THE HIGH COURT

[2018 No. 297 M.C.A.]

IN THE MATTER OF THE INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT (CAPE TOWN CONVENTION) ACT, 2005

IN THE MATTER OF THE CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT

AND

IN THE MATTER OF THE PROTOCOL TO THE CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT IN MATTERS SPECIFIC TO AIRCRAFT EQUIPMENT

BETWEEN

UNICREDIT GLOBAL LEASING EXPORT GMBH

APPLICANT

AND

BUSINESS AVIATION LIMITED AND AVIARETO LIMITED

RESPONDENTS

JUDGMENT of Mr. Justice Denis McDonald delivered on 6 March, 2019.

Introduction

1. These proceedings relate to the International Registry for International Interests in Mobile Equipment ("the Registry") established under Article 16 of the Cape Town Convention (i.e. the Convention on International Interests in Mobile Equipment done at Cape Town on 16th November, 2001) and the Aircraft Protocol (i.e. the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment).

2. The Registry is maintained by the second named respondent ("the Registrar") in Dublin. The Registrar was appointed by the International Civil Aviation Organisation ("*ICAO*") to operate the Registry pursuant to Article 17(5) of the Cape Town Convention.

3. As explained in para. 4 of the affidavit of Robert Cowan sworn on 15th November, 2018, the Registry is at the centre of the Cape Town Convention and Aircraft Protocol priority system which operates on an internet or web-based worldwide platform accessible 24 hours a day. It provides for the electronic registration and the protection of registered interests which are recognised by all States which have ratified or acceded to the Convention and the Protocol, with priority being determined on a "*first-to-file*" basis. Registration of an interest in an aircraft object serves as a notification to the world of that interest. Registered interests will have priority over unregistered interests. Registration is considered to be an essential step for owners, creditors, lessors and others in protecting their financial interest in aircraft objects. The registration system established under Convention and the Protocol thus serves a very important function ensuring legal predictability in cross border financing and leasing transactions involving aircraft.

4. It is important to note that it is not part of the Registrar's function to verify or validate any specific registration made. The Registrar has a purely administrative function. The Cape Town Convention and Aircraft Protocol priority system is essentially premised upon the *bona fides* of those undertaking registrations.

5. It is also important to note that the registration system established under the Convention and Protocol is, for the most part, concerned with consensual rights and interests arising under security agreements, title reservation agreements, leasing agreements and (through the Protocol) outright sales. Such registrations are effected consensually with the input of the parties to the underlying transaction. These proceedings are not concerned with rights and interests of this kind.

6. These proceedings concern rights or interests which can be registered unilaterally. This is provided for in Chapter X of the Convention. These are known as registrable non-consensual rights or interests ("RNCRIs"). It is for each Contracting State to declare the categories of RNCRIs that may be registrable. This is done pursuant to a declaration to that effect which is deposited by the relevant Contracting State under the provisions of Article 40. Professor Goode in the Official Commentary on the Convention (3rd ed., July 2013, at para. 4.282) explains that Article 40:

> *"enables a Contracting State to extend the application of the Convention so as to allow designated categories of non-consensual rights or interests to be registered as if they were international interests".*

7. Professor Goode further explains (at para. 2.219) that Article 40 declarations typically cover:

> *"judgments or orders permitting attachment of equipment covered by the Protocol and State liens for taxes or unpaid charges".*

8. The Convention and the Protocol have been given the force of law in Ireland by s. 4 of the International Interests in Mobile Equipment (Cape Town Convention) Act, 2005 ("the 2005 Act"). Under s. 8 of the 2005 Act, all courts and tribunals are required to take judicial notice of the provisions of both the Convention and the Protocol. In addition, s. 3(5) provides that, in interpreting the Convention and the Protocol, the court is entitled to have recourse to the Official Commentary by Professor Goode together with such other texts as the court considers relevant.

9. Under s. 7 of the 2005 Act, the High Court is the relevant court for the purposes of both the Cape Town Convention and the Aircraft Protocol. In fact, as a consequence of the provisions of Article 44.1 of the Convention, the High Court has exclusive jurisdiction to make orders against the Registrar. In this context, article 44.1 provides that the courts of the place in which the Registrar has its centre of administration shall have exclusive jurisdiction to award damages or make orders against the Registrar.

The application before the court

10. The applicant in these proceedings ("*UniCredit*") seeks an order removing three RCNRIs from the registry which have been registered by the first named respondent ("*BAL*"). These registrations (which were effected on 9 March, 2018) relate to an aircraft owned by UniCredit namely a Bombardier Challenger 850 aircraft (manufacturer's serial number 8065) ("*the aircraft*") together with its two General Electric engines ("*the engines*"). The purported RNCRIs in question rely on the declaration made by the United Arab

Emirates ("*UAE*") in accordance with Article 40 of the Convention.

11. In its originating notice of motion, UniCredit has sought an order directing BAL to forthwith procure the discharge of the registrations (which have been assigned International Registry file numbers 1491816, 1491817 and 1491818 respectively). UniCredit has also sought an order pursuant to Article 44(1) and/or Article 44(3) of the Convention requiring the Registrar to discharge the registrations in question in the event that BAL fails to procure their discharge within 48 hours after the making of the order against it.

12. The application by UniCredit was heard by me on Tuesday 19th February, 2019. At that hearing, I heard submissions from counsel on behalf of UniCredit and on behalf of the Registrar. There was no attendance on behalf of BAL. I should explain that, until recently, BAL was represented by McCann Fitzgerald solicitors. A number of affidavits were filed on behalf of BAL while McCann Fitzgerald continued to act on its behalf. However, on 18 January, 2019, McCann Fitzgerald made an application to Haughton J. for leave to bring an application, under O. 7. R. 3 of the Superior Court Rules, for an order that they had ceased to act as solicitors for BAL. The application was made on the basis that McCann Fitzgerald had been unable to obtain instructions from BAL. Haughton J. directed that the application be served on BAL by email. Subsequently, Haughton J. heard the substantive application by McCann Fitzgerald on 21 January, 2019. On that day, having considered the evidence tendered by McCann Fitzgerald, he made a declaration that McCann Fitzgerald have ceased to act as solicitors for BAL.

13. When the matter came on for hearing before me on 19 February, 2019 an affidavit was produced to the court demonstrating that BAL had been made aware of the hearing by email in a similar manner to the O. 7. R. 3 application and also by post. However, there was no attendance in court on behalf of BAL.

14. At the conclusion of the hearing on 19th February, 2019, I indicated that I was satisfied that it was appropriate that orders should be made in the terms summarised in para. 11 above. In taking that course, I was mindful of the importance that applications of this kind should be dealt with as speedily as possible. As counsel for the Registrar emphasised in her submissions, this is reflected by the way in which O. 81A of the Rules of the Superior Courts provides that the application is to be made by an originating notice of motion. This form of procedure ensures that the matter will be listed before the court at the earliest possible time. The concern that such proceedings should be determined swiftly is also reflected in the way in which O. 81A expressly interacts with O. 63A providing that proceedings of this kind may be entered in the Commercial List where they will be given appropriate priority.

15. In taking this course, I was also conscious of the observations of O'Malley J. in *Belair Holdings Ltd v. Etole Holdings Ltd* [2015] IEHC 569 where she emphasised the importance of ensuring that misleading registrations should be removed from the registry. The integrity of the registry is of fundamental importance. Interested parties should be able to rely on the register as an accurate reflection of the registrable rights or interests affecting an aircraft. It is, therefore, essential that misleading registrations should be removed at the earliest possible time.

16. On 19 February, 2019, I indicated that I would give my reasons for my decision at a later time. This judgment now sets out the reasons why I was satisfied to make the orders in question.

