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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION (COMMERCIAL HUB)

BETWEEN:

SHORT BROTHERS PLC

Plaintiff/Respondent:

and

AAR CORP.

Defendant/Appellant:

Richard Coghlin KC and Anna Rowan (instructed by Carson McDowell LLP) for the Plaintiff/Respondent
David Dunlop KC and Peter Hopkins KC (instructed by Tughans Solicitors) for the Defendant/Appellant

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Before: McCloskey LJ, Horner LJ and Huddleston J

McCLOSKEY LJ ***(delivering the judgment of the court)***

INDEX

THE PROTAGONISTS

Within the pleadings, contractual instruments, correspondence and affidavits one finds varying descriptions of the protagonists, who may be conveniently identified at the outset:

The Plaintiff:	*Short Brothers PLC; Shorts; the customer; the respondent*
The Defendant:	*AAR Corp*; *the guarantor*; *the Appellant*
AAR Composites:	*A subsidiary of the defendant and party to the 2010 Procurement Contract with Shorts; the supplier*
Aeromatrix:	Purchaser of AAR Composites' assets in June 2020

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Introduction

[1] By her judgment delivered on 8 October 2024 and ensuing order, Madam Justice McBride determined keenly contested applications (a) by the defendant for discovery of particular documents and (b) by the plaintiff for leave to make limited discovery. A mixed outcome ensued. With the leave of the judge, the defendant challenges the judge's order before this court.

[2] In its initial configuration the appeal to this court was of significantly narrower confines than its counterpart at first instance. As will become apparent, a further and not insignificant refinement materialised as the appeal progressed. Ultimately, this appeal turns mainly, though not exclusively, on the familiar principle of relevance. In short, has the defendant discharged its burden of establishing that the documents which are the focus of its discovery application/appeal, as refined, relate to any matter in question between the parties?

The governing principle

[3] In determining this appeal, this court will apply the following well established principle:

> "There are many authorities for the proposition that an appeal will not be entertained from an order which it was within the discretion of the judge to make, unless it be shown that he exercised his discretion under a mistake of law (*Evans v Bartlam* [1939] A.C. 473) or in disregard of principle (*Young v Thomas* [1892] 2 Ch. 134) or under a misapprehension as to the facts (ibid.); or that he took into account irrelevant matters (*Crowther v Elgood* (1887) 34 Ch. D. 691 at 697) or the conclusion which the judge reached

> in the exercise of his discretion was "outside the generous ambit within which a reasonable disagreement in possible" (*G v G* [1985] 1 W.L.R 647; [1985] 2 ALL E.R 225 HL). Many of the cases in this area are decisions refusing to interfere with a judge's discretion in making some interlocutory order."

[The Supreme Court Practice 1999, Volume 1, para 59/1/142]

This passage, familiar to all practitioners, enshrines a rule of practice which has been routinely followed by this court without qualification, as illustrated in, for example, *Flynn v Chief Constable of PSNI* [2017] NICA 13, at para [22]. The application of this rule of practice to this appeal was not contested by either party.

The litigation framework

[4] The framework of these proceedings is carefully traced in paragraphs [7]–[20] of the judgment of McBride J, which we gratefully adopt (and from which neither party demurred):

> ***"The Parties***
>
> [7] The plaintiff, Short Brothers Plc (Shorts), is a manufacturer of aircraft parts and structures mostly manufacturing wings. Shorts is a wholly owned subsidiary of Bombardier and is registered and incorporated in Northern Ireland.
>
> [8] The defendant is a company registered in the State of Delaware and is a holding company of subsidiaries that provide aviation parts and services.
>
> [9] AAR Composites is a subsidiary of the defendant. It designs, fabricates and assembles composite aerospace products.
>
> [10] The dispute concerns a flap track fairings procurement contract ("the procurement contract") entered into between AAR Composites and Shorts.
>
> [11] AAR Composites entered into the procurement contract with Shorts on 30 September 2009. Under the terms of the contract AAR Composites agreed to, inter alia, design, develop, test, certify, manufacture and supply flap track fairings ("FTFs") to Shorts or to any other supplier as may be directed by Shorts.

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

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

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

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

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

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

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

[19] The plaintiff alleges that when the defendant failed to indemnify it and failed to perform Aeromatrix's obligations, the plaintiff took steps to mitigate its losses which included entering into several agreements with Aeromatrix in August 2022, including a Bill of Sale, a Transitional Services Agreement and a Covenant not to sue ("the 2022 agreements").

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

[5] At paras [21]–[25], McBride J summarised the plaintiff's claim thus:

> "[21] The plaintiff claims that the defendant guaranteed the performance in full of the obligations of Aeromatrix under the procurement contract and the defendant is, therefore, obliged to indemnify the plaintiff in respect of all loses it has sustained because of Aeromatrix's failure to deliver in a timely manner conforming products, namely FTFs.
>
> [22] The plaintiff claims an unquantified amount of costs and losses which is currently estimated at not less than US $32m. Details of the losses claimed are set out in a schedule of losses attached to the statement of claim.
>
> [23] As appears from the schedule, the plaintiff claims actual losses between April 2022 and February 2023 in respect of the following items:
>
> - Direct labour
> - Overhead costs in Belfast
> - Total material costs
> - Expedited costs
> - Supplier payments to AMX
> - Pre-petition costs
> - On-site support
> - Carriage
> - TSA costs
> - Travel
> - Working Party
> - Consumables
>
> [24] It further claims "estimated costs" in respect of these items between March 2023 and December 2023. The total amount claimed for actual and estimated costs is $41,000,443.00. In addition it claims for: the cost of maintaining the fabrication facility in Belfast; recovery of Airbus's claim for late delivery fees; tools; disruption costs

for relocation to Belfast factory; claim for a contractual cost to Aeromatrix and a claim for incremental costs to Short Brothers. The schedule additionally contains a note outlining that the claim does not include legal and other potential costs and expenses relating to rates and insurance and Airbus's claim for late deliveries post June 2022. The total loss claimed for late deliveries is $2.5m but the pleadings indicate it could amount to $3.8m by 2023. As appears from the statement of claim a large part of the claim for loss relates to taking over production of FTFs and relocating the facility from Florida to Belfast.

