Neutral Citation Number: [2014] EWCA Civ 1649

Case No: A3/2013/2328

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
COMMERCIAL COURT
MR JUSTICE SIMON
[2013] EWHC 2211 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/12/2014

Before :

LORD JUSTICE LEWISON
LORD JUSTICE CHRISTOPHER CLARKE
and
SIR COLIN RIMER

- -

Between :

Tigris International N.V.	**Appellant**
- and -	
China Southern Airlines Company Limited and Anr	**Respondent**

- -
- -

Hugo Page QC (instructed by **Watling & Co**) for the **Appellant**
Bankim Thanki QC and David Murray (instructed by **DLA Piper UK LLP**) for the **Respondent**

Hearing dates : 23rd and 24th July 2014

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Approved Judgment

LORD JUSTICE CHRISTOPHER CLARKE :

1. Tigris International NV ("Tigris"), the appellant, claims damages against China Southern Airlines Co Ltd ("CSA"), the first respondent, and the return of the deposit paid under an agreement for the purchase of six aircraft. On 25 July 2013 Simon J dismissed those claims and awarded CSA $ 37,400,000 on its counterclaim. The question in this appeal is whether he was right to do so.

The parties and those associated with them

2. Tigris is incorporated in Curaçao. It was in 2009 the joint venture vehicle of Mr Rutger Koolhaas, who is Dutch, and Mr Bijan Pakdaman, who is of Iranian extraction. These two individuals fell out spectacularly during the course of the venture. Tigris had, as the judge put it, "*no market history, no assets, no financial resources of its own and no published accounts*". Mr Koolhaas was, but Mr Pakdaman was not, a director of Tigris.

3. Mr Herman Venter ("Mr Venter") is a very experienced mechanic with an FAA licence and an Inspector's Authorisation Licence. In early 2009 Mr Koolhaas and Mr Pakdaman agreed with him that he would represent Tigris in all technical matters relating to the sale and purchase of aircraft and in return would receive a 20% share of net profits.

4. CSA is the sixth largest airline in the world in terms of the size of its fleet. It operates scheduled flights worldwide. Its headquarters are in Guangzhou. At the relevant time Mr Su Liang ("Mr Su") was its Chief Economist and Dr Zhong Cheng ("Dr Zhong"), sometimes referred to as Brown Zhong, was a Project Manager within its Planning and Development Department.

5. GALink Aviation Technology Co Ltd ("GALink"), the second defendant, acts as a broker. Its principal representatives were Hawk Yang ("Mr Yang") and Jim Smith ("Mr Smith"). Tigris obtained a default judgment against it on 28 September 2011 but has not recovered anything thereunder. It was essentially a middleman, mainly concerned with promoting its own commercial interests. The judge said [75] that he would treat with caution any assertion made by it as to what other parties had said or done or intended.

6. Mr Koolhaas and Mr Pakdaman's business plan was to buy aircraft from China and sell them in Iran. This was, as the judge put it, "*a delicate commercial transaction*". Iran was subject to UN sanctions and Tigris lacked any commercial or financial substance. Tigris knew that CSA would not be willing to sell aircraft whose ultimate destination was Iran. The judge found [70] that, whatever might have been their suspicions by the end of the contract, neither Mr Su nor Dr Zhong knew that the aircraft were ultimately destined for an Iranian airline.

7. Since Tigris, itself, had no way of fulfilling its obligations under any aircraft purchase the success of the venture depended on securing, through Mr Pakdaman's contacts, back-to-back contracts so that the deposit and the balance of the purchase price paid by Tigris to CSA would be funded by the sub-purchasers from it. In broad terms it was agreed between Mr Koolhaas and Mr Pakdaman that Mr Koolhaas would be

responsible for the purchase of the aircraft and Mr Pakdaman would be responsible for sales in Iran. Mr Venter would deal with the technical aspects of the venture.

8. Tigris' principal claim was that at one or more of various meetings in 2009 in Beijing, Shanghai and Johannesburg, unlawfully and in breach of the agreement for the sale of the aircraft, and knowing that it was a breach of Mr Pakdaman and Mr Venter's duties to Tigris, CSA, GALink and Messrs Pakdaman and Venter entered into a secret agreement, concealed from Koolhaas and Tigris, that CSA and GALink would divert the sale contracts for 5 of the 6 aircraft, engines and spares from Tigris to a company or companies set up, or to be set up, by Mr Pakdaman and Mr Venter with the benefit being shared between the defendants; Re-Amended Paritculars of Claim ("RAPOC") para 15.

Mr Pakdaman's status in relation to Tigris

9. On 24 June 2007 Mr Koolhaas, Mr Pakdaman and a Dr Folkers entered into a Cooperation Agreement. This was the only document relied on in Tigris' pleadings as conferring any authority on Mr Pakdaman in relation to Tigris. Dr Folkers, a lawyer, resigned from the arrangement in early 2008. The agreement is expressed to be between those three individuals. Mr Koolhaas, the Second Party, is expressed to be acting "*in his own name for and on behalf of the companies he owns such as but not limited to Tigris*". It recites Mr Koolhaas' wish to seek the advice of Mr Pakdaman and Dr Folkers to develop business opportunities for his companies on the territory of Iran and Kurdistan.

10. By the Agreement Mr Pakdaman was appointed as:

> "*1 ….the Exclusive Agent for the Second Party. This means that the First Party* [i.e. Mr Pakdaman] *has the right to represent the Second Party towards any Government Entity or third party to the best interests of the second Party. Moreover the Agent is authorised to negotiate contracts subject to written approval of the second Party. Under no circumstance the Agent can legally bind the Second Party without his written consent…. The second party will not conclude any contract in Iran and Kurdistan without specific consent of the first party*"

As is apparent both the negotiation of contracts and the making of them required Mr Koolhaas' consent. Clause 3 provided that the parties were to cooperate "*to obtain and execute contracts in Iran*". Clause 4 provided that the profits would be shared equally between the three.

11. Simon J held that it was unclear what authority Mr Koolhaas had to contract on Tigris' behalf on this date because he was not a director of it: [85]. He was, however, the sole shareholder. There had also been disclosed by Tigris a letter dated 5 April 2006, which was not in the trial bundles, by which Mr Witteveen, the then managing director of Tigris, gave Mr Koolhaas full unlimited power of attorney to represent Tigris. CSA did not object to the admission of this evidence before us and was content to proceed on the basis that Tigris was a party to the Cooperation Agreement.

12. On 19 December 2007 Mr Koolhaas and Mr Pakdaman were given very wide powers of administration and disposition by Tigris, including the ability to enter into

contracts, so that they could represent it "*jointly*". By now Mr Koolhaas was a 51% and Mr Pakdaman a 49% shareholder; Mr Koolhaas was President and Mr Pakdaman secretary. This was the authority in existence when the project with CSA first started.

13. In August 2009 there were further developments in relation to Mr Pakdaman's authority: see [30] below.

The history

14. It is necessary to address the history of events in some detail. What follows is, in large measure, derived from the judgment of the learned judge. But it also incorporates reference to communications which the Appellants say that the judge should have taken into account but did not.

15. In July 2008 CSA advertised for sale the aircraft, engines and spare parts that form the subject matter of this appeal, which were redundant from its fleet.

16. On 15 January 2009 Mr Koolhaas for Tigris and Mr Yang of GALink entered into a Letter of Intent for the purchase by Tigris of 6 Airbus 300-600R aircraft identified as MSN 733, 734, 739, 750, 756 and 762 with an associated package of engines and spares for a total price of US $ 160 million.

Tigris' sale contract with Oghab

17. On 1 February 2009 Tigris signed an agreement to sell aircraft MSN 750, 756 and 762 to an Iranian airline - Oghab Assaluyeh ("Oghab") - at a price of $ 27.5 million each with the buyer contracting to pay a deposit of $ 9 million and a balance of $ 24.5 million per aircraft. The purchase of these aircraft by Tigris was initially intended to be through GALink. On 13 May Oghab released € 6.16 million to Tigris and Tigris paid $ 8.25 m to GALink. Subsequently the sale was restructured and Tigris entered into a direct contractual relationship with CSA.

Letter of Intent No 1

18. On 22 May 2009 CSA, Tigris, and GALink executed a Letter of Intent ("LOI No 1") for the sale by CSA of the 6 Airbus 300-600R aircraft with the MSNs specified in [16] above and five spare engines for $ 124 million. Tigris was required to pay CSA a non-refundable security deposit of $ 12.4 million within 10 business days of the signing and to make a payment of $ 57 million before delivery of the first aircraft. On 26 May 2009 Tigris and GALink signed an agreement confining the scope of GALink's relationship with Tigris to the sale of the spare parts for $ 20 million.

19. On 5 June 2009 Tigris made a payment to CSA of $ 6.2 million and on 30 June 2009 a further payment of $ 4,677,697.92, making $ 10,877,697.92 in all towards the deposit, leaving a shortfall of $ 1,522,302.08. Tigris did so having received € 17.5 million (c $ 24.5 million) from Oghab, being the balance for the first aircraft.

20. Even at this early stage the breakdown in trust between Mr Koolhaas and Mr Pakdaman had begun. On 8 June 2009 Mr Pakdaman sent him a long email of complaint for having bought six planes and not three, saying that there was no chance of raising the deposit for six before the first aircraft was delivered.

The Aircraft Sale Agreement

21. LOI No 1 was superseded by the Aircraft Sale Agreement ("ASA") formally dated 27 July 2009, the date of CSA Board approval, although it was in fact signed on 10 July 2009. Mr Koolhaas signed for Tigris. Mr Su signed for CSA and Mr Yang for GALink. The fourth party was Shenyang Southern Airlines Import & Export Trading Corp.Ltd, an export agent. The terms were similar to LOI No 1.

22. Under Clause 2.1. and Schedule 1 delivery was to be as follows:

MSN	750, 756 and 762	By 31 July 2009
MSN	733, 734 and 739	By 27 August 2009

The spare engines were to be delivered within 60 days of the delivery of the last of the aircraft to Tigris. The aircraft were to be delivered in China and ferried by CSA to Johannesburg. The combined price of the aircraft was $ 114 million (the first four aircraft having a price of $ 20.9 million and the last two a price of $ 15.2 million each). The price of the five engines was $ 10 million in all.

23. As to payment, clause 4 and Schedule 4 provided for three instalments payable as follows:

(i)	$ 10,877,697.92 (already paid)	Within 10 Business Days of the signing of LOI No 1
(ii)	$ 57,235,487.56	At or before delivery of the First Aircraft
(iii)	$ 55,886,814.52	At or before delivery of the Fourth Aircraft

24. Clause 2.2 (c) of the ASA provided that CSA's obligation to deliver the aircraft was conditional on it having received the purchase price for the relevant aircraft. Clause 2.10 provided that if Tigris failed to make payment by the contractually stipulated deadlines CSA would be entitled to terminate the ASA. The ASA is governed by English law and contains a jurisdiction clause in favour of the English courts: clauses 16.1 and 16.2.

25. Clause 15.2 provided:

> "***15.2 Amendments***
>
> *This Agreement shall not be modified, except by written agreement of an even date herewith or subsequent hereto signed on behalf of the Seller and the Buyer by their respective duly authorised officers or representatives*"

26. By this stage Mr Koolhaas and Mr Pakdaman each owned 50% of the shares in Tigris of which Mr Koolhaas had been sole Managing Director since 9 April 2009.

27. On 23 July 2009 the first three aircraft were technically accepted by Tigris and $ 2 million was released to GALink for 3 ferry flights and $ 0.5 million for spares to be carried on each aircraft. However Tigris was only able to pay $ 19 million of the $ 57

million due on 31 July, which it did on 29 July 2009. As a result none of the first three aircraft were delivered.

28. On 2 August 2009 Mr Koolhaas emailed to Mr Pakdaman to say that CSA had performed in every way and had accepted all Tigris' mistakes and delays and breaches made by the buyer because (a) the money did not arrive, as a result of which the deposit was not paid on time; (b) then only 50% was paid; and (c) the remainder was paid short and too late, adding that there was only one way to convince CSA to continue the contract and that was "*to pay for the balance of the two aircraft and deliver the 3 aircraft to Johannesburg asap*": judgment [71].

A possible change of party

29. On 5 August 2009 Dr Zhong emailed Mr Su with the news that Mr Smith, still in South Africa, had told him that "*the investing party*" i.e. Mr Pakdaman, planned to transfer control over the contract from Mr Koolhaas to Herman i.e. Mr Venter. On 6 August 2009 Mr Su emailed Mr Yang to say that if the contract was amended the original contracting parties and the new contracting party must sign together, and that, if Mr Venter controls the transfer flight of the aircraft, "*the fund transferring party …must be approved by the original contracting party*".

Mr Pakdaman's limited power of attorney

30. On 7 August 2009 the power of attorney of 19 December 2007 was replaced by a more limited power to represent Tigris. Mr Pakdaman was given power, acting jointly with Mr Koolhaas, to represent Tigris with CSA and to negotiate with CSA the final terms and conditions for delivery of the aircraft, spare engines and spares. Mr Pakdaman could represent Tigris in discussions with CSA but could only sign for or bind it by a joint signature with Mr Koolhaas. The power was to be effective until 7 February 2010 unless previously revoked and it, itself, revoked all previous powers.

31. On the same day Mr Page of Penlaw, Tigris' solicitors, sent an email to Dr Zhong and Mr Su in which he referred to Mr Koolhaas as the "sole director" of Tigris. Mr Koolhaas said in evidence that this was sent in order to make clear to CSA that only Mr Koolhaas had authority to act on behalf of Tigris.