17. This judgment also deals with the additional relief sought by UniCredit namely an order that BAL, its servants, officers or agents (including but not limited to Mr Abed el Jaouni and Mr Martin Spiegl) should be restrained from making any further registrations against the aircraft and the engines.

18. On 19 February, 2019 it was also agreed that the claim made by UniCredit for damages against BAL and costs should be adjourned until after this judgment has been delivered.

Relevant facts

19. Before addressing the legal issues that arise, it is important to identify the relevant factual background against which the legal issues fall to be considered.

20. On the basis of the affidavit evidence before the court, there is no dispute between the parties that the aircraft is registered in Germany (with UniCredit registered as the relevant owner). It is registered on the aircraft registry at the Luftfahrt-Bundesamt, the German Federal Office of Civil Aviation ("*LBA*").

21. On 23 February, 2009 UniCredit entered into an Aircraft Finance Lease Agreement with Phoenix XX (Twenty) Aviation Management GmbH ("*Phoenix*") under which it agreed to lease the aircraft to Phoenix for a term of 60 months commencing in May 2009 ("*the aircraft lease*"). Phoenix is a company incorporated in Austria having its registered office in Vienna.

22. In turn, Phoenix, appointed ImperialJet Europe GmbH ("*ImperialJet*") as the operator of the aircraft by way of an aircraft operating lease agreement. Imperial is a company incorporated in Germany and is based in Munich Airport business park. There is no contractual relationship between UniCredit and ImperialJet.

23. Clause XXIII of the Aircraft Lease provided for a put option exercisable by the lessor which entitled UniCredit to require Phoenix to purchase the aircraft at the end of the lease period ("the Put Option"). At the end of the lease period, UniCredit, by letter dated 13 November, 2014 exercised the Put Option and informed Phoenix that the put option price would be US $14,386,155.

24. Phoenix failed to pay the Put Option price. Following negotiation, on 26 January, 2015, UniCredit and Phoenix entered into a Debt Deferral Agreement under which it was agreed that the Put Option price would be paid over a 24 month period with US $10.5 million payable at the end of the 24 month deferral period.

25. Phoenix failed to comply with its obligations under the Debt Deferral Agreement. By letter dated 9 May, 2017, UniCredit declared that the entire Put Option price was due and payable pursuant to Article 4 of the Debt Deferral Agreement and demanded payment of the sum of US $11,595,859.68. The deadline for payment was 31 May, 2017.

26. Subsequently, by letter dated 24 May, 2017, UniCredit declared the termination of the Debt Deferral Agreement and the Aircraft Lease effective as of 1 June, 2017 unless all of the sums due and owing were paid in full by 31 May, 2017. The letter further indicated that UniCredit was willing to consider any firm proposals made by Phoenix to prolong the business relationship between the parties.

27. On 12 June, 2017, UniCredit offered a prolongation of the credit period, subject to an immediate down payment and other conditions. After further negotiations between Phoenix and UniCredit, this offer was superceded by a second prolongation agreement offer issued on 16 August, 2017 and subject to an addendum of the same date (collectively "*the PAO*"). Under the terms of the PAO it was agreed that part of the outstanding Put Option price (US €7,250,000) would be deferred and would not become payable until 31

March, 2020 by Phoenix. The balance of the price was to be paid by way of a down payment of US $1,035,522.34 together with three additional payments payable annually and 34 monthly instalments payable from 30 June, 2017.

28. The PAO did not require Phoenix to accept its terms in writing. Instead, Clause 14 of the PAO provided that acceptance of its terms would be effected by performance - namely by means of the transfer of the down payment of US$1,035,522.34 not later than ten business days after receipt of the PAO. The PAO provides that it is governed by Austrian law.

29. On 14 August, 2017 ImperialJet paid, by means of a bank transfer, the sum of US $1,035,522.34. While there is a dispute on the affidavit evidence before the court as to the basis of this payment, the remittance information provided in the text of the transfer order is in the following terms:

> *"Down payment for Phoenix XX – prolongation offer 14.08.2017*
>
> *Unter vorbehalt".*

30. UniCredit says that this payment was (as the terms of the transfer order very clearly suggest) the down payment contemplated by the PAO. In contrast, the case made on affidavit on behalf of BAL is that the payment (which, it is contended, was funded by BAL) was for the purpose of ensuring the continuation of negotiations between UniCredit and Phoenix. In the affidavit of Mr Abed el Jaouni sworn on behalf of BAL on 28 August, 2018 (at a time when McCann Fitzgerald were still acting for BAL) Mr. el Jaouni says in para. 23:

> *"The payment had been made by BAL to ImperialJet as a loan and in good faith with the sole purpose of ensuring the continuation of the negotiations between the applicant and the Phoenix…so as to arrive at a new shareholding or new structure, with the understood intent of a continuation of the operating lease to ImperialJet".*

31. Mr. el Jaouni also says that the statement in the transfer order that the payment was made "*unter Vorbehalt*" means that it was made under protest which he says has a particular meaning in German law. This translation of the expression "*unter Vorbehalt*" is disputed by UniCredit. The literal translation of "*unter Vorbehalt*" is "*under reservation*". The expert evidence of Professor Von Bodungen (discussed further below) suggests that, ordinarily, a reservation of this kind will have the effect, under German law, of preserving a debtor's right to claim restitution in the event that the debtor subsequently succeeds in establishing a basis for such a claim. Absent such a reservation, an unqualified payment will extinguish any restitutionary claim that the debtor might wish to make. According to the expert evidence of Professor Kodek (also discussed further below) the position is similar under Austrian law.

32. In his affidavit, Mr. el Jaouni contends that the making of a good faith payment was agreed between Mr. George Murnane the chief executive officer of the ImperialJet group and Mr. Andreas Schild, the head of business aviation and helicopter financing of UniCredit. However, Mr. Murnane has not sworn any affidavit in these proceedings. An application of this kind is not an interlocutory application and, accordingly, hearsay evidence is not admissible in relation to an issue of contested fact. Moreover, Mr. Schild has sworn an affidavit on behalf of the UniCredit on 25th October, 2018 in which he explains that he was the leader of the UniCredit negotiation team. Mr. Schild explains that Mr. Murnane was part of the lessee negotiation team, even though ImperialJet had no contractual relationship with UniCredit. Mr. Schild says that ImperialJet effectively led the negotiations on behalf of Phoenix. ImperialJet was invited to become a party to any new PAO but declined to do so. In para. 4 of his affidavit Mr. Schild says:

> *"There was never any doubt between Mr. Murnane and I that the payment of the Down Payment would be anything other than to settle outstanding debts on behalf of Phoenix….The payment was not to secure any future obligations. This was unequivocal."*

33. In circumstances where Mr. Murnane has not sworn any affidavit in these proceedings, and in circumstances where Mr. el Jaouni is not in a positon to give direct evidence about the negotiations in relation to the PAO, I accept the evidence on affidavit given by Mr. Schild. It is the only direct evidence I have as to what transpired during these negotiations. Furthermore, the evidence is supported by the terms of the bank transfer itself. As the language quoted above makes very plain, the payment was made expressly as a down payment on behalf of Phoenix in respect of the prolongation offer of 14 August, 2017. The fact that the payment emanated from ImperialJet rather than from Phoenix does not alter this conclusion. As Mr. Schild explains in para. 6 of his affidavit, it was the normal course of business, throughout the previous seven year period, that UniCredit received payments directly from a bank account of ImperialJet or one of its affiliates.

34. Notwithstanding the making of the payment on 17 August, 2017, Phoenix did not fulfil all of the conditions precedent pursuant to clause 5 of the PAO. In particular, the periodic maintenance payments were not made. By letter dated 25 October, 2017, UniCredit sent a termination notice to Phoenix in which it called on Phoenix to either fulfil its obligations under the PAO and pay all of the instalments and further down payments due or return the aircraft by 30 October, 2017.