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

[6] At paras [26]–[29] McBride J addressed the defence:

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

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

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

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

[7] As appears from the foregoing, there has been a multiplicity of corporate entities with different roles in the relevant events and giving rise to a series of different legal relationships. The single constant in the narrative is Shorts. It was the customer from the outset and throughout. The sole defendant, AAR Corporation, was not a party to any relevant contractual relationship between September 2009 and June 2020. Throughout this period AAR Corporation was alien to the relevant contractual arrangements and had no involvement in the contractual activities concerning the design and supply of the FTFs to Shorts. These two factors have emerged as central pillars of the contested discovery application giving rise to this appeal. In short, AAR Corporation is sued *qua* guarantor and in no other capacity.

The pleadings analysed

[8] Self-evidently, the extant pleadings are of fundamental importance. These have the following salient features. First, there is, inevitably, a heavy focus on the 2009 Procurement Contract. The essence of this contract entailed the design, manufacture and supply of FTFs by AAR Composites (the "supplier") to Shorts. The central contractual obligation imposed upon the supplier was that of accepting purchase orders from Shorts for any quantity of the contractual products "…for so long as Shorts manufactures, sells or supports…" specified aircraft parts: per Article 1.4. There are important contractual definitions of specified terms, including in particular "aircraft", "product", "structure" and "work." Article 3 of the Procurement Contract, entitled "Scope of Work", which we do not reproduce, is incontestably a contractual provision of overarching importance. Likewise Article 2, which contains a series of representations and warranties by AAR Composites.

[9] Thus the Procurement Contract lies at the heart of Shorts' claim. The legal foundation of this claim is the last of the contractual instruments rehearsed by McBride J (above), namely the Deed of Guarantee (the "2020 Guarantee"). The Procurement Contract may be conveniently described as the underlying contractual instrument. Shorts claim that there have been significant breaches of the latter giving rise to financial losses. The core pleading in the Statement of Claim is that the original contracting supplier, Aeromatrix, failed to perform its obligations under the Procurement Contract in specified respects. More specifically, it is pleaded that Aeromatrix (a) failed to deliver conforming "Products" in a timely manner and, further (b) was guilty of "delays and quality failures."

[10] In replies to a request for further particulars, there is considerable elaboration of the contractual defaults asserted by Shorts against Aeromatrix. In view of their volume, these are reproduced in Appendix 1 to this judgment. These further particulars indicate, inter alia, that there were amendments of the Procurement Contract between the date of inception and the 2020 Guarantee. The appellant has focused on the following passages in particular:

> "2(a)-(c) The aircraft model within the family of Bombardier Inc. in the 90 to 149 passenger range

> designated as the CSeries at the time the Procurement Contract was executed was subsequently designated the Airbus A220. The redesignation of the aircraft did not alter the Supplier's obligations under the Procurement Contract, which are to provide aircraft wing components to the plaintiff. The end user of those products is irrelevant to the obligations of the Supplier under the Procurement Contract. References to "aircraft model within the family of Bombardier Inc." are simply a way of describing the relevant aircraft at the time the Procurement Contract was executed.
>
> 2(d)(i) A General Terms Agreement was entered on 1 January 2016 (the "GTA"). The GTA was amended and restated on 1 July 2019 and further amended and restated effective 20 December 2019. An Umbrella Agreement was also entered on 20 December 2019 and amended on 16 October 2020.
>
> 2(d)(ii) The GTA is between Airbus Canada Limited Partnership, Short Brothers and Airbus Canada Managing GP Inc. The Umbrella Agreement is between Airbus Canada Limited Partnership, Spirit AeroSystems, Inc. and Airbus Canada Managing GP, Inc."

[11] In the context of this appeal the key passage in the defence is para 25. It is essential to reproduce this in its entirety:

> "Further and in the alternative, if, which is denied, the defendant has any liability to the plaintiff pursuant to the Deed of Guarantee, then the said liability is limited to the obligations of performance imposed on AAR Composites pursuant to the Procurement Contract. Therefore, the defendant can only be in breach of the Guarantee to the extent that Aeromatrix fails to meet the minimum requirements of production specified in the Procurement Contract and not the levels of production as specified or claimed by the plaintiff within the Statement of Claim. Furthermore, the defendant says that, insofar as it is aware, since execution of the Procurement Contract, there have been material variations which change the entire basis on which the defendant agreed to provide any guarantee. In particular:

(a) AAR Composites was required to supply the CTFs to the plaintiff pursuant to the Procurement Contract;

(b) At the date of the execution of Procurement Contract in September 2009, the plaintiff was ultimately a wholly owned subsidiary of Bombardier, and the Procurement Contract was executed by AAR Composites and guaranteed by the defendant in the knowledge and understanding that the contractual obligations of the plaintiff were to supply completed aircraft wings for the C-Series aircraft, solely to Bombardier;

(c) Consequently, the defendant entered into a guarantee in 2009**, to guarantee the performance of AAR Composites, in the knowledge that AAR Composites was supplying the CTFs to the plaintiff as part of a vertically integrated supply chain within the Bombardier group of companies, for the provision of components for incorporation into aircrafts within the "family of Bombardier Inc. Aircraft in the 90-149 passenger range";

