a single sheet attached to the statement of claim which sets out a number of actual and a number of projected losses in respect of various items.

[109] The plaintiff now seeks to provide sample documentation in respect of its loss. In contrast, the defendant seeks full Peruvian Guano discovery of the plaintiff's losses.

[110] The court has already set out reasons why it considers standard discovery is appropriate in respect of issues 1-15. The plaintiff now seeks a further refinement of standard discovery to discovery by sample in respect of its financial documentation.

[111] In determining the appropriate mode of discovery, the court must intervene to provide a proportionate response. In deciding what is proportionate I have balanced on one side the following factors. The plaintiff's claim is a very large claim and one

which is increasing. Secondly, the losses are not in the distant past and the plaintiff knew it was making a claim in April 2022 when it wrote to the defendant setting out its claim. It is therefore surprising that it did not at that stage, log its losses in a manner which was easily accessible. Accordingly, many of the problems now encountered by the plaintiff arise from its failure to keep information in an accessible format. Thirdly, the plaintiff is a large organisation and has a large workforce and many resources available to it who know the system and have expertise in accessing them. Mr Guzhur avers that it would take about £4,000 or £5,000 to extract the data. This must be seen in the context of a claim over $40m. Fourthly, the plaintiff has been able to calculate its losses and placed these in a table. It appears an accountant has produced the schedule, and in the preparation of the schedule he or she must have had access to documentation provided by the plaintiff especially as many of the losses claimed are "actual" losses and not estimates.

[112] On the other side of the balance the defendant has no real idea of how the plaintiff's claim has been calculated or formulated. Consequently, it sent a notice for further and better particulars to the plaintiff seeking details in this regard. In its replies to the notice for further and better particulars the plaintiff stated, "a matter of discovery/evidence." Accordingly, discovery of the documentation in respect of the quantum claim is essential to enable the defendant to understand how the plaintiff's claim has been formulated and calculated. The defendant is not in a position, with only a single sheet of losses, to realistically draw up a protocol for discovery by sample. For all these reasons, I do not consider it is proportionate that the plaintiff only provides discovery by way of sample.

[113] I, therefore, consider that in the first instance the defendant should at least be provided with the documentation made available by the plaintiff to the accountant who prepared the schedule of loss attached to the statement of claim. Without this documentation I consider the defendant will have no idea how the plaintiff has calculated its claim and accordingly the defendant would not be placed on an equal footing with the plaintiff in determining sampling.

[114] Bearing in mind the need for expedition and to save costs but at the same time bearing in mind the need for fairness in enabling the defendant to defend the claim, I consider that the plaintiff should produce all correspondence, notes, memos, reports or other documents prepared by the accountant in relation to calculation of the plaintiff's claim as set out in the schedule attached to the statement of claim together with all the documents the accountant had access to in formulating the schedule of loss attached to the statement of claim.

[115] Thereafter, I consider the defendant should provide this documentation to an expert who will be able to advise what further specific documents are required and if necessary bring an application for specific discovery. I consider that this approach, which will be expert led will focus on the material documents and thereby avoid excessive time being spent in providing documentation which is of limited or no assistance in the resolution of the quantum dispute.

Question 4 - Confidentiality

[116] The plaintiff submits that the documents set out in schedule 2 and the other documents it is required to provide in discovery in respect of the list of issues are commercially sensitive. It relies on the affidavit of Michael Leibor of Airbus who states that the documentation contained in these documents consists of commercially sensitive information, in particular, information regarding pricing and who further avers that the documents are subject to non-disclosure agreements.

[117] In *Crofthouse Care Ltd and others v Durham County Council* [2010] EWHC 909 at para [38], the court held:

> "… the court in deciding whether to give disclosure must have regard to the fact that any documents are confidential, and that discovery would be a breach of confidence, so that the fact that a document is relevant alone is not determinative of the need to give disclosure."

[118] The ultimate test in deciding whether to provide disclosure and inspection is whether the documents are necessary for disposing fairly of the proceedings. All the parties accept the documents are relevant and necessary, therefore, the only issue is whether the court needs to consider whether some special measures must be put in place such as redaction or a confidentiality ring.

[119] Although the defendant submits the documents are not commercially sensitive, the court accepts the uncontroverted evidence of Mr Leibor that they are. He is best placed to make such an assessment and as he avers the documents go to pricing information and I accept that they are of a commercially sensitive nature. Accordingly, there is a risk that if such information is provided without restriction, it could have adverse effects on the company. In such circumstances the issue for the court is whether the court should adopt a staged approach, initially ordering the documentation should be provided with redactions.

[120] I consider that this approach could lead to further delay and expense as the parties would continue to dispute the extent and need for redaction. Accordingly, I consider the most proportionate response is to order discovery within a confidentiality ring.

Conclusion

[121] I order discovery of Issues 3, 6, 9, 10 and 11 from April 2021 and Issues 2 and 4 from 23 June 2020; such discovery to be in standard form. The plaintiff should provide all documentation provided to its accountant who prepared the schedule of loss attached to the statement of claim. Discovery of documents in schedule 2 and other discoverable Airbus documents to be provided within a confidentiality ring.

[122] I will hear the parties in respect of costs.