Neutral Citation Number: [2025] EWCA Civ 783

Case No: CA-2024-002353, CA-2024-002353-A

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LONDON
COMMERCIAL COURT
MR JUSTICE PICKEN
[2024] EWHC 1946 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24th June 2025

Before:

LADY JUSTICE ASPLIN
LORD JUSTICE POPPLEWELL
and
LORD JUSTICE ZACAROLI

- -

Between:

VIETJET AVIATION JOINT STOCK COMPANY	**Appellant/ Defendant**
- and -	
FW AVIATION (HOLDINGS) 1 LIMITED	**Respondent/ Claimant**

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- -

Lord Wolfson KC, Mr Steven Thompson KC, Ms Erin Hitchens, Mr Douglas Paine and Mr Giles Robertson (instructed by **King & Spalding International LLP**) for the **Appellant**

Mr Tom Smith KC, Mr Jonathan Peacock KC, Mr Richard Lissack KC, Mr Robin Lööf, Ms Sarah Black, Mr Orestis Sherman & Ms Susanna Breslin (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Respondent**

Hearing dates: 20th, 21st & 22nd May 2025

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LORD JUSTICE POPPLEWELL:

Introduction

1. This appeal concerns the purchase in 2018 and 2019 of four Airbus 321 passenger aircraft, for operation by the appellant ('VietJet'), a Vietnamese airline. Two were "New Engine Option" and have been referred to as 'the NEOs', being manufacturer serial numbers 8906 and 8937. Two were "Current Engine Option" and have been referred to as 'the CEOs', being manufacturer serial numbers 8577 and 8592. The respondent ('FWA') is a Jersey registered company and part of the FitzWalter Capital group, headquartered in the UK, which since 2021 has operated funds investing in distressed credit assets.

2. The aircraft were purchased under financing arrangements in a structure known as JOLCO (Japanese Operating Lease with Call Option). The financing was provided by a mixture of debt and equity. 75% was provided by syndicated loans from commercial banks, led by BNP Paris ('BNP') for the CEOs, and Natixis Singapore Branch ('Natixis') for the NEOs. The other 25% was provided by Japanese equity investors who under the JOLCO structure were entitled to tax advantages.

3. In these proceedings FWA claim a right to immediate possession, custody and control of the aircraft pursuant to assignments taken under the financing arrangements, and large sums allegedly due thereunder together with damages. VietJet disputes that FWA is entitled to the aircraft and disputes its monetary claims. Picken J heard a trial on issues of liability between 4 and 14 June 2024. He gave judgment in favour of FWA on 31 July 2024 and on the same day made an order reflecting the uncontroversial consequences of his decision. Following a consequentials hearing on 2 October 2024 he made a further order on 16 October 2024 (sealed 18 October 2024), including granting permission to appeal on five grounds. This is the appeal from his orders of 31 July and 16 October 2024 in respect of liability. Whilst this appeal was pending, he heard a quantum trial in January 2025 and gave judgment in FWA's favour for approximately US$181 million. There is to be a further quantum hearing next year.

The financing arrangements and relevant events in outline

4. The financing arrangements involved a separate set of documents for each aircraft, identical in structure, and in many respects materially identical in their terms (there were a few differences between the two for the CEOs and the two for the NEOs which are relevant to the issues in the appeal, which I identify below). Each aircraft was purchased from Airbus by a special purpose vehicle ('SPV'), established under or recognised by Japanese law, which became the owner of the aircraft. The shareholders in the SPV were the Japanese 25% equity investors who thereby became the beneficial owners of the aircraft. The balance of the price was provided to the purchasing SPVs by the syndicated lenders ('the Lenders') under a loan facility agreement ('the Loan Agreement(s)'). The Loan Agreement was drawn down in full at the outset and provided for repayment of capital and interest over its term of about 12 years by quarterly payments.

5. Each aircraft was leased to VietJet for the same period, with the lease payments calibrated to enable the SPVs to meet the loan repayment obligations; and with an option to purchase at expiry. The leasing to VietJet was accomplished by a lease and sub-lease, essentially on back to back terms, with the intermediate lessee/lessor being a special purpose vehicle owned by VietJet. The lease and sub-lease in each case is referred to as the Head Lease and the Sub-Lease. Non-payment of rent was an event of default under the Sub-Lease and Head Lease. In such eventuality, VietJet also had an option to purchase the aircraft, but if it were not exercised, VietJet would be obliged to return the aircraft in accordance with the return conditions set out in the Head Lease/Sub-Lease; and in addition, VietJet would be obliged to pay termination payments calculated in accordance with a detailed formula.

6. The purchasing SPVs are therefore referred to variously as the Owners, the Borrowers and the Head Lessors. The VietJet SPV subsidiaries are referred to as the Head Lessees and Sub-Lessors. VietJet is referred to as the Sub-Lessee.

7. Under the Loan Agreement the personal liability of the Owners/Borrowers to the Lenders is limited, with the Lenders' recourse primarily being to a security package which comprised:

(1) a mortgage over the aircraft granted by the Owners/Borrowers as a first priority security interest, governed by New York law;

(2) security assignments, which assigned most of the rights of the lessor under the Head Lease/Sub-Lease in certain eventualities; this was achieved by back to back security assignments comprising:

(a) a 'Security Assignment (Lessee)' by which the VietJet subsidiaries assigned their rights under the Sub-Lease to the Head Lessors (i.e. the Owners/Borrowers); and

(b) a 'Security Assignment (Lessor)' by which the Owners/Borrowers assigned their rights under the Head Lease, and the assigned rights of the Sub-Lessor under the Sub-Lease, to a security trustee representing the interests of the Lenders.

VietJet acknowledged each of these by Assignment Acknowledgments.

(3) an Irrevocable Deregistration and Export Request Authorisation (IDERA) in favour of BNP and Natixis respectively, filed with the Civil Aviation Authority of Vietnam ('The CAAV').

8. The mortgages and security assignments were granted to BNP in respect of the CEOs, and Natixis in respect of the NEOs, as trustees/agents for the Lenders. In this capacity BNP and Natixis are referred to as 'the Security Trustee' (although the language used in the CEO Loan Agreements was Security Agent rather than Security Trustee).

9. Registrations were made in respect of 'International Interests' and assignments of 'International Interests' on the international registry under the Cape Town Convention on International Interests in Mobile Equipment ('the Convention') and its associated Protocol on Matters Specific to Aircraft Equipment ('the Protocol'). The Convention is implemented in the UK by the International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015 (SI 2015/912) ('the Regulations'). The ranking of those interests and the key features of the regime established by the Convention are described at [24] and [25] of the Judgment.

10. The CEO aircraft were delivered in November 2018 and the NEO aircraft in July and November 2019.

11. Covid restrictions in Vietnam operated between March and May 2020, and as a result of the Delta variant a hard lockdown was reimposed between 31 May and 30 September 2021. The CAAV suspended VietJet's operations between 19 July 2021 and 8 October 2021. VietJet fell behind in its rental payments and sought to negotiate deferrals of rent, those negotiations taking place with the Lenders rather than the Owner/Head Lessors, to reflect the reality of the financing documents. However, before those negotiations reached any conclusion, in October 2021 the Lenders resolved to sell their positions to FitzWalter. A special purpose English subsidiary was incorporated for this purpose, FitzWalter Capital Partners (Financial Trading) Limited ('FWC'), on 24 September 2021. It is a subsidiary of FitzWalter Capital Partners (Master HoldCo) Limited, a Jersey company which holds the investments in FitzWalter's first fund.

12. At FWC's instigation, Natixis and BNP as Security Trustees served termination notices (on 18, 22 and 26 October 2021) ('the Termination Notices') purporting to terminate the Leases and Sub-Leases with immediate effect for arrears of rent pursuant to clause 19.1 of those leases. The arrears were between 48 and 118 days for the different aircraft, and totalled some US$8 million (see Judgment at [358]). The Judge subsequently determined, as indeed VietJet itself asserted, that VietJet was in a position at that time to pay the rent but chose not to do so (Judgment [359]). In his Judgment, the Judge addressed as Question 1 whether the Termination Notices validly terminated the leases and Sub-Leases pursuant to clause 19.1 and concluded that they did so. That conclusion is challenged in ground 1 of VietJet's appeal to this court. In the quantum trial the Judge determined that the termination payments due under the terms of the Head Leases and Subleases upon their valid termination totalled some US$181.5 million (in addition to sums which had fallen due prior to termination) and gave judgment in favour of FWA in those sums by his Order of 17 April 2025.

13. In addition to the Termination Notices, BNP and Natixis also served Mandatory Prepayment Notices on the Head Lessors/Borrowers under the Loan Agreements, which if valid would accelerate the obligation to repay the loan in full. It is

common ground between the parties that if the Termination Notices were validly given, as the Judge decided they were, these were unnecessary because the termination of the leases/Sub-Leases automatically accelerated repayment under the terms of the Loan Agreements. However FWA also relied on the Mandatory Prepayment Notices as accelerating repayment of the loans. The Judge held that if the Termination Notices were not valid (contrary to his conclusion on Question 1), the Mandatory Prepayment Notices were not valid, and there is no appeal by FWA from that determination. They do not fall for further consideration on this appeal.

14. FWC then took assignments of the loans under the Loan Agreements on 26, 28 and 29 October 2021, in each case after BNP and Natixis had served the Termination Notices. On 3 November 2021 Natixis and BNP resigned as Security Trustees and FWC was appointed as Security Trustee in succession. VietJet disputes that FWC fell within the permitted class of assignees under the terms of clause 17 of the NEO Loan Agreements by reference to the definition at clause 9.1(iii) as a "financial institution"; and disputes that FWC fell within the permitted class of new Security Trustees under the Security Assignments for all four aircraft, which turns on identical wording. The Judge determined as Questions 2 and 9 that FWC was such a 'financial institution' so as to constitute a permitted assignee and permitted successor Security Trustee. VietJet challenges that conclusion in ground 2 of the present appeal.

15. In relation to the NEO aircraft, but not the CEO aircraft, there are two further issues as to whether FWA was a permitted assignee by reference to the definition in clause 9.1(iii) of the Loan Agreements, which required it to be someone benefitting from a double taxation treaty with Japan. Those issues, which turn on an interpretation of the relevant double taxation treaty and factual questions about FWC's business and purposes, were determined by the Judge in favour of FWA in answering Questions 5 and 6. VietJet challenges those conclusions in grounds 3 and 4 on this appeal.

16. On 8 and 9 November 2021 FWC transferred the Security Trustees' rights under the Head Leases and Sub-Leases to FWA.

17. In December 2021 and January 2022 the security rights were purportedly exercised by FWA to sell the aircraft for approximately US$150 million to four affiliated companies of FWC and FWA which had been incorporated on 27 October 2021, one for each aircraft ('the Trustee Owners') with the intention that they would become owners of them on trust for FWA. The transfer to the Trustee Owners took place in the case of the NEO aircraft by a foreclosure sale under New York law and in the case of the CEO aircraft by a public auction (which VietJet contends was not a genuine exercise).

18. In August 2022, the four Trustee Owners declared a trust of the respective aircraft in favour of FWA.

Early stages of the litigation

19. VietJet initially refused to redeliver the aircraft to FWC on the basis that the Leases and Sub-Leases had not been validly terminated, and continued to operate the aircraft for about a year (without paying any rent). However, the two sides agreed a Consent Order dated 16 November 2022, after FWA brought proceedings in the English Court for interim injunctive relief. VietJet agreed to hand over the aircraft to FWA on an "as is, where is" basis, without prejudice to either side's arguments at trial.

20. VietJet gave possession of the aircraft to FWA on 15 December 2021 and between 16 December 2021 and 19 January 2022 the aircraft were deregistered by the CAAV in Vietnam from VietJet's name and re-registered in Guernsey in the name of the Trustee Owners. However they remained in Vietnam for some considerable time: FWA did not succeed in exporting the first of the aircraft until June 2024, with the second and third following in October 2024. There is a dispute as to why that is so. FWA says VietJet created difficulties in getting the aircraft removed in breach of the Consent Order, which VietJet denies.