(d) In July 2016, following substantial delays in the certification of the C-Series aircraft and associated losses incurred by Bombardier, Bombardier reached an agreement with Investissement Québec, a Société générale de financement (SGF) owned by the Government of Quebec, to transfer the C-Series manufacturing programme to the C Series Aircraft Limited Partnership ("CSALP"), in which Bombardier and Investissement Québec respectively held approximately a 62% and a 38% interest;

(e) In October 2017, Airbus acquired a 50.01% controlling stake in the CSALP. On or about 10 July 2018, C-Series aircraft was rebranded as the Airbus A220;

(f) In March 2019, CSALP announced the change of its name to Airbus Canada Limited Partnership ("ACLP"), which change took effect in June 2019;

(g) In February 2020, Bombardier fully completed its exit from the ACLP, transferring its remaining interest to Airbus and Investissement Québec. Airbus and Investissement Québec agreed in February 2022 to invest a further $1.2bn in the ACLP, to support the significant acceleration of the A220 production rate;

(h) In October 2020 Spirit AeroSystems, Inc., and Spirit AeroSystems Global Holdings Limited ("Spirit") acquired the plaintiff from Bombardier;

(i) As a result:

(i) Despite the Procurement Contract expressly relating to aircrafts within the "family of Bombardier Inc. Aircraft in the 90-149 passenger range" the Products thereunder now relate solely to the A220 aircraft manufactured by the ACLP, following the changes described above;

(ii) Despite the Procurement Contract relating to manufacture by the plaintiff for supply to its (then) parent company Bombardier (as demonstrated, for example, by references in the Procurement to Contract with Quality Assurance requirements), the plaintiff's commercial relationship now appears to be directly with ACLP, which is not under common ownership;

(j) In June 2020, the plaintiff agreed to the novation of the Procurement Contract from AAR Composites to Aeromatrix;

(k) The plaintiff's claim is that the defendant also agreed to guarantee the obligations of Aeromatrix under the Procurement Contract as part of the June 2020 Guarantee (as to which see paragraph [] above);

(l) The defendant says that there was no intention or agreement that the obligations of Aeromatrix under the Procurement Contract would be varied

as part of the June 2020 Guarantee or pursuant to the Deed of Novation;

(m) The defendant says that as a result of the changes set out at (a) to (i) above, the exposure and liability of the defendant under the Guarantee is materially different from that which would have been understood by the defendant when a guarantee was first given in 2009 and thereafter when the Guarantee now relied on by the plaintiff was given in June 2020;

(n) Further and in the alternative, and as set out further above, the arrangements made by the plaintiff in the implementation of the Procurement Contract (not all of which are presently known to the plaintiff) render the Guarantee now relied on by the plaintiff materially different from that contemplated when the parties agreed such Guarantee;

(o) In view of the defendant's lack of visibility of these changes, it reserves its right to plead further to these issues following discovery."

[the first guarantee – the second is dated June 2020]

[12] While any attempt to reduce this elaborate pleading is a challenging task, AAR Composites is, in essence, in its defence making the positive case that its liability (if any) under the Guarantee is confined to the minimum requirements of production specified in the Procurement Contract which, it claims, differ from those asserted in the Statement of Claim. It is further averred, in terms, that these requirements are not those specified in the Procurement Contract but are, rather, specified in subsequent "material (contractual) variations." It is pleaded that the latter have the effect of fundamentally altering "...the entire basis on which [AAR Composites] agreed to provide any guarantee."

[13] Pausing, this court has probed at some length the issue of contractual amendments. The response of Mr Dunlop KC on behalf of AAR Corporation is that these are of two types. The first type consists of express contractual amendments which, in the context of this appeal, are uncontentious and can be disregarded (and, hence, the court was assured that it did not need to receive them). The second type is of an altogether more obscure kind, with traits of the unspecified, the possible and the purely speculative. It is suggested by the defendant that there might have been post-2009 contractual variations based on the parties' conduct. This suggestion, ultimately, forms the first cornerstone of the case made for extending the discovery

order at first instance. The other cornerstone involves the suggestion that the defendant is bereft of material knowledge.

The discovery dispute

[14] The defendant's summons invoked two provisions of Order 24, namely rule 2(5) and rule 7. This court probed the reasons for (a) bringing this application in the absence of the exchange of Lists of Documents between the parties and (b) the invocation of these two separate provisions of Order 24. Whatever might be said about conventional procedure and practice, we are satisfied that nothing of substance turns on either of these considerations. This court has taken into account para 28 of Practice Direction 1/2022. We consider that, in essence, this is an application for discovery of specific documents, with Rule 7 therefore dominating.

[15] The defendant's discovery summons, supporting affidavits and exhibits and replying affidavits occupy well in excess of 1,000 pages. The arguments of the parties have confined their focus to a narrow part of this voluminous material. Two affidavits grounding the defendant's discovery application were sworn by their solicitor. Paras 11 and 16 of the first affidavit are in these terms:

> "I am advised by the defendant that it considers that if the plaintiff is required to give discovery in connection with the issues as defined by the defendant, the documents and material disclosed will illustrate to the court just how significantly the obligations in the Procurement Contract and those guaranteed in the associated Guarantee (originally given in 2009), and relatedly the financial consequences of any default under those agreements, have changed in the intervening thirteen years before the plaintiff called on the defendant to satisfy the Guarantee on 14 April 2022. The defendant has limited visibility of the extent of those changes – both because (i) the defendant had no direct involvement in relation to many of the relevant events, and (ii) the defendant divested the relevant business unit which originally performed the Procurement Contract, together with the associated personnel and documentation, in 2020, meaning that it now has very limited access to the relevant documents. However, it is clear that very significant commercial changes did take place and the defendant believes that those changes are likely to render the Guarantee unenforceable or at least significantly denuded of effect. I believe that limiting discovery in the manner contended for by the plaintiff would unfairly constrain the defendant's ability to defend this very substantial claim.
>
> …