Meetings in Beijing and Shanghai

Beijing

32. Mr Yang of GALink asked Dr Zhong to travel to Beijing and on 12 August 2009 he did so.

33. According to the evidence of Dr Zhong, who the judge accepted had given broadly truthful evidence on the central issues, Mr Yang introduced him to Mr Pakdaman, whom he had not met before, as "*the real investor*" behind Tigris. He half believed this, but half did not. Mr Pakdaman told Dr Zhong that he was part of the senior management of Tigris, that there was a power struggle between him and Mr Koolhaas for the deal, and that without his investment Tigris could not perform. Dr Zhong said that if he wanted to take over Tigris' responsibility for the deal, he had to ask Mr Koolhaas to transfer the ASA to him. He denied that Mr Pakdaman had ever said that

he would ensure that Tigris failed to pay thus allowing CSA to terminate the ASA and continue with someone other than CSA. The judge accepted his evidence that Mr Pakdaman said that he would ensure that Tigris paid the overdue balance for the first three aircraft[1].

The alleged secret agreement

34. Tigris alleged, and Dr Zhong emphatically denied, that at this meeting a secret agreement was made to transfer the benefit of the ASA from Tigris and to cut Tigris out of the sale. The judge found [88] that there was no such agreement and that CSA dealt with Mr Pakdaman (in the absence of Mr Koolhaas) on the basis that he was acting for Tigris and would be able to procure the outstanding payments that Tigris was contractually bound to make.

Shanghai

35. On 18 August there were some meetings (described by Dr Zhong as "*unofficial meetings, just chatting*") between Dr Zhong and Mr Pakdaman in the coffee bar of a hotel in Shanghai. The evidence of CSA's witnesses was that they went to Shanghai because they had heard that Mr Pakdaman and his team were going to meet representatives of China Eastern Airlines, Dr Zhong's purpose was to meet Mr Pakdaman to try to save the deal with Tigris. Mr Su's purpose was to meet contacts at China Eastern Airlines to persuade them not to sell its aircraft to Tigris.

36. It was suggested to Dr Zhong and Mr Su that in Shanghai they struck a deal with Mr Pakdaman and Mr Venter to divert the opportunity to purchase the aircraft and engines under the ASA from Tigris to some other entity controlled by one or other or both of them. Both witnesses denied that and the judge found that no such agreement was made. He was also quite satisfied that Mr Su was not present at any meeting with Mr Pakdaman and Mr Venter in Shanghai.

37. The evidence to the contrary was derived from Mr Venter. Mr Pakdaman did not give evidence. Mr Venter accepted in his evidence that he had conducted himself in relation to the transaction in a "*deeply dishonest and underhand manner*". In the course of his oral evidence he disavowed his allegation that Dr Zhong and Mr Su had agreed to accept bribes in return for diverting the contract from Tigris to another company. The judge was only prepared to accept his evidence if it was adverse to Tigris' case or was clearly and directly supported by independent and contemporaneous documents [73].

Side Agreement No 1

38. On 20 August 2009 CSA and Tigris purportedly entered into Side Agreement No 1. It was agreed that Tigris would pay the balance of the deposit of $ 1,522,302 on or before 26 August 2009 and CSA would perform the ferry flight delivering MSN 762 to Johannesburg on or before 27 August 2009.

39. Mr Pakdaman signed for Tigris. Tigris says - correctly in the light of the POA of 7 August 2009 - that he had no authority to do so. Mr Koolhaas, who was not told of it,

[1] His exact evidence was that, when he asked when the Swiss bank was likely to pay up for the two aircraft Mr Pakdaman "*said they were making the arrangements but needed time*".

said that he would have agreed to Tigris being a party to Side Agreement No 1 if asked. In any event the Side Agreement was something that, for the moment, kept the deal on track and it was Mr Pakdaman's job to inform Mr Koolhaas of it. The Side Agreement did not make any amendment to the delivery schedule in respect of the remaining aircraft. Tigris contends that the reason why Mr Koolhaas was not told was in order to make it appear that the deal with Tigris was at an end, whilst in fact keeping the contract with Tigris open for future transfer to a Pakdaman company. The judge did not accept this and it was not suggested to Dr Zhong or Mr Su that they had deliberately concealed it from Mr Koolhaas.

Exchanges between Mr Koolhaas and Mr Pakdaman whilst Mr Pakdaman was in China

40. Whilst Dr Zhong was in Beijing and Shanghai the following exchanges took place. On 12 August 2009 at 21:22 Beijing time Mr Koolhaas sent an email to Mr Pakdaman referring to an earlier conversation in which Mr Pakdaman had told him that he was "*out*" and that he, Mr Pakdaman, was taking over and asking how he thought that he, Mr Koolhaas, would think about that. Mr Pakdaman replied with an intemperate response in German at 22:10 Beijing time on 12 August 2009 ("*Rutger, what do you think, that I am your employee. You destroyed everything. 33 million is gone. I need to get it back. You have lied to all people. I am broke, you too…*").

41. On 13 August 2009 Dr Zhong received from Mr Yang some Tigris corporate documents including the 19 December 2007 POA. Why this POA and not that of 7 August 2009 was sent was unexplained. Mr Koolhaas had sent the 7 August 2009 POA to Mr Pakdaman on 10 August and to Kelvin Zha at CSA and Mr Yang on 12 August. On 16 August 2009 Mr Pakdaman repeated to Mr Koolhaas in emotional terms that the deal was over and Tigris must pay the money back ("*The financier does not make it anymore/Our life is gone/ I'm finished, broke/you are a liar/I will see you in court, if we then are still alive/we lost everything.*").

Delivery of MSN 762

42. Tigris did not pay the amount required by Side Agreement No 1 in time. On 19 August 2009 Mr Koolhaas emailed Dr Zhong to ask for the original bill of sale for the first aircraft, having only received a copy. Dr Zhong replied:

> "*Since you didn't pay full deposit, it is still short of USD 1.5 million, and you failed to pay the balance for the remaining two aircraft. Do you think I still need give you the original bill of sale?*"

43. On 26 August 2009 Mr Koolhaas replied to the effect that Dr Zhong should provide the original bill of sale because schedule 4 of the ASA showed that the accepted amount of the LOI deposit was $ 10,877,697.92 and the purchase price of the first aircraft had been paid in full. To this he got the reply: "*You shall pay the balance of LOI deposit at least*". (Tigris draws attention to the fact that Dr Zhong referred to the LOI and not the Side Agreement). Emails followed in which Mr Koolhaas said that he did not agree with that answer and Dr Zhong said pay the $ 1.5 million or go to court.

44. Despite the non-payment of the balance of the deposit CSA agreed to deliver MSN 762 on the strength of the amount of the deposit already paid ($ 10.8 million) and the

$ 19 million already received. The aircraft was flown to Johannesburg on 28 August 2009, with Dr Zhong and Mr Pakdaman on it. Mr Su and Hawk Yang travelled there on a commercial flight. Mr Venter was already there.

Developments in relation to Mr Pakdaman's authority

45. Meanwhile Mr Koolhaas had been in more acrimonious correspondence with Mr Pakdaman. On 25 August 2009 Mr Koolhaas told Mr Pakdaman in an email timed at 11:40 that he (Mr Pakdaman) as a shareholder had :

> "….*No authorisation at all to act on behalf of Tigris…A shareholder has shares that is all. He is not allowed to work on behalf of Tigris…Only the managing director can And you know I am the Managing Director. Also you have no POA to act for Tigris International, so take serious note of what You are allowed to do and what not*".

Mr Pakdaman made an intemperate response ("*you are a small boy*") in which he claimed to have "*the full power of attorney*" and a 50% share of Tigris and could prove all the money came from him. Mr Koolhaas sent an email in reply, timed at 19:42, which included a reminder to Mr Pakdaman that:

> "*you do not have a power of attorney. The full power which you refer to was cancelled by a subsequent one which was given specifically for certain purposes in connection with this deal and which purposes you are unable to complete. You therefore have no effective power of attorney as you well know*".

Mr Koolhaas referred to the fact that Tigris of which he was sole Director/President was trying to minimise its losses due to "*your principal Oghab failing to comply with its contractual obligations*".

46. The judge held that this was a revocation of such authority as Mr Pakdaman had to act on Tigris' behalf "*as Mr Koolhaas was constrained to accept in his evidence*". Tigris submits that it was no such thing. It was merely an incorrect assertion that the existing power of attorney had come to an end as a result of Mr Pakdaman being unable to complete the ASA so that the deal was over.

The ferry flight and its sequel

47. Dr Zhong's evidence was that in the course of the ferry flight to Johannesburg on 28 August Mr Pakdaman tried to convince him that he (Mr Pakdaman) should be allowed to take delivery of the aircraft himself and that Mr Koolhaas, who was in the Netherlands awaiting the birth of his child, should be prevented from coming to South Africa for the purpose. Dr Zhong refused Mr Pakdaman's request to be allowed to accept the aircraft on behalf of Tigris and required Mr Koolhaas to come to South Africa to accept delivery in person.

48. Mr Koolhaas, who had previously made arrangements for a South African lawyer to sign the acceptance documents on his behalf under a power of attorney, flew to South Africa on 31 August 2009. He and Mr Venter signed the acceptance certificate on behalf of Tigris on 1 September 2009.

Events in Johannesburg

49. Mr Su, Dr Zhong, Hawk Yang, Mr Pakdaman and Mr Venter had a meal together in a restaurant near Johannesburg airport. Tigris' case was that at this meeting CSA was told that Tigris had no funds or access to funds other than from Mr Pakdaman, who could thus ensure that Tigris defaulted. CSA agreed to cancel the ASA and divert the sale of the remaining aircraft to a company controlled by Messrs Pakdaman and Venter. Mr Su and Dr Zhong both denied this. The judge found that no such agreement was made and that the evidence of Mr Venter was hardly compelling [93].

50. This is not surprising. Mr Venter was unable to describe how Mr Su had indicated his assent to the secret agreement. His evidence was that Dr Zhong had said that any transfer of the ASA from Tigris would require Mr Koolhaas' consent. He also said that Dr Zhong and Mr Su were "*not completely*" in on the alleged conspiracy by the time MSN 762 was delivered on 1 September 2009; that he did not know about a secret agreement at this time; and that he had no first-hand knowledge of any discussions about the "secret agreement" involving CSA.

51. Mr Su's evidence was that after the ferry flight he was told by Mr Venter and Mr Yang that Mr Pakdaman was responsible for funding for Tigris from which it was obvious to him that Mr Pakdaman's cooperation was required to complete the process. At a dinner given by insurers in Johannesburg Mr Pakdaman told Dr Zhong that Mr Koolhaas had no money and that Mr Pakdaman was the money guy. At some stage Mr Pakdaman said that he wished to take over Tigris' responsibility in the deal. Dr Zhong's evidence was that he said that if Mr Pakdaman wanted to do this he had to ask Mr Koolhaas to transfer the ASA to him.

Revival of any lapsed authority?

52. Tigris alleges that if Mr Pakdaman's authority to negotiate with CSA ever lapsed it was revived by a number of events. On 12 September 2009 Mr Koolhaas emailed Mr Pakdaman to ask "*whether we [are] going to send an answer to CSA*" (in relation to Dr Zhong's email of 8 September: see [54] below) and asking, *inter alia*, "*why don't we work together?*". On 15 September 2009 there were telephone conversations between them about, *inter alia*, the source of the $ 1.5 million i.e. the balance of the deposit which had not been paid (see [53] below), and an email in which Mr Koolhaas said that he did not mind Mr Pakdaman taking a very active part but he should also let Mr Koolhaas do his part too. He reminded him that, although he had 50% of Tigris he, Mr Koolhaas, was the President of the company and responsible for all the company's acts. Thus it was logical for him to be largely responsible for the Chinese and for Mr Pakdaman to remain largely in charge of the Tehran end. What was important was that the two of them should work together for the delivery of the second aircraft. On 18 September he asked "*Can you tell me what you have been doing with CSA regarding the Heavy check?*" (this relates to maintenance). Tigris submits that the relationship did not finally break down until 5 October when Mr Pakdaman told Mr Koolhaas that "*we are not able to work with you anymore*".

Developments in September

Communications between CSA and Tigris down to 21 September

53. On 8 September 2009 CSA received $ 1,499,965 out of the $ 1,522,302 deposit due from Tigris under Side Agreement No 1. This payment was made by Felicity General Trading LLC, a Dubai registered company apparently owned by or associated with Mr Pakdaman.

54. Also on 8 September 2009 Dr Zhong emailed Mr Koolhaas to inform him that the ASA would be terminated automatically if the balance for the second aircraft was not wired prior to 18 September 2009. He told him that if Tigris could not pay the balance in time, a new ASA would be entered into with "*CSA other client shortly*".

55. On 9 September 2009 Mr Koolhaas replied to say that it appeared that during the meetings between Mr Pakdaman and the CSA team in China it was agreed that the 3 aircraft would be delivered before the end of September and so there was no reason to pull the second aircraft forward to 18 September 2009.

56. On 10 September 2009 Dr Zhong replied:

> "*I don't think you are serious to respect the ASA. Now that you have lost control to pay the balance, what I want to do is to draw your attention on the ASA*"

57. In a letter of 14 September to Dr Zhong Mr Koolhaas wrote:

> "*The delivery schedule has been modified many times. Such schedule is now flexible with the aircraft being delivered one by one at reasonable intervals.*"

The suggestion that the schedule had been modified many times was inaccurate. After raising a number of matters said to excuse Tigris for not taking delivery Mr Koolhaas continued:

> "*We shall inform you of the likely timing for the next delivery as soon as the first aircraft has been registered in South Africa and ferried to the painting shop, which should be* ***in the near future****.*
>
> *Meanwhile, please confirm that you will deliver the following two (then three further) aircraft to us. If you do not provide such confirmation you will naturally understand that we will be obliged to protect our rights*"
>
> [Bold in this and other citations added]

58. Dr Zhong replied on the same day:

> "*It is confirmed that we can deliver the remaining five aircraft immediately one by one* ***once you pay the balance of purchase price***"

To which Mr Koolhaas responded:

> "*Thank you for this. So we will pay for the aircraft one by one, the balance for such aircraft (i.e. the purchase price less the proportion of the deposit). We shall let you know when the first of such payments will be made*".