21. Of potential relevance to the present appeal is the fact that on 16 February 2023 proceedings in Vietnam were commenced by Silva Star Capital PTE Ltd ('Silva Star'), a Singaporean company and a minority shareholder in VietJet, seeking an annulment of the CAAV decisions to deregister the aircraft and interim relief suspending the implementation of the deregistration. Such interim relief was

granted by the Hanoi Court on 23 February 2023. There were financial links between Silva Star and VietJet, and between Silva Star's parent, Polar Star, and VietJet. VietJet's apparent founder, Madam Thao, was Silva Star's ultimate beneficial owner and controlling party. She was also at the time proceedings were commenced VietJet's General Director, and one of its three statutory legal representatives. VietJet's then Vice General Director, Dr Phuong, another of its statutory legal representatives, was a director of Polar Star. After complaint from FWA on 26 February 2023, VietJet wrote to Silva Star inviting it to withdraw its claim. Between 8 and 13 March three other shareholders lodged claims before the court seeking the same relief. Silva Star applied on 21 March 2023 to discontinue its claim and discharge the injunction, but identical interim relief was granted to the three new shareholders in support of their claim on 23 March, in place of the relief which had been granted to Silva Star. Their claim was discontinued and this injunction was discharged on 4 April 2023. The course of these proceedings, and other steps taken by VietJet are described in the Judgment at [76] to [91], and are referred to hereafter as the Shareholder Proceedings. On 31 March 2023, FWA issued contempt proceedings against VietJet (and Madam Thao and Dr Phuong), alleging amongst other things that its involvement in the Shareholder Proceedings constituted a breach of the Consent Order. Those alleged contempts are denied, and the contempt proceedings are yet to be heard.

Ground 1: The validity of the Termination Notices

22. When addressing the grounds of appeal, I will refer to the financing documentation for NEO 8906, which is representative of the documentation for all four aircraft save to the extent specifically identified.

23. The Head Lease and the Sub-Lease each provide by clause 18 that an Event of Default occurs when, amongst other things, there is non-payment of rent due under them. Clause 19.1 provides that the lease may be terminated upon such an Event of Default by a termination notice served by the lessor, and that thereupon the lessee must return the aircraft in accordance with specified return conditions; and becomes obliged to make the specified termination payments. There is no dispute that when BNP and Natixis served the Termination Notices there had been such an Event of Default and the Lessor/Borrower would have been entitled to serve such notices

terminating the leases. The issue is whether under the terms of the Security Assignment (Lessor), BNP and Natixis had assigned to them the right to do so as Security Trustee.

24. The Security Assignment (Lessor) contained the following terms of relevance to this issue. By clause 3.1, headed "Assignment":

> "The Lessor hereby, with full title guarantee, assigns and agrees to assign the Assigned Property, free from any Security Interest (other than Permitted Liens), absolutely and unconditionally by way of security to and in favour of the Security Trustee, in order to secure the payment, performance and discharge in full of all the Secured Obligations."

25. "Secured Obligations" was defined to include any obligations owed to the Lenders under the Loan Agreement, whether or not payable by the Borrower itself under the limited recourse provisions. Because the rental payments were calibrated to ensure repayment of the loan instalments, the loan instalments were in arrears by the time the Termination Notices were served, and so there existed at that time a failure in performance of the Secured Obligations, notwithstanding that the limited recourse provisions meant that the Borrower itself had no personal obligation to meet them.

26. "Assigned Property" had a wide definition which included "all of the right, title and interest, present and future, of the Lessor in, to and under (a) the Lease…(e) the Security Assignment (Lessee) … (k) all proceeds in respect of any of the foregoing together with…all rights of the Lessor to require, enforce or compel performance of all the provisions of any of the Agreements, and otherwise to exercise all claims, rights, remedies thereunder, including without limitation all rights to terminate the leasing of the Aircraft under or pursuant to the Lease….and the Assigned Property includes each of [the associated rights to payment or other performance of the Lessor under the Convention] … but excluding in each case the rights, title, benefits and interest of the Lessor in and to the Excluded Property, and otherwise subject always to Clauses 3.4 (Excluded Property), 3.5 (*Co-Extensive Rights*) and 3.6 (*Restrictions on dealing with the Exclusive Property and Co-Extensive Rights*)".

27. The Excluded Property set out in the definitions is not of significance to the present issue but the Co-Extensive Rights provisions are material, and I shall return to them.

28. Clause 7 provided as follows:

7. DEFAULT AND REMEDIES

7.1 Powers of Security Trustee

Without prejudice to any of its other rights whether conferred under any of the Operative Documents or by law generally, at any time upon or following the occurrence of an Enforcement Event provided the same is continuing the Security Trustee shall be entitled (subject to Clauses 3.4 (*Excluded Property*), 3.5 (*Co-extensive Rights*) and 3.6 (*Restrictions on dealing with the Excluded Property and Co-extensive Rights*)):

7.1.1 to apply to any court of competent authority for an order for foreclosure absolute so as to vest all the Lessor's right, title and interest in all or any of the Assigned Property in the Security Trustee;

7.1.2 to sell, call in, collect and convert into money all or any of the Assigned Property by public or private contract at any place in the world with or without advertisement or notice to the Lessor or any other person, with all such powers in that respect as are conferred by law; and by way of extension thereof such sale, calling in, collection and conversion may be made for such consideration as the Security Trustee may in its sole and absolute discretion deem reasonable (whether the same shall consist of cash or shares or debentures in some other company or companies or other property of whatsoever nature or partly of one and partly of some other species of consideration, and whether such consideration shall be presently payable or by instalments or at some future date, and whether such deferred or future payments shall be secured or not) and in all other respects in such manner as the Security Trustee may in its sole and absolute discretion think fit (in the absence of fraud, gross negligence or wilful misconduct or as otherwise may be the case under applicable law), and without being liable to account for any loss of or deficiency in such consideration (in the absence of fraud, gross negligence or wilful misconduct or as otherwise may be the case under applicable law); and section 103 of the Law of Property Act 1925 shall not apply to this Assignment or to the power of sale, calling in, collection or conversion hereinbefore contained; and for the purposes of this paragraph the Security Trustee may (in its sole and absolute discretion) by notice appoint the Lessor (with the Lessor's consent which shall not be unreasonably withheld) or any other person its non-exclusive agent to sell all or any of the Assigned Property on terms satisfactory to the Security Trustee;

7.1.3 to settle, arrange, compromise or submit to arbitration any accounts, claims, questions or disputes whatsoever which

may arise in connection with the Assigned Property or in any way relating to this Assignment and execute releases or other discharges in relation thereto;

7.1.4 to bring, take, defend, compromise, submit to arbitration or discontinue any actions, suits or proceedings whatsoever, civil or criminal, in relation to the Assigned Property;

7.1.5 to execute and do all such acts, deeds and things in relation to the Assigned Property as the Security Trustee may consider necessary or proper for or in relation to any of the purposes aforesaid; and

7.1.6 to appoint a Receiver of all or any part of the Assigned Property upon such terms as to remuneration and otherwise as the Security Trustee shall deem fit; and the Security Trustee may from time to time remove any Receiver so appointed and appoint another in its stead; and to fix (at or after the time of its appointment) the remuneration of any such Receiver. A Receiver so appointed shall be the agent of the Lessor, and the Lessor shall be liable for such Receiver's actions and defaults to the exclusion of liability on the part of the Security Trustee. Nothing herein contained shall render the Security Trustee liable to any such Receiver for its remuneration, costs, charges or expenses or otherwise.

7.2 **Law of Property Act**

Sections 109(6) and 109(8) of the Law of Property Act 1925 shall not apply in relation to any Receiver appointed under Clause 7.1 (*Powers of Security Trustee*).

29. The argument advanced on behalf of VietJet is that clause 7 qualifies the exercise of assigned rights under clause 3 and makes them exercisable only "upon or following the occurrence of an Enforcement Event". It is common ground that when the Notices of Termination were given by Natixis and BNP there had not been such an Enforcement Event. An Enforcement Event, as defined, is either a Loan Default, i.e. an Event of Default under the Loan Agreement; or the Loan becoming or being declared due and payable in full in accordance with the terms of the Loan Agreement and not being paid when due. Although the rental payments were designed to fund the loan repayments so that VietJet's arrears necessarily caused the loan repayments to be in default, that default was not a Loan Default, defined as a default by the Borrower, because of the limited recourse provisions which

stated that the Borrower was not personally liable to repay, and required the Lenders to look to their security rights. The rent arrears did not themselves automatically accelerate the loan, although it entitled the Lenders to serve a Mandatory Prepayment Notice which would have that effect and would lead to an Enforcement Event if the whole loan was not repaid within the time given in the notice, which had to be a minimum of five days. It is worth emphasising, however, that a valid Notice of Termination under the Leases would itself constitute an Enforcement Event because it automatically caused the lease termination payments to fall due which was an eventuality identified as automatically accelerating the loan and making it payable in full without the need for a Mandatory Prepayment Notice. Accordingly if VietJet's argument is correct, the Termination Notices were not validly given under clause 19 of the Leases; but if FWA is correct, and they were validly given, the consequence is that there was then an Enforcement Event and the Security Trustees had the powers identified in clause 7 of the Loan Agreement.

30. Lord Wolfson KC argued that the scope of clause 7.1 covered everything which the Security Trustee could do by way of enforcement of assigned rights. Termination of the Leases was within the wording of clause 7.1.5 as an act in relation to the Assigned Property which the Security Trustee might consider necessary or proper for or in relation to the purposes identified in 7.1.1 to 7.1.4, and in particular for foreclosing on the aircraft to acquire title and/or realise their value as security.

31. The Judge rejected this argument, holding that clause 7 conferred additional rights on the Security Trustee over and above those which were conferred by the assignment in clause 3, and was not to be construed as qualifying or cutting down the rights assigned by clause 3. This conclusion was supported by the wording of clause 7, which was expressed to be without prejudice to any other rights under any of the Operative Documents (which included the Lease and Sub-Lease); and by the Co-Extensive Rights provisions. Lord Wolfson criticised this reasoning. He submitted that the Borrower had no additional rights capable of transfer beyond those already assigned under clause 3: the assignment, as he put it, involved the Borrower giving away all its rights. The "without prejudice" wording, he submitted, was simply a reference to the clause 7 rights not prejudicing rights under

documents other than the Lease. He argued that this construction was supported by clause 16.3 of the Loan Agreement.

32. Like the Judge, I am unable to accept these arguments. Clause 3 is clear in its terms in assigning to the Security Trustee rights which include the right to give a Termination Notice in the event of non-payment of rent under the Head Lease. That is an express aspect of the description of the Assigned Property at clause (k) quoted above. Clause 7 is expressed to be without prejudice to that right: the without prejudice wording makes clear that clause 7 does not cut down "*any* of its other rights conferred under *any* of the Operating Documents", which includes the Lease. If it had been intended in this carefully and professionally drafted agreement to make the rights in clause 3 exercisable only upon or after an Enforcement Event, the parties would surely have said so by including that proviso at the beginning of clause 3. In fact the wording of clause 3 is unqualified and the wording of clause 7 makes clear that it does not cut down or qualify any other contractual rights.

33. It misses the point to argue, as Lord Wolfson does, that by clause 3 the Borrower has given away all its rights and can have no additional rights left to confer on the Security Trustee under clause 7, beyond those assigned by clause 3. Clause 3 involves an assignment "by way of security" and "in order to secure the payment, performance and discharge" of the secured obligations. The Borrower retains the equity of redemption arising from its ownership rights, and nothing in clause 3 deprives the Borrower of that equity. Clause 7.1, on the other hand, is addressed to the powers of the Security Trustee to realise the security, including the power to seek an order for foreclosure, thus destroying the equity of redemption, and the power of sale, by which the assigned rights may be sold free from the equity of redemption. The two provisions are simply dealing with different things: clause 7 provides for the enforcement of the security interest created by the assignment effected in clause 3. As such, there is no basis for construing clause 7 as limiting the rights created by clause 3.

34. In any event, it is wrong to say that clause 7 does not confer rights on the Security Trustee beyond those that are implicit in the grant of security under clause 3. Section 103 of the Law of Property Act 1925 confers a power of sale and the power to appoint a receiver on a mortgagee, but such powers are qualified by section 104.

The statutory powers are, nevertheless, subject to the terms of the contract and may be extended or restricted by agreement: s. 101(4). Clauses 7.1.2, 7.2 and 8.1 make clear that the parties had such powers in mind and intended to modify them. Clause 7 confers ancillary powers in wide terms and disapplies the restrictions in s. 103. In doing so it does indeed confer rights additional to those which the Security Trustee would otherwise have solely by virtue of the security assignment under clause 3. This is what its language suggests. It provides that the Security trustee "shall be entitled" to do the things identified in the clause, which is the language of conferring rights.