35. The aircraft lease was subsequently terminated. On 5 March, 2018 the aircraft was flown to Stuttgart where UniCredit took possession of it. Thereafter UniCredit appointed a new operator of the aircraft in place of ImperialJet. On 9 March, 2018 UniCredit demanded that ImperialJet deliver up the log books and other documentation relating to the aircraft. Ultimately, it became necessary for UniCredit to commence proceedings in Germany against ImperialJet to secure delivery of the aircraft documentation.

36. In the meantime, on 9 March, 2018, BAL registered the RNCRIs in issue. An RNCRI was registered as against the aircraft and as against each of the engines. In the registration in respect of the aircraft it is expressly stated that the State Registry of the aircraft is the UAE. Each registration identifies the category of RNCRI as:

> *"All other non-consensual rights or interests which under the law of the United Arab Emirates could have priority over the rights of secured creditors".*

37. At this point, I should explain that, in his first affidavit, Mr el Jaouni says that BAL and ImperialJet are part of the Imperial group and that he is the sole shareholder of both ImperialJet and BAL. In his second affidavit, he says that the agreement between BAL and ImperialJet (under which BAL funded the payment made to UniCredit) was concluded orally. It appears to be the case that BAL is also asserting that it has now succeeded to ImperialJet's restitutionary claim as assignee of that claim although there is no evidence in writing of any such assignment.

38. On 18 April, 2018, UniCredit wrote to BAL demanding that the registrations be removed. When no satisfactory response was received from BAL, the present proceedings were commenced on 23 July, 2018. Extensive affidavits have been exchanged between the parties including affidavits as to experts in the laws of Austria, Germany, and the UAE. This exchange of affidavits has,

regrettably, delayed the resolution of these proceedings to an unusual degree. At a later point in this judgment, it will be necessary to have regard, in more detail, to what is said in those affidavits.

The case made by UniCredit for removal of the registrations
39. Broadly speaking, there are three principal grounds on which UniCredit contests the validity of the registrations:

> (a) In the first place, UniCredit contends that the Convention does not apply at all. In making this case, UniCredit submits that it is clear that there is no connecting factor with the Convention. In such circumstances, UniCredit contends that the registrations must be set aside;
>
> (b) Entirely without prejudice to the argument summarised at (a) above, UniCredit submits that the claim asserted by BAL does not fall within any of the categories of RNCRI the subject of the UAE declaration under Article 40 of the Convention;
>
> (c) Prior to submitting its registrations, BAL did not obtain an Authorising Entry Point ("*AEP*") Code.

40. I now consider each of these grounds in turn.

Connecting factors
41. There are two factors which will attract the application of the Convention – namely where the relevant "*debtor*" is in a Contracting State to the Convention or where the relevant aircraft is registered in a Contracting State.

42. Thus, in the present case, unless the *"debtor"* (as defined in the Convention) is situated in a Contracting State or unless the aircraft is registered in a Contracting State, the Convention does not apply.

43. In so far as "*debtors*" are concerned, the sphere of application of the Convention is very clearly stated in Article 3 (1) which is the following terms:

> *"This Convention applies when, at the time of the conclusion of the agreement creating or providing for the international interest, the debtor is situated in a Contracting State."*

44. For completeness, it should be noted that, under Article 3(2), the fact that the creditor happens to be situated in a non-Contracting State does not affect the applicability of the Convention. Subject to what I say below in relation to the place of registration of an aircraft, the applicability of the Convention therefore depends on the situation of the debtor. For this purpose, a *"debtor"* is defined in Article 1(a) as meaning:

> *"a chargor under a security agreement, a conditional buyer under a title reservation agreement, a lessee under a leasing agreement* or a person whose interest in an object is burdened by a registrable non-consensual right or interest (emphasis added)."

45. It follows from the definition of *"debtor"* as set out Article 1(a) that UniCredit is the relevant debtor for the purposes of the Convention since it is the person whose interest in the aircraft and engines is burdened by the RNCRIs claimed.

46. In turn, it follows that, in order to determine whether the Convention applies, it is necessary to consider where UniCredit is "*situated*" for the purpose of the Convention. Article 4 of the Convention sets out the criteria to determine that question. Article 4 provides as follows:

> *"1. For the purposes of Article 3(1), the debtor is situated in any Contracting State:*
>
> *(a) under the law of which it is incorporated or formed;*
>
> *(b) where it has its registered office or statutory seat;*
>
> *(c) where it has its centre of administration; or*
>
> *(d) where it has its place of business.*
>
> *2. A reference in sub-paragraph (d) of the preceding paragraph to the debtor's place of business shall, if it has more than one place of business, mean its principal place of business or, if it has no place of business, its habitual residence."*

47. On the evidence before the court, it is very clear that UniCredit is situated in Austria for the purposes of the Convention. UniCredit was incorporated in Austria. It also has its registered office in Austria at Rotschildplatz 41020 Vienna. Having regard to Article 4.1(a) and (b), UniCredit is therefore situated in Austria. Based on the evidence before the court, it also appears to have its centre of administration there. In this context, I note that Mr. Stefan Greutter, the special accounts manager of UniCredit, and Mr Andreas Schild, the head of business aviation and helicopter financing of UniCredit, (who have both made affidavits on behalf of UniCredit) have given, as their address, the UniCredit registered office. This strongly suggests that UniCredit also has its centre of administration in Vienna. However, it is unnecessary to make a determination to that effect. It is clear that UniCredit is situated in Austria based on the criteria set out in paras. (a) and (b) of Article 4(1). Furthermore, no suggestion is made in any of the affidavits delivered on behalf of BAL that, for the purposes of the Convention, UniCredit is situated elsewhere than Austria.

48. In circumstances where Austria is not a Contracting State to the Convention, the Convention cannot apply to the interests claimed by BAL against the aircraft and the engines unless there is some other basis on which the Convention could be said to apply.

49. The only other conceivable basis on which it might be suggested that the Convention applies is that the aircraft is registered in a Contracting State. In this context, Article IV of the Protocol extends the sphere of application of the Convention to a helicopter or to an airframe pertaining to an aircraft which is registered in an aircraft register of a Contracting State. Article IV, insofar as relevant, provides as follows:

> *"1. Without prejudice to Article 3(1) of the Convention, the Convention shall also apply in relation to a helicopter, or to an airframe pertaining to an aircraft, registered in an aircraft register of a Contracting State which is the State of registry, …".*

50. It will be recalled that, when submitting its registrations against the aircraft in March 2018, BAL purported to state that the aircraft is registered in the UAE. That is manifestly not correct. On the evidence before the court, it is clear that the aircraft is registered in Germany. As stated in para. 20 above, the aircraft is registered on the register of aircraft maintained by the LBA in Germany. The certificate of registration is dated 26th February, 2010. That certificate was not questioned at any stage in any of the affidavits filed on behalf of BAL in these proceedings. Crucially, Germany is not a Contracting State.

51. In these circumstances, there is plainly no connecting factor to the Convention in existence. There is nothing in the terms of the Convention or the Protocol that would permit the Convention to be invoked against the aircraft. On this basis alone, it is clear that there was no foundation under the Convention or under the Protocol for the registrations effected by BAL in March 2018 as against the aircraft and its engines.

52. As the decision of O'Malley J. in *Belair Holdings v. Etole Holdings Ltd* [2015] IEHC 569 demonstrates, it is not necessary to go any further. The non-applicability of the Convention is a sufficient ground, in itself, to order BAL to remove or discharge the registrations in question.