59. Also on 14 September 2009 Mr Koolhaas emailed Dr Zhong to remind him that he, Mr Koolhaas, the Managing Director of Tigris, was the only person who could take delivery of the aircraft and was also the "*contracted party for these aircraft*".

60. On 18 September 2009 William KK Ho & Co, CSA's Hong Kong solicitors, wrote to Tigris to say that if Tigris failed to take delivery of MSN 756 and pay the balance of the Purchase Price on or before 20 September 2009 CSA would exercise its rights under the ASA and terminate it in respect of that aircraft. Mr Koolhaas' immediate response was to email Mr Pakdaman to ask what he had arranged with CSA. He appears still not to have been told about Side Agreement No 1.

61. On 21 September Penlaw replied. They referred to the exchange of emails on 14 September and asserted that the contract was being performed according to the mutual consent of both parties:

> "*There is no date limit for our clients to take delivery of the remaining 5 aircraft, but they will proceed as soon as reasonably possible.*
>
> *Consequently, if your clients purport to terminate the contract, they will do so wrongly and will be responsible for the consequences*"

Communications between GALink and CSA down to 21 September

62. In an email of 9 September - immediately after the balance of the deposit had been paid on 8 September 2009 - Mr Smith emailed Dr Zhong (alone) to say how happy he was that that had happened and added: "*I truly hope that Bijan can finish the deal for all of us*". Dr Zhong replied to ask whether Mr Smith knew what "*is Bijan's schedule for the second aircraft?*". Dr Zhong's evidence was that the reason for asking this question was not because it had already been agreed that the second aircraft would be delivered to Mr Pakdaman and not Tigris.

63. Mr Smith replied the same day to say that Mr Pakdaman had previously told him he was sure that he could take the second aircraft by mid-September and the third by the end of it; and he had not been told anything different.

64. On 10 September 2009 Dr Zhong replied:

> "*It seems we need an agreement that Koolhaas assigns Bijan to take over his responsibility. The agreement declares that the coming payment from another account is Tigris payament [sic]*".

I take that to be a reference to the balance of the deposit of whose recent arrival Dr Zhong was then ignorant.

65. On 15 September 2009 Mr Smith reported to Mr Yang that he had been told that Mr Koolhaas had signed over all rights of Tigris NV to Stream Land Air, owned 40% by Mr Koolhaas, 20% by Mr Venter and 40% by an investor. This was not in fact correct. Mr Smith expressed the view that

> "*they will default, I do not think they can stop fighting each other. If Koolhass has control he has no money now, so he cannot finish. He will look for a reason to blame CSA for breaking the contract but the truth is he cannot finish the deal without the money and the investor will not give Koolhass anymore money. I think we should all be ready for no more payments from koolhass*"

Later the same day he emailed Mr Yang again to say that he had just spoken with Herman and his partner who would be able to take delivery of the second plane in China no later than 23 September and that they had all the legal documents "*just signed by koolhass that will give them all rights to Tigris NV business"*. These two emails were forwarded to Dr Zhong the next day. They would have indicated that an assignment by Mr Koolhaas was in contemplation, although no such assignment had in fact been signed.

Further steps towards a possible transfer of the ASA

66. On 17 September 2009 Mr Smith emailed Mr Yang and Dr Zhong to say that Mr Venter had just called and needed to talk with Dr Zhong and Mr Su. Dr Zhong said that he never called back because he did not know what they wanted to talk about.

67. CSA indicated a willingness to terminate the ASA with Tigris and sign a new ASA with Messrs Pakdaman and Venter and their new company; but only on the basis that Tigris assigned its rights under the ASA. As early as 6 August 2009 – see [29] above – Mr Su had told GALink that, if the purchase of the remaining aircraft was to be transferred from Tigris to another company, this would have to be with the consent of Tigris: see also [64] and [65] and [68] below.

68. On 21 September Mr Venter sent an email to Dr Zhong and others (not including Mr Koolhaas) attaching a form signed by Mr Koolhaas transferring Tigris' rights to Stream Land Air, the South African company to which Tigris had told CSA it intended to transfer the aircraft. (Tigris' idea was to re-register the aircraft in South Africa before they went on to Iran). Dr Zhong emailed Mr Venter in reply, *with a copy to Mr Koolhaas*, to say that he would send a proposed amendment to the ASA, which would have to be signed by Mr Koolhaas, transferring Tigris' rights to Stream Land Air. Mr Koolhaas replied saying that Tigris did not intend to transfer the contract "*at this time*" and remained the contracting party. The document Mr Venter had prepared was said by Mr Koolhaas to relate to the registration and lease of the aircraft after purchase and was not a transfer of the purchase contract itself. He stated that Tigris remained the co-contractant of CSA and that he represented Tigris.

69. Meanwhile Mr Venter had started the process of incorporating Thesa Aircraft Company (Pty) Limited ("Thesa") which he and Mr Pakdaman intended should replace Tigris as the purchaser of the five remaining aircraft. Thesa was incorporated in South Africa on 21 September 2009 with Mr Pakdaman and Mr Venter as shareholders in the proportions 670/330. Mr Venter was the sole director.

70. On and after 21 September 2009 a series of emails were exchanged between Mr Koolhaas and Messrs Pakdaman and Venter, some of which were copied to CSA. As the judge recorded, a number of intemperate statements were made, among which were Mr Venter's assertion that Mr Koolhaas had lied about Tigris' ability to fund the purchase of the aircraft and Mr Pakdaman's (unjustified) accusation in an email of 21

September that Mr Koolhaas had stolen € 1.3 million and that "*my lawyer will take care of this*".

71. On 21 September 2009 Mr Koolhaas sent an email to Mr Venter in reply to one of his and copied it to Dr Zhong, Mr Pakdaman, Mr Yang and Mr Smith. In it he said, *inter alia*, that Tigris was the principal party and wanted to avoid the project failing. Mr Venter sent the email to the recipients (and others) with various annotations. These included the comment "*Rutger all you want is to be HIGH and MIGHTY for the rest you are not honest"*. He also added the following:

> "*All I can say is that you DO NOT HAVE ANY MONEY, … so STOP LYING TO THE CHINESE PEOPLE. Also stop this copy and paste stuff from you [sic] lawyer. If you were serios [sic] about the deal you would have responded last week and not wake up when I call or send you email. You know that you stole the money from Bijan and company. We have proof.*"

72. In the light of that Dr Zhong emailed Mr Smith on 22 September 2009 to say:

> "*I think you had read Mr Koolhaas' email. After evaluated the whole situation I advise you talk Mr Bijan, Herman* ***or Koolhaas*** *about CSA position regardling [sic] of A300 project. The following points shall be understood by all of them:*
>
> *1 Since Koolhaas doesn't like to cooperate us, the ASA shall be terminated as soon as possible and CSA will retain the deposit, the second warning letter to Tigris will be issued shortly, after then, a termination letter will be sent.*
>
> *2 After the ASA is terminated, CSA likes to sign a new ASA with Herman to replace Koolhaas under the condition of the same purchase price.*
>
> *3 The situation is now critical for Koolhas (sic),CSA can not wait any longer*"

73. Mr Smith replied to Dr Zhong to say that he would contact Tigris (Koolhaas and Herman) and asked whether, once the ASA was terminated, the current deposit would be applied to a new ASA with Herman, to which Dr Zhong replied that he would like to invite Messrs Venter and Pakdaman to China to discuss a new ASA after which the previous ASA would be terminated.

74. On 23 September William KK Ho replied to Penlaw's letter of 21 September saying that if Tigris failed to take delivery of the MSN 756 Aircraft and pay the balance of the Purchase Price in respect of it on or before 29 September 2009 CSA would terminate the Agreement in respect of the MSN 756 Aircraft. On the same day Mr Smith had urged Dr Zhong to send a notice to Tigris to pay and, if no money was received within 3 days, to give a "*quit or pay*" notice and then terminate. As the judge observed [46] William KK Ho's letter was not in the terms sought by GALink.

75. On 24 September 2009 Mr Venter wrote a letter on behalf of Thesa to GALink offering to sign a new ASA with CSA *"if the previous ASA can be declared null and void*": judgment [47]. It was expected that Thesa would be in a position to have the

funds available for the second aircraft by 15 October and Mr Venter expressed the view that the deposit already paid to CSA could be credited to Thesa.

76. On 5 October 2009 Mr Koolhaas spoke to Dr Zhong on the telephone and, as Mr Koolhaas confirmed to Mr Pakdaman that day, Dr Zhong confirmed "*that we can still buy the aircraft*".

77. On 6 October 2009 Mr Coetzer, described as General Manager of Thesa Airlines, emailed Mr Smith to ask whether he knew if CSA had sent Mr Venter a letter stating that they were willing to sign a new agreement with Thesa and cancel the Tigris ASA, saying "*We are sitting on hot coal here in Iran waiting on a letter. The bank will release the money if we have a letter*".

78. On 7 October 2009, by which time it was clear to CSA that Tigris did not have the funds to perform its obligations under the ASA, Mr Koolhaas emailed CSA saying that he understood that the "*funds should be available fairly soon for Tigris to take delivery of the second aircraft*" and asking how much notice was needed to make the aircraft available. He said this:

> "*Please also note that if another party approaches you for the same aircraft you should please inform them that Tigris is purchasing. As you know we have a binding agreement between Tigris and CSA.*"

79. On the same day Mr Coetzer emailed Mr Smith with copies to Mr Yang, Mr Venter and Dr Zhong to say that Thesa needed a letter from CSA to say that they had or were ready to cancel the deal with Tigris and sign a new deal with Thesa Airlines to give to Mr Pakdaman's bank in order to have the money released and sent to CSA's bank.

80. On 9 October 2009 Dr Zhong emailed Mr Koolhaas to say:

> "*There were so many stories happened during the first aircraft transaction. since you are not the real buyer, and also lied so many times, I don't believe that you have fund [sic] to pay the aircraft balance. My suggestion is that you shall settle down all problems with Herman and Bijan as soon as possible. CSA will not wait for your cooperation too long. It is absolutely to terminate the ASA if you act negatively.*"

81. On 13 October Penlaw wrote on behalf of Tigris acknowledging that their client had been unable to comply with the delivery schedule, repeating the claim that CSA had agreed to the delivery of the remaining five aircraft "*one by one, without limit of time*" and asserting, implausibly, that since the aircraft were back in service CSA was "*not suffering any prejudice by the delay*". The letter confirmed Tigris' intention to perform the contract.

82. On 12 and 14 October Mr Koolhaas spoke to Mr Venter who told Mr Koolhaas that he was finished with the project. This was not true. He had in fact travelled to China on 12 October. He met Mr Pakdaman and flew with him to Guangzhou.

The Thesa Letter of Intent

83. On Friday 9 October 2009 Dr Zhong had emailed Messrs Pakdaman, Venter *and Koolhaas* to say that a settlement of the A 300 project had to be reached by the following Thursday. He advised them to come back to Guangzhou before then in order to "*discuss details and solve problems*". If not, he said, the A300 ASA would be terminated on the Friday.

84. A meeting took place at CSA's office in Guangzhou on Friday, 16 October 2009 (attended by Mr Pakdaman and Dr Zhong) at which a Letter of Intent between Thesa and CSA for the sale of the 5 remaining aircraft and engines ("The Thesa LOI") was signed. The total price payable under the Thesa LOI was $ 103.1 million which was $ 20.9 million less than the $ 124 million payable under the ASA. In effect the price of the aircraft was to be the same as under the ASA, since $ 20.9 million was the price for MSN 762 which had already been delivered under that contract. The Delivery Schedule provided for estimated delivery dates between 12 November 2009 and 21 January 2010. By clause 5 Tigris undertook to pay a deposit of $ 10.31 million within 5 days failing which (clause 25) the Thesa LOI would terminate automatically. The deposit was non-refundable save in the event that any aircraft suffered a total loss or CSA did not obtain approval from its Board of Directors. The Thesa LOI provided that the parties would enter into a later ASA in respect of the sale and purchase of the aircraft: clause 21.

85. Mr Su's evidence was that he told Dr Zhong to tell Thesa that it could not bargain with the price as otherwise they would need to go to the Board again for authority. It is not wholly clear whether that meant that Board approval for the Thesa LOI had already been given. In addition, despite the use of the words "did not", the provision that the deposit was refundable if the Board did not approve may have been intended to provide for its return if the Board did not approve the ASA that was to be entered into.

86. Dr Zhong's evidence was that the Thesa LOI was only entered into because Mr Pakdaman apparently needed it to help obtain finance for the remaining aircraft and spares. Both he and Mr Su said that they did not believe that the Thesa LOI was a binding contract. In fact it was an agreement with contractual force (which by clause 24 was governed by English law and subject to English jurisdiction) under which any obligation to sell was dependent on receipt of the deposit. Dr Zhong's evidence was that the 5 day period provided for the provision of the deposit was intentionally short because CSA wished to test Mr Pakdaman's intention and ability to pay.

87. In the event the deposit was never paid and the Thesa LOI came to an end. Tigris asserts that the deposit was treated as if it had been paid or, at least, that CSA agreed to sell the aircraft at a reduced price because the deposit had been forfeited already. The judge did not accept the former (see [100] below).

88. On 20 October 2009 CSA wrote to Tigris giving notice that, if Tigris failed to take delivery of all of the remaining aircraft and pay the balance of the Purchase Price on or before 23 October 2009 CSA would immediately thereafter exercise their rights under the ASA and terminate it in respect of all of the remaining aircraft. On 21 October 2009 Tigris replied to point out that the delivery dates had been varied by agreement so that delivery of the five remaining aircraft was to be one by one on dates

to be agreed: hence the notice in the letter of 20 October was invalid. Tigris asked for proposed delivery dates for the aircraft to be delivered one by one.