35. Since these are rights to enforce the security in full so as to destroy the Borrower's equity of redemption, it is natural that they should be expressed to occur only upon or after an Enforcement Event which involves acceleration of the loan or other loan default. There is no commercial rationale, however, for making such an event a precondition to termination of the Leases, the right to which arises under the terms of clause 18 of the lease not only for non-payment of rent, but for a wide variety of other defined defaults, some of which are breaches of other obligations by the lessee, and others of which (such as change of control) are not. The termination of the lease does not as such, and without more, interfere with the Borrower's equity of redemption because it leaves its ownership right intact with an entitlement to possession. It is clause 7 which then kicks in to affect the Borrower's equity of redemption because the automatic effect of termination of the lease is itself to create an Enforcement Event.

36. This conclusion is reinforced by a consideration of the provisions dealing with Co-Extensive Rights. Clause 3 makes clear that it is intended to be available to the Security Trustee in circumstances where Co-Extensive Rights, as defined, are exercisable by the Borrower. The provisions which define those Co-Extensive Rights, and the circumstances in which they may be exercised co-extensively by the Borrower and the Security Trustee, illustrate that they must have been intended to apply before any Enforcement Event under the loan, during the operational period of the lease when both Lease and loan were being performed. In summary they comprise the detailed regime laid down for the day to day operation of the aircraft. They must, therefore, have been intended to allow reliance on clause 3 by the

Security Trustee without and before any Enforcement Event. Reference to some of the contractual terms will illustrate the point.

37. By clause 3.5. of the Security Assignment the Borrower/Lessor is "entitled to exercise and benefit from the Co-Extensive Rights as separate, independent and co-extensive rights (but without prejudice to the rights of the Security Trustee by virtue of the assignment under clause 3.1 (*Assignment*) to exercise, and to benefit from such Co-Extensive Rights…" The Co-Extensive Rights are defined in the Definitions clause as follows:

> "**Co-extensive Rights**" means all of the rights, title, benefits, claims and interest, present and future, actual and contingent, of the Lessor in, to, under or in respect of the following clauses and schedules of the Lease (other than to the extent any provision thereof or payment thereunder is Excluded Property or a Relevant Payment):
>
> (a) clause 2.1 (*Lessee Representations*);
>
> (b) clause 3.1 (*Lessor Conditions Precedent*);
>
> (c) clause 3.4 (*Conditions Subsequent*);
>
> (d) clause 5.5 (*Authorisations for Payments*);
>
> (e) clause 7 (*Lease Period*);
>
> (f) clause 11.1 (*Lessee's Undertakings*);
>
> (g) clause 12 (*Operation, Use and Possession*);
>
> (h) clause 13 (*Maintenance and Repair*);
>
> (i) clause 14 (*Interchange and Replacement of Engines and Parts*);
>
> (j) clause 15 (*Title and Registration*);
>
> (k) clause 16 (*Insurance*);
>
> (l) clause 17 (*Loss and Requisition*);
>
> (m) clause 18 (*Events of Default*);
>
> (n) clause 22.1 (*Transfer*);

(o) clause 24 (*Benefit of Agreement*);

(p) clause 25 (*Further Provisions*);

(q) clause 27 (*Law and Jurisdiction*);

(r) clause 8 (*Change in Circumstances*) and clause 19 (*Remedies*) but in each case other than any right thereunder to repossess, require redelivery of and/or to sell the Aircraft (except in respect of any remarketing or offering for sale, or any sale of the Aircraft to the Lessee (or its nominee), in accordance with the provisions of clause 8 (*Change in Circumstances*) or clause 19 (*Remedies*) of the Lease),

and also the rights of the Lessor to the equivalent provisions in the Sub-Lease as assigned pursuant to the Security Assignment (Lessee)."

38. The descriptions of the Lease clauses given in these definitions are sufficient to illustrate the nature of the rights without the need to quote the clauses in full. So, for example, under clause 11, the Lessee gives extensive undertakings, which include the provision of documentation, including accounts and condition reports, to enable the Lessor to monitor compliance. Clause 12 contains extensive undertakings by the Lessee as to the operation, use and possession of the aircraft, including trading restrictions, maintenance of technical records and rights of inspection, and restrictions on sub-leasing and chartering or "wet leasing". Clause 13 contains extensive obligations of maintenance and repair. Clause 16 deals in great detail with insurance obligations, including the obligation to provide documentation to the Lessor. These are all obligations which are concerned with the day to day operation of the aircraft under the Lease. The Judge mentioned the right of inspection as an example. Lord Wolfson objected that there was no need for the Security Trustee to rely on clause 3 of the Security Assignment for a right of inspection because it was expressed in clause 12 of the Lease to be a right of the Security Trustee as well as the Lessor, and the third party rights clause in the Lease gave the Security Trustee an entitlement to enforce that clause, which was for its benefit, independently of any assignment of rights. However that is not true of many of the terms of the Lease which the Lenders would have an interest in seeing observed and enforced during the operational currency of the Lease. In any event it does not meet the point that the Co-Extensive Rights regime envisages the Security Trustee having all those rights, co-extensively with the Borrower, during

the operational period of the Lease, under and by reason of the assignment in clause 3.

39. The Lenders' interest in the Lessee's performance of these operational obligations does not only arise for the first time upon a loan default and for the purposes of preserving the security for enforcement purposes. It is in the interests of the Lenders that these should be performed during the normal operation of the leases so as to maintain the cash flows and *avoid* any loan default. There is an obvious commercial rationale for conferring on the Security Trustee this ability to step in where necessary to ensure compliance by the Lessee with the day to day operational requirements of the Lease, given the identity of the Lessor/Borrower, and the limited recourse provisions in the Loan Agreement. The Borrower is a special purpose vehicle for the Japanese equity investors who have neither the expertise to be involved in the business of aircraft leasing on a hands on basis, nor any interest in doing so. They are passive investors seeking tax advantages from the investment. The JOLCO structure envisages that it will primarily be the Lenders who will seek to ensure compliance with the Lease obligations so as to be able to ensure, so far as possible, that the Loan is serviced in accordance with its terms, quite apart from any protection of the security if and when the loan defaults. This is also evident in the provisions in clause 35 of the Loan Agreement that there is to be limited recourse against the Borrower, such that the Lenders will have to look primarily to the security to protect their repayment interest.

40. Moreover there would be an unfortunate lacuna, on VietJet's case, by reason of clause 3.5 (b) of the Security Assignment, which precludes the Lessor from exercising a Co-Extensive Right which otherwise falls within the clause if it would adversely affect the value of the aircraft. Clause 3.1.5 (b) states in terms that in those circumstances only the Security Trustee may exercise the Co-Extensive Right. But unless clause 3 of the Security Assignment confers that right on the Security Trustee during the currency of the Lease, there is no one who can exercise a right which would reduce the value of the aircraft by a single cent, however commercially sensible or necessary that might be for the day to day operation of the aircraft.

41. There is a further linguistic point which tells against VietJet's argument. Clause 7.1.5 refers to powers exercisable where necessary or proper "for or in relation to any of the purposes aforesaid". The purposes aforesaid are the powers of foreclosure, sale and appointment of a receiver identified in clause 7.1.1 to 7.1.4. I have some doubt whether termination of the Leases would come within that rubric. But in any event, it is striking that Clause 7 does not refer in terms to the right to terminate the Leases for non-payment. Had the parties intended to make such termination right conditional on some loan default, they would surely have said so clearly and expressly, not, as VietJet's argument necessarily entails, by the circuitous method of including in clause 7.1.5 a form of general wording which does not mention it but which it is argued is wide enough to include it. Non-payment by VietJet must have been foreseen as one of the main circumstances in which the Lenders would wish to realise the security, given the limited recourse against the Borrower. It was of key commercial importance, and if intended to come within clause 7 would have been specifically identified, as it was for other purposes in clauses 3.5(2)(a) and 3.6.1.

42. VietJet's argument derives no assistance from clause 16.3 of the Loan Agreement which provides:

> "**Enforcement of Security**
>
> On and at any time after the occurrence of an Enforcement Event which is continuing the Security Trustee may, and shall if instructed by the Instructing Group:
>
> (a) take such steps as it considers necessary or desirable to preserve, protect and enforce the rights of the Financing Parties under the Operative Documents;
> and/or
>
> (b) take such steps as it considers necessary or desirable for the enforcement, protection and preservation of the Security Interests constituted by the Security Documents."

43. This clause in part confers a right on the Lenders to *require* the Security Trustee to take enforcement action after an Enforcement Event. Insofar as it is permissive of what the Security Trustee may do of its own initiative, it is important to keep in mind that this comes within clause 16 which is headed, and deals with, "Events of Default", and so is addressing circumstances in which there has been a loan default.

It is not, however, the clause by which the Lenders confer on the Security Trustee its powers of preservation, protection or enforcement. The powers of the Security Trustee in that respect, and its duties, are set out at great length at clause 21 of the Loan Agreement. There they have no limitation as being exercisable only after an Enforcement Event. There is nothing in the wording of clause 16.3, or its place in the Loan Agreement, which suggests that it is a confined definition of the only circumstances in which such powers may be exercised. Moreover, as I have observed, to construe clause 16.3 as confining the Security Trustee's powers to an ability to act only after an Enforcement Event would be inconsistent with the Co-Extensive Rights provisions agreed by the Borrower with the Security Trustee, which envisage action by the Security Trustee during the day to day operation of the Lease.

44. For all these reasons, which largely reflect those given by the Judge, I would dismiss the appeal on ground 1. That renders it unnecessary to consider the first two grounds of the Respondent's Notice.

Ground 2: Was FWC a "financial institution"?

45. The issue arises for all four of the aircraft but there is a distinction between the NEOs and the CEOs in how it arises. For the NEOs, but not the CEOs, it governs the issue of whether FWC was a permitted assignee. For all of the aircraft it governs the issue of whether FWC was a permitted Security Trustee successor.

46. Under clause 17.1 of the (NEO) Loan Agreement, the position in relation to assignees generally is identified as follows:

> 17.1 **Assignments and transfers by the Lenders**
>
> Subject to this Clause 17, a Lender (the "**Existing Lender**") may:
>
> (a) assign any of its rights; or
>
> (b) transfer by novation any of its rights and obligations,
>
> under the Operative Documents, to another bank or financial institution or to a trust, fund or other entity which is regularly engaged in or established for the purpose of making, purchasing or investing in loans, securities or other financial assets (the "**New Lender**").

47. Under the NEO Agreements the consent of the Borrowers was required, and FWC did not seek or obtain it. The class of permitted assignees in those circumstances is governed by clause 17.2:

> 17.2 **Conditions of assignment or transfer**
>
> (a) The consent of the Borrower is not required for any assignment or transfer by a Lender of its rights and/or obligations under the Operative Documents to which it is a party **provided that**:
>
> (i) such assignment or transfer is to another Lender who is at the time of such assignment or transfer a Qualifying Lender; or
>
> (ii) such assignment or transfer is to a Lender or a New Lender who, upon becoming a Lender, would be a Qualifying Lender; or …

48. Qualifying Lender is defined in the Definitions clause as having the meaning given to it in clause 9, which is concerned with "TAX GROSS UP AND INDEMNITIES". The Clause 9.1 definition is in relevant part in the following terms:

> " "**Qualifying Lender**" means a Lender which is beneficially entitled to interest payable to that Lender in respect of an advance under an Operative Document and is a Lender:
>
> (i) [a Japanese bank, financial institution or company licensed to carry on banking or lending business in Japan]
> (ii) [a non-Japanese bank or financial institution participating in the loan through a Japanese Facility Office]
> (iii) "which (x) is a bank or other financial institution organized under the laws of any jurisdiction other than Japan (y) participates in the Facility through a Facility Office outside Japan and (z) benefits from a double tax treaty with Japan so that no withholding tax will be levied in relation to payments of interest (the "**Relevant DTT**") being qualified as an entity that can receive such interest free of withholding tax under the Relevant DTT and the relevant regulations and not acting through its branch in Japan."

49. It is common ground that FWC did not fall within (i) or (ii). For the NEOs, therefore, the critical question is whether FWC came within the words "bank or other financial institution" in (iii) (x) of the definition of Qualifying Lender.

50. This issue does not arise for the CEOs both because under the CEO Agreements Borrower consent was not required so that the applicable wording was clause 17.1;

and because in any event the definition of Qualifying Lender has a subclause 9.1(iii) in different terms which does not require the New Lender to be a bank or other financial institution or indeed any kind of entity, but merely that it must have the tax exemption status to ensure payment of interest without withholding tax.

51. Therefore, under the CEOs the question is whether FWC came within the definition in clause 17.1 of a New Lender as "a bank or financial institution or a trust, fund or other entity which is regularly engaged in or established for the purpose of making, purchasing or investing in loans, securities or other financial assets". VietJet accepts that FWC fell within the second half of this description as an entity established for or engaged in that kind of business, but disputes that it fell within the first half of the description as a financial institution, which is necessary for the shorter form of wording in (iii)(x) of the definition of Qualifying Lender in clause 9.1 of the NEO Loan Agreements.