53. Nonetheless, for completeness, I consider below the remaining issues debated in the course of the hearing before me on 19 February, 2019. In my view, it is desirable that these issues should be determined particularly in circumstances where UniCredit not only seeks an order requiring BAL to remove the registrations but also seeks an order restraining BAL, its servants or agents, from effecting any further registrations in relation to the aircraft and engines.

The Article 40 declaration

54. As explained in para. 6 above, it is for each Contracting State to the Convention to declare the categories of RNCRIs that may be registerable. In the case of the UAE, it has made a declaration under Article 40 in respect of the following categories of non-consensual rights or interests:

> *"(a) rights of a person obtaining a court order permitting attachment of an aircraft object in partial or full satisfaction of a legal judgement;*
>
> *(b) liens in favour of workers for unpaid wages arising prior to the time of a declared default under a contract to finance or lease the subject object;*
>
> *(c) liens or other rights of a state entity relating to taxes or other unpaid charges arising*
>
> *(d) all other nonconsensual rights or interests which under the law of the United Arab Emirates could have priority over the rights of secured creditors".*

55. It is crucially important to bear in mind that if a registrant is to seek to rely on the UAE declaration, it must establish that, under the laws of the UAE, it holds an interest that falls within the scope of that declaration. In this context, the Legal Advisory Panel of the Aviation Working Group have stated in the "*Practitioners' Guide*" (September 2015) at pp 73 – 74:

> *"In order to be a registrable non-consensual right or interest – thus subjecting that type of interest to the Convention's registry system and priorities – the underlying interest must arise under the laws of a Contracting State that has made an election under Article 40 of the Convention. To date very few types of interest have been addressed in this fashion by Contracting States other than judgment liens and tax liens. So the nature of registrable non-consensual interests today is reasonably narrow. Once a Contracting State establishes a category of interest as a registrable non-consensual right or interest, registration is required in order for the interest to establish its priority as against other registrable interests.*
>
> *In contrast, many forms of non-consensual interests may arise under national law that are not made subject to an Article 40 declaration, and all of these would be non-Convention interests. Any registration of such an interest is invalid for all purposes of the Convention….Such a registration misleads third parties (including the affected debtor) as to the nature of the underlying right or interest, as well as its priority and effect. The registration is misleading as to its nature because the information reflected on a priority search certificate will imply that the underlying right or interest is within one of the categories listed by the relevant …Article 40 declaration, when it is not…."*

56. It is therefore necessary to consider whether the claim made by BAL for repayment of US$1,035,522.84 could be said to be a claim capable of registration under the Article 40 declaration made by the UAE. Before attempting to analyse the claim which has been made, it is important to keep in mind that the rights or interests capable of being registered under an Article 40 declaration do not extend to purely *in personam* claims. Professor Goode explains the position as follows, in para. 4.25 of the Official Commentary:

> *"'Non-consensual right or interest' – this definition is confined to non-consensual rights or interests falling within Article 39 and therefore having priority without registration if covered by a Contracting State's declaration ….A registrable non-consensual right or interest falls within Article 40, where it has a somewhat broader meaning and could, for example, cover a judgment or order. A non-consensual right or interest is one created by law and is to be contrasted with a right or interest created by agreement of the parties, which falls outside the definition even if entry into the agreement requires approval of the court, as may be the case where the debtor is a debtor in possession in insolvency proceedings. 'Interest' denotes a right in rem, whereas 'right' is a broader term capable of embracing a purely ad rem personal right enforceable by recourse to the object, e.g. a right of seizure, detention or sale given by law or a right of recourse by way of execution of a judgment or order of a court.* Excluded from the definition are purely personal contractual rights not constituting interests in an object and these are outside the Convention altogether, *though Article 39(1)(b) enables a Contracting State to make a declaration that nothing is to affect rights of arrest or detention of an object, whether contractual or given by law, for payment of amounts owed to a provider of public services directly relating to those services in respect of that object or another object*". (emphasis added)

57. In order to determine the nature of the claim made by BAL (or ImperialJet), and in particular determine whether the claim is purely *in personam* in nature, it is essential to identify the applicable law governing the claim. Article 5 of the Convention provides for a cascade system in respect of choice of law:

> (a) Where a question is governed by the express provisions of the Convention, those provisions displace any national law and must be given an autonomous interpretation. (See the Official Commentary at para. 2.18):
>
> (b) If the question under consideration is not governed by the express provisions of the Convention, it is to be settled in

conformity with the general principles on which the Convention is based;

(c) Where a question relating to matters governed by the Convention cannot be determined either from its express provisions or in conformity with the general principles on which it is based, it is legitimate to resort to the applicable law. (See the Official Commentary at para. 2.22).

58. For completeness, it should be noted that Article VII of the Protocol provides that, subject to a declaration by a Contracting State, the parties are free to choose the law governing their relations.

59. In the present case, the nature of the interest or right claimed by BAL (or ImperialJet) is not governed by the Convention. Nor are there any general principles derived from the Convention which can be applied. In these circumstances, it is necessary to identify the applicable law by reference to which the nature of the interest or right is to be determined. For this purpose, Article 5(3) of the Convention provides that the applicable law is to be determined by reference to the rules of private international law of the forum State (in this case Ireland).

60. As Ireland is a member state of the EU, I am required to apply the conflict rules contained in Regulation (EC) No. 593/2008 on the law applicable to contractual obligations ("*Rome I*") and Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations ("*Rome II*").

61. In the affidavits which have been sworn on behalf of BAL, no attempt has been made to characterise the nature of the claim which BAL or ImperialJet can be said to have against UniCredit. On the basis of those affidavits, there is no sufficient evidence before the court to establish that there was a contract between either Imperial Jet or BAL and UniCredit. In circumstances where there is no contractual relationship with UniCredit, I agree with the submission made by counsel for UniCredit that the claim is properly characterised as a claim for unjust enrichment. The applicable law in a claim for unjust enrichment is governed by Article 10 of Rome II which provides as follows:

> *"1. If a non-contractual obligation arising out of unjust enrichment, including payment of amounts wrongly received, concerns a relationship existing between the parties, such as one arising out of a contract or a tort/delict, that is closely connected with that unjust enrichment, it shall be governed by the law that governs that relationship.*
>
> *2. Where the law applicable cannot be determined on the basis of paragraph 1 and the parties have their habitual residence in the same country when the event giving rise to unjust enrichment occurs, the law of that country shall apply.*
>
> *3. Where the law applicable cannot be determined on the basis of paragraphs 1 or 2, it shall be the law of the country in which the unjust enrichment took place.*
>
> *4. Where it is clear from all the circumstances of the case that the non-contractual obligation arising out of unjust enrichment is manifestly more closely connected with a country other than that indicated in paragraphs 1, 2 and 3, the law of that other country shall apply."*

62. I believe it would be unsafe to rely on Article 10.1. While UniCredit maintains that the down payment concerns the PAO, this is disputed by Imperial. I therefore do not believe that it would be appropriate to apply Article 10.1.

63. Article 10.2 is also not applicable in circumstances where UniCredit is an Austrian company, ImperialJet is a German company and BAL is based in the UAE.

64. In circumstances where neither Article 10.1 nor Article 10.2 can be said to apply, Article 10.3 points to the law of the country in which the unjust enrichment took place. On the undisputed facts, the money was received by UniCredit in Austria. Article 10.3 thus strongly suggests that Austrian law should apply unless the circumstances demonstrate that there is some other country which is manifestly more closely connected with the claim, in which case Article 10.4 would trump the application of Article 10.3.

65. Having regard to all of the circumstances of the case, I can see no basis on which it could plausibly be suggested that there is some country other than Austria which is "*manifestly more closely connected*" to the non-contractual obligation in issue. This is particularly so in circumstances where UniCredit and Phoenix are both Austrian companies and where the lease, the Debt Deferral Agreement and the PAO are all governed by Austrian law.