89. On 26 October 2009 Mr Su of CSA replied to say (i) that the Delivery Date was defined in the ASA and (ii) that Dr Zhong's email of 14 September was written in response to and on the basis of Mr Koolhaas' letter of 14 September which referred to the next delivery taking place "*in the near future*", which had not happened; and (iii) that CSA had never agreed to wait indefinitely for delivery of the remaining aircraft.

90. At the same time GALink and Messrs Pakdaman and Venter were urging CSA to terminate the ASA: see Mr Venter's email to GALink timed at 21:12 on 24 October 2009 ("*Bijan really needs the confirmation that the contract with Tigris is cancelled*").

91. Mr Koolhaas was not informed about the signing of the Thesa LOI. On 4 November he spoke to a Mr Zomorodian of Saha Airlines who told him that Mr Pakdaman had told Mr Zomorodian that Tigris would not be able to complete and it would be necessary to switch the sub-contract to Thesa.

92. On 11 November Mr Smith informed Dr Zhong that Mr Venter was asking for a copy of the official letter of cancellation of the Tigris ASA and, by a later email, Mr Venter informed him that Thesa's bank needed to see a letter of cancellation of the Tigris ASA before it could release money for the next aircraft.

93. On 11 and 13 November 2009 Mr Koolhaas requested updated technical information about the aircraft on behalf of Tigris on the basis that they had been in service since last inspected.

94. On 13 November 2009 Mr Page of Penlaw wrote to CSA warning CSA that it could not lawfully contract to sell the aircraft to anyone other than Tigris. He asserted that Mr Pakdaman was attempting to arrange the purchase of the remaining aircraft through a different company and that such action would be improper as being a breach by CSA of its contract with Tigris and an apparent tortious conspiracy to prevent Tigris from proceeding with the ASA.

95. On 16 November CSA 2009 wrote to Tigris stating that, unless it took delivery of and paid for the remaining 5 aircraft at the rate of 1 aircraft per week from 20 November to 18 December 2009, CSA would terminate in relation to each aircraft as the delivery date passed. Penlaw replied to William KK Ho the same day complaining that the notice was unreasonable and insisting on the provision of technical details of the aircraft before Tigris could take delivery.

96. On 20 November 2009 Penlaw wrote to William KK Ho asserting that CSA was in repudiatory breach, that on behalf of their clients they held CSA fully responsible for all consequences, damages etc. and would advise their clients on the steps open to them in order to secure the amount of their claim and obtain judgment. On the same day Dr Zhong emailed Mr Yang to say:

> "*1 From a political point we don't like to work together in that area people. CSA will not allow them to inspect aircraft and facility, Herman shall take care of this kind of issue,*

> *2 Bijan shall give Koolhaas pressure to terminate Tigris NV ASA, even as CSA is going through legal procedures.*
>
> *After Dec 31 2009 there will be a big change in this deal, please note this situation*"

The reference in the first paragraph to "*that area*" is a reference to Iran and Mr Pakdaman's Iranian people wanting to inspect the maintenance facilities in Shenyang.

97. On 27 November 2009 Penlaw wrote to CSA and William KK Ho again threatening to seize CSA's assets wherever they might be found. Tigris contends that this was its acceptance of CSA's repudiation; or, if not, its letter of 4 December was: see [98] below.

98. On 4 December 2009 Penlaw wrote to CSA saying that Tigris was treating the totality of CSA's conduct as evincing an intention no longer to be bound to perform the ASA and confirming that Tigris accepted CSA's repudiatory conduct as bringing the contract to an end. The letter relied on CSA's alleged failure to supply Tigris with up to date engine and airframe details relating to the remaining five aircraft. It also relied on CSA having negotiated a separate agreement with Mr Pakdaman relating to the aircraft the subject of the ASA; and expressed the belief that CSA had conspired with Mr Pakdaman and others to deprive Tigris of the benefit of the ASA.

99. On 19 December 2009 CSA terminated the ASA pursuant to clauses 2, 10 and 11.4. Thus by that date at the latest the ASA was at an end.

Events after Termination of the ASA

100. On 29 January 2010 an aircraft sale agreement was made between CSA and GALink Aviation Technology Company Limited ("GALink HK"), a Hong Kong associated company of GALink. By it CSA agreed to sell aircraft MSN 750 and some associated parts for $ 19 million. The aircraft was delivered to GALink HK in South Africa on 9 February 2010. Dr Zhong's evidence was that at a lunch on 25 January 2010 Mr Yang and Mr Smith explained that GALink was to be the purchaser, which would allow the transaction to be in dollars and that Thesa would in turn purchase from GALink HK. No deposit was required from GALink HK. In the event Tigris arrested the aircraft at Johannesburg Airport. What happened in relation to this aircraft is unknown.

Deposit for MSN 750?

101. Tigris has claimed that GA Link was credited with the deposit for the aircraft that Tigris had paid under the ASA. The judge rejected this argument and rightly so. The contract with GALink HK makes plain that the purchase price was $ 19,000,000. It contained no provision for a deposit. The judge accepted - judgment [63] - Mr Su's evidence that the reason for the lesser price was that the aircraft was almost a year older than when the price was originally fixed in LOI No 1. It was also the evidence of Dr Zhong that there was no such transfer, that he had refused GALink's request made on 22 September 2009 (see [73] above) that CSA should make the transfer (and refused another request after the Thesa LOI was signed), and that he would not have done so without the agreement of CSA and Messrs Koolhaas, Venter and Pakdaman.

The deposit paid on behalf of Tigris, less $ 1.9 million which was applied to the purchase price of MSN 762, was transferred from one CSA bank account to another on 14 July 2010.

Tigris' South African action

102. In March 2010 Tigris began proceedings in the High Court of South Africa against Thesa, Mr Pakdaman and Mr Venter claiming that they had conspired to deprive Tigris of the opportunity to complete the purchase of the aircraft and spare engines under the ASA. Judgment was entered against Mr Venter on 25 May 2011 in the sum of $ 60,086,000. On 15 September 2011 he entered into an agreement whereby the judgment would not be enforced against him if he provided documentary material and gave evidence on Tigris' behalf.

103. On 1 April 2010 CSA concluded a further aircraft sale agreement with GALink HK pursuant to which CSA agreed to sell MSN 756, one spare engine and some associated parts for $ 22.02 million. This agreement was not, however, performed because GALink HK did not make any payments under it.

104. By an agreement of 31 March 2011 CSA sold the four remaining aircraft back to Airbus SAS, their manufacturer. The price was $ 12 million per aircraft. At the time of the hearing the five spare engines and their package of spare parts remained unsold.

The judge's findings

105. The judge's findings on Tigris' contractual claim were as follows:

a) Since Tigris was only able to pay $ 19 million of the first instalment of $ 57,235,497 due on 31 July 2009, Tigris was in breach of the ASA and CSA was entitled to terminate it, subject to any subsequent agreement to vary the terms or any forbearance by CSA in exercising its contractual rights: judgment para [80].

b) The exchange of emails of 14 September did not vary the ASA so as to entitle Tigris to call for delivery of the aircraft one by one whenever it chose and without limit of time. The effect of clause 15.2 of the ASA was that it could not be varied except by written agreement signed on behalf of the Seller and the Buyer by their duly authorised officers and representatives.

c) The effect of the exchanges was no more than a representation that, if Tigris paid for and took delivery of the remaining aircraft at reasonable intervals in the near future CSA would not insist on delivery in accordance with the strict terms of the ASA, but that, if Tigris did not do so, CSA would be entitled to give notice of a new deadline within which Tigris would have to perform. Under Clause 15.5 of the ASA any delay by CSA in exercising its rights did not amount to a waiver and, thus, since CSA's notices were not complied with, Tigris was potentially in breach.

d) There was no credible evidence that a secret agreement had been reached between CSA and Messrs Pakdaman and Venter at the meetings in Beijing and Shanghai in August 2009. Side Agreement No 1, which enabled Tigris to keep the ASA alive, was entirely inconsistent with any such agreement.

e) Whatever might have been the position before 25 August as to Mr Pakdaman having authority to act for Tigris, any such authority was revoked by an email sent by Mr Koolhaas to Mr Pakdaman on 25 August: [91]. Mr Pakdaman's authority was not revived: [92].

f) By the time that MSN 762 arrived in Johannesburg Messrs Pakdaman and Venter were putting in place a company which might buy the aircraft for which Tigris could not pay. Although CSA was concerned about Tigris' repeated failure to make the payments required under the ASA the evidence did not show that CSA reached a further secret agreement as alleged by Tigris: para [93]. Dr Zhong insisted to Mr Venter that any transfer of the ASA from Tigris would require Mr Koolhaas' consent.

g) CSA was not acting in bad faith at the time: para [94]. It was caught in the difficult position of wanting to sell the aircraft and knowing that Tigris could not fund the purchase without Mr Pakdaman. CSA knew that it could not enter into a binding contract with Mr Pakdaman or anyone else so long as the ASA with Tigris subsisted.

h) CSA's notices in September and October calling for payment were not sent pursuant to any secret agreement. CSA had been entitled to terminate the ASA almost continuously from the beginning of August and it made commercial sense for it to know that, if it did so, it would be able to sell to another purchaser at a comparable price: para [95]. CSA had the right to terminate the ASA and delayed in exercising it. In those circumstances it was immaterial that Mr Venter and GALink were putting pressure on Tigris to terminate: para [96].

i) The Thesa LOI never took effect and CSA did not act in a way which made it unable to perform its obligations under the ASA. To the extent that it was an expression by CSA of an unwillingness to perform the ASA it was not communicated to Tigris and was superseded by CSA's subsequent expression to Tigris of willingness to perform: para [97]. Accordingly Tigris was not entitled to regard the Thesa LOI as a repudiation [97].

j) Technical acceptance of MSNs 750, 756 and 762 had taken place in July 2009. Tigris had no contractual right to further information. No contractual term was identified as having been breached, let alone breached in a repudiatory manner. The demand for up to date technical information in circumstances where Mr Koolhaas knew that Tigris did not have the money to pay for the aircraft was one of many devices deployed to conceal that inability and to make it seem that CSA was at fault: para [98].

k) Tigris would not have been entitled to rely on CSA's dealings with Mr Pakdaman as a repudiation. Tigris was not entitled to bring the ASA to an end by its letter of 4 December. That letter was itself a repudiation of the contract, which was ultimately brought to an end by the exercise of CSA's rights to determine the contract as it did by its letter of 19 December: para [99].

106. The judge also dismissed Tigris' tortious claims for inducement of breach of contract and unlawful means conspiracy. Tigris' appeal is confined to the issue of breach of contract.

The Appeal

Tigris' submissions

107. Mr Hugo Page QC for Tigris contends that the judge should have concluded that CSA committed a repudiatory breach of the ASA which Tigris accepted as a result of which it was entitled to the return of the deposit of nearly $ 10.5 million which it had paid and a further sum of $ 260,000 paid in respect of other expenses.

108. Tigris submits that the applicable principles of law are the following:

i) An agent will be a fiduciary provided that he has undertaken to act for and on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. There must be a legitimate expectation that the fiduciary will not utilise his position in a way which is adverse to the interests of his principal.

ii) The test is an objective one. It is irrelevant that the principal does not in fact trust the agent. Nor is the principle limited to agents who have power to bind their principals. The issue is simply whether the relationship imports a duty of trust and confidence.

iii) The duties of a fiduciary include a duty not to enter into a transaction or pursue a gain where there is a conflict between his interests and those of his principal; in particular an agent may not use his position as agent to make a profit for himself or divert his principal's business opportunity to himself. He cannot evade such a duty by resigning.

iv) Even after the agency relationship is over it is a breach of duty for the agent to use information obtained by him as agent or take a business opportunity which the principal had been seeking to obtain and it is irrelevant that the principal may be incapable of obtaining the opportunity for itself.

v) Any surreptitious dealing between one principal and the agent of the other is a fraud on such other principal and entitles that other principal to terminate the contract: *Panama and South Pacific Telegraph Co v India Gutta Percha Telephone Works Co* [1875] 10 Ch App 515, 526; in such a case the state of mind of the agent and the third party is irrelevant: *ibid*.

vi) In considering the evidence on this subject it is important to remember the words of James LJ in that case:

> "*You must act on the general principle from the impossibility which the Court finds itself in of ever ascertaining the real truth of the circumstances…*"

109. In this respect Mr Page prayed in aid the summary of directors' duties made by Mr Livesey QC sitting as a deputy judge of the High Court in *Hunter Kane Ltd v Watkins* [2002] EWHC 186 (Ch) which was largely derived from the judgment of Lawrence Collins J in *CMS Dolphin Ltd v Simonet* [2001] 2 BCLC 704.

110. Mr Page submits that the proper application of these principles to the facts of this case is as follows. Mr Pakdaman plainly was a fiduciary, although Simon J made no finding on that question. He, therefore, owed the duties set out above. The Thesa LOI of 16 October was itself a secret agreement (since Mr Su and Dr Zhong knew that Mr Koolhaas was not being told about it – a proposition which both of them accepted in evidence) under which, in breach, in Mr Pakdaman's case, of his fiduciary duty, Mr Pakdaman and Mr Venter took Tigris' corporate opportunity to purchase the aircraft for themselves; and deprived Tigris of the services of Mr Pakdaman without which, as CSA knew, the ASA could not be performed. It was a surreptitious dealing between one principal and the agent of another and a repudiatory breach of the ASA. Reliance is placed on the evidence of Dr Zhong that in relation to the Thesa LOI they were discussing the same deal as the ASA.