52. However, the issue under ground 2 arises for all four aircraft because there is a restriction on the class of permitted successor Security Trustees which is common to all four loans. Clause 21.3 of the NEO Loan Agreements (with an equivalent in the CEO Loan Agreements) provides:

> **21.23 Retirement of Security Trustee**
>
> (b) "The Security Trustee may …retire from its appointment as Security Trustee … provided that no such retirement shall take effect unless there has been appointed as a successor security trustee …the successor (i) who shall be a trust corporation, bank or financial institution nominated by the Instructing Group (after consultation with the Borrower **provided that** no Event of Default has occurred and is continuing) or, failing such a nomination; (ii) any trust corporation, bank or financial institution nominated by the Security Trustee (after consultation with the Borrower)"

53. Permitted successor Security Trustees are therefore limited to trust corporations, banks or financial institutions.

54. FWC's case, which was accepted by the Judge, is that financial institution bears a well-known and wide meaning established by this court in *The Argo Fund Ltd v Essar Steel Ltd* [2006] EWCA Civ 241 [2006] 2 All ER (Comm) 104, namely a legally recognised form or being which carries on business in accordance with the laws of its place of creation and whose business concerns commercial finance.

VietJet contends that its meaning in these agreements has to be approached by reference to the fact that the wider category of permitted assignee in clause 17.1 is to be contrasted with the narrower and more limited wording in the clause 9 definition of the NEO Loan Agreements, and clause 21.23 which has its equivalent in all the Loan Agreements. These, it was submitted, were consciously narrower, reflecting a desire that the Borrower would want someone of standing and relevant expertise to perform the Security Trustee's role of enforcement which would affect the value of its assets and (if FWC is correct on Ground 1) of termination of the Leases before term so as to jeopardise the long term tax advantages which it was the purpose of their investment to enjoy. The meaning to be attributed to financial institution in relation to replacement Security Trustees should drive the interpretation of the same phrase in relation to permitted assignees. That does not have the additional wording "or to a trust, fund or other entity which is regularly engaged in or established for the purpose of making, purchasing or investing in loans, securities or other financial assets", to which I will refer for ease of exposition as 'the additional wording'. It is submitted that in clause 17.1 there are two categories, namely (a) bank or financial institution and (b) those within the additional wording; and that because FWC falls within the additional wording it does not fall within the first category as a financial institution. When pressed as to what definition VietJet would give to the expression financial institution, Lord Wolfson referred to a footnote in VietJet's written closing submissions before the Judge, where it said that a financial institution "would share at least some and perhaps all of the key characteristics of banks, being commercial lenders, of a certain size and substance and subject to regulation. Examples might be a building society or a credit union".

55. It is convenient to start the analysis with *Argo v Essar*. Essar had entered into an unsecured syndicated loan agreement as borrower on the standard 1997 Loan Market Association ('LMA') form, which permitted transfer of a lender's rights to "a bank or other financial institution". Argo was an entity which described itself as a "Global Emerging Markets Debt Hedge Fund" which had a portfolio of debt mostly purchased in the secondary debt market. Lord Wolfson, who was junior counsel for Essar, told us that it was run from a flat in Belsize Park. It had bought tranches of Essar's debt at a discount in the secondary debt market and the issue

was whether it qualified as a transferee as an "other financial institution". The Court of Appeal unanimously held that it did. The majority judgment was given by Auld LJ, with whom Hallett LJ agreed. Rix LJ gave a concurring judgment in which he gave different reasons for reaching the same conclusion.

56. A central aspect of the argument advanced on behalf of Essar was that the use of the word "other" before "financial institution" meant that an entity had to be 'bank like' to qualify (see [27]), which Auld LJ rejected at [43] and [49], saying in the latter paragraph that a permitted transferee need not exhibit any particular standard of suitability or probity as a financial institution, and in [50] that there was no threshold of being a sound or respectable lender. The critical conclusion is set out at [51]:

> "I, therefore, end up with a broader interpretation than did the judge of the term 'other financial institution' in the expression, 'a bank or other financial institution', in the agreement. In my view, the judge, in identifying the nature of the restriction imposed by the agreement on the meaning of a transferee for the purpose of considering whether a putative transferee was entitled to claim repayment of debts of Essar passed to it, adopted too restrictive a meaning. He should have held that it was satisfied by proof that the putative transferee met the broad fifth criterion he identified (at [38]), namely having 'a legally recognised form or being, which carries on its business in accordance with the laws of its place of creation and whose business concerns commercial finance', and whether or not its business included the lending of money on the primary or secondary lending market."

57. The wording in clause 17.1 of the Loan Agreements in this case, reflects the LMA standard form of wording for many types of loan agreement which was in place at the time of these aircraft financing transactions (and remains so). That is a revision of the wording under consideration in *Argo v Essar*, involving the omission of "other" before financial institution and the addition of the additional wording. That revision was not, however, a response to the decision in *Argo v Essar*. The LMA wording was revised in November 2001, after the loan in that case, but before the decision. Auld LJ said at [2] that the change was made by the LMA "in order to remove grounds for dispute, illustrated by this appeal, as to the range of entities that could qualify as a 'financial institution' within this provision."

58. It seems to me to be a safe starting point to treat the parties as having deliberately adopted the current LMA wording in clause 17.1. Any other conclusion would be

an improbable coincidence. Moreover this was a carefully drafted English law suite of documents involving experienced firms of English solicitors. *Argo v Essar* was a leading decision referred to in the textbooks, and those responsible for drafting the Loan Agreements and advising their clients can be taken to have been aware of the decision, and to have drafted their agreements accordingly. It is therefore likely that they intended financial institution to bear the meaning which the courts had given to it in *Argo v Essar*. That approach is supported by *Sunport Shipping Ltd v Tryg Baltica International (UK) Ltd (The Kleovoulos of Rhodes)* [2003] EWCA Civ 12 [2003] 1 All ER (Comm) 586 in which Clarke LJ endorsed a principle set out at [25] that

> "…where the relevant expression has been given a settled meaning by the courts, the court should so construe it in the same context in the future."

He went on at [28] to say:

> "To my mind, that principle is essentially a principle of construction. Thus the court is trying to ascertain the intention of the parties in using the expression deployed in the contract. Where a contract has been professionally drawn, as in the case of the Institute Clauses, the draftsman is certain to have in mind decisions of the courts on earlier editions of the clause. Such decisions are part of the context or background circumstances against which the particular contract falls to be construed. If the draftsman chooses to adopt the same words as previously construed by the courts, it seems to me to be likely that, other things being equal, he intends that the words should continue to have the same meaning."

59. Against that background, Lord Wolfson's argument that financial institution means something different from the *Argo v Essar* meaning is unsound both in principle and linguistically. It is unsound in principle because the revision of the LMA standard form, by including the additional wording formulation, can only have had as its purpose to widen the potential class of permitted assignees so as to include those outside the category of bank or financial institution. The additional wording is additional and alternative: it provides an additional and alternative gateway through which a potential assignee may pass. Yet Lord Wolfson's argument is to treat it when part of the LMA standard wording as narrowing the meaning of financial institution. His argument that the language of the Qualifying Lender and permitted successor Security Trustee provisions must be approached in the context of this particular Loan Agreement does not meet this difficulty. His argument takes

as its very starting point the definition in clause 17.1 and seeks to give a limited meaning to financial institution in that clause, which he argues then defines its meaning in the Qualifying Lender and permitted Successor Trustee provisions. But clause 17.1 was obviously consciously taken as the LMA standard wording and the expression financial institution in that wording must have been intended by these parties to bear whatever meaning it bears in the standard LMA wording whenever adopted.

60. Lord Wolfson's argument is also unsound as a matter of language. It is clear that there are three categories of potentially qualifying assignee namely (i) bank (ii) financial institution and (iii) trust fund or other entity which is regularly engaged in … [etc]. The clause is not split rigidly into two separate and mutually exclusive categories. Plainly there can be overlap between them and an entity can fall within one or two or three of them. A bank will be a financial institution although the latter expression will cover entities other than banks. A bank will also be regularly engaged in the activity described in the additional wording so as to fall within that part as well. The same is true of a financial institution which meets VietJet's more restrictive definition: it will also fall into the third category comprising the additional wording. Ultimately Lord Wolfson's splitting of the clause into two rigid and mutually exclusive halves rested on the use of "to" twice ("*to* another bank or financial institution or *to* a trust, fund …[etc])". But the use of a second "to" is readily explicable as being in order to make clear that the qualifying activity applies to each of trust, fund and other entity, not just to the last of these.

61. The argument rests on treating FWC as falling within the additional wording and for that reason alone being incapable of being in the mutually excluded category of a financial institution. However FWC is neither a trust nor a fund, and must therefore, on this argument, fall within the additional wording as an "other entity". That is wide wording, and it was not clear from Lord Wolfson's argument how it could be confined in a way which would not also catch many banks or financial institutions. Indeed the definition of Qualifying Lender in clause 9 makes clear that a financial institution ***is*** an "entity" by providing in the last part of (iii) (z) that it must be "qualified as an entity that can receive such interest free of withholding tax under the Relevant DTT and the relevant regulations". In other words, in the

very provision that matters for the purposes of identifying the permitted class of assignees without Borrower consent, a financial institution is treated as an "entity". That is wholly inconsistent with the argument that because it is an "entity" it cannot be a financial institution.

62. The Judge said that the expression 'bank or financial institution' in the Qualifying Lender definition was simply a shorthand for the longer wording in clause 17.1 so as in effect to include the additional wording. I would accept Lord Wolfson's criticism that that fails to give effect to the parties' use of different language, so far as it goes, but it does not go very far. The additional wording potentially widens the pool by expressly referring to trusts, funds and other entities. This seems to focus on the nature of the vehicle in question, rather than the nature of its activity, which is governed by the second part of the additional wording. The expression "any other entity" involves exceedingly wide language. This seems to me to have been an attempt to ensure that in wording which might have to be applied to entities under foreign systems of law, or to those involved in increasingly complex debt instrument structures (one only has to think now of synthetic CDOs, for example), which it would be difficult to foresee let alone describe or categorise exhaustively, the form of the permitted assignee should be as wide as possible and the substance of the restriction lies in the nature of the business in which it is engaged or for which it is established. What is significant, to my mind, is that the nature of the activity which is being aimed at, which will be common to banks, financial institutions and trusts, funds or other entities falling within the additional wording, is 'the establishment for or carrying out of making, purchasing or investing in loans, securities or other financial assets', which reflects the activity which was identified by the majority in *Argo v Essar* as the touchstone of a financial institution.

63. If one asks, therefore, what the effect of removing the additional wording has on the class of permitted assignees in the absence of Borrower consent, the answer is not very much because the additional wording does no more than make clear that the particular form of the entity carrying out that kind of business, which is what characterises a financial institution, makes no difference. It is a very modest curtailment of the category of potential assignees at most, and contrary to Lord Wolfson's submission, would seem to have nothing to do with protection of

borrowers in general, or the Borrower (against whom there is limited recourse) in this case, from unsuitable lenders.

64. Lord Wolfson's argument that in clause 21.3 the category of permitted Security Trustee successors has been deliberately chosen as different from the clause 17.1 definition of Lender, because different language has been used, is sound; but again that does not assist VietJet's case on this issue. It is clear that a trust corporation has been added as a new category, but that is explicable because whilst a trust corporation with the ability to exercise security rights would typically come within the *Argo v Essar* definition of financial institution, some might conceivably not. That cannot, however, justify giving financial institution a different meaning in clause 21.3 from that which it bears in clause 17.1 or the Qualifying Lender definition imported into 17.2.

65. I would therefore conclude, in agreement with the Judge and the contention of FWA, that 'financial institution' in clause 17.1, and in the Qualifying Lender definition imported into clause 17.2, and in clause 21.3, bears the meaning given to it by Auld LJ at [51] of *Argo v Essar*.

66. That being so, there is no room for any real doubt that FWC qualified as a financial institution when it took the assignment of the NEO Loans, and when it was appointed Security Trustee under all the loans. It was set up to acquire these loans and realise their value; and that is what it was doing at the critical times, namely when it took the assignments and when it became Security Trustee. That is activity coming within the description of the business of commercial finance, in just the same way as was Argo's business of buying up debt in the secondary debt market in order to realise its value.