66. I am accordingly of the view that Austrian law applies pursuant to Article 10.3 of Rome II. Having regard to Article 15.2 of Rome II, Austrian law will also govern the assignability of any claim by ImperialJet to BAL.

67. For completeness, I should also address the appropriate applicable law in the event that it could be said that the relationship between ImperialJet or BAL and UniCredit is governed by contract. In doing so, I am conscious that, insofar as it is claimed that there was some form of agreement between ImperialJet and UniCredit, this is vigorously disputed by UniCredit. I have earlier drawn attention to the fact that there is no direct evidence to support the existence of any such contract and that the only direct evidence is to the contrary. In addressing Rome I, I do not wish to imply that UniCredit is in any way mistaken in suggesting that there is no contract in place between it and Imperial or BAL. I am of the view, on the evidence, that no such contract exists. Lest it could be said that I am wrong in that view, I will address the issue, for completeness, on the assumption that such a contract could be said to exist.

68. There can be no doubt that Austrian law governs the lease, the Debt Deferral Agreement and the PAO. Article 3 of Rome I recognizes the freedom of parties to choose the applicable law. In the case of each of these contractual documents, they are expressly governed by Austrian law.

69. To the extent that it is alleged that there is some form of agreement between ImperialJet and UniCredit or between BAL and UniCredit, separate from the PAO, the applicable law falls to be determined in accordance with Article 4 of Rome I. Article 4 sets out the approach to be adopted to the extent that the law applicable to the contract has not been chosen by the parties. Article 4.1 deals with eight specific species of contract, none of which is relevant for present purposes. Article 4 then continues as follows:

> *"2. Where the contract is not covered by paragraph 1 or where the elements of the contract would be covered by more than one of points (a) to (h) of paragraph 1, the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.*

3. Where it is clear from all the circumstances of the case that contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.

4. Where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected."

70. Article 4.2 focuses on the country where the party required to effect the characteristic performance of the contract habitually resides. It is well established that, in the case of a bilateral contract requiring the payment of money by one party, such payment does not represent the characteristic performance of the contract. (see for example Dicey, Morris & Collins "*The Conflict of Laws*", 15th ed., 2012, Vol. 2 at para. 32-077).

71. As Dicey, Morris & Collins (at para. 32-077) explain "*It is the performance for which the payment is due which is characteristic of the contract".* As noted above, Mr. el Jaouni makes the case that the payment was made for the sole purpose of ensuring the continuation of negotiations between UniCredit and Phoenix with the "*understood intent of a continuation of the operating lease to ImperialJet…"*

72. In my view, if there was a contract to that effect, the relevant party who is to effect the characteristic performance of the contract was, undoubtedly, UniCredit. It was the party who would be required to perform the obligation (if such an obligation existed) to continue the negotiations with Phoenix so as to continue the operating lease to ImperialJet. On the assumption that a contract existed, the obligation that was to be performed on UniCredit's side in return for the payment made, was the continuation of the negotiation. That obligation (if it existed at all) fell to be performed by UniCredit. In those circumstances, it seems to me to be very clear that the "*party required to effect the characteristic performance of the contract"* was UniCredit and therefore, applying Article 4.2, the relevant law governing any such contract is Austrian law.

73. I cannot see any basis on which it could be suggested that the "*contract*" is manifestly more closely connected with a country other than Austria. I therefore see no scope for the application of Article 4.3. Furthermore, I can see no scope for the application of Article 4.4. It will only apply where the applicable law cannot be determined pursuant to Article 4.1 or 4.2.

74. As Dicey, Morris & Collins make clear (at para. 9R-001), in any case to which foreign law applies, that law must be pleaded and proved as a fact to the satisfaction of the court by expert evidence. The only party to adduce evidence as to Austrian law is UniCredit. That evidence takes the form of an affidavit and report from Professor Georg E. Kodek who is a professor of civil and commercial law at the Vienna University of Economics and Business where he is the head of the Commercial Law Group. He has also acted, since 2006, as a judge of the Austrian Supreme Court. Professor Kodek has published widely on issues of Austrian law and his list of publications and lectures runs to 20 pages. There is no doubt as to his eminence and expertise.

75. In his report Professor Kodek explains that under ss. 1431 and 1435 of the Austrian Civil Code, claims to unjust enrichment are recognised. In para. 54 of his report he explains that such claims are *in personam* in nature. He continued as follows in paras. 55-56:

"55. They do not confer a right in rem or a right to enforce the claim against the debtor's property without either the consent of the debtor or a court order.

56. Therefore, even if, arguendo, one assumed that ImperialJet had a claim under s. 1431 or 1435 Austrian Civil Code, this would not entitle ImperialJet to assert rights in the Aircraft without Applicant's consent or a court order."

76. To the extent that BAL bases its claim on some form of assignment or subrogation from ImperialJet, Professor Kodek, unsurprisingly, states in para. 47 of his report that BAL can only have a valid claim as assignee if ImperialJet had a valid claim in the first instance. In para. 63 he explained this in more detail as follows:

"Obviously, neither by way of assignment nor by way of subrogation can the new creditor (assignee) obtain more or other rights than those held by the original creditor (assignor). The scope and nature of the right assigned or subrogated is not affected by the assignment or subrogation. Therefore, since ImperialJet did not have a right in rem as to the Aircraft, but only a personal claim, the same holds true for any claim of BAL based on or otherwise derived from rights previously belonging to ImperialJet…".

77. There is no countervailing evidence as to Austrian law from BAL. BAL has placed an opinion as to German law before the court namely an opinion of Mr. Jonas Mark, a lawyer based in Munich. However, even on the assumption that German law has some relevance, there is nothing in this opinion that addresses the nature of the claim. The opinion merely deals with the assignability of claims. The opinion says nothing at all about the nature of the claim and in particular whether it is an *in personam* claim or a claim *ad rem or in rem*. At this point, I should mention that, lest German law be relevant, UniCredit has also placed evidence as to German law before the court in the form of an affidavit from Professor Benjamin von Bodungen together with a detailed report from him. Professor Bodungen is a Professor of German and international commercial and corporate law, finance and tax law at the German Graduate School of Management and Law in Heilbronn. He also practices as "*of counsel*" in the banking and finance practice group of Bird & Bird LLP based in Frankfurt. He has particular expertise in the law relating to the financing of high value mobile equipment such as aircraft.

78. In para. 6.3 of his report, Professor Bodungen has explained that, under German law, an aircraft registered in the German Civil Aircraft Register maintained by the LBA cannot be encumbered in any manner other than in accordance with the German Act Regarding Rights in Aircraft. This Act exclusively provides for an aircraft mortgage that requires registration in the German Aircraft Mortgage Register kept with the local court. (This is a different register to the register maintained by the LBA). In the circumstances, it is clear that, if German law applied (and I do not believe that it does) BAL would not be entitled to register its claim against the aircraft or its engines. There is no evidence to suggest that any registration has taken place in Germany in the manner outlined by Professor Bodungen.

79. For completeness, I should also mention that Professor Bodungen, like Professor Kodek, expresses the view that, insofar as BAL makes a claim as assignee from ImperialJet, its legal position is no different to that enjoyed by ImperialJet prior to any assignment. In para. 6.9 of his report, Professor Bodungen says:

"In particular, the mere assignment to BAL of any personal rights held by Imperial…could not give rise to any form of in rem right or interest on the part of BAL in the Aircraft. As mentioned above, any rights that could have been acquired by Imperial…would have been in personam non-contractual rights".