111. For these purposes it is irrelevant that by 16 October 2009 Mr Pakdaman had ceased to be Tigris' agent or that Tigris could not itself have completed the transaction. The proposition is also wrong. If CSA had not agreed with Mr Pakdaman that they would contract with him or his company Mr Pakdaman would have been forced to cooperate with Tigris (or lose the $ 10.5 million paid by his Iranian customers) and Tigris would have taken delivery of at least one more aircraft.

112. The LOI amounted to a contract of sale. But even if it did not it still amounted to a surreptitious dealing between CSA and Tigris' agent. Further the LOI did not determine automatically. It stayed in force and was treated by the parties as subsisting until well after 4 December 2009. On 11 November 2009 Mr Venter emailed Dr Zhong to say that "*we have big problem if [CSA] does not cancel the deal with Tigris* ..." because the bank wanted to see the cancellation before releasing money for the next aircraft. He said they would have proof of funds by Monday. On 19 November 2009 Mr Smith asked Mr Venter to put together a written proposal with a time line for CSA. On 21 December 2009 Dr Zhong emailed Mr Pakdaman to tell him that the termination letter had been sent to Mr Koolhaas on 19 December and to inquire how "*your payment process is going on*". Thesa continued to take steps to secure funds and to indicate that they would be forthcoming. Thesa and CSA continued to discuss a maintenance contract for the aircraft. The Thesa LOI was simply renegotiated between Dr Zhong and Mr Yang following which the GALink ASA was signed.

113. The Thesa LOI would be a repudiatory breach even if it stood alone. In fact it did not. It was the result of previous discussions and dealings which amounted to a diversion of the opportunity away from Tigris.

114. Mr Page submits that it is apparent that there were two sets of communications proceeding in parallel. On the one hand CSA was calling on Tigris for performance, setting down deadlines and eventually terminating the ASA. On the other hand from

around the second week in September CSA was dealing with Hawk Yang and Mr Smith and discussing entering into a contract for the remaining planes with a company in the Pakdaman stable. These latter discussions matured into the Thesa LOI and finally the agreement of 29 January 2010. They had two critical features. First they were unknown to Mr Koolhaas. Secondly not only were they related to a business opportunity which had come to Tigris and which Tigris wished to bring to fruition, but, also, the fact that they were taking place at all was inherently likely of itself to deprive Tigris of that opportunity since, as CSA knew, Tigris could not perform without Mr Pakdaman's support. The natural consequence of these discussions was that he would not be providing or procuring the funds that Tigris needed if it was to purchase the aircraft. And so it proved.

115. Given the correspondence in September, the only inference, Mr Page submits, that the court can draw is that it was agreed in principle in Johannesburg (if not beforehand in Beijing or Shanghai), when Mr Pakdaman told Dr Zhong that he wished to take over Tigris' responsibility in the deal, and that CSA would allow Mr Pakdaman to take over the deal. Whether the plan was to try and get an assignment or to allow Tigris to go into default does not matter. This was a secret agreement between CSA and Mr Pakdaman in relation to a contract which could not lawfully be transferred without Mr Koolhaas' fully informed consent.

116. That such an agreement was made is consistent with the evidence of Mr Coetzer that there were lengthy discussions in Johannesburg about getting rid of Mr Koolhaas, as also with that of Mr Venter who said that Mr Pakdaman, Mr Su and Dr Zhong agreed that they would cut Tigris out of the deal in relation to the remaining five aircraft. Mr Coetzer, who did not give oral evidence, was described by Mr Page as a "wholly independent witness". But he was, in fact, Mr Venter's employee between July and November 2009. The judge was fully entitled to place no weight on his statement. Further Dr Zhong was asked if he had ever met Mr Coetzer. He said that he had not and was not further cross examined on Mr Coetzer's witness statement.

117. The making of such an agreement is also, Mr Page submits, consistent with the August documents referred to in [40] ff above. Mr Pakdaman's telling Mr Koolhaas that he was "*out*" followed by telling him that the deal was over and Tigris must pay the money back, must have been because he had received a favourable response from CSA as to their willingness to deal with him. The dispatch by Mr Yang to Dr Zhong of Tigris' corporate documents, including the December 2007 power of attorney on 13 August 2009 must have been done because a takeover by Mr Pakdaman was being discussed. CSA must have wanted to know how much power Mr Pakdaman had within Tigris e.g. to effect an assignment. The existence of the Side Agreement No 1 was concealed from Mr Koolhaas, aided by the fact that when, shortly afterwards, Dr Zhong started to press Mr Koolhaas for payment of the $ 1.5 million balance of the deposit, he never referred to the Side Agreement stating instead that the deposit was due under the LOI. This concealment must have been in order to convince Mr Koolhaas that the sale was impossible while allowing Mr Pakdaman's new company to take advantage of it.

118. Dr Zhong admits to having been told in Beijing in the middle of August, that there was a power struggle between him and Mr Koolhaas for the deal and that without his investment Tigris could not perform. That must have taken place in the context of a discussion about transferring the deal to Mr Pakdaman.

119. The communications in September show the same thing. When on 9 September [62] Mr Smith expresses the hope that "*Bijan can finish the deal for all of us*" Dr Zhong does not ask what he means because he knows. The observation "*it seems we need an agreement...*" in Dr Zhong's email of 10 September [64] probably indicates that there had been previous discussion with the CSA legal department. Dr Zhong's email to Mr Koolhaas on 10 September [56] stating that Mr Koolhaas "*has lost control to pay the balance*" is preparing the way for the Pakdaman takeover of the deal. When on 15 September [65] Mr Smith forwarded to Dr Zhong emails stating that Mr Koolhaas cannot finish without the money and that the investor will not give him any more that must have been against the background of an agreement to sell to Mr Pakdaman, because otherwise the project would simply have been over. In fact Mr Pakdaman and Mr Venter were said by Mr Smith to be on their way to China.

120. Mr Page submits that on the judge's own findings there was a repudiatory breach. He found – judgment [74] - that once Dr Zhong considered that Tigris would be unable to perform without Mr Pakdaman's cooperation he looked at ways of keeping the contract alive by involving Mr Pakdaman. That is something which CSA knew from the time of the dinner in Beijing. In [118] he accepted Mr Venter's evidence that once he and Mr Pakdaman had fallen out with Mr Koolhaas and Tigris they took the proposal for the sale to Thesa to CSA. This must have been at the end of July 2009. In [95] he refers to CSA's entitlement to terminate almost continuously from the beginning of August and how it made good commercial sense that before it did so, it knew that it would be able to sell the aircraft to another purchaser for a comparable price. It is implicit in that finding that at least since Johannesburg in early September CSA was negotiating with both Tigris and Mr Pakdaman in the hope that one of them would purchase. He referred in [44] to the exchange of emails from Dr Zhong after 21 September (semble a reference to his email of 22 September: see [72] above) which revealed that CSA was willing to terminate the ASA with Tigris and sign a new ASA with Messrs Pakdaman and Venter.

Tigris' claim

121. Tigris claims its deposit on the remaining five aircraft, being (a) $ 10,877,962 + $ 1.5 million, less (b) $ 1.9 million (the amount of the deposit applied in respect of MSN 762) i.e. $ 10,477,962. It also claims $ 260,000, being the sum paid for the ferry flights for the second and third aircraft in respect of which the consideration has wholly failed. Dr Zhong admitted in evidence that GALink had paid this. The judge accepted Mr Thanki's argument that that amount was a matter between Tigris and GALink. This, however, ignores the fact that clause 4.4 of the ASA provided that $ 130,000 for each ferry flight would be paid by GALink on behalf of Tigris. Against this Tigris accepts liability for parking charges at $ 10,000 per day for 2 days each for MSN 750 and MSN 762 from 31 July and 25 days for MSN 756 totalling $ 290,000.

122. The judge decided that CSA should obtain judgment for $ 37,400,000 on its counterclaim. That sum included $ 26.1 million as damages for non acceptance, being the difference between the contract price and the sums received on the sales to GALink HK and to Airbus. Added to that was $ 1.3 million in respect of the difference between the sale and market prices of the engines and $ 10 million in respect of parking, storage, maintenance and insurance costs. The judge adopted that as a broad figure representing some abatement of the $ 16 million claimed, rather than conducting any substantial analysis of the figures relied on. He observed that had

there been any chance of a judgment in favour of CSA being satisfied more time would have been spent looking at the figures.

123. Before the judgment was entered Tigris took the point that the sum awarded should give credit for the deposit received. CSA agreed to reduce the counterclaim to reflect the receipt of that deposit as a result of which the sum specified in the order made was $ 27,919,525.65 including interest.

CSA's submissions

124. CSA submits that it was not in repudiatory breach. It did not (a) renounce the contract by evincing an intention no longer to be bound; (b) put it out of its power to perform so that there was self-induced impossibility or (c) fail to perform.

125. As to (a) the judge found that the secret agreement was never made and, if it had been, it would obviously not have been apparent to Tigris. Tigris was not aware of the Thesa LOI. In any event CSA's dealings with Thesa went no further than exploratory discussions about the possibility of selling the remaining aircraft and spares if Tigris was unable to perform, as any unpaid seller would do. CSA had given notice of an intention to resell on 8 September. No binding sale agreement was made with Thesa or, if it was, it terminated after five days and long before Tigris became aware of it.

126. As to (b) even if CSA had made a contract to sell the aircraft to another company that would not amount to impossibility, although it would require a choice to be made of which contract to fulfil (see *The* "*Bulk Uruguay*" [2014] EWHC (Comm) 885); but, in any event, all that could begin to be relied on was the Thesa LOI, which although not without contractual force, was not a contract which, when made, bound CSA to sell the remaining aircraft and spares and which only lasted for a very a short period.

127. As to (c) there was no actual failure of performance by CSA. Delivery of the aircraft was to be against payment, which never came.

Surreptitious dealing

128. The foundation of the Appellant's case is the proposition ("the basic proposition") derived from *Panama and South Pacific Telegraph* that:

> "*any surreptitious dealing between one principal and the agent of the other principal is a fraud on such other principal cognizable in this court*".

129. In *Panama and South Pacific Telegraph* the plaintiff telegraph company contracted with the defendant works company for it to lay a cable, the price being payable in instalments against certificates given by the telegraph company's engineer, who was named in the contract. Shortly after the contract was made the engineer secretly sub-contracted with the works company to lay the cable himself. The telegraph company later discovered this. The Court of Chancery Appeals (James and Mellish LJJ) held that it was entitled to rescind the contract and to recover the money already paid to the works company under it. The engineer had, when the contract was made, a reasonable expectation, founded on the acts of the works company that he would be awarded the sub-contract ("*what he understood, and what everybody understood as a matter of*

course, was, that he would apply for and obtain the sub-contract for laying the Panama cable":[531]).

130. The claim was for a declaration that the agreement was not binding on the telegraph company and that it should be set aside and delivered up to be cancelled, and for an order for repayment of the £ 40,000 paid when the order for the works was given.

131. At first instance the Vice Chancellor held that, if there was fraud in the form of bribery at the time of the contract, the contract was void. If there was fraud in the execution of the contract e.g. where a bribe was offered to the purchaser's agent after a sale contract was made, amounts due before the bribe was given would remain due but the purchaser would be entitled to treat the contract as void from the moment when he discovered the fraud. The declaration that he made was that the agreement was invalid and not binding upon the plaintiffs and ought to be set aside and delivered up to be cancelled.

132. The argument for the plaintiffs in the Court of Appeal was that there was fraud *ab initio,* the contract should be rescinded and the £ 40,000 paid on the giving of the order for the works repaid.

133. The approach of the two members of the Court was somewhat different. James LJ held that the answer was obvious. He then enunciated the basic proposition, which he described as not disputed in argument although lacking any authority or dictum exactly laying it down, and said that the defrauded principal, "*if he comes in time, is entitled, at his option, to have the contract* ***rescinded…***", although he thought that the word "*invalid*" should be left out of the declaration which, as made, also omitted "*and not binding upon the plaintiffs*". It is clear that the basic proposition was propounded in circumstances where what was being considered was (527) something "*in the nature of a fraud*" and that a "*surreptitious sub-contract with an agent is regarded as a bribe*". He conceived himself to be applying a plain principle of equity.

134. Mellish LJ held that the plaintiffs had made out the case stated in their bill (528). He also expressed the view (*obiter*) that the telegraph company would still be entitled to the relief which it sought even if the sub-contract had never been thought of until the date when it was made (531) i.e. if the bribery post-dated the contract.

135. He was not prepared to go the full length to which James LJ had gone in thinking that, because someone had been a party to a fraudulent act of this kind after the contract was made, that would necessarily entitle the innocent party not to carry out the contract. He appears to have thought that the innocent party might not be so entitled if full redress for the fraud could otherwise be obtained. He then turned to consider *obiter* whether at law there would be a defence for the telegraph company on the ground that the act of the works company made the performance of the contract impossible. As to that he held that any fraudulent misconduct on its part in entering into an agreement with the engineer which deprived the telegraph company of his disinterested advice would entitle the telegraph company to rescind the contract if by that it rendered impossible that the telegraph company could have the full benefit of the contract. He held that it was a term of that contract that the engineer (named in the contract) would be the engineer for the purposes of the venture and be responsible during the lifetime of the contract for certifying when payments were due to the plaintiff. The effect of the sub-contract was to deprive the telegraph company of the

disinterested advice of the engineer and thus the full benefit of the cable laying contract. This amounted to a breach of contract which entitled the plaintiff to rescind the agreement.

136. Mellish LJ then considered whether the lapse of time during which the contract was performed (during which the sub contract was not discovered) precluded rescission and decided that it did not. He went on to say that the contract had been broken by the default of the works company which had deprived the telegraph company of the disinterested advice of the engineer as a result of which the telegraph company was entitled to have the £ 40,000 back.

137. It seems to me clear that both judges held that on the facts of the case itself, where the agent had been bribed when the contract was made, the principal was, when he discovered it, entitled to rescission *ab initio*.