67. For these reasons, which again largely reflect those given by the Judge, I would dismiss the appeal on ground 2.

Grounds 3 and 4: the double tax treaty

68. These grounds apply only to the NEOs and the wording defining a Qualifying Lender in clause 9 of the NEO Loan Agreements, which for the reasons I have identified do not apply to the CEO loans. Grounds 3 and 4 focus on the requirement

in (iii) of the Qualifying Lender definition in clause 9 of the NEO Loan Agreements that such a new lender must be one which "benefits from a double tax treaty with Japan so that no withholding tax will be levied in relation to payments of interest (the "**Relevant DTT**") being qualified as an entity that can receive such interest free of withholding tax under the Relevant DTT and the relevant regulations…"

69. FWC is a company incorporated under the law of England and Wales. There is a double tax treaty between the United Kingdom and Japan signed on 2 February 2006 as amended by a Protocol signed on 17 December 2013 ('the DTT'). The issue is whether FWC benefited from the DTT such that no withholding tax would be levied in Japan in respect of interest payments paid to it by the Borrowers.

70. I would observe that by the time FWC took an assignment of the loans, which is the relevant point of time at which to determine whether it fell within the definition of a permitted assignee, there had been a loan default and the loan had been accelerated; and the limited recourse provisions meant that it would have to look to the security to recover the amount due. There was no question by that stage of the Borrower making the periodic interest payments under the Loan, to which qualification as a beneficiary of a double tax treaty for withholding tax purposes might be relevant. It is true that the Loan Agreements provided for default interest, so that the amount of security which the Lenders through the Security Trustee might realise before having to account for such surplus to the Borrower would be affected by the amount of such default interest due, but it was never going to be paid by the Borrower and no question of paying it with or without withholding tax would arise. However the argument before us proceeded on the basis that what mattered, at least for ground 3, was whether FWC would have been entitled to receive interest payments under the loan net of withholding tax under the DTT, which the Judge held it would. This was presumably on the basis that the clause 9(iii) definition identifies a category of permitted assignee which must be fulfilled whether or not interest payments which may attract withholding tax are or are not made or to be made.

71. The purpose of the DTT appears from its recital, expressed as being "for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital gains." As Mr Peacock KC put it, it is designed to

avoid double taxation and double non-taxation. It applies in the case of UK tax to income tax, corporation tax and capital gains tax, and in the case of Japanese tax to income tax, corporation tax, and other identified taxes, and for both States, to any replacement or similar successor tax. Article 11 addresses interest, which by Article 11.3 is defined as income from debt-claims of any kind. Article 11.1 provides that interest arising in a contracting state and beneficially owned by a resident of the other contracting state shall be taxable only in that other contracting state. So for qualifying beneficiaries of the DTT, interest arising in Japan which is beneficially owned by a UK resident is taxable only in the UK, and so if FWC qualified as a beneficiary of the treaty, interest payments under the Loan Agreement would be payable without Japanese withholding tax.

72. Despite the wide wording of Article 11.1, not everyone who is a resident of the other contracting State (here the UK) qualifies for the Article 11.1 tax treatment of interest. A person qualifies for the Article 11.1 treatment if they are either (a) a qualifying resident as defined in Article 22.2; or (b) an exempt resident as defined in Article 22.5; and (c) in either event not disentitled by reason of Article 11.7.

73. FWC did not come within the categories of qualifying residents in Article 22.2. Ground 3 challenges the Judge's determination that it was an exempt resident under Article 22.5. Ground 4 challenges his conclusion that FWC was not disentitled to the Article 11.1 treatment as falling withing Article 11.7.

Ground 3: was FWC an exempt resident under Article 22.5?

74. Article 22.5(a) provides:

> "5. (a) Notwithstanding that a resident of a Contracting State may not be a qualified person, that resident shall be entitled to the benefits granted by the provisions of paragraph 3 of Article 10 or paragraph 1 of Article 11; or of Articles 12, 13 or 21 of this Convention with respect to an item of income, profit or gain described in those paragraphs or Articles derived from the other Contracting State **if the resident is carrying on business in the first-mentioned Contracting State (other than the business of making or managing investments for the resident's own account, unless the business is banking, insurance or securities business carried on by a bank, insurance company or securities dealer),** the income, profits or gains derived from the other Contracting State is derived in connection with, or is incidental to, that business and that resident satisfies any other

> specified conditions in those paragraphs or Articles for the obtaining of such benefits" (my emphasis).

75. I have emphasised in bold the wording which is critical to ground 3. It is common ground that FWC was carrying on business in the UK, and that it was doing so on its own account. VietJet contends that that was the business of 'making or managing investments' for its own account, to which business the interest payments under the Loan Agreement would be connected or incidental, so as to fall outside the exempt resident category. It argues that FWC's activity in taking an assignment of the Loans was that of making investments within the normal and natural meaning of that word.

76. FWA argues that investment has to be more restrictively interpreted in the following way. The DTT contains a non-exhaustive definition of "business" in Article 3.1 as including the performance of professional services and of other activities of an independent character. It contains no definition of investment. However Article 3.2 goes on to provide that where a term is not defined, it shall have the meaning which it has in the Contracting State of tax application, here the UK, unless the context otherwise requires. FWA's argument is that UK tax law draws a distinction between carrying on a trade and making investments, which are mutually exclusive forms of activity; that FWA's business was that of carrying on a trade; and that accordingly it cannot have been one of managing or making investments. The UK tax case law, it argues, explains the inclusion within the parentheses of "banking, insurance or securities business carried on by a bank, insurance company or securities dealer" which is an exempt resident qualification for the Article 11.1 tax treatment.

77. There are two issues which arise:

    (1) What is the proper interpretation of "the business of making or managing investments" within Article 22(5(a)? and

    (2) Did the business which FWC was carrying on at the date of the assignments fall within that phrase on its proper interpretation?

Issue 1: interpretation

78. The correct approach to interpretation of double tax treaties was largely common ground. It was summarised by Falk LJ in *GE Financial Investments v Revenue and Customs Commissioners* [2024] EWCA Civ 797 [2024] STC 1310 at [36]-[44]. She said:

> "[36] There was no dispute as to the general approach to the interpretation of double tax conventions so, for convenience, I will repeat the summary I gave in *Royal Bank of Canada v HMRC* [2023] EWCA Civ 695, [2023] STC 1205:00
>
> > '[23] … Article 31(1) of the Vienna Convention on the Law of Treaties (1969) (the "Vienna Convention") requires a treaty to be:
> >
> > > "… interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."
> >
> > [24] Article 31 also provides that the context extends beyond the treaty itself to certain other sources, including subsequent agreements between the parties in respect of the interpretation of the treaty, subsequent practice that establishes such an agreement and any relevant rules of international law.
> >
> > [25] Article 32 permits recourse to further supplementary means of interpretation in order to confirm the meaning resulting from the application of Article 31, or to determine that meaning when it would otherwise be ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable.
> >
> > [26] As Lord Reed explained in *Anson v HMRC* [2015] UKSC 44, [2015] STC 1777:
> >
> > > "[56] Put shortly, the aim of interpretation of a treaty is therefore to establish, by objective and rational means, the common intention which can be ascribed to the parties. That intention is ascertained by considering the ordinary meaning of the terms of the treaty in their context and in the light of the treaty's object and purpose. Subsequent agreement as to the interpretation of the treaty, and subsequent practice which establishes agreement between the parties, are also to be taken into account, together with any relevant rules of international law which apply in the relations between the parties. Recourse may also be had to a broader range of references in order to confirm the meaning arrived at on that approach, or if that approach leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable."
> >
> > [27] Later in his judgment Lord Reed commented on the fact that the process of interpretation must take account of the fact that what is

being interpreted is an international convention, not a UK statute. He said this:

> "[110] Article 31(1) of the Vienna Convention requires a treaty to be interpreted 'in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. It is accordingly the ordinary (contextual) meaning which is relevant. As Robert Walker J observed at first instance in *Memec* [1996] STC 1336 at 1349, 71 TC 77 at 93, a treaty should be construed in a manner which is 'international, not exclusively English'.
>
> [111] That approach reflects the fact that a treaty is a text agreed upon by negotiation between the contracting governments …"

He went on to emphasise in the same paragraph the courts' predisposition, when faced with "narrow and technical constructions", to favour an interpretation which reflects the "ordinary meaning of the words used and the object" of the treaty.

[28] This echoes the well known passage of Lord Diplock's speech in *Fothergill v Monarch Airlines Ltd* [1981] AC 251, at pp.281–282:

> "The language of an international convention has not been chosen by an English parliamentary draftsman. It is neither couched in the conventional English legislative idiom nor designed to be construed exclusively by English judges. It is addressed to a much wider and more varied judicial audience than is an Act of Parliament that deals with purely domestic law. It should be interpreted, as Lord Wilberforce put it in *James Buchanan & Co. Ltd. v. Babco Forwarding & Shipping (U.K.) Ltd.* [1978] AC 141, 152, 'unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptation'."

[29] The Treaty we are concerned with here, like most bilateral double tax treaties, is based on the OECD Model Tax Convention ("MTC"). As explained by Lord Briggs in *Fowler v HMRC* [2020] UKSC 22, [2021] 1 All ER 97, guidance as to how such a treaty is to be interpreted can also be found in OECD Commentaries on the MTC, which (even where they postdate the treaty in question) should be "given such persuasive force as aids to interpretation as the cogency of their reasoning deserves" (see at [16] and[18], citing Patten LJ's judgment in *Smallwood v HMRC* [2010] EWCA Civ 778, [2010] STC 2045 at [26(5)]; see also Irish Bank, where the 2008 version of the Commentary was considered in interpreting a treaty entered into in 1976).

[37] I would add four points at this stage.

> [38] First, the unilateral opinion or practice of a tax authority is not a relevant aid to interpretation: see *Irish Bank Resolution Corporation Ltd v HMRC* [2020] EWCA Civ 1128, [2020] STC 1946 ('Irish Bank') at [18]–[23].
>
> …
>
> [43] Fourthly, there was some discussion at the hearing about how reference to OECD Commentaries (and indeed to the MTC itself) fits in with the terms of arts 31 and 32 of the Vienna Convention. Given Lord Briggs' guidance in *Fowler* and the fact that there is no controversy that reference is permitted, it is not necessary to determine the extent to which the power to refer to such material is derived from art 31 or 32, or (at least for versions of the OECD Commentary that post-date the relevant treaty) is akin to academic commentaries. However, I note that in relation to later versions of the OECD Commentary Lord Briggs referred in *Fowler* at [18] to the cogency of their reasoning in a similar way to Lord Diplock's reference to the use of academic commentaries in Fothergill v Monarch Airlines, and that the authority that Lord Briggs cited was Smallwood at [26], where Lord Diplock's comment is referred to in a citation from Commerzbank, p 298 at para (5). In other words, those later versions were treated in a similar way to academic commentaries."

79. The Court of Appeal decision in *Royal Bank of Canada v HMRC*, in which Falk LJ first articulated these principles, was subsequently upheld by the Supreme Court ([2025] UKSC 2 [2025]1 WLR 939), in which decision Lady Rose JSC also summarised some of these principles at [27]-[32].

80. In *Czech Republic v Diag Human SE* [2025] EWCA Civ 588 this Court said of the application of the Vienna Convention to a Bilateral Investment Treaty ('BIT') at [154]:

> "154. Accordingly Article 1(1)(c) of the BIT must be interpreted (1) in good faith (2) in accordance with its ordinary meaning (3) in its context, which includes the terms of the BIT as a whole and (4) in the light of the object and purpose of the BIT. However, although we have for ease of exposition broken down the various elements of the interpretation exercise, reflecting some of the submissions made to us, it is important to say that interpretation is "a single combined operation", as the Supreme Court explained in *JTI Polska Sp Z.o.o. v Jakubowski* [2023] UKSC 19, [2024] AC 621:
>
> > "26. Article 31 focuses on seeking to ascertain the ordinary meaning of the relevant terms of the treaty having regard to their context and the object and purpose of the treaty. This is to be done by reference to the text of the treaty and to the material set out in article 31.2 to 31.4, such as its preamble, as a 'single combined operation'.

> 27. As Lord Kerr of Tonaghmore explained in *Moohan v Lord Advocate* [2014] UKSC 67; [2015] AC 901, para 64:
>
> > "It would be wrong to read article 31 as reflecting something like the so-called 'golden rule' of statutory interpretation where one starts with the ordinary meaning of the words and then moves to other considerations only if the ordinary meaning would give rise to absurdity. That is not international law. The International Law Commission made clear in its commentary to the draft treaty, at p 219, that, in accordance with the established international law which these provisions of [the Vienna Convention] codified, such a sequential mode of interpretation was not contemplated: 'The commission, by heading the article 'General rule of interpretation' in the singular and by underlining the connection between paras 1 and 2 and again between para 3 and the two previous paragraphs, intended to indicate that the application of the means of interpretation in the article would be a single combined operation'."