80. Thus, on the basis of both the expert evidence as to Austrian law and the evidence as to German law, the only claim which BAL

or Imperial could conceivably assert is an *in personam* claim. There is no basis to conclude that an *ad rem* claim or an in rem claim could be asserted. Thus, even if there was a relevant connecting factor with the Convention (which there is not) this would not give rise to a right to register an RNCRI. As discussed in para. 56 above, the registration system created under the Convention and Protocol is not concerned with *in personam* claims. Such claims do not give rise to any right or interest in or as against the res i.e. the aircraft or engines. They are purely personal claims exercisable as against the relevant party alleged to be in default.

The position under UAE law

81. In circumstances where I have held that Austrian law applies, it is not strictly necessary that I should consider the position under UAE law. Nonetheless, since the issue was fully argued and since it may ultimately have a bearing on the view I take in relation to the application for a restraining order against BAL, I now consider the position by reference to UAE law.

82. In para. 54 above, I have already set out the relevant terms of the Article 40 declaration made by the UAE. Evidence as to the law of the UAE was submitted by both BAL and UniCredit. The evidence submitted by BAL consists of an affidavit sworn by Mr. Zouhdi Yakan together with a report from Mr. Yakan. He is a legal consultant and partner in the law firm Shaikha Almehrzi Advocates and Legal Consultants located in Dubai and Abu Dhabi. In his report, Mr. Yakan draws attention in particular to para. (d) of the Article 40 declaration which, as noted above, deals with:

> *"Other non-consensual rights or interests which under the law of the United Arab Emirates could have priority over the rights of secured creditors".*

83. According to Mr. Yakan, a creditor is entitled under UAE law to make an *ex parte* application to a court in the UAE to request the court to attach the assets of a defaulting debtor in contractual disputes. Mr. Yakan draws attention to Article 252 of the UAE Civil Procedures Code (as amended by Federal Law No. 10 of 2014). Insofar as relevant, Article 252 provides as follows:

> *"Without prejudice to any provisions of any other law, the creditor may request from the court which examines the action … according to the circumstances, to impose provisional attachment on the real properties and the movables of his adversary in the following circumstances:*
>
> *1. Each case in which he would be afraid to lose the security of his right, as the following cases:*
> *(a) If the debtor is not a settled resident of the State;*
>
> *(b) If the creditor was afraid that the debtor escapes, smuggles his money or hide (sic) it;*
>
> *(c) If the securities of the debt were at risk of being lost…"*

84. Mr. Yakan expresses the view that, in light of Article 252, a creditor with a valid claim against a defendant may seek to attach an asset in the possession of the defendant or a third party. Mr. Yakan then says that:

> *"In conclusion, we are of the opinion that where a company in the UAE has extended an intercompany loan for a payment made by a foreign company to secure rights in respect of an aircraft and the debt due to the UAE company from the foreign company remains unpaid, then it is prima facie possible …that the UAE company may register its interest against the aircraft concerned as a Registrable Non-Consensual Right or Interest under Article 40 of the … Convention".*

85. In the course of the hearing before me, counsel for UniCredit suggested that this opinion and conclusion of Mr. Yakan is expressed in very hypothetical terms. Counsel also drew attention to the express qualification in Mr. Yakan's report that he had not been requested (nor had he attempted) to advise on the relationship between BAL and ImperialJet or "*on any of the documents signed between them and relating to the loan or the assignment of rights*". Counsel submitted that Mr. Yakan's report thus refrains from analysing, in any way, the underlying facts and applying the law to those facts. Counsel characterised the report as a "*sterile and hypothetical legal opinion*". In making that observation, counsel stressed that:

> (a) the report does not identify the nature of the claim allegedly acquired by ImperialJet and assigned to BAL;
>
> (b) It does not state that ImperialJet was in default or clarify whether any demand for payment had been made by BAL to ImperialJet;
>
> (c) It does not confirm that BAL acquired its alleged right through operation of UAE law;
>
> (d) No explanation is provided as to how the courts of the UAE would have jurisdiction to make an order for the attachment of an aircraft registered in Germany which had no physical presence in the UAE at the time any alleged claim arose and is owned by an Austrian company;
>
> (f) There is a very significant gap in the report in circumstances where the author does not express any view as to whether the conditions for the grant of an attachment order are satisfied;
>
> (g) Most importantly, the report does not state that any application has, in fact, been made to the courts of the UAE for an attachment order;
>
> (h) It also does not confirm that, if such an order for attachment were to be made, it would have priority over a secured creditor in accordance with the law of the UAE. In this context, it is crucial to recall that para. (d) of the Article 40 declaration refers expressly to non-consensual rights or interests which have priority over the rights of a secured creditor.

86. It seems to me that these criticisms are well made. Moreover, the views expressed by Mr. Yakan have been comprehensively addressed in a detailed report of a UAE law expert, Mr Mohammed Elghatit put in evidence by UniCredit. Mr. Elghatit is the founding partner of OGH Legal, a firm of lawyers in Dubai. He has been in practice in the UAE for ten years or more. He has sworn an affidavit in which he exhibits a detailed opinion on UAE law dated 25th October, 2018.

87. The following aspects of the opinion of Mr. Elghatit are of particular importance:

> (a) In the first place, Mr. Elghatit explains that, at best, any rights which BAL has are rights *in personam* because the payment made by BAL was not towards the purchase price of the aircraft but rather was by way of a facilitation

payment; Mr. Elghatit correctly observes that the BAL report proceeds on a bare assumption that the claim of BAL is secured. At para. 7.27 of his report he says that this assumption has not been evidenced in any way and the basis for it has not been explained. Mr Elghatit is entirely correct in this observation. The report of Mr Yakan contains nothing to explain how, as a matter of UAE law, the BAL claim takes priority over the rights of secured creditors. As noted in para. 85(h) above, the only rights or interests that fall within the ambit of para. (d) of the UAE Article 40 declaration are those that take priority over the rights of secured creditors

(b) At para. 7.5 of his report, Mr. Elghatit explains that:

"…if BAL is asserting that this was a secured assignment, then such an assignment would have needed to be in writing because it would have needed to be registered with the relevant local authority. In this case, that would be the UAE notary office";

(c) Furthermore, although an aircraft is technically movable, according to the law of the UAE, an aircraft is classified as immovable property for the purposes of registering security rights. At para. 6.14 of his report, Mr. Elghatit says:

> *"Accordingly, in relation to any alleged security taken by BAL on the Aircraft, for it to be subject to UAE law…, it would need to be registered in the UAE".*

Nothing is said by Mr Yanak to suggest that such registration occurred.

(d) With regard to para. (d) of the Article 40 declaration made by the UAE, Mr. Elghatit draws attention, in para. 6.7 of his report, to another declaration made by the UAE under the Convention which makes clear that the creditor's remedy may only be exercised by application to the court. The language of the declaration is in the following terms:

> *"The United Arab Emirates declares that any remedies available to the creditor under the Convention which are not expressed under the relevant provision thereof to require application to the court, may be exercised only with leave of the court".*

(e) Mr. Elghatit also expresses the view that the UAE courts would not have jurisdiction over the contractual claim asserted in this case. In contrast, this important issue is not addressed at all by Mr Yanak. At para. 6.9 of his report Mr Elghatit refers to Article 21 of Federal Law 11 of 1992 dealing with civil procedure which specifically addresses the jurisdiction of the UAE courts over a foreign person or entity. Insofar as contractual obligations are concerned, para. 3 of Article 21 provides that the UAE courts will have jurisdiction if the action is concerned with an obligation concluded or executed in the UAE or if its execution was conditioned in the UAE or related to a contract required to be authenticated in the UAE. There is also a jurisdiction where one of the defendants has a residence or domicile in the UAE. Mr. Elghatit explains at para. 6.10 that:

> *"Accordingly, for the UAE Courts to have jurisdiction over a contractual matter, the subject matter of the contract should be in the UAE, or an act pursuant to a contract must have occurred in the UAE, or the defendant must reside in the UAE".*

(f) In para. 7.11 of his report, Mr. Elghatit says that the UAE courts will not adjudicate on a matter unless the jurisdictional requirements set out at (e) above have been satisfied. In circumstances where the aircraft is (i) not owned by a UAE company, (ii) ImperialJet is not a UAE company, (iii) the aircraft is not registered on the UAE registry but is registered in Germany and (iv) the aircraft was not physically within the territory of the UAE (except in transit), Mr Elghatit expresses the opinion, in para. 7.12, that a UAE court would not have jurisdiction and would not therefore deal with any application for attachment against the aircraft.