> The plaintiff claims that Aeromatrix breached its obligations under the Procurement Contract (as novated) and that, as a result, the plaintiff has suffered, or will suffer, costs, losses and expenses which it seeks to recover from the defendant. At present, the plaintiff claims to have incurred (or will incur), for the 20-month period between April 2022 and December 2023, costs and expenses in excess of $56 million in consequence of Aeromatrix's alleged failure to perform, albeit the plaintiff has offered scant detail to support that claim. That is almost four times the total contractual price which would have been payable to Aeromatrix for the FTFs delivered during that period, even assuming that the order numbers presented by the plaintiff are correct (which is not accepted). Of this, the plaintiff seeks payment of approximately $41 million from the defendant, which is itself vastly in excess of the total sums paid by the plaintiff to the defendant for the FTFs under the Procurement Contract from the time AAR Composites first began to deliver shipsets pursuant to the Procurement Contract in 2015, up to its transfer to Aeromatrix in 2020. The defendant believes that these extraordinarily high costs are driven or exacerbated by material changes to the commercial terms, and the volume and nature of the supply, of the FTFs to the plaintiff under the Procurement Contract, and material changes to the commercial terms, and the volume and nature of the supply, of the FTFs by the plaintiff to the end-user/manufacturer. Those material changes are striking and forensically significant, given that this is a claim on a guarantee."

Paras [47]–[48] continue:

> "**As to Issue No 2** on the list (at 'MMcC1' page 281), the defendant's position is that the changes to the terms on which FTFs were supplied from 2009 to the present day are material and have led to substantial changes to the defendant's exposure and liability under the Guarantee, such that it is materially different from that which would have been understood when the Procurement Contract was executed in 2009 (Defence ¶25).
> …
>
> The defendant's liability under the Guarantee is expressly limited by articles 2 and 18 of the Guarantee, such that it

does not extend beyond Aeromatrix' obligations under the Procurement Contract. This is relevant because the performance of the obligations under the Procurement Contract and the trading relationship between the plaintiff and Aeromatrix, and the plaintiff and its end-customer respectively, materially changed over time. The obligations of the Parties, the nature and terms of the trading relationship, the volume (and value) of FTFs supplied, and the end-user for the FTFs to be provided under the Procurement Contract, are directly relevant to the 'obligations' which the defendant promised to guarantee and the recoverability of losses arising from Aeromatrix's alleged breaches; consequently I believe that they are relevant issues for discovery (Defence ¶ 25 at 'MMcC1' page 42)."

[16] Paras [51]–[55] and[59] are in these terms:

"51. The Guarantee provides expressly that the defendant's obligations cannot extend beyond Aeromatrix's own obligations under the Procurement Contract – with the effect that the defendant is entitled to rely on any defences which would have been available to the Supplier under the Procurement Contract, including as to causation and remoteness of loss. The defendant is entitled to understand how the Procurement Contract changed and evolved over time to reflect the significant changes affecting the plaintiff's obligations to third parties, not least because those obligations are one of the grounds relied upon by the plaintiff to justify the expenditure of sums in excess of $56 million which it seeks to recover from the defendant.

52. The Procurement Contract did not operate as a single, self-contained contractual document. In addition to the main body of the contract, it incorporated a series of complex and changing schedules and annexure, which in turn cross-referred to the changing policies and procedures published by the plaintiff and/or Bombardier (and later, presumably, Airbus and/or Spirit) from time to time.

53. The terms also changed informally over time, as the plaintiff changed its requirements for order terms, quantities and values – changes which would not

necessarily be reflected in formal amendments to the Procurement Contract.

54. Discovery of the terms in existence at the inception of the Procurement Contract is plainly necessary as a benchmark or starting point for the contractual relationship between the Parties prior to any orders being placed, and when the contract envisaged the delivery of FTFs by the Supplier to the plaintiff solely for the purpose of integration of C-Series aircraft manufactured by Bombardier (then the owner of the plaintiff, as the immediate customer). Having clarity in relation to the starting point for the relationship is critical to understanding the subsequent changes, both for the purposes of Issue 2 and of Issue 3 (addressed below).

55. The defendant itself was never a party to the Procurement Contract. AAR Composites was the party to the Procurement Contract. Nevertheless, the defendant sold the AAR Composites business, together with the personnel and records relating to that business, to Aeromatrix in 2020. Therefore, to the extent that relevant documents were in its possession prior to 2020, they are not substantially complete, and the defendant has very limited access to the relevant documents. As a result, discovery is required in relation to the period prior to 2020.

…

59. These dates have been selected because they will enable the defendant to analyse variations to the terms of supply of FTFs at key dates, namely (i) at the very outset, (ii) at the time of the sale of the AAR Composites business to Aeromatrix, which may reflect some of the changes implemented as a result of Airbus' acquisition of the C-Series programme; (iii) after the date of the novation, by which time Bombardier had sold is stake in the plaintiff to Spirit, and (iv) following the execution of the contractual changes negotiated between the plaintiff and Aeromatrix during the Chapter 11 bankruptcy process."

[17] This court has also considered the solicitor's second affidavit, in particular those averments highlighted in the submissions of Mr Dunlop.