81. The one area of controversy in relation to these principles was as to the extent to which OECD materials can be resorted to where, as here, the relevant provision reflected wording in the OECD Model Tax Convention. VietJet suggested it was limited to OECD Commentaries on the Model Tax Convention and did not include other OECD publications. The Judge referred to one such OECD publication at [257], but it was not something on which Mr Peacock placed any reliance in oral argument, and indeed was not in the materials put before us. In those circumstances I do not need to resolve this controversy in this case.

82. Turning to the rival arguments, those advanced by Mr Thompson KC were based firmly on the language of the word "investments"', and what was suggested to be its natural meaning. What FWC was doing was what, as a matter of natural use of language, would be described as making an investment, and indeed Mr Weinstock giving evidence on behalf of FWA used that term himself to describe it. That, Mr Thompson submitted, ought to be the end of it, although he went on to offer some submissions on the purpose of the provision.

83. The holistic exercise required by the Vienna Convention means that starting with a supposed natural meaning is often not a helpful approach. As Lord Mance said in *Bloomsbury International Ltd v Department for Environment, Food and Rural Affairs* [2011] 1 WLR 1546 at [10] in the context of statutory interpretation:

> "In this area as in the area of contractual construction, "the notion of words having a natural meaning" is not always very helpful (*Charter Reinsurance Co Ltd v Fagan* [1997] AC 313, 391C, per Lord Hoffmann), and certainly not as a starting point, before identifying the legislative purpose and scheme."

84. The correct interpretation of investment in Article 22.5 requires one to search for a coherent scheme for the interpretation of the language of the provision as a whole, and a coherent scheme as to how the object and purpose of the treaty is served by such interpretation. That requires consideration of how it applies not just to interest under Article 11 but also to other forms of receipt to which Article 22.5 applies in conferring exempt residence status, namely those arising under Articles 10.1, 12, 13, and 21. Article 10.3 governs dividends paid by a company. Article 12 governs royalties. Article 13 covers capital gains from the sale of immovable property or the sale of shares, partnership interests or trust interests where their value is 50% or more derived from immovable property. Article 21 is a sweep up provision governing income not dealt with in other Articles, which would cover, for example, income from chattel leasing.

85. Mr Thompson's submissions, when probed, failed to identify any coherent linguistic or purposive scheme for the application of his interpretation, either in relation to interest under Article 11 or in the wider context of the other forms of receipt to which it applies.

86. Mr Thompson's first submission on the purpose of Article 22.5 was that it was to avoid treaty shopping and abuse by parties who were not resident in a DTT state from simply incorporating companies there to take advantage of the treaty. He referred us to the OECD Model Tax Convention on Income and on Capital condensed version 15 July 2005, and in particular Article 1 and the Commentary on Article 1 ('the OECD Commentary'). Under a heading "Improper Use of the Convention" the OECD Commentary at paragraphs 7 to 19 identifies examples or descriptions of such abuses, including the use of conduit companies, and considers different approaches to combatting them by states, both in their domestic law and by different forms of bilateral treaty wordings, with the Commentary suggesting forms of wording which might be suitable for particular abuses. Paragraph 20 then provides:

"20. Whilst the preceding paragraphs identify different approaches to deal with conduit situations, each of them deals with a particular aspect of the problem commonly referred to as "treaty shopping". States wishing to address the issue in a comprehensive way may want to consider the following example of detailed limitation-of-benefits provisions aimed at preventing persons who are not resident of either Contracting States from accessing the benefits of a Convention through the use of an entity that would otherwise qualify as a resident of one of these States, keeping in mind that adaptations may be necessary and that many States prefer other approaches to deal with treaty shopping:

"1. Except as otherwise provided in this Article, a resident of a Contracting State who derives income from the other Contracting State shall be entitled to all the benefits of this Convention otherwise accorded to residents of a Contracting State only if such resident is a "qualified person" as defined in paragraph 2 and meets the other conditions of this Convention for the obtaining of such benefits.

2. A resident of a Contracting State is a qualified person for a fiscal year only if such resident is either:

a) an individual;

b) a qualified governmental entity;

c) a company, if

(i) the principal class of its shares is listed on a recognised stock exchange specified in subparagraph a) or b) of paragraph 6 and is regularly traded on one or more recognized stock exchanges, or

(ii) at least 50 per cent of the aggregate vote and value of the shares in the company is owned directly or indirectly by five or fewer companies entitled to benefits under subdivision i) of this subparagraph, provided that, in the case of indirect ownership, each intermediate owner is a resident of either Contracting State;

d) a charity or other tax-exempt entity, provided that, in the case of a pension trust or any other organization that is established exclusively to provide pension or other similar benefits, more than 50 per cent of the person's beneficiaries, members or participants are individuals resident in either Contracting State; or

e) a person other than an individual, if:

(i) on at least half the days of the fiscal year persons that are qualified persons by reason of subparagraph a), b) or d) or subdivision c) i) of this paragraph own, directly or indirectly, at least 50 per cent of the aggregate vote and value of the shares or other beneficial interests in the person, and

(ii) less than 50 per cent of the person's gross income for the taxable year is paid or accrued, directly or indirectly, to persons who are not residents of either Contracting State in the form of payments that are deductible for purposes of the taxes covered by this Convention in the person's State of residence (but not including arm's length payments in the ordinary course of business for services or tangible property and payments in respect of financial obligations to a bank, provided that where such a bank is not a resident of a Contracting State such payment is attributable to a permanent establishment of that bank located in one of the Contracting States).

3. a) A resident of a Contracting State will be entitled to benefits of the Convention with respect to an item of income, derived from the other State, regardless of whether the resident is a qualified person, if the resident is actively carrying on business in the first-mentioned State (other than the business of making or managing investments for the resident's own account, unless these activities are banking, insurance or securities activities carried on by a bank, insurance company or registered securities dealer), the income derived from the other Contracting State is derived in connection with, or is incidental to, that business and that resident satisfies the other conditions of this Convention for the obtaining of such benefits.

b) If the resident or any of its associated enterprises carries on a business activity in the other Contracting State which gives rise to an item of income, subparagraph a) shall apply to such item only if the business activity in the first-mentioned State is substantial in relation to business carried on in the other State. Whether a business activity is substantial for purposes of this paragraph will be determined based on all the facts and circumstances.

c) In determining whether a person is actively carrying on business in a Contracting State under subparagraph a), activities conducted by a partnership in which that person is a partner and activities conducted by persons connected to such person shall be deemed to be conducted by such person. A person shall be connected to another if one possesses at least 50 per cent of the beneficial interest in the other (or, in the case of a company, at least 50 per cent of the aggregate vote and value of the company's shares) or another person possesses, directly or indirectly, at least 50 per cent of the beneficial interest (or, in the case of a company, at least 50 per cent of the aggregate vote and value of the company's shares) in each person. In any case, a person shall be considered to be connected to another if, based on all the facts and circumstances, one has control of the other or both are under the control of the same person or persons.

4. Notwithstanding the preceding provisions of this Article, if a company that is a resident of a Contracting State, or a company that controls such a company, has outstanding a class of shares

a) which is subject to terms or other arrangements which entitle its holders to a portion of the income of the company derived from the other Contracting State that is larger than the portion such holders would receive

> absent such terms or arrangements ("the disproportionate part of the income"); and
>
> b) 50 per cent or more of the voting power and value of which is owned by persons who are not qualified persons the benefits of this Convention shall not apply to the disproportionate part of the income.
>
> 5. A resident of a Contracting State that is neither a qualified person pursuant to the provisions of paragraph 2 or entitled to benefits under paragraph 3 or 4 shall, nevertheless, be granted benefits of the Convention if the competent authority of that other Contracting State determines that the establishment, acquisition or maintenance of such person and the conduct of its operations did not have as one of its principal purposes the obtaining of benefits under the Convention.
>
> … "

87. The DTT adopts a good deal of this wording although not all of it. In particular paragraph 3 was adopted by Article 22.5. Mr Thompson is right to say that Article 22.5 of the DTT thus owes its origins to a suite of wording suggested by the OECD Commentary as intended to prevent abuse. However, there is nothing in the OECD Commentary which explains what abuse the particular wording with which we are concerned in Article 22.5 of the DTT is aimed at, or how the carve out of making or managing investments in Article 22.5 serves such a purpose. Mr Thompson suggested it did so because those were activities which were easily conducted from a computer screen which a swiftly incorporated company could deploy. Ultimately the rationale he gave for the exclusion in Article 22.5 was that those are the sort of activities which can be done by pressing a button from abroad. This is not a coherent explanation: all sorts of business activities could be conducted by pressing a button from abroad without constituting making or managing investments in any sense but give rise to the kind of income gain or profit covered by Article 22; conversely making and managing investments, however narrowly or widely defined, could be a business activity conducted by very large trading entities resident in a state without any abusive behaviour at all. That does not explain why trading income derived by a resident carrying on business in the UK from investments, in the broad sense contended for by VietJet, should not be exempt from tax in Japan.

88. At one stage, when pressed with particular examples such as antique spoons, land, or paintings, Mr Thompson's argument suggested that what was meant by

investments depended upon the nature of the asset being invested, but that cannot be right and he did not in the end press it. He submitted that the reference to the activities of banks, insurance companies and securities dealers meant that 'investments' was wide enough to cover any activities which those entities might ordinarily carry out. But those entities carry out activities which could not, even on VietJet's widest construction, properly be called an investment, for example issuing a policy of car insurance.

89. Another variant of the purpose of Article 22.5 advanced by Mr Thompson was that it was designed to exclude what he described as 'faux banks'. I do not understand how this is consistent with the meaning he attributed to investments, which in its ordinary and natural meaning would include many assets which typically would be traded by large organisations who are not banks. Are those whose business is trading in shares, bonds or gilts to be treated as faux banks? It is difficult to see why; or indeed why, if that were an apt description, they should be excluded from the class of exempt residents for that reason alone. Moreover this explanation ignores the other forms of income (e.g. royalties) to which Article 22.5 applies.

90. Mr Peacock's submission on behalf of FWA proceeded by application of UK tax law relying on Article 3.2. In summary it was that if a person is carrying on a business which in UK tax law would be carrying on a trade, the same business activity cannot be carrying on a business of making or managing investments, because UK tax law draws a rigid distinction between income from trade activity and income from investment activity. Income from the same activity cannot be from both trade and investment activity. I understood the steps in the argument to be as follows, although the summary doubtless fails to do it full justice.

    (1) The concept of carrying on a business is a very wide one, considered by Falk LJ in *GE Financial Investments* at [127]-[136]. It is wider than carrying on a trade.

    (2) However, a business which is carrying on a trade is a trading business and is taxed as a trading business. The 'badges of trade' are those discussed in *Marson v Morton* [1986] 1 WLR 134 which are regularly applied by the courts.

(3) UK tax law also recognises that a person may carry on investment business: *Cook (Inspector of Taxes) v Medway Housing Society Ltd* [1997] STC 90.

(4) Article 22.5 draws the same distinction between non-investment business (exempt status) and investment business (excluded from exempt status save for banks, insurers and securities dealers). Trading business is, ex hypothesi, non-investment business. It follows that for the purposes of Article 22.5 an entity which is carrying on a trading business cannot be making or managing investments with respect to the same activity.

(5) Since FWC was carrying out a trading business and its relevant activity was trading activity, its business could not fall within the exclusion in the parenthesis of investment business.

(6) The special singling out of banks and insurance companies in Article 22 is explicable by what was said in the House of Lords decision in *Nuclear Electric Plc v Bradley* [1996] 1 WLR 529. The issue was whether the investment income from a sinking fund which a nuclear fuel powered electricity generating company had invested in order to meet future decommissioning costs was a trading receipt. In holding that it was not, Lord Jauncey, giving the leading speech, treated banks and insurance companies whose business required them to make and hold investments to meet current liabilities as those whose investment income would be part of their trading activity (at p. 535B-C).