88. Thus, in a reasoned and comprehensive way, Mr. Elghatit has provided a complete answer to the suggestion made by Mr. Yakan in his short report (discussed above) that, under Article 252 of the UAE Civil Procedures Code, a creditor could apply to attach an asset such as an aircraft. In contrast to the rather cursory exercise which Mr. Yakan was asked to undertake, Mr. Elghatit has carefully considered the relevant legal and jurisdictional issues and applied them to the underlying facts. As noted above, Mr Yakan did not address, in any meaningful way, the nature of the claim asserted by BAL. Nor did he address how such a claim would have priority under UAE law over the rights of secured creditors. Likewise, he did not consider the registration requirements under UAE law and he never addressed the crucial question of how the UAE courts could assert jurisdiction over the aircraft. Finally, he provided no evidence that the courts of the UAE have made any order under Article 252 in respect of the aircraft.

89. Ordinarily, in a case of this kind heard solely on affidavit, a court would find it difficult to resolve a dispute between experts as to foreign law without cross-examination of the experts. No such difficulty exists here. I have before me, on the one hand, the very cursory report from Mr. Yakan which does not attempt to analyse the issues or to support the author's conclusions by reference to authority while, on the other, I have a careful and fully considered report which addresses the issues, explains the basis for the author's views and cites the relevant authority for each element of the author's opinion. In these circumstances, I have no hesitation in preferring the evidence of Mr. Elghatit. In my view, it is clear from Mr. Elghatit's report that there is no substance to the suggestion that para. (d) of the Article 40 declaration by the UAE could be said to apply.

90. In the circumstances described above, I can see no basis, by reference to the Article 40 Declaration made by the UAE, that BAL has a right or interest capable of being registered as an RNCRI against the aircraft or its engines. Thus, even if the debtor here was situated in a Contracting State, there would be no basis on which BAL would be entitled to maintain the registrations in issue.

Requirement for an AEP Code

91. In para. 25 of the affidavit of Mr. Cowan sworn on behalf of the Registrar, he explains that the UAE has opted into the AEP regime which arises under Article XIX of the Aircraft Protocol which provides as follows:

> *"1. Subject to paragraph 2, a Contracting State may at any time designate an entity or entities in its territory as the entry point or entry points through which there shall or may be transmitted to the International Registry information required for registration other than registration of a notice of a national interest or a right or interest under Article 40 in either case arising under the laws of another State.*

2. A designation made under the preceding paragraph may permit, but not compel, use of a designated entry point or entry points for information required for registrations in respect of aircraft engines".

92. Article XIX of the Aircraft Protocol therefore leaves it up to a Contracting State, which has elected to designate an AEP, to determine whether relevant information shall or may be transmitted to the International Registry. The UAE has made a declaration under Article XIX that the General Civil Aviation Authority ("*GCAA*") of the UAE is to be the entry point through which information required for registrations is to be transmitted to the Registry. It is clear from the language of the declaration that, insofar as airframes are concerned, it is mandatory that the AEP regime be followed. Insofar as relevant, the declaration provides as follows:

> *"The United Arab Emirates declares that the …GCAA, acting through its Aircraft Registry (Dubai/Abu Dhabi) and/or Ince Al Jallaf & Co. (Dubai) as published by the GCAA, shall be the entry point(s) at which* information required for registration in respect of airframes …to civil aircraft of the [UAE] or aircraft to become a civil aircraft of the [UAE] shall be transmitted, *and in respect of aircraft engines may be transmitted, to the International Registry."* (emphasis added)

93. In my view, it is clear from the language of the declaration that, in the case of airframes, compliance with the regime is mandatory. Under the AEP regime, an authorisation code is required to be issued by the relevant authority (in this case the GCAA) before a valid registration can be made.

94. In her submissions, counsel for the registrar accepted that a registration may still be valid without an AEP code where such a code was not obtainable from the designated entry point (in this case the relevant authorities in the UAE). At the time of the registrations effected in March 2018, BAL maintained that an AEP code was not obtainable. Yet, in none of the affidavits sworn on behalf of BAL has any case been made to explain the basis upon which it is suggested that an AEP code was not obtainable from the relevant authorities in the UAE. This raises a significant issue in relation to the validity of the registrations.

95. However, in circumstances where I have come to the conclusion that the registrations are, in any event, invalid on other grounds, I do not believe that it is necessary to make a formal finding in relation to the AEP issue. I believe it is safer not to do so. I am concerned that the AEP issue may not have been sufficiently flagged in the course of the affidavit evidence to put BAL on notice that an explanation was required.

The relief claimed

96. In her judgment in *Belair Holdings Ltd v. Etole Holdings Ltd* [2015] IEHC 569, O'Malley J. emphasised the importance of ensuring that the Registry reflects the true legal position. She said:

> *"The fact that the Registry has been established in such a way as to preclude the necessity, or indeed possibility, for the Registrar to verify the details of every entry does not mean that a court should be prepared to condone a misleading registration."*

97. In her concluding remarks in that case, O'Malley J. added:

> *"It seems to me that the relief sought as regards rectification of the registration is of a sort that an Applicant who proves its case is entitled to more or less ex debito justitiae relief, in that it's difficult to see what conduct on the part of the Applicant would persuade a court that a registration that should not have been made should nonetheless be left undisturbed. In this regard, the Court must be conscious of the purpose and principles of the Convention and importance of maintaining the integrity of the Registry."*

98. In the present case, I am satisfied that UniCredit has proved its case. There is no proper basis for the registrations that were made by BAL. Prior to the commencement of these proceedings, UniCredit wrote to BAL on 18th April, 2018 demanding that the registrations be discharged. That demand was contested by BAL. In those circumstances UniCredit was left with no alternative but to commence these proceedings. The claim made by UniCredit in these proceedings was opposed by BAL on grounds which I have now found to be without foundation. The opposition put forward by BAL has significantly delayed the resolution of these proceedings and put UniCredit to very considerable inconvenience and expense in having to place detailed evidence as to foreign law before the court. None of this would have been necessary if BAL had agreed to discharge the registrations itself. In this context, Article 25(4) of the Convention expressly envisages that:

> *"Where a registration ought not to have been made or is incorrect, the person in whose favour the registration was made shall, without undue delay, procure its discharge or amendment after written demand by the debtor delivered to or received at its address stated in the registration".*

99. In my view, BAL was under a positive obligation under Article 25(4) to take all necessary steps to remove these registrations. Their persistent failure to do so requires the intervention of the court. I therefore had no hesitation, following the conclusion of the hearing on 19th February, 2019, in making an order directing BAL to discharge the three registrations in question. The court's power to make such an order is expressly contemplated by the language of Article 44(2) which cross refers to Article 25 and speaks of an order being made against a registrant "*requiring it to procure the discharge of the registration".*

100. For similar reasons, and in light of the ongoing failure of BAL to discharge the registrations notwithstanding the letter of April 2018, I had no hesitation in making the further order that was sought under Article 44(3) of the Convention. As noted by counsel for UniCredit, this is an order that was made by Kelly J. (as he then was) in *Transfin-M Ltd v. Stream Aero Investments SA* [High Court, 2013 No. 112 MCA]. It is an order which is now routinely made in proceedings of this kind.