[18] The discovery battle played out at first instance was, as is commonplace, preceded by certain inter-partes correspondence. Certain aspects of this

correspondence, which we have considered, featured in the submissions of Mr Dunlop. In particular:

[D to P, 21/12/23]

> "**THE 2009 PROCUREMENT CONTRACT**
>
> Your client relies in its Statement of Claim on the 2009 Procurement Contract (as amended) to which your client is a party. Indeed "*Procurement Contract*" is a term defined in the Statement of Claim (and all consequent pleadings) as that 2009 contract "*as amended to date*", i.e. up to 20 April 2023.
>
> Our client is aware that the Procurement Contract entered into in 2009 was indeed amended several times by: (i) the formal process envisaged in clause 1.1 and, so far as we are instructed, (ii) less formally by the parties' conduct (which would bind the parties by the usual process of estoppel as explained by Lord Sumption in *MWB v Rock Advertising* [2019] AC 119, 130 at [16]). Please confirm by return that your client has the same understanding.
>
> For ease of reference, we attach a copy of the third formal amendment signed by your client and AAR Composites in 2017 which our client has in its record. For the avoidance of doubt, our client does not have a full record of all other formal or less formal amendments, but your client will have (or would have had) counterparts of all such documents. It is, however, aware of that amendment in 2017."

[P to D, 08/01/24]

> "**<u>The 2009 Procurement Contract</u>**
>
> There are three written amendments to the Procurement Contract. Those amendments comply with the formality requirements at Article 1.1 of the Procurement Contract.
>
> It is not our client's case that the Procurement Contract was also amended "*less formally by the parties' conduct*" or that the parties to the Procurement Contract are bound by estoppel. If your client wishes to seek to rely on such arguments, including to seek discovery, they must be properly pleaded, including what the alleged estoppel is

said to be and what was said or done, by whom, to give rise to it. Unless and until this argument is properly pleaded, any requests for discovery in support of it are no more than a fishing expedition. Our client reserves the right to respond further to such arguments if and when they are properly pleaded."

[D to P, 19/01/24]

"**<u>The 2009 Procurement Contract</u>**

We are grateful for your acceptance that the 2009 Procurement Contract was amended from time to time. We note that you dispute that the Procurement Contract was amended by the parties' conduct. It is apparent from your client's pleadings to date that it does seek to rely on sources of obligations which are not stated on the face of the Procurement Contract (for example, the obligation to comply with certification requirements imposed by Airbus (see [7(b)(ii)] to your client's Replies to NFBP's), therefore the position that pre-2020 documents are irrelevant and not disclosable is difficult to comprehend. That is clearly an issue on which the parties will have to seek resolution from the court, after discovery.

We do not agree with you that there is any lack of clarity in the Defence about the changes to the Procurement Contract (or that there were any argument raised for the first time during the Hearing). The term *"Procurement Contract"* was expressly defined in the Statement of Claim as the 2009 contract *"as amended to date."* Furthermore, the Defence expressly pleaded that there were amendments made to the Procurement Contract by virtue of the 2022 Agreements (see [18(a)(iii)]) and that there were other material changes to the underlying contractual circumstances between 2009 to 2022 (see [25]).

We therefore are not required to, nor do we intend to, amend our client's Defence as you request in your letter. The defence as currently pleaded encompasses these issues."

[P to D, 01/02/24]

> "…the plaintiff fails to see what expert evidence could be required in a trial of liability and considers it unlikely that factual issues over mitigation would have a bearing on liability."

The amended discovery summons

[19] By the preceding route one arrives at a development which unfolded around the mid-point of the transaction of this appeal. This we summarise as follows. The structure of the schedule to the defendant's discovery summons entails the specification of a number of identified "Issues." Two of these are "Issues 2(a) and 2(b)." In her judgment McBride J addressed these aspects of the discovery application in paras [42]–[55]. The judge's decision was partly favourable and partly unfavourable to the defendant. Bearing in mind the unsatisfactory terminology of the schedule to the discovery summons, the judge decided in essence that the defendant's quest for discovery of documents bearing on these two issues in respect of the period September 2009 to some unspecified date was unmeritorious. The second part of the judge's decision, focusing on the date of the second Guarantee, namely 23 June 2020, was that discovery of documents relating to "…the trading relationship between the parties [and] the volume and value of the products supplied and the identity of the end customers" from 23 June 2020 should be provided. There is no appeal or cross-appeal challenging this aspect of the judge's order.

[20] This court raised with Mr Dunlop in the terminology of the "Issue 2" section of the discovery summons, the breadth of the period specified therein and the internal coherence between certain columns. The court afforded an opportunity to amend. This gave rise to a substantial amendment of the relevant part of the schedule (initially), followed quickly by another notable amendment prompted by further questions of the court. These events occurred (figuratively) midstream, following completion of Mr Dunlop's submissions. In furtherance of the overriding objective and (properly) in the absence of any substantial objection on behalf of Shorts, the court permitted these amendments to be made. As a result, Schedule 1, as now amended, is insofar as material couched in the following terms:

"**Amended Schedule 1**

List of Issues for Discovery

	Issue	**Party/s to give discovery**	**Documents sought**
1.	~~The negotiation of the Deed of Novation and the Guarantee including the parties'~~		

	~~subjective understanding of what the Guarantee was intended to cover, as well as communications between the parties and between each of them and AE OpCo III LLC ("AMX") regarding the Deed of Novation and/or Guarantee for the period, including the parties' common understanding of these documents.~~		
2.	(A) ~~In respect of the trading relationship and supply of FTFs under the Procurement Contract, the respective obligations of the Parties, the nature and terms of the trading relationship, as at:~~ a. ~~21 January 2010 – the date that the Plaintiff executed the Procurement Contract~~ In respect of the parties' understanding of any losses likely to result from any failure to perform their respective obligations under the Procurement Contract (limited to a search of records created during the period 21 January 2009 to 21 January 2011); In respect of the trading relationship and supply of FTFs under the Procurement Contract, the respective obligations of the Parties, the nature and terms of the trading relationship, as at: b. 23 June 2020 – the effective date of the Deed of Novation; c. 15 January 2021 - following execution of the Deed of Novation in December 2020 and the sale of the Plaintiff to Spirit AeroSystems	Plaintiff	In respect of Issue 2(A)a. and 2(B), searches to be conducted under standard discovery principles for all documents, notes, emails or other records held by the relevant Party, or within its custody possession or power, relating to Issue 2 during the period 21 January 2009 to 21 January 2011 In respect of Issues 2(A)b.-d. and 2(B), searches to be conducted under ~~Peruvian Guano~~