91. Mr Peacock's argument that it is well established in UK tax law that a particular activity is either a trading or an investment activity, but cannot be both, was disputed by VietJet. The authority on which he relied comprised a passage from the House of Lords decision in *Simmons Properties Ltd (in liquidation) and Others v Commissioners of Inland Revenue* [1980] STC 350 (1980) 53 TC 461 at pp. 352-3, in which Lord Wilberforce said that it is not possible for an asset to be both trading stock and permanent investment at the same time; it must be one or the other. This passage was cited with approval in *Lim Foo Yong Sdn Bhd v Comptroller-General of Inland Revenue* (PC) [1986] STC 255 per Lord Oliver at p. 259; *Kirkham v Williams* (CA) [1991] STC 342 per Nourse LJ at p. 347; and *Ensign Tankers (Leasing) Ltd v Stokes* (HL) [1992] STC 226 per Lord Templeman

at p. 242, This, it was submitted, makes good the proposition about trading and investment activity because whether an asset is a trade asset or an investment asset is resolved by its intended use for trade activity or investment activity.

92. I would accept that this proposition is sound. The point was put clearly by Millett LJ in the Court of Appeal in *Nuclear Electric* [1995] STC 1125 at pp. 1139-40, cited with approval by Lord Jauncey, in the House of Lords upholding the decision, at p.531F:

> "The income from investments held by a trader is prima facie investment income; but it may in certain circumstances be brought into account as a trading receipt. Whether it may or may not be so treated depends on the nature of the trade. What the authorities show is that the nature of the trade must be such that it can fairly be said that the making and holding of the investments at interest is an integral part of the trade."

93. I find Mr Peacock's argument on the interpretation of Article 22.5 persuasive. It gives a coherent construction to the wording of the provision, which accounts for the reference in it to banks, insurance companies and securities dealers.

94. I would also treat it as giving effect to the object and purpose of the DTT in the following way. Returning to the origin of this provision in the wording suggested in paragraph 20 of the OECD Commentary, in the context of preventing abuse, FWA's construction gives effect to that purpose. It prevents a taxpayer from having income which ought to be treated as investment activity income for the purposes of taxation claiming the benefit of the treaty by reference to a place of residence which it can choose simply to achieve that benefit without any economic business activity being undertaken there to earn the income from the investment, and thereby having it treated as trading income. It excludes cases where the carrying on of business at the place of residence is such that the income would be treated not as trading income, but investment income, taxed as such. Where in any individual case the line is to be drawn between investment income and trading income is not a matter of interpretation of the treaty but of its application.

95. Mr Thompson had no convincing answer to Mr Peacock's argument. Essentially he submitted that the position under UK tax law cannot be transposed into Article 22.5, which makes no mention of trading activity. Rather, he argued, it uses very different language. He placed emphasis on the language expressly recognising that

a person can "carry on a business" which consists of "making or managing investments." However FWA's interpretation does not ignore such language: it recognises that there is a category of carrying on investment business on which the exclusion bites, because not all business activity is trading activity. The contrast which is drawn with 'investment' activity, by FWA's interpretation, is not any business activity, but rather trading activity, which is narrower. Ultimately all Mr Thompson's criticisms of Mr Peacock's argument returned to, or were based on, the propositions that the article contemplated that a taxpayer could be carrying on the business of making investments, and that investments should bear its natural meaning. The first is accepted by FWA and accommodated in its interpretation. The second merely asserts what it sets out to prove, and suffers from the absence of any coherent explanation for the language and its purpose.

Issue 2: Was FWC carrying on business making or managing investments?

96. VietJet's argument has at times treated the relevant business activity as managing the fund, but that approach failed properly to distinguish between the FitzWalter companies and to focus on FWC. FWC was not managing the fund. In his oral submissions in support of the appeal Mr Thompson made clear that VietJet's case was that FWC was carrying on the business of doing what it in fact did in relation to these four loans, which was the activity it was specifically incorporated to undertake. That involved taking an assignment of the loans for the purposes of enforcing the security and realising the value of the loans through that process. FWA did not take issue with that characterisation of FWC's business. Both parties treated this as the business activity which fell to be assessed so as to determine whether FWC met the DTT requirement in clause 9(iii) and so to be a permitted assignee.

97. I should mention two matters of relevance to that characterisation.

98. First, FWC's activity, by the time it undertook it, did not involve receiving interest at all, because the loan had been accelerated and the security was to be enforced, without recourse to the Borrower, so that no question would arise under Article 22.5 as to whether FWC was carrying on the business of making or managing investments for the purpose of that clause. However both parties proceeded on the

basis that FWC's actual business activity at the time of the assignment was nevertheless the relevant inquiry for the purposes of determining whether FWC was a permitted assignee under the NEO Loan Agreements.

99. Secondly, in the course of his oral reply, Mr Thompson sought to rely on what he described as a concession by Mr Peacock that the fund was a hedge fund which was carrying out investment activity, and to argue that because the fund was the 100% owner of FWC, that meant FWC was carrying out investment activity by reason of Article 22.5(c) which deals with connected parties. In the light of the fact that this was raised for the first time in oral reply submissions, FWA did not have any opportunity to address argument upon it. It is far from clear to me:

(1) that Mr Peacock was making the concession alleged; or

(2) that the fund was being conducted by an entity which was FWC's 100% parent at the time of the assignment, given that Mr Thompson was simply relying on a chart from 2023; or

(3) that Article 22.5(c) is relevant to FWC's business activity or qualification for DTT exemption, when it seems to be addressed:

(a) to whether a taxpayer who has received an interest payment can be treated as carrying on business in the UK by reference to the business activity of a connected person doing so, whereas the question here is not whether FWC is carrying on business in the UK, which is common ground, but the nature of that business; and

(b) to the place of business of subsidiaries being attributable to their parent in certain circumstances, not vice-versa, which is how it is contended to apply here; or

(4) that this argument is within the ground of appeal.

100. As I say these were points on which we were not addressed because the argument in support of the appeal was put squarely in the appeal submissions on the basis of FWC's own activity. In my view it was far too late to advance the point in oral reply submissions.

101. Having cleared to one side those two points, I return to the ultimate question of whether FWC's activity was making or managing investments within the meaning of Article 22.5(a), which depends upon whether it was conducting trading activity or investment activity. It is to my mind clear that FWC's investment in the loans for the purpose of realising their value through enforcement of the security was part of trading activity, and something which would only produce income as a result of the business activity which FWC was conducting as a UK resident, not by way of a Japanese income stream. Although one paragraph of VietJet's written skeleton argument contended that the Judge was wrong to treat FWC's business as in the nature of a trade, that argument was not pursued orally. I should, nevertheless, briefly address it. The written skeleton criticised the Judge for treating the intention to realise the security as indicative of trading activity contending that it was wrong on two levels. The first relied on the fact that Mr Weinstock of FWC had said in evidence that FWC only sometimes sought to acquire collateral. However, this related to its subsequent investments, and given Mr Thompson's agreement that FWC's business activity is to be judged by what it intended to do, and did, in relation to the four aircraft loans with which this litigation is concerned, the point is a bad one. The second flaw alleged to infect the Judge's conclusion is that whether or not an investor intends to hold an investment to term cannot affect the question of whether it is making or managing investments for the purposes of Article 22.5. However this argument was dependent on VietJet's case on the proper interpretation of Article 22.5 rather than an independent point on the nature of FWC's business activity at the time.

102. For these reasons, which again largely reflect those given by the Judge, I would reject ground 3 of the appeal.

Ground 4

103. Article 11.7 of the DTT provides

> "7. No relief shall be available under this Article if it was the main purpose or one of the main purposes of any person concerned with the creation or assignment of the debt-claim in respect of which the interest is paid to take advantage of this Article by means of that creation or assignment."

104. VietJet's argument is that FWC falls foul of this prohibition because it was deliberately incorporated in England so as to be able to come within clause 9.1(iii) as entitled to the benefit of a double tax treaty. The Judge made no such finding, but VietJet contends that he should have: it is the overwhelming probability given the terms of clause 9.1(iii) and the evidence of Mr Weinstock, a founding partner of FitzWalter, that they took tax advice. Mr Weinstock was the only witness called for FWA. His evidence was that he did not know why FWC had been incorporated in England, but, VietJet argued, there was no obvious reason to choose England as the place of incorporation other than to take advantage of the DTT, and FWA had not called the two relevant people who could speak to the reason for English incorporation, Mr Andrew Gray and Ms Esther Scott, who were still working for FitzWalter in its Mayfair office, such that an adverse inference should be drawn in accordance with the principles confirmed by Lord Leggatt in *Efobi v Royal Mail Group Ltd* [2021] 1 WLR 3863. That meant that FWC's main purpose or one of its main purposes in taking the assignment of the NEO Loans was to take advantage of Article 11 of the DTT.

105. The Judge rejected the argument that Article 11.7 applied for two separate reasons, namely:

(1) Article 11 is concerned with interest, and by the time of the assignment the loans had been accelerated so that there was no prospect of interest being paid under the Loans; and

(2) the fact that FitzWalter sought to structure its affairs in a tax efficient manner did not establish that the "main purpose" requirement was made out, and the Judge was not prepared to draw any adverse inference that evidence from Mr Gray or any other uncalled witness would have established that it was.

106. I do not find it necessary to deal with the arguments addressed by VietJet to that reasoning, nor FWA's responsive arguments, because there are two of FWA's arguments which are fatal to VietJet's reliance on Article 11.7 and which do not depend on it.

107. The first is that "taking advantage" in Article 11.7 does not mean simply taking the benefit of Article 11 of the DTT. It means doing so contrary to the object and

purpose of the treaty. In other words it is an anti-abuse provision. That is clear from the object and purpose of the treaty, and from the OECD Commentary on the Model Convention.

108. As to the object and purpose of the treaty, it is to attribute the right to tax persons in the state of residence or state of source in accordance with its detailed provisions, and, as Mr Peacock put it, to avoid double taxation and non-taxation. Article 11 applies that purpose in respect of debt income. If a taxpayer is "taking advantage of" the Article in the sense which VietJet contends the words bear of simply taking the benefit of Article 11, that would involve it paying tax in the state which Article 11 provides for. If so, to treat Article 11.7 as preventing it from doing so it would be the very opposite of giving effect to the object and purpose of the treaty; it would disapply the treaty and so subvert the allocation of taxing rights and benefits which the contracting States have thereby agreed.

109. If, for example, a parent company has two trading subsidiaries, one in the UK and one in a state without a double tax treaty, and chooses to use the UK subsidiary for a transaction in order that tax is payable on interest in the UK as Article 11 provides for, it would be contrary to the object and purpose of the DTT to interpret Article 11.7 as disapplying the treaty and leaving the taxpayer exposed to double taxation.

110. As to the OECD Commentary, in the section referred to above which addresses particular forms of abuse there is the following passage:

> "9.4 … it is agreed that States do not have to grant the benefits of a double taxation convention where arrangements that constitute an abuse of the provisions of the convention have been entered into.
>
> 9.5 It is important to note, however, that it should not be lightly assumed that a taxpayer is entering into the type of abusive transactions referred to above. A guiding principle is that the benefits of a double taxation convention should not be available where a main purpose for entering into certain transactions or arrangements was to secure a more favourable tax position and obtaining that more favourable treatment in these circumstances would be contrary to the object and purpose of the relevant provisions."

111. At paragraph 21 and following, the Commentary addresses other forms of abuse, still under the rubric of the heading "Improper Use of the Convention". It includes the following:

> "*Anti-abuse rules dealing with source taxation of specific types of income*
>
> 21.4 The following provision has the effect of denying the benefits of specific Articles of the convention that restrict source taxation where transactions have been entered into for the main purpose of obtaining these benefits. The Articles concerned are 10, 11, 12 and 21; the provision should be slightly modified as indicated below to deal with the specific type of income covered by each of these Articles:
>
> "The provisions of this Article shall not apply if it was the main purpose or one of the main purposes of any person concerned with the creation or assignment of the [Article 10: "shares or other rights"; Article 11: "debt-claim"; Articles 12 and 21: "rights"] in respect of which the [Article 10: "dividend"; Article 11: "interest"; Articles 12 "royalties" and Article 21: "income"] is paid to take advantage of this Article by means of that creation or assignment."

112. This is clearly the source for Article 11.7 of the DTT, and is in terms explained as an anti-abuse provision in a section of the Commentary addressed to meeting "Improper use of the Convention". It is therefore to be interpreted as catching and only catching abusive conduct, that is to say taking advantage of Article 11 as a main purpose where that is contrary to the object and purpose of the DTT in its application to the taxpayer.

113. Here there was nothing about FWC being incorporated as an English company to take the assignment of the Loans which constituted an abusive use of Article 11. That is so for two reasons. First, by the time FWC took the assignment the loan had accelerated and there was no question of it receiving interest payments, so that it could not have had as one of its main purposes abusive treatment of such interest under Article 11. This may be what the Judge had in mind as the first reason for rejecting VietJet's argument. Secondly, if any interest had been paid it would have been taxable in the hands of FWC in the UK in accordance with Article 11. Indeed the contrary was not suggested.