101. Article 44(3) provides as follows:

> *"Where a person fails to comply with an order of a court having jurisdiction under this Convention or, in the case of a national interest, an order of a court of competent jurisdiction requiring that person to procure the amendment or discharge of a registration, the courts referred to in paragraph 1 may direct the Registrar to take such steps as will give effect to that order".*

102. There is no doubt that this court is a court of competent jurisdiction for the purposes of Article 44(3). As noted previously, this court has exclusive jurisdiction to make orders against the Registrar.

103. No issue arises in relation to the court's jurisdiction against BAL. Prior to January 2019, it has participated fully in the proceedings and submitted to the jurisdiction of the court. Even if it had not submitted to the jurisdiction in that way, there could be

no doubt that this court has jurisdiction against BAL. In the first place, Regulation 5.4(f) of the Regulations expressly requires, as a condition to the registration of an RNCRI, that the registrant agrees to submit to the jurisdiction of the courts where the Registrar has its centre of administration. Secondly, as noted by Professor Goode, at para. 2.228 of the Official Commentary, Kelly J in *Transfin*, held that the court has jurisdiction against a non EU defendant (in the position of BAL here) under O. 11 R. 1(f) and (g) on the ground that proceedings of this kind relate to a tort committed within the jurisdiction (slander of title, malicious falsehood and misrepresentation) and on the ground that the order sought is, in substance, an injunction as to an activity performed within the jurisdiction.

104. In light of (a) the provisions of Article 44(3), (b) the long standing practice of the court, (c) the evidence in this case at to the manner in which the registrations were effected and (d) the ongoing failure or refusal of BAL to discharge the registrations, I was satisfied, at the conclusion of the hearing on 19th February, 2019, to make an order directing the registrar to give effect to the order made against BAL in the event that the latter did not comply with the order made against it within 48 hours from 19 February, 2019.

The application for a restraining order

105. In my view, the mere fact that an applicant has succeeded in an application to require a registrant to discharge a registration does not, of itself, provide any basis for the grant of an order restraining that registrant from registering any further RNCRIs against the relevant aircraft. However, there may be circumstances where it is entirely appropriate to make such a restraining order. In particular, it may be necessary to do so where it has been demonstrated to the court that a registration was effected abusively such as to give rise to a concern that a registrant may involve itself in further unconscionable registrations against the same aircraft in the future. As discussed at an earlier point in this judgment, under the system established under the Convention, there is no screening of applications for registration. Accordingly, in the absence of a restraining order, there would be nothing to prevent an unscrupulous registrant (or someone acting on its behalf) from registering a further purported RNCRI against the same aircraft. Where the court can be satisfied that there is a real danger that this will occur, there can be no doubt but that the court has an appropriate ancillary power to grant a restraining order against such a registrant.

106. In the present case, it is disturbing that a registration took place which contained a manifestly false statement that the state of registry of the aircraft was the UAE. The person who effected the registration here is Mr. Spiegl who is the managing director of ImperialJet. Given that ImperialJet was the operator of the aircraft, it is impossible to accept that Mr. Spiegl could have innocently inserted the wrong state of registry of the aircraft in the registration particulars. I can only conclude that the UAE was deliberately inserted as the state of registration. The state of registry of an aircraft is a key component of a registration at least in so far as the airframe is concerned. Its significance in this case is that, if Germany had been named as the state of registration, it would have been patently obvious to anyone inspecting the register that the registration was incorrect.

107. The registration system established under the Convention and the Protocol assumes that registrants will act in a *bona fide* way. As previously noted, the Registrar has no function to review or interrogate an application for registration. The system therefore depends on participants acting responsibly. This is emphasised in The *Practitioners' Guide* at p 74. A registrant who knowingly submits a registration containing false particulars shows contempt for the entire system of registration and is plainly acting in an abusive manner. In such cases, it may well be essential, in order to maintain the integrity of the registration system, to make an order of the kind proposed here to ensure that there is no continuation of such abusive and reprehensible behaviour.

108. A further factor of importance is that, as the evidence of Mr Elghatit shows, there was, in fact, no arguable basis on which, even under UAE law (i.e. the law with which BAL would be familiar), the BAL claim could be said to fall within para. (d) of the Article 40 declaration made by the UAE. The exercise which Mr Yanak was asked to carry out was a very limited one which contained a number of very obvious and crucially important omissions which I have attempted to summarise in paras. 85-88 above. The limited nature of the exercise which Mr Yanak was instructed to carry out raises a significant issue as to the *bona fides* of the approach taken by BAL. It is difficult to avoid the conclusion that a deliberate decision was made to very narrowly confine the exercise that Mr Yanak was asked to carry out. For example, it is noteworthy that Mr Yanak's report contains the following qualification and limitation: *"In this memorandum, we have not been requested nor have attempted to advise on the relationship between BAL and Imperial or on any of the documents signed between them and relating to the loan or the assignment of rights".*

109. That qualification by Mr Yanak is relevant to a further troubling feature of the evidence in this case. Although BAL has claimed to be the assignee of the rights of ImperialJet in relation to the claim for the return of US$1,035,522.34, the only document evidencing BAL's claimed entitlement to the purported RNCRI that was presented to the Registry was the bank transfer order transferring the funds from ImperialJet to UniCredit. There were no documents evidencing any assignment to BAL and no documents explaining how BAL could rely on a money transfer made not by it but by ImperialJet. Moreover, when discovery was made in this case by BAL, no documents were disclosed relating to any assignment.

110. In this context, it is a requirement of the Regulations governing the Registry that documentary evidence should be submitted in electronic form of the RNCRI in question. Regulation 5.4 of the Regulations deals with the information certification and documents that must be submitted to the Registry in order to effect the Registration of a RNCRI. Among the documents that must be submitted are:

> *"(e) documentary evidence submitted in electronic format of the registrable non-consensual right or interest being registered".*

111. In his affidavit, Mr. Cowan has confirmed that the only documentary evidence submitted was the bank transfer order. Nothing further was put in evidence by BAL in the affidavits placed before the court. Thus, neither at the time of registration nor at any time thereafter, has any documentation been produced which evidences the alleged assignment between Imperial and BAL. In the evidence before the court, BAL has asserted that the assignment was oral. This was also explicitly stated in a letter dated 12 October, 2018 from McCann Fitzgerald acting on behalf of BAL sent in response to an O.31 R. 15 notice served by Mason Hayes & Curran, the solicitors for UniCredit, calling for production of the assignment. Following the failure to elicit any relevant documents following the service of that notice, discovery of documents was sought by UniCredit of (*inter alia*) all documents evidencing or recording the assignment. However, no discovery was made of any documents in that category.

112. Furthermore, no particulars of the assignment have at any time been provided. For example, the affidavit evidence before the court does not even identify the date on which the assignment is alleged to have been effected.

113. It is very surprising that there is no documentation of any kind to corroborate the fact that the assignment took place. Even if the assignment was made orally, one would expect that there would be something in the books and records of BAL which evidenced an assignment of this kind. Yet nothing to that effect was disclosed in the affidavit of discovery sworn by Mr el Jaouni.

114. The factors outlined above have led me to conclude that, in this case, there would be a proper basis to find that the registration

here was registered abusively and that there are good grounds on which to make a restraining order of the kind proposed. However, I am conscious that I have not yet heard the submissions of the Registrar on this issue and I will therefore defer making any order until the Registrar has an opportunity to address the matter and to make any necessary submissions.