	Holdings, Inc. ("**Spirit**") (in October 2020); and d. 31 December 2022 – after the Bill of Sale, the Transitional Services Agreement and the Covenant Not to Sue (the "**2022 Agreements**") were approved by the Bankruptcy Court. (B) In respect of the trading relationship and supply of FTFs under the Procurement Contract: a. the volume and value of all of Product supplied under the Procurement Contract to the Plaintiff; and b. the identity of the intended or actual customer/s of the Plaintiff for any Product supplied to it (whether or not integrated into other components)."		standard discovery principles for all documents, notes, emails or other records held by the relevant Party, or within its custody possession or power, relating to Issue 2 during the period from June 2020~~September 2009~~ – to date.

Analysis

[21] As appears from all of the foregoing, the contours of the discovery battle played out before this court on appeal are considerably narrower than, and differ from, their first instance counterparts. In determining the reconfigured discovery dispute between the parties we are mindful of the framework of legal principle. The main components of this are the decisions in *Hadley v Baxendale* [1854] 9 Ex 341, *Victoria Laundry v Newman Industries* [1949] 2 KB 528 and *The Heron* [1969] 1AC 350. The principles of the law of contract enshrined in these authorities constitute the first element of the legal framework within which the parties' discovery dispute must be determined.

[22] The rule (as it is known) in *Hadley v Baxendale* remains the *locus classicus* of the legal principles governing remoteness of damage in contract cases. Under the first limb of the rule the recoverable damages are, per Alderson B:

> "…such as may fairly and reasonably by considered either as arising naturally ie according to the usual course of things from such breach of contract itself, or as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

The heavy emphasis on objective evaluation is self-evident. The second limb of the rule is dominated by the concept of "special circumstances":

> "Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated."

In this, the second, limb of the rule there is a notable migration from objective analysis to actual subjective knowledge. We are mindful of the refinements of the rule arising out of the decision of the Court of Appeal in *Victoria Laundry v Newman Industries* [1949] 2 KB 528 and that of the House of Lords in *The Heron* [1969] 1AC 350.

[23] In both written and oral argument on behalf of the defendant there was a heavy emphasis on the second limb of the "rule." This was confirmed by the passages in the authorities on which Mr Dunlop relied particularly, exemplified by the fourth of the six propositions formulated by Asquith LJ in *Victoria Laundry*, at 539. Likewise, the reliance on Lord Reid's reference to "…the information available to the defendant when the contract was made …" in *The Heron*, at 385f. In argument, phrases such as "core question" featured in counsel's submissions.

[24] While it was not clear to the court that this submission was well founded, this issue was put to bed by Mr Coghlin's unequivocal acknowledgement that the plaintiff's claim for damages is based on the first limb of the "rule." The image of wind being taken from a ship's sails springs readily to mind. This central argument on behalf of the appellant has no traction in consequence. This acknowledgement we consider to be consistent with the plaintiff's statement of claim.

[25] The next central pillar of the defendant's arguments involved a frontal challenge to para [53] of the judgment of McBride J. It is necessary to consider paras [52]–[53] together (and, indeed, the preceding 11 paragraphs particularly):

> "Accordingly, I consider that there is no legally sustainable case that any amendments to the procurement contract made prior to the 2020 guarantee discharged the defendant from liability under the 2020 guarantee. The issue the court must determine is the nature of the defendant's obligations in accordance with the various written contracts. This is a question of interpretation of the written contracts and therefore a question of law rather than a question of fact. Accordingly, the court will not have regard to parole evidence. Consequently, documentation relating to the matters sought in the period prior to the 2020 guarantee is not relevant.
>
> I further consider that documentation during this period should not be provided based on a remoteness of damages defence. No such case is pleaded in the defence and no viable submissions have been made that the "type of loss" claimed by the plaintiff is different to that which Aeromatrix would have understood was likely to ensue if the contract was breached. (See para 21 and 22 of *Transfield Shipping Inc v Mercator Shipping* [2008] UKHL 48). As Lord Hoffman observed at para [25]:
>
> > '…the question of whether a given type of loss is one for which a party assumed contractual responsibility involves the interpretation of the contract as a whole against its commercial background, and this like all questions of interpretation, is a question of law.'"

[26] These two paragraphs are preceded by certain passages in which the judge considers, and construes, certain provisions of the legal instruments under scrutiny, in particular the Deed of Novation and the 2020 Guarantee. No challenge was mounted to the correctness of the judge's construction exercise and this court can identify no material error therein. This exercise provided the basis for the judge's first reason for rejecting the appellant's "Issue 2" discovery quest and the reasoning which followed. No sustainable challenge to any aspect of paras [48]–[52] has been established to the satisfaction of this court.

[27] The defendant reserved its main artillery for a challenge to para [53] of the judgment. In this context we remind ourselves of Order 18, Rule 15A of the Rules of the Court of Judicature:

> "(1) In his defence the defendant must state—

(a) which of the allegations in the particulars of the statement of claim he denies;

(b) which of the allegations he is unable to admit or deny but which he requires the plaintiff to prove;

(c) which of the allegations he admits.

(2) Where the defendant denies liability the defence shall be so pleaded that it raises the defendant's case with sufficient clarity that the opposite party is made aware of the true nature of the defendant's case and, where appropriate, the defence shall put forward the defendant's version of relevant facts or events if that version is materially different from the plaintiff's version as pleaded in the statement of claim.