114. The second reason why VietJet's reliance on Article 11.7 cannot succeed is that it erroneously focusses on the purpose of incorporating FWC in England, whereas the purpose which Article 11.7 requires to be addressed and fulfilled is the purpose of the taxpayer, here FWC, in taking the assignment. The complaint about incorporation in England is that its main purpose was to achieve contractual status to take the assignment. However Article 11.7 is concerned to prevent a taxpayer

from achieving a favourable tax position from the assignment: the consequence of a main purpose being to take advantage of the article, if established, is that "No relief shall be available under this Article". Achieving a particular contractual status is not achieving a favourable tax position. What matters is the advantage which the taxpayer seeks to achieve by the assignment, not how it has come to be contractually entitled to take the assignment.

115. Lord Wolfson argued that the assignment was to this particular assignee, and its place of incorporation is inseparable from the assignment which it was specifically incorporated to take. This does not meet the point that Article 11.7 is concerned with a tax advantage.

116. For these reasons I would dismiss the appeal on ground 4.

Ground 5

117. Ground 5 is that the Judge made an error of law in attributing to VietJet the conduct of Madame Thao and Dr Phuong in relation to the Shareholder Proceedings which I have described above. It is that:

> "… the Judge erred in law in concluding that the actions of VietJet's founder and its CEO (as the Judge found them to be) in causing the Vietnamese Shareholder Proceedings to be brought was attributable to VietJet. He ought to have concluded that any such actions were undertaken on behalf of Silva Star and the other shareholders in VietJet who were parties to the Shareholder Proceedings, and that there was no basis in English or Vietnamese law for attributing the actions of VietJet's shareholders to VietJet itself."

118. The Judge considered this conduct as part only of his reasoning in concluding that VietJet's claim to relief against forfeiture failed because of its conduct. VietJet has not appealed from that conclusion: it has no appeal that the judge was wrong to dismiss its claim for relief against forfeiture. Ground 5 therefore does not challenge any part of the Judge's order, nor his conclusion on the issue, but merely one aspect of one part of his reasoning in reaching that conclusion. FWA contends that this court has no jurisdiction to hear an appeal against such a challenge or should not exercise it; alternatively that the Judge made no error of law and that the challenge is to a finding of fact which was open to him on the evidence. Mr Thompson argued on behalf of VietJet that this court should address the issue because there was a risk

of prejudice to VietJet if the erroneous finding of law was not corrected. That was because the contempt allegation against VietJet included the conduct in question, and whilst he did not go so far as to suggest that it would give rise to an issue estoppel in the contempt proceedings, he submitted that the judge hearing them might be influenced by the finding.

Jurisdiction

119. In this case our jurisdiction derives from section 16 of the Senior Courts Act 1981 which provides:

> "16.— Appeals from High Court
>
> (1) Subject as otherwise provided by this or any other Act … or as provided by any order made by the Lord Chancellor under section 56(1) of the Access to Justice Act 1999, the Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of the High Court."

120. The Court of Appeal's jurisdiction in appeals from the High Court in the family jurisdiction is governed by section 31K of the Matrimonial and Family Proceedings Act 1984, in which an appeal lies against a "decision". For appeals from the County Court, it is governed by section 77(1) of the County Courts Act 1984 which provides for appeals against a "determination". The jurisprudence on this Court's appellate jurisdiction, including the leading cases of *Lake v Lake* [1955] P 336 and *Cie Noga d'Importation et d'Exportation SA v Australia and New Zealand Banking Group Ltd* [2002] EWCA Civ 1142 [2003] 1 WLR 307, amongst others, has not sought to draw a distinction between "judgments and orders" and "decisions" and "determinations". A "judgment" within the meaning of s. 16 of the Senior Courts Act is a decision or determination, not the document in which reasons are given for that decision or determination. The principle is often expressed as being that an appeal lies against an order not reasons (see, for example, per Jackson LJ in *Bank of Scotland v Johnson* [2013] EWCA Civ 982 at [51]). Whilst that is a slight oversimplification because a decision can be appealed if it has not formally been recorded in an order (see *Noga* at [27]), the distinction between a decision and the reasoning to support it is clear; an appeal lies only against the former. If the decision of the court is one which the losing party does not want to challenge in the result, it is not open to them to seek to appeal a finding as part of the reasoning for that

decision. Two passages from the judgments in *Noga* will suffice. At [27] Waller LJ, with whom Tuckey LJ and Hale LJ agreed on this part of his judgment, said:

> "… *Lake v Lake* properly understood means that if the decision when properly analysed and if it were to be recorded in a formal order would be one that the would be appellant would not be seeking to challenge or vary, then there is no jurisdiction to entertain an appeal. That is in my view consistent with *In re B*. That this is so is not simply by virtue of interpretation of the words "judgment" or "order", but as much to do with the fact that the court only has jurisdiction to entertain "an appeal". A loser in relation to a "judgment" or "order" or "determination" has to be appealing if the court is to have any jurisdiction at all. Thus if the decision of the court on the issue it has to try (or the judgment or order of the court in relation to the issue it has to try) is one which a party does not wish to challenge in the result, it is not open to that party to challenge a finding of fact simply because it is [not] one he or she does not like."
>
> [I have put [not] in square brackets because the sense suggests it is a typographical error]

Hale LJ said at [53]:

> "It is clear that the statutory jurisdiction of the Court of Appeal is to hear appeals from a 'judgment or order' of the High Court or a 'determination' of a county court. It has long been axiomatic that these words refer to the result of the hearing rather than to the reasons given by the judge for reaching that result. Hence I agree with Waller L.J. (para 27, above) that '*Lake v Lake* properly understood means that if the decision when properly analysed and if it were to be recorded in a formal order would be one that the would−be appellant would not be seeking to challenge or vary, then there is no jurisdiction to entertain an appeal.' This ties in neatly with the distinction drawn in the CPR between a cross appeal, in which the respondent is seeking a different or varied result, for which he needs permission, and upholding the decision on other grounds, for which he does not."

121. That is exactly what VietJet is seeking to do by ground 5. It does not seek to appeal the decision that it was not entitled to relief against forfeiture, but wishes to challenge one aspect of the reasoning in reaching that result which it does not like.

122. Mr Thompson argued that this obstacle could be overcome by our exercising what he described as a modest extension of the principle in *In Re W (a Child) (Care Proceedings: Non-Party Appeal)* [2016] EWCA Civ 1140, [2017] 1 WLR 2415.

123. In that case a local authority brought care proceedings in respect of children on the basis of allegations that they had been sexually abused by family members.

Following a fact-finding hearing the judge, in a judgment given in private, rejected the allegations and criticised the actions of the authority, a social worker and a police officer finding amongst other things that the social worker and police officer, with others, had been involved in a joint enterprise to obtain evidence to prove the allegations irrespective of any underlying truth and the relevant professional guidelines; that both had lied to the court with respect to an important aspect of the investigation; and that the local authority and the police generally, but the social worker and the police officer in particular, had subjected the child to a high level of emotional abuse over a sustained period as a result of their professional interaction with her. None of these suggestions had been foreshadowed during the hearing. There was no challenge to the judge's determination dismissing the sexual abuse allegations nor to his order, but the social worker and police officer, neither of whom had been a formal party to the proceedings, together with the local authority, appealed against the judge's adverse and extraneous findings against them on the basis that they had been given no opportunity to know of or meet the criticism during the trial, in breach of their rights under article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR'); and, so far as the social worker and police officer were concerned, that the process was so unfair as to amount to a breach of their rights to respect for their private and family life under article 8 of ECHR.

124. The Court held that the police officer and social worker had standing to appeal; that the Court had jurisdiction; that the conduct of the trial had been in breach of the article 6 and article 8 rights relied on; and that the appropriate relief was that those matters which the judge had found proved against SW, PO and the local authority which were outside the parameters of the issues in the case and were the subject of the appeal were to be set aside as having no further validity and regarded as if they had never been made.

125. For present purposes it is important to focus on how the court reached the conclusion that it had jurisdiction, notwithstanding that there was no challenge to the order made by the judge. McFarlane LJ, with whom Sir James Munby P and Christopher Clarke LJ agreed, addressed the relevant jurisprudence at [45] to [65] recognising the principle expressed by Waller LJ in *Noga* which I have quoted. The

reason he held that the *Noga* principle was not, however, an obstacle to the court assuming jurisdiction in that case was because the judge's findings were themselves a judicial act which engaged article 6 ECHR; and therefore, because they were made in breach of article 6 and article 8, they could be challenged as unlawful under s. 7 of the Human Rights Act 1998 without having to bring them within the description of a "decision" "determination" "order" or "judgment": see [111]-[118].

126. It is immediately apparent that what Mr Thompson is asking us to do is something very different from what was done in *In Re W*. In our case he does not suggest that anything which happened at the liability trial involved a breach of VietJet's rights under the ECHR. However it was only because there had been such a breach in *In Re W* that the court did not need to found its jurisdiction on the statutory footing of s. 31K of the Matrimonial and Family Proceedings Act 1984. By contrast, in this case our jurisdiction to hear an appeal on ground 5 rests squarely and solely on s. 16 Senior Courts Act 1981, and founders on the *Noga* principle, by which we are bound, that there is no appeal from the decision on relief from forfeiture.

127. Mr Thompson sought to get round this difficulty by relying on the quotation by McFarlane LJ at [52] of what Waller LJ had said in *Noga* at [28] immediately after the passage I have quoted above:

> "It is in that context that it might be appropriate for the court at first instance to consider whether some declaration should be granted to provide a "judgment" or "order" or "determination" which could be the subject of an appeal. If for example the findings of fact might be relevant to some other proceedings (and Mr Pollock accepted this), it might be appropriate to make a declaration so as to enable a party to challenge those findings and not find him or herself prejudiced by them. The findings would still be pregnant with legal consequences. It is to go beyond the scope of this judgment to consider precisely what circumstances might allow for the granting of a declaration where findings of fact might affect other proceedings."

128. Mr Thompson argued that the Judge's findings about the Shareholder Proceedings were pregnant with legal consequences because of their potential prejudicial effect in the contempt proceedings.

129. In *In Re W*, McFarlane LJ did not base his decision on submissions by counsel for the local authority that the findings against it were relying on findings which are "pregnant with legal consequences". He said at [118]:

> "It is therefore unnecessary to hold that the *Cie Noga* approach can be engaged in this case because it may be said that the judge's findings are "pregnant with legal consequences" or some such phrase. That factor is relevant, but it is relevant to determining whether or not the individual's article 8 private life rights are engaged and in reviewing the overall proportionality of establishing whether or not there has been a breach of those rights. It is also not necessary to use the rather contrived vehicle of the judge's refusal to grant a declaration in the terms of the adverse findings in order, in some way, to generate an "order" or "judgment" that can be the subject of any appeal."

130. As in *Noga*, and *In Re W*, it is not necessary for the purposes of determining ground 5 in the present appeal to consider precisely what circumstances might allow for the granting of a declaration where findings of fact or law might affect other proceedings. Assuming that there is room for such an approach, it cannot assist VietJet in this case for two reasons. First, the Judge did not make, and was not asked to make any declaration or any other order in relation to his findings about the Shareholder Proceedings. There is therefore no room for what McFarlane LJ described as the rather contrived vehicle of treating the judge's refusal to grant a declaration in the terms of the adverse findings in order, in some way, to generate an "order" or "judgment" that can be the subject of any appeal. The section 16 problem therefore remains unaddressed by this argument and an insuperable obstacle to our having jurisdiction.

131. Secondly, the Judge's findings are not pregnant with legal consequences in the sense used in *Noga*. What is said by VietJet is that they might potentially have an adverse effect in the contempt proceedings if they are sought to be relied on in a way which would be unfair. But it is not said by VietJet that the Judge's findings in relation to the Shareholder Proceedings will give rise to an issue estoppel; and it is to be assumed that the judge conducting the contempt proceedings will do so fairly and so as to avoid any breach by the court of its obligations under article 6 ECHR. There are no *legal* consequences flowing from the Judge's findings at all. Moreover even if there were some risk of unfair use of the findings, such a possibility is sufficiently remote and inchoate that I very much doubt whether it could overcome the jurisdictional threshold in section 16; and if as a matter of jurisdiction it could, it would not be an appropriate case in which to exercise any such jurisdiction.

132. That is sufficient to dispose of ground 5.

Conclusion

133. I would dismiss the appeal on all grounds.

LORD JUSTICE ZACAROLI

134. I agree.

LADY JUSTICE ASPLIN

135. I also agree.