138. As to the position where the sub-contract is not in contemplation until after the contract was made the position is less clear. The Vice Chancellor's view that, in that event, the purchaser would be entitled to treat the contract as void "*from the moment of discovery*" (i.e. not *ab initio*), but that "*articles previously delivered must, of course, be paid for*" might in modern legal parlance more readily be regarded as an analysis based on acceptance of a repudiation. The same would apply to Mellish LJ's holding that a breach of contract by depriving the telegraph company of the full benefit of the contract followed by rescission provided a defence at law, the contract "*having been broken off through the default of the defendant*". This does not, however, seem to tally with the proposition that, if there was bribery *after* the contract, the telegraph company would be entitled to the *same* relief as if there had been bribery at the time.

139. In *Ross River Limited v Cambridge City Football Club* [2007] EWHC 2115 (Ch) the defendant club agreed to sell its football stadium to the claimants. A second contract was made after that, following the payment of a bribe by the claimants to the defendant's director. The defendant was held entitled to rescind the second agreement but not the first. Briggs J, as he then was, considered the *Panama* case. He referred to James LJ's example:

> "*If a man hired a vetturino to take him from one place to another and found that the vetturino, **after** he had accepted the hiring, had conspired with his servant to rob him on the way, he would be entitled to get rid both of the vetturino and the servant*"

which he said he would categorise, not as rescission in the strict sense, but as an accepted anticipatory repudiatory breach. The compact to rob between servant and vetturino could equally, and perhaps more readily, be regarded as a breach of an implied term to take reasonable care of the safety of the passenger/master.

140. Briggs J regarded Mellish LJ as not having treated the case as one of rescission but as one of termination by an accepted repudiatory breach, citing, in particular, the passage in which he had referred to the contract having been "*broken off through the default of the Defendant*". (Kerr J, as he then was, reached a similar view in *The* "*Siboen*" *and The* "*Sibotre*" [1976] 1 Lloyd's Rep 291, 339). Briggs J regarded the repayment of the

£ 40,000 that had been paid when the order was first given as "*appropriate monetary relief in respect of the fraud which had been committed*".

141. Mellish LJ cannot, I think, be regarded as having treated the case as entirely one of accepted breach since both he and James LJ regarded the telegraph company as entitled in equity to rescind the contract *ab initio* and to recover the £ 40,000 and granted relief on that basis. Mellish LJ then went on to consider the matter in common law terms.

142. The *Panama* case is, thus, authority for the proposition that a party whose agent has been bribed to enter into a contract may rescind it when he discovers this fact, for which proposition it has been relied on in a substantial number of other cases e.g. *Armagas Ltd v Mundogas S.A.* [1986] 1 A.C. 717, 743; *Logicrose Ltd v Southend United Football Club (No 2)* [1988] 1 WLR 1256, 1260.

143. This line of authorities, and general principle, establishes, in my view, that the remedies available to the principal of an agent bribed or offered a secret commission by his counterparty include the following. If the agent is bribed to enter into the contract the principal may rescind it i.e. avoid it *ab initio*, provided that counter restitution can be made and the right has not been lost e.g. by delay. This is rescission properly so called – an equitable remedy. If, after the contract has been entered into, the agent is bribed in the course of its performance, the principal may bring it to an end as from the moment of discovery i.e. for the future. The same applies if the bribery was effected at the time of the contract but for some reason (delay, impossibility of counter restitution, rights of bona fide third parties etc.) rescission *ab initio* is impossible: *Logicrose* at 1260F. At law bribery, whether at or after contract, amounts to a repudiatory breach by the bribing party which, on discovery, his counterparty may accept as bringing the contract to an end. Whether that is because bribery is a stand-alone ground for termination, or the obligation to restrain from it an incident or an implied term of every contract is debatable and, for present purposes, does not matter.

144. Whether or not Tigris was entitled to avoid the contract *ab initio* is of potential significance for present purposes. If Tigris was so entitled it can claim the return of its deposit. If it was only entitled to accept a repudiation or rescind for the future such that the contract subsisted until it did so it must give credit for any right to damages that accrued before such acceptance. I consider this further below.

145. In the present case it seems to me that Tigris is not entitled to avoid the contract *ab initio* and it has never claimed to do so. If CSA was guilty of "*surreptitious dealing*" that was not the position when the ASA was made in July 2009. The position is similar to that postulated by the Vice Chancellor in the *Panama* case of an improper approach made after the contract.

What does surreptitious dealing involve?

146. James LJ did not define exactly what he meant by surreptitious dealing. His use of the expression must, however, be viewed in the context in which he used it, namely behaviour which amounted to bribery (which is not alleged against CSA) and was regarded as fraudulent and dishonest.

147. Some dealing between CSA and Mr Pakdaman and Mr Venter could amount to a breach of CSA's contract with Tigris. The breach relied on was an alleged secret agreement made in Beijing and/or Shanghai and/or Johannesburg and in pursuance of which the Thesa LOI is said to have been made, to divert the sale contracts for the remaining five aircraft, the engines and the spares from Tigris to a company or companies set up or to be set up by Mr Pakdaman and Mr Venter, with the benefit being shared between the defendants: para 15 of the RAPOC. It is that agreement which is said to be a breach and repudiation by CSA of the ASA and/or an inducement of breach by Mr Pakdaman and Mr Venter of their contract with and/or duty towards Tigris: para 17.

148. That such a secret agreement had been made was roundly rejected by the judge, as was any suggestion that there was some form of fraud on Tigris [see paras 88, 93 - 95, 112]. The judge did so in circumstances where there was no documentary evidence of such an agreement; where the evidence relied on was that of Mr Venter whom the judge found thoroughly unreliable and untruthful; and where a finding in Tigris' favour required him to disbelieve witnesses whom he found to be witnesses of truth. Tigris' appeal thus involves a challenge to most of the judge's primary findings on matters in dispute. I consider whether that challenge is well founded below.

Fiduciary duties

149. The *Panama* case concerns an agent owing fiduciary duties. Mr Pakdaman was never a director of Tigris. Mr Pakdaman's status had, therefore, to be considered by reference to the agreements he had with Tigris.

150. The judge found [85] that although Mr Koolhaas was said in the Cooperation Agreement of 24 June 2007 to be acting on his own behalf and on behalf of the companies he owned, including Tigris, it was unclear what authority he had to contract on Tigris' behalf. Furthermore whilst the Agreement gave Mr Pakdaman authority to represent Mr Koolhaas and his companies it did not expressly impose any duties upon him beyond a general and mutual obligation to cooperate.

151. As to the former, as now appears, Mr Pakdaman did have authority to act, to some extent, on its behalf: see [10 & 11] above. However, that agreement related to business opportunities for Mr Koolhaas' companies in the territory of Iran and Kurdistan (see the recital referred to in [9] above and the last sentence of clause 1 cited in [10] above) and regulated their cooperation "*to obtain and execute contracts in Iran*": clause 3. It was not, in my view, applicable to dealings in China.

152. The Cooperation Agreement was followed by the general power of attorney of 19 December 2007. That power must, as it seems to me, be taken to have superseded the Cooperation Agreement, which may in any event have been terminated at an earlier stage. (In the South African proceedings commenced against him by Tigris Mr Pakdaman contends that it was terminated by oral agreement shortly after it was made). The new power of attorney was made following a material change in the structure of the relationship between Mr Koolhaas and Mr Pakdaman as a result of which on 18 October 2007 Mr Koolhaas transferred 49% (later 50%) of the shares in Tigris to Mr Pakdaman. The additional 1% was transferred on 15 April 2009.

153. The 19 December 2007 power of attorney was, itself, replaced by the power of attorney of 7 August 2009, which revoked and replaced any previous powers of attorney and was itself revocable by a decision of the shareholders or the President of Tigris i.e. Mr Koolhaas.

154. The judge held [91] that the effect of Mr Koolhaas' email of 25 August 2009 was that from that date Mr Pakdaman was no longer Tigris' agent and that to the extent that there had ever been a relationship by virtue of which he owed duties of trust and confidence to Tigris and Mr Koolhaas he no longer did so.

Discussion

155. Whether or not an agent owes fiduciary duties (and which ones) depends on the terms on which he is acting: *Kelly v Cooper* [1993] AC 205, 214 - 215. Mr Pakdaman was not an agent in the sense of someone who could, by himself, bind Tigris to a contract with a third party – a paradigm circumstance for the imposition of such a duty. That does not, however, mean that he cannot have been a fiduciary. A fiduciary "*is someone who has undertaken to act for and on behalf of another in circumstances which give rise to a relationship of trust and confidence*" per Millett LJ in *Bristol and West Building Society v Mothew* [1998] Ch 1, 18.

156. Mr Bankim Thanki QC for CSA submits that it is impossible to describe the relationship between Mr Pakdaman and Tigris/Mr Koolhaas as one involving trust and confidence, since the relationship between them had irreparably broken down by around August 2009 at the latest and that that breakdown brought to an end any fiduciary relationship with Mr Pakdaman which may have existed up to that point. The fiduciary character of an agency relationship depends, he submits, on the continuance of a relationship of trust and confidence between agent and principal. Once that is lost there can be no question of the relationship subsisting: see *Temple Legal Protection Ltd v QBE Insurance (Europe) Ltd* [2009] EWCA Civ 453, in which Moore-Bick LJ said that it would be:

> "*unusual for any principal who employed an agent to manage some aspect of his business to be obliged to allow the agent to continue to act on his behalf once the necessary degree of confidence had, for whatever reason, been lost*".

157. He draws attention to the observations of Lord Woolf M.R. in *AG v Blake* [1998] Ch 439, 453H, and 454D that "*We do not recognise the concept of a fiduciary obligation which continues notwithstanding the determination of the particular relationship which gave rise to it*".

158. In *Temple Legal Protection* the relevant contract – an underwriting agency agreement (a binder) – had been terminated by the underwriters. The question was whether the broker was entitled to manage the run off thereafter. In *AG v Blake* the defendant's fiduciary relationship with the Crown had long since ceased. Someone who owes fiduciary duties cannot, however, avoid those duties by breaking them. There may be a breakdown of relationship in the sense that the principal believes, possibly rightly, that an agent with fiduciary duties has betrayed his trust, whilst entitled to expect him to observe them in the future. It is necessary, therefore, to identify when the relevant relationship terminates.

159. In my judgment the judge was entitled to hold that the emails of 25 August 2009 revoked any authority which Mr Pakdaman had to act as Tigris' agent and marked the complete breakdown of any relationship of trust and confidence between Tigris and him. They are not sensibly to be regarded as no more than inaccurate statements of the existing position which continued exactly as it was before 25 August 2009. Consistently with that Penlaw in their email of 13 November 2009 referred to "*an individual who at one time held a power of attorney (but such power having now been cancelled*)".

160. The course of the breakdown of trust is plotted in the events which I have described above. Mr Koolhaas accepted in evidence that the breakdown began in June 2009 when Mr Pakdaman began to blame him for the problem that Tigris was encountering in raising the full LOI deposit. On 12 August Mr Pakdaman sent the intemperate email cited at [40] above. On 16 August 2009 he sent the email referred to at [41] above in which he said "*I will see you in court, if we then are still alive*". This was followed by the intemperate response email of 25 August referred to at [45] above in which Mr Pakdaman, *inter alia*, called Mr Koolhaas a small boy, said he had "*sh*t all you deal with*" and threatened to "*bring you down*". He said he had told "*big lies*" and alleged various improper activities. Mr Koolhaas accepted that by now the relationship had plainly broken down.

161. On 26 August Mr Koolhaas discovered that Mr Pakdaman had forged his signature on a contract that Mr Pakdaman had shown to a Swiss finance house in order to raise funds. On 21 September Mr Pakdaman sent the email accusing Mr Koolhaas of stealing € 1.3 million [70]. On 5 October 2009 Mr Pakdaman said that neither he nor Mr Venter was prepared to work with Mr Koolhaas any more.

162. The judge was also entitled not to hold [92] that any authority on Mr Pakdaman to act was revived and to hold that the emails relied on showed little more than Mr Koolhaas asking for information and requiring Mr Pakdaman to cooperate with him for the good of Tigris and reminding him that he was a 50% shareholder and not part of the management. Mr Koolhaas' own evidence was that so far as he was aware Mr Pakdaman stopped working for Tigris after 25 August 2009 and whilst he had not given up hope of their working together (see his email of 12 September 2009 [52]) Mr Pakdaman did not answer his email or his questions. Mr Su said that he considered that Mr Pakdaman was working with or for Tigris after the first delivery of aircraft at the end of August. Thereafter he had almost no contact with him. Dr Zhong, however, appears to have thought until 15 September that Mr Pakdaman and Mr Koolhaas would accept delivery of the second aircraft because no mention had been made of some different arrangement up until that date.

163. I accept that the termination of any authority did not absolve Mr Pakdaman from any continuing duties arising out of his former relationship with Tigris. That requires consideration of what duties Mr Pakdaman had and what is the liability of someone such as CSA, which deals or contracts with him or his company after the former relationship is over.

The secret agreement

164. The circumstances in which CSA found itself in 2009 were somewhat unusual. It had a contract with Tigris which, as it was told after the contract was made, was

dependent on Mr Pakdaman's ability to procure a sub-contract if it was to be fulfilled. It was then faced with the situation where, despite its not terminating the contract as soon as it could have done, the requisite funds were not put up by Tigris. In those circumstances it was entitled, whilst calling for performance, to consider what it should do if, as seemed likely, Tigris was not going to perform. One obvious possibility was that some other company connected with Mr Pakdaman might be prepared to do so.