(3) Where the claim includes a money claim, a defendant shall be taken to require that any allegation relating to the amount of money clamed be proved unless he expressly admits the allegation."

We further remind ourselves that this rule (a) is a reflection of the ever expanding requirements of transparency, clarity and specificity in pleadings, (b) is to be construed and applied accordingly by any court and (c) must further be construed and applied against the background and in furtherance of the overriding objective in Order 1, Rule 1A.

[28] Against the immediately preceding background, we consider the defendant's repeated focus on the words "remoteness of damage defence" something of a distraction. It is not necessary for this court to resolve the parties' interesting arguments and counter arguments on the question of whether in a breach of contract case the onus rests on the plaintiff to prove that the loss and damage claimed are not too remote or is on the defendant to establish that they are, based as they were on the decision of the UK Supreme Court in *Armstead v Royal and Sun Alliance Insurance* [2024] UKSC 6.

[29] We consider that this issue belongs firmly to the periphery of this appeal essentially because the appellant's argument seeks, impermissibly, to isolate the first sentence of para [53] from what follows. The latter has two components. First, the judge stated unerringly that the Defence contains no remoteness of damage pleading. Second, the judge concluded that "no viable submissions" of the type then described had been made out. In this context the appellant's remoteness of damage submissions in its first instance skeleton argument were drawn to the attention of this court. There was no suggestion that the judge did not consider these discrete submissions. Rather the real question for this court becomes that of whether the

judge erred in law in considering them not "viable." We are unable to identify anything in the Appellant's arguments making good this case. We would add, insofar as necessary, that the judge plainly had in contemplation para 25 of the defence. Thus, the judge's "no viable submissions" assessment is unimpeachable.

[30] A further central pillar of the defendant's arguments entailed a focus on various parts of the Procurement Contract, including in particular certain definitions. It is trite that the definitions cannot be separated from the express substantive obligations imposed upon the supplier. The correct construction of the latter provisions barely flickered in the defendant's arguments. The fundamental importance of some of these is self-evident: this applies particularly to Articles 1.4, 1.8, 2.2.6, 3.1, 3.2, 3.3 and 3.4. While it seems unlikely that there can be any serious dispute about the correct construction of these provisions, that is not for this court to determine. This court considers that the defendant's emphasis on certain of the definitions in the Procurement Contract merely serves to underscore that element of the judge's reasoning founded upon the indelibly correct statement that the interpretation of contractual provisions is a question of law. This aspect of the defendant's arguments lacks substance accordingly.

[31] We turn to consider the applicable discovery principles. The court raised the question of the framework of the first instance hearing, giving rise to the impugned order, and the framework of this appeal. In association with this enquiry the court also raised questions about the adequacy of the averments in the defendant's supporting affidavits. Linked thereto, at a notably advanced stage of the appeal hearings, Mr Dunlop, in reply, made some puzzling submissions about the Order 24, Rule 7 component of the discovery summons. In essence, he attempted to argue that this should in some way be airbrushed.

[32] We consider the elementary, and undeniable, realities of this discrete issue to be the following:

(i) The defendant's discovery summons sought three forms of relief. The first was an order "pursuant to Order 24, Rule 2(5) and Rule 7…" requiring the plaintiff to make discovery of documents in the terms of the attached Schedule.

(ii) The judgment of McBride J determined the defendant's discovery application in its entirety.

(iii) The ensuing order of McBride J (which, incidentally, simultaneously determined the plaintiff's application under, *inter alia,* Rule 5(2)) was partially successful from the defendant's perspective. The judge, however, did not accede to that aspect of the defendant's application based on rule 7. Rather, the order was confined to Order 24, Rules 2(5) and 11(1) and, in that context, standard discovery under para 28(3) of PD 01/2022.

(iv) The defendant's Notice of Appeal followed. This, in turn, was followed by the defendant's skeleton argument.

(v) A substantial amendment of its discovery summons was pursued by the defendant mid-hearing. This did not extend to the Rule 7 element, which remained intact.

[33] We consider it beyond plausible debate that in form, content and substance, as well as by its express terms, this has been from its inception a predominantly Rule 7 discovery application. We are in absolutely no doubt that as a matter of simple construction of everything featuring in the immediately preceding two paragraphs, the appeal before this court, reflecting the appellant's discovery application at first instance, continues to invoke both Rule 2(5) and Rule 7 of Order 24. The appellant has had repeated and ample opportunity to confine the scope of the appeal to Rule 2(5). This step has not been taken. Given this analysis, the belated suggestion that this court should disregard completely the Rule 7 element of the unamended discovery summons is frankly startling and is rejected.

[34] The significance of this is uncomplicated and incontestable. It relates in part to the questions raised by the court about the adequacy of the appellant's grounding affidavits and in further part it engages the burden assumed by any litigant in an Order 24, Rule 7 application. The essence of this burden is long established. Reduced to its bare minimum, it requires an affidavit on the part of the moving party deposing to and establishing a *prima facie* case that (a) the documents pursued are in the possession, custody or power of the other party and (b) that they relate to some matter in question in the proceedings. A sufficient evidential foundation for both is required. In certain circumstances this foundation may be established by permissible and reasonable inference from identified evidential components. The decisions in this jurisdiction include *Herman v Yorkshire TV* [1992] NI 27, *Kennedy v Chief Constable* [2010] NIQB 57 and *HL (A Minor) v Facebook* [2014] NIQB 101.