165. What CSA did, as it seemed to the judge, was to follow an orthodox course of indicating that, whilst the contract with it remained alive (albeit it was terminable at will for much of the period after 31 July 2009) it could not be transferred to anyone else without *inter alia* Tigris' consent: see Mr Su's email of 6 August 2009 [29] and Dr Zhong's of 10 September 2009 [64]. But, as it became increasingly apparent that Tigris was unlikely to be able to perform, Dr Zhong indicated a preparedness to sell to someone else if Tigris could not perform and the ASA had to be terminated.

166. In my view the judge was entitled to find that there was no secret agreement to divert the ASA made in Beijing and Shanghai or elsewhere and that Side Agreement No 1, which kept the ASA alive, was entirely inconsistent with such a plan. He was also entitled to find that the notices to complete sent in September and October were not sent pursuant to any secret agreement but were a natural consequence of Tigris' default.

167. The supposed conspiracy to cut Tigris out does not fit with a number of matters:

a) CSA's insistence on Mr Koolhaas coming to Johannesburg to accept MSN 762;

b) Dr Zhong making it plain that any transfer of the ASA should be with Tigris' assent;

c) Mr Pakdaman's attempt on 14 August 2009 to get Mr Koolhaas to come to Shanghai to attend the meetings which led to Side Agreement No 1 (which he would scarcely have done if then intending to cut Tigris out);

d) CSA's failure to hold Tigris to the contractual payment deadlines and cancel when they were not met, despite pressure from Mr Pakdaman and Mr Venter so to do (something which Mr Venter accepted was a source of great frustration to him); instead CSA set further deadlines on 4 separate occasions (18 September, 23 September, 20 October and 16 November) and did not in fact terminate until 19 December after Tigris had itself purported to do so;

e) Dr Zhong's email to Mr Koolhaas of 18 September 2009 in relation to maintenance proposals in respect of two of the aircraft that had not yet been sold pursuant to the ASA (MSNs 734 and 739);

f) Dr Zhong's attempt by his 22 September 2009 email [66] to get Mr Smith to sort the position out with the warring parties [72];

g) Dr Zhong's telephone conversation with Mr Koolhaas on 5 October 2009 confirming that Tigris could still buy the aircraft [76];

h) Dr Zhong's email of 9 October 2009 to Mr Koolhaas suggesting that he settle down all problems with Messrs Venter and Pakdaman [80];

i) Dr Zhong's email of the same date to Messrs Koolhaas, Pakdaman and Venter inviting them all to China to "*discuss details and solve problems*" with the A 300 project, a message which the judge found to have been sent in good faith: see [49] and [94] of the judgment. On the same day Mr Smith emailed to Mr Yang in connection with a meeting that Mr Venter and Mr Pakdaman were to attend with CSA in China a few days later to say that Mr Venter would need to bring proof of funds to the meeting and that "*If he is working with Tigris NV he must bring proof of funds for Tigris NV*". This was copied to Dr Zhong; and

j) The fact that it was not in CSA's interests to terminate the ASA with Tigris if it could perform it.

168. The secret agreement claim is further weakened by the fact that CSA appears to have intended to terminate the ASA with Tigris whether or not it could enter into an agreement with Thesa. On 23 September Mr Smith told Mr Venter that CSA intended to terminate the ASA "*no mater [sic] what you decide unless Tigris NV can make the next payment immediately per Mr Ho's letter*".

169. Tigris' assault on the judge's primary findings of fact involves drawing inferences from documents which the judge did not draw, or accepting as true evidence which the judge did not find credible. Tigris asserts that the Thesa LOI did not terminate automatically when under its terms it did. It contends that the only inference possible from the September correspondence is that there was some form of secret agreement made in Beijing or Shanghai when the judge has rejected that on the basis of the oral testimony. Reliance is placed on the evidence of Mr Venter which the judge plainly rejected and on the supposedly independent written evidence of Mr Coetzer. The diversion of the contract was said to be the return for the bribe: so that the withdrawal of the bribe allegation necessarily weakened the secret agreement claim.

170. Tigris relies on a number of individual matters as viewed from its own perspective, which the judge was not bound to share. The dispatch of Tigris' contractual documents on 13 August is prayed in aid as indicating that a takeover by Mr Pakdaman was under discussion when the more likely explanation is that it vouches his ability to act for Tigris. Claiming payment of the $ 1.5 million balance of the deposit by reference to the LOI is treated as sinister because it was not claimed under the Side Agreement No 1, although it was in fact due under the LOI and Dr Zhong was not cross examined on this point. Mr Smith's hope that "*Bijan can finish the deal for all of us*" seems equally capable of referring to a purchase by Tigris. Dr Zhong's reference in his email of 10 September to Mr Koolhaas losing control to pay the balance was entirely correct. So was Mr Smith's statement that Mr Koolhaas could not finish without the money. His statement that the investor would not give any more does not mean that there had already been an agreement to sell to Mr Pakdaman.

171. In short I do not regard Tigris as having established that the judge's findings were not open to him. Since that was the foundation of Tigris' claim the judge was entitled to reject it.

172. Before us Tigris put the case on a wider basis. Tigris contends that, in circumstances where it became apparent that Tigris was not going to perform unless Mr Pakdaman procured the money from sub-purchasers, it was a breach of CSA's duties and a form of surreptitious dealing to indicate to Mr Pakdaman a preparedness to contract with some other company of his and to discuss how that might come about. The inevitable, or at least likely, result of doing that was that Mr Pakdaman would take the purchase from CSA for himself, using the finance obtained from his sub-purchasers.

173. Reliance is placed on a particular passage of Dr Zhong's evidence, which I have set out in an appendix, as indicating that he understood that if he started discussing the sale of the aircraft to Mr Pakdaman that would inevitably prevent Tigris from performing. I accept, as must the judge have done, that the passage does not bear the weight which Tigris seeks to put on it. In particular it is not clear what Dr Zhong, who gave evidence through an interpreter, understood to have been meant by "*dealing with Mr Pakdaman personally*". If it meant selling to Mr Pakdaman or his company, that would preclude a sale to Tigris. A discussion with Mr Pakdaman of a possible sale to someone else if Tigris failed to perform would not. If Dr Zhong thought that it would it is difficult to see why he failed to terminate the ASA until December.

174. In order to succeed in its claim Tigris would have to establish either (i) that CSA was in repudiatory breach of contract; or (ii) that it was under some duty in equity of which it was in breach; or (iii) that it committed some tort.

175. Tigris contends that the sort of surreptitious dealing that occurred here constitutes a repudiatory breach. Mr Pakdaman put himself into a position where his duty and his interest conflicted once he began to discuss the possible sale of the aircraft by CSA to someone other than Tigris, and how it might come about. As someone with power to represent Tigris he owed Tigris a duty of loyalty which he breached by discussing with CSA a purchase by someone other than Tigris. Whilst he represented Tigris it was entitled to his disinterested advice and his best efforts to advance the purchase of the aircraft by it. When, without Tigris's knowledge, CSA discussed the possibility of selling to some company of his they deprived Tigris of the benefit of his disinterested advice and produced a conflict between his duty to Tigris and his personal interest. It is immaterial (a) that there was no provision in the ASA relating to Mr Pakdaman since Tigris was entitled to his advice and loyalty without it; and (b) that CSA did not contemplate that the contract with Tigris would be brought to an end unlawfully.

176. I do not accept that the somewhat loose concept of "surreptitious dealing" can be used to accommodate CSA's actions in this case in order to secure the same remedy as was afforded to the telegraph company in *Panama*. James LJ regarded the surreptitious dealing of which he spoke as a form of fraudulent activity amounting to a bribe. His words cannot be divorced from the context in which they were used.

177. Liability in this context is based on the fraud of the counterparty dealing with the agent. The judge has acquitted CSA of fraud or bad faith. CSA's position, prior to 25 August, when any fiduciary relationship ceased, was that they were told by Mr Pakdaman that he was the real investor but only half believed it. On the judge's

findings CSA made no secret agreement to divert the ASA as alleged. It dealt with Mr Pakdaman on the basis that the ASA was with Tigris (with Mr Pakdaman saying that he was making the necessary arrangements with a Swiss bank); and that if it was to be transferred from Tigris he would have to ask Mr Koolhaas to transfer the ASA to him. Matters proceeded on the basis that Tigris would perform, and the Side Agreement of 20 August 2009 was entered into in order to keep the ASA alive. On 31 August MSN 762 was delivered. When on 28 August (3 days after the revocation of his authority and the termination of any fiduciary relationship) Mr Pakdaman sought to take delivery of the aircraft he was told that Mr Koolhaas would have to do so.

178. I do not regard those activities as amounting to the sort of surreptitious conduct which is repudiatory or, indeed, that CSA can properly be regarded as having deprived Tigris of Mr Pakdaman's disinterested advice.

179. It is, also, necessary to consider the position of Dr Zhong and Mr Su. For there to be liability CSA must know that it was depriving Tigris of the disinterested advice of its agent, or at least be wilfully blind to that: *Logicrose* 1261 D – G where Millett J said that there was a close analogy between rescission in this context and knowing assistance (now more commonly known as dishonest assistance). The judge has made no finding to that effect and the findings which he did make are to the contrary. The judge found CSA innocent of fraud or bad faith [94] and accepted [102] [103] that neither Mr Su nor Dr Zhong knew of any contractual or other arrangements in place between Tigris and Messrs Koolhaas, Pakdaman and Venter (other than that Mr Pakdaman was a shareholder in Tigris), and that they had little commercial interest in such matters.

180. The judge also rejected the suggestion that CSA turned a blind eye to the contractual relationships between Tigris and Messrs Pakdaman and Venter. Dr Zhong's reaction to Mr Pakdaman's assertions about his role was cautious [104]. Dr Zhong has been told by Mr Pakdaman in Beijing that he was part of the senior management but that was, on Tigris' own case, false, particularly after 25 August. Tigris in its Reply had, itself, denied that CSA believed that Mr Pakdaman was authorised to speak on behalf of Tigris: para 12.

181. So far as liability in equity is concerned it may well be that Mr Pakdaman would be under an obligation to account to Tigris for any profit that he or his companies made on any sub-sale of aircraft purchased from CSA, on the basis that he had diverted a business opportunity belonging to Tigris for the benefit of himself. If so, there was a potential claim against CSA for dishonest assistance. But the latter claim was never advanced and, in the light of the judge's findings is not available.

182. In the present case the term said to have been breached was not identified in the pleadings. Mr Page submits that that was unnecessary because the obligation not to engage in surreptitious dealing is an incident of every contract. If, however, dealing of the requisite kind is not established and reliance is placed on some form of implied term that CSA would do nothing to prevent Tigris from performing, Tigris is met by the judge's finding [123] that CSA did not do anything which did that; and that, if Tigris had been able to perform, CSA would have supplied the aircraft. It was its own lack of sub-contracts and finance which prevented it.

183. Further, any term whose effect was that CSA should not communicate with Mr Pakdaman in the period from August to December 2009 about the possibility of a company of his purchasing the aircraft, if Tigris did not do so, does not seem to me necessarily to be implied, particularly given the fluctuating status that he enjoyed vis-à-vis Tigris and CSA's ignorance of what exactly his status was.

184. In addition, the judge did not find that CSA's communications with Mr Pakdaman were what prevented the purchases from going ahead. On the contrary he found that Mr Pakdaman had no intention of cooperating with Mr Koolhaas and that there was no basis for saying that he would have done so if CSA had conducted all communications with Mr Koolhaas [94]. It is apparent that the rift between Messrs Pakdaman and Koolhaas had begun as early as June 2009, well before any supposed secret agreement.

185. I do not, therefore, accept that CSA was in breach, let alone a repudiatory breach, of its contract in the dealing which it had with Mr Pakdaman or GALink.

186. The Thesa LOI was an agreement with CSA. But it was uncommunicated to Tigris; did not, on any view, constitute a contract of sale in the absence of payment of the deposit; lapsed after 5 days; did not prevent CSA from performing the ASA; and was, as the judge found [97], superseded by CSA's later expressions of willingness to perform the ASA inherent in the notices of 20 October 2009 [88] and 16 November 2009 [94]. It did not amount to a repudiation of the agreement which it was open to Tigris to accept. What was under discussion thereafter was not the Thesa LOI, which provided for a sale of five aircraft, but a different deal.

Is the claim for the return of the deposit maintainable in any event?

187. CSA contends that Tigris has already received credit for the deposit and cannot recover it again. Even if it is assumed that CSA was in repudiatory breach of the ASA, and that Tigris had validly terminated it in consequence, the contract was not brought to an end until 4 December 2009 at the earliest, or possibly 27 November 2009. By that time, however, Tigris was already in breach of its obligation to take delivery under the ASA, as it had been since July. Tigris would only be released from its prospective obligations and would remain liable for those which had accrued. CSA's accrued right to damages was not affected by Tigris' later acceptance of CSA's repudiation, if that is what it was. Accordingly CSA had, as at 4 December, a right to damages which accrued on 31 July or 27 August. As Lord Diplock put it in *Berger & Co Inc v Gill & Duffus SA* [1984] AC 382,390:

> "*[The termination of the contract] had the consequence in law that all primary obligations of the parties under the contract which had not yet been performed were terminated. This termination did not prejudice the right of the party so electing to claim damages from the party in repudiatory breach for any loss sustained in consequence of the non-performance by the latter of his primary obligations under the contract, future as well as past. Nor did the termination deprive the party in repudiatory breach of the right to claim or to set off, damages for any past non-performance by the other party of that other party's own primary obligations, due to be performed before the contract was rescinded*"

188. CSA accepts that it would be bound to give credit in respect of any damages to which it is entitled for any deposit received (even if non-refundable). But that is what it has done. It cannot be required to do it again.

189. Tigris contends that at the time when it accepted what it claims to have been CSA's repudiation CSA had no accrued right to damages. At best it had a claim for the price of one or two aircraft but any amount paid in respect of such claim would be recoverable for a total failure of consideration since it has not received any of the five aircraft due to be delivered.

190. The contractual position in relation to price and acceptance is as follows. Under clause 4.1. Tigris was to pay the security deposit of $ 10,877,697.92 within 10 business days after the signing of the 22 May 2009 LOI. That deposit was paid, although not within that timescale. Under clause 2.1. each aircraft and spare engine was to be delivered on the Delivery Date (being either 31 July or 27 August 2009 for the two sets of 3 aircraft) at the Delivery Location (being two different airports in China). On the Delivery Date the Buyer was to sign and deliver to the Seller an Acceptance Certificate in respect of each aircraft (clause 2.1). Under clause 4.2. the Buyer was to comply with Schedule 4 (which provided for payment of the price at or before delivery of the First or Fourth Aircraft) and pay the amount for each specific aircraft transaction after signing of the Aircraft Technical Acceptance. The Seller's obligation to sell and deliver each Aircraft Package (being Aircraft or Engines as the case might be) was subject to it having received the Purchase Price for the relevant Aircraft or Spare Engine in full: 2.2(c)[2].

191. The sequence contemplated was, thus: (a) the aircraft being available at the Delivery Location on the Delivery Date; (b) Technical Acceptance; (c) Payment thereafter, if not made before; (d) delivery. Delivery was defined as the transfer of title from the Seller to the Buyer.

192. CSA never had a claim for the balance of the price which was only due after signing of Technical Acceptance. Property had not passed so there would be no claim under section 49 (1) of the *Sale of Goods Act*. It would, however, have a claim for non acceptance since Tigris failed to execute the Technical Acceptance of any of the aircraft and take delivery thereof.

193. After 31 July and 27 August 2009 new deadlines were set on four occasions. The last was on 16 November 2009. The letter said, in material part:

> "*We hereby give you notice that if you fail to take delivery of each of the Remaining Aircraft and pay the balance of the Purchase Price in respect of that Remaining Aircraft to us on or before the following dates:*
>
> *MSN 750 20 November 2009*
> *MSN 756 27 November 2009*
> *MSN 733 4 December 2009*
> *MSN 734 11 December 2009*

[2] The ASA has a curious feature. Clause 2.5 (a) provides that *after* execution of the Technical Acceptance and receipt of the related Purchase Price the Seller was to arrange for the aircraft to be flown to the Ferry Flight Destination, being Johannesburg. Schedule 1 specified the Ferry Flight Dates which were either 29 July or 25 August 2009. However, these dates *precede* the Delivery Date upon which the Acceptance Certificate was due to be signed.

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we will immediately thereafter exercise our rights under the Agreement and terminate the Agreement in respect of that Remaining Aircraft.

All our rights and remedies under this Agreement, at law or in equity are reserved."

194. Clause 15.5. of the ASA includes the following:

> "*…The rights of each of the parties (whether arising under this Agreement or the general law) shall not, as against or in favour of the other parties, be capable of being waived or varied, otherwise than by an express waiver or variation in writing; and in particular any failure to exercise or any delay in exercising any of such rights shall not operate as a waiver or variation of that or any other such right and no act or course of conduct or negotiation on its part or on its behalf shall in any way preclude it from exercising any such right or constitute a suspension or any variation of any such right*".

195. It seems to me, however, that the effect of the four notices of 18 and 23 September, 20 October and 16 November was by their express terms to lead Tigris to believe that CSA would not insist on its right to have the aircraft accepted on the dates specified in the ASA and would accept Tigris taking them on the various dates specified in the notices. Tigris continued to endeavour to perform the ASA in what must have been reliance on these notices (so far as they went – Tigris claimed to be able to accept delivery in its own time) in such a way that it would have been inequitable for CSA to resile from them and insist on delivery taking place before the time specified. If Tigris had been able to accept delivery on those dates CSA could not refuse to deliver on the grounds that they should have been taken earlier. As at 4 December which, in my judgment, was the date of acceptance of CSA's repudiation, if there was one, CSA's accrued right to damages was in respect of the two planes that should have been accepted by 20 and 27 November and its damages in respect of them would be calculated by reference to that date. I would not regard the reservation of rights at the base of the letters as precluding waiver. There is authority that the mere reservation of rights under contract will not preclude a waiver or estoppel where the remaining circumstances justify a finding to that effect: *Bremer v Mackprang* [1979] 1 Lloyd's Rep 332, 335, 230; *Nichimen Corp v Gatoil Oversea Inc* [1987] 2 Lloyd's Rep 46, 51.

196. If I had thought that CSA repudiated the agreement I would have held CSA liable to return the deposit less the proportion of its counterclaim attributable to those two planes. As it is, I would dismiss the appeal.

The Counterclaim

197. Part of CSA's claim was for parking, maintenance and insurance charges. I call this "the disputed claim". As the judge observed [141] no issue had been taken on the formulation of CSA's cross claim for damages in the pleading. There was, however, a general denial of entitlement to any loss or damage and a reference to CSA's losses "*(if any)*".

198. The disputed claim amounted to $ 16,747,388.17 in respect of which the judge awarded $ 10 million: see [122] above. The claim in respect of these items was originally set out in an exhibit to Dr Zhong's first witness statement ("the first schedule"): C/28/888H in the appeal bundles. It was expressed in Chinese yuan and, in respect of parking charges, specified, for each aircraft, the period between the ASA delivery date (being either 31.7.09 or 27.8.09) and the actual sale delivery date. It produced a total figure for days grounding for all six aircraft of **1,222** days and total parking charges of **¥ 1,113,014.72**. Using an exchange rate of ¥ 1= US $ 0.162 the total charge is approximately $ **180,330**. In the first schedule the parking charges are said to be the actually paid parking charges "*provided by variable costs CMS system of Northern subsidiary*". The first schedule also contained figures for maintenance and insurance while grounding.

199. Dr Zhong was not challenged in cross examination other than in relation to the parking charges: Day 5 page 32-33. On 8 June 2013 he had filed a statement which accepted that MSN 762 and 750 were returned to commercial service on 2 August 2009, and MSN 756 on 25 August 2009. He said that he filed this statement because he understood that Tigris was seeking clarification of the dates on which the aircraft in the first batch of three were returned to service. In the light of his evidence the days of grounding specified in the first schedule (28, 55, and 372) for these planes appeared to be grossly inaccurate, subject to consideration of the period over which they remained in actual service after their initial return thereto. He explained that the reason for the discrepancy was that branch companies of CSA had in fact resumed services of some of the aircraft without informing him. The first schedule had been prepared by the finance department based in Guangzhou when the planes were in Shenyang and Dalian thousands of miles away. He then referred to the fact that aircrafts MSNs 733, 739, 734, and 756 had had to be grounded for maintenance, whereupon Mr Page turned to another topic. He was not re-examined on the topic.

200. CSA annexed to their closing written submissions (no oral ones being made on the disputed claim) an amended version of the first schedule ("the second schedule"): A16/360A in the appeal bundles. Some figures were converted into US dollars. The parking charges were now split into pre and post termination charges (on the footing that termination was on 19 December 2009). (However the dates taken were the ASA ferry flight dates and the actual sale ferry flight dates). Not all the figures were, however, the same. The total claimed for parking charges was $ 2,560,000 up to termination, and $ 99,298.25 thereafter, making **$ 2,659,298.25**. This was a massive increase over $ **180,330**. What had happened was that the figures up to 19 December 2009 were calculated using a figure of $ 10,000 per day for 256 days in all. The figures thereafter were calculated on a quite different basis in yuan. Thus the total number of days of grounding from 20 December to actual ferry flight for all the aircraft was said to be 1,337 producing a total figure of ¥ 610,298 which at the above exchange rate is about $ 98,868. The total number of days of grounding was 256 + 1,337 = **1,593** instead of **1,222**. Whereas the total days grounding for the first three aircraft had decreased, the total for the next three had increased from 502 to 988 days, without explanation and even though the first schedule had contained too many days because it had been wrongly compiled in the manner that Dr Zhong had explained.

201. No further evidence had been given to explain these different figures, save that it was apparent from emails exchanged between 5 and 7 August 2009 that there was an agreement between the parties that Tigris should pay $ 10,000 per day in respect of the first three aircraft on account of their aborted delivery (for which Tigris accepts liability). The agreement does not however extend to the other three.

202. A number of points were made in relation to this aspect of the counterclaim in Tigris' very short oral closing submissions on the disputed claim. The first was that the number of grounding days was still wrong. MSN 756, for instance, appears to have had 36 days of grounding up to 19 December, being 11 days longer than the 25 days referred to by Dr Zhong in his second witness statement. The number of days grounding from 20 December was said to be 595, making 620 in all, which greatly exceeds the total figure of 372 in the first schedule.

203. The second point was that no credit was being given for operating income even though Dr Zhong had said in his witness statement that CSA had reduced their losses by returning the aircraft to commercial service until final delivery. I accept that CSA would not be entitled to recover the cost of parking and maintenance and insurance without having to give any credit for its operating income. No questions were put to Dr Zhong about the extent of that income. The third point was that there was no evidence to support the claim.

204. The claim of $ 10,000 a day is in addition to insurance and maintenance when it is tolerably clear from Dr Zhong's email of 5 August 2009 ("*we have to take care of the maintenance during parking*") that the $ 10,000 was intended to cover maintenance as a parking expense.

205. The grounds of appeal contain a contention that there was no proper basis for the figure of $ 10 million awarded by the learned judge in respect of the disputed claim. They do not however include a contention that the judge was wrong to reject the claim for $ 260,000 in respect of the ferry flights (see [121] above) and CSA contend that we should reject any such claim for that reason. The skeleton argument originally lodged on behalf of Tigris did not contain any reference to the $ 10 million award. CSA pointed this out in their skeleton argument. Tigris then took the opportunity presented by the need to update its skeleton to add two further paragraphs, pointing out that there was an appeal in respect of the judge's finding on parking charges and raising points in relation thereto.

206. CSA submits that the Court should not entertain any challenge to the amount of the counterclaim other than in respect of the claim for parking charges because the first occasion on which any of the other figures have been challenged is in Tigris' written reply submission served after the end of the appeal hearing.

207. The situation that I have described is profoundly unsatisfactory. The pleadings in relation to the disputed claim are unrevealing as is the list of issues. No expert evidence related to it. The evidence in respect of parking, maintenance and insurance was in schedules setting out total figures. Cross examination was very short and limited in the way I have described. Tigris' skeleton for the appeal in the end dealt with the claim for parking charges but not maintenance and insurance. It did, however, contend that there was a failure to give credit for operating income about

which no evidence was ever adduced or extracted. Accordingly Tigris is entitled to rely on that point in this appeal.

208. I have little doubt that the reason why the disputed claim was dealt with in this perfunctory way was because, as Tigris puts it in its reply skeleton, the question of damages on the counterclaim only matters if Tigris's appeal succeeds on the repudiation issue, in which case it would wish to resist any reduction in its recovery. If that appeal fails (as, in my view, it should) the quantum of the disputed claim is wholly academic since Tigris has no assets.

209. What the judge did was to take a very broad brush approach by reducing the $ 16.7 million figure to $ 10 million because "*some issue was taken about the figures which appear to have included costs when the aircraft was put back into service*".

210. What, then, are we to do with this entirely academic question? In my judgment we should set aside the award of $ 10 million. The component of the $ 16.7 million which represents parking charges is a different (and unevidenced) figure from the one in the first schedule. The figures for parking charges are themselves odd. Thus, in respect of the period from 20 December 2009 the number of days grounding for MSN 733 and 756 is said to be 525 and 595. Yet the parking charges for 733 are said to be ¥ 9,987 and for 756 ¥ 197,036. The $ 10,000 per day figure has been charged for, but is not applicable to, the second three aircraft. The $ 16.7 million figure includes very substantial sums for maintenance and insurance after the aircraft were returned to service or when they were retained in service (since the second three would not appear to have left it) but gives no credit for any operating income. Whilst it may be said that some of these points should have been the subject of cross examination, the basic rule is that it is for CSA to prove its case in respect of the disputed claim which it did not properly do. The judge's $ 6 million discount recognises that the claim is too high and, whilst I understand why he took this approach in the absence of any great assistance on the topic, the $ 10 million award is not, in truth, an exercise in rough justice but the plucking of a figure from the air. It is not clear to me that it represents an irreducible minimum value of the disputed claim.

211. We should not allow an unjustifiable figure forming part of a damages award to stand because it makes no commercial difference whether it does or not. If Tigris had any substance it might have been appropriate to order a retrial on the disputed claim. Since it has none, I would reduce the amount awarded on the counterclaim by $ 10 million less the sum of $ 290,000 representing parking charges for which Tigris accepts liability: see [121], making $ 9,710,000 together with any interest applicable thereto. I would not in addition reduce the award by $ 260,000 since it is not the subject of the grounds of appeal.

Sir Colin Rimer

212. I agree.

Lord Justice Lewison

213. I also agree.

Appendix – Dr Zhong's Evidence

"*Q. Dr Zhong, you knew, didn't you, that without the investment of Mr Pakdaman, Tigris could not perform the aircraft sale agreement?*

A. Could you be more specific, at what point of time you want to ask this question?

Q. Well, you knew from the meeting in Beijing, at the beginning of August 2009, that Tigris could not perform without the investment of Mr Pakdaman?

A. During the Beijing meeting, Pakdaman told me that he was the investor. I was half believe, half in doubt, about that statement.

Q. He also told you, didn't he, that without his investment Tigris could not perform?

A. Pakdaman did say so.

Q. That meant that as soon as you started dealing with Mr Pakdaman personally, as opposed to through Tigris, you knew that would make it impossible for Tigris to perform?

A. Yes

…

Q. Did Mr Pakdaman ever tell you that he would ensure that Tigris failed to pay, thus allowing CSA to terminate the aircraft sale agreement and continue with Mr Pakdaman?

A. Never."