[35] The submissions of Mr Dunlop had a notably heavy emphasis on law of contract principles but were positively lightweight as regards the fundamental discovery principle of relevance and its offshoots. The submissions of Mr Coghlin KC are to be contrasted in this respect. We have traced the defendant's discovery quest above through the critical staging posts of the underlying contractual instruments, the pleadings and the affidavit evidence (with exhibits) founding the application. We have done so for the purpose of determining whether the threshold to be overcome has been fulfilled by the defendant and moving party. One can view this task through different prisms, each of them ultimately focusing on the fundamental test of relevance. One of these prisms is whether the discrete discovery dispute to be determined by this court involves a so-called "fishing" or "Micawber" exercise on the part of the defendant. We must further bear in mind that the onus rests on the defendant, being the moving party.

[36] The next stage in the analysis entails consideration of the affidavits grounding the appellant's discovery application. The responses to the court's questions at the hearing confirmed the following two facts. First, the affidavits in question, both sworn by the appellant's solicitor, contain no averments of the kind necessary for an Order 24, Rule 7 application. Second, these affidavits contain no material averments compliant with the facility permitted by Order 41, Rule 5 namely "statements of information or belief with the sources and grounds thereof." Averments of the "I am advised" species do not comply with this Rule. Practitioners will hopefully take note.

[37] We consider that the evidential foundation of the defendant's discovery application suffers from multiple frailties. The supporting affidavits are replete with sworn argument, impermissibly so. Furthermore, they are notably evasive regarding the key issue of the defendant's knowledge. This weakness is not masked by the abundant repetition and obfuscation in their contents. The absence of any affidavit sworn by an officer or employee of the defendant is especially striking. Fundamentally, there is no affidavit before the court engaging directly and candidly with the crucial issue of the knowledge which the defendant does possess and the sources and timing thereof.

[38] Ultimately, the question for this court is whether the foundation necessary for interfering with the order of McBride J by ordering more extensive discovery in favour of the defendant has been established. In determining this question we must give effect to the well-established principle rehearsed in para [3] above. Our overall evaluative judgement is that the defendant's quest for further discovery is characterised by vagueness and speculation, coupled with bare assertion. Having considered everything rehearsed in this judgment, we conclude that no basis for interfering with the order of McBride J has been made out. In consequence we affirm that order and dismiss the appeal.

Conclusion

[39] None of the grounds of appeal has been made out. For the reasons given, we dismiss the appeal and affirm the impugned decision of McBride J. We would add the final observation that both parties should review critically the state of their pleadings following the discovery of documents to be made at this juncture.

APPENDIX 1

2. In respect of the assertion the Procurement Contract provided for the supply of aircraft wing components for aircraft within the family of Airbus, please state:

   (a) The relevant term or terms within the Procurement Contract which so provided;

   (b) For each such term, whether it was part of the original Procurement Contract or is said to arise by way of subsequent variation or modification;

   (c) If it arose by way of variation or modification, please state:

      (i) When that variation or modification occurred;

      (ii) How that variation or modification occurred;

      (iii) Whether that variation or modification was in writing signed by both Supplier's (AAR Composites or Aeromatrix) and Shorts' respective contract authorities (in accordance with clause 1.1 of the Procurement Contract);

      (iv) The parties to that variation or modification;

      (v) The consideration, if any, for that variation or modification;

   (d) The contractual or other arrangements between the plaintiff and Airbus in respect of the supply of aircraft wing components under the Procurement Contract for aircraft within the Airbus family, including:

      (i) When any such contractual arrangements were entered into;

      (ii) The parties to any such contractual arrangements;

…

Response

2(a)-(c) **The aircraft model within the family of Bombardier Inc. in the 90 to 149 passenger range designated as the CSeries at the time the Procurement Contract was executed was subsequently designated the Airbus A220. The redesignation of the aircraft did not alter the Supplier's obligations under the Procurement Contract, which are to provide aircraft wing components to the plaintiff. The end user of**

those products is irrelevant to the obligations of the Supplier under the Procurement Contract. References to "*aircraft model within the family of Bombardier Inc.*" are simply a way of describing the relevant aircraft at the time the Procurement Contract was executed.

2(d)(i) **A General Terms Agreement was entered on 1 January 2016 (the "GTA"). The GTA was amended and restated on 1 July 2019 and further amended and restated effective 20 December 2019. An Umbrella Agreement was also entered on 20 December 2019 and amended on 16 October 2020.**

2(d)(ii) **The GTA is between Airbus Canada Limited Partnership, Short Brothers and Airbus Canada Managing GP Inc. The Umbrella Agreement is between Airbus Canada Limited Partnership, Spirit AeroSystems, Inc. and Airbus Canada Managing GP, Inc.**

7. In respect of the assertion Aeromatrix has failed to deliver in a timely manner conforming Products under the Procurement Contract, please specify:

(a) Each and every instance upon which Aeromatrix failed to deliver in a timely manner and specify:

(i) When Aeromatrix delivered each such Product;

(ii) When it should have delivered each such Product (with reference to Shorts' production forecasts at the relevant time, required in accordance with clause 4.5 of the Procurement Contract);

(iii) Particulars of any loss occasioned to the plaintiff by that failure;

(b) Each and every instance upon which Aeromatrix failed to deliver conforming Products and specify:

(i) When Aeromatrix delivered each non-conforming Product;

(ii) How precisely each such Product did not conform;

(iii) Particulars of any loss caused to the plaintiff by such non-conformity;

(iv) Whether the plaintiff's reference to 'quality failures' refers to the non- conforming Products asserted in Paragraph 14;

(c) For each such instance of alleged failure by Aeromatrix, specify:

(i) The contractual term(s) of the Procurement Contract allegedly breached by Aeromatrix;

(ii) If Aeromatrix was in breach of the delivery schedules included in the applicable Purchase Orders;

(iii) When this first came to the attention of the plaintiff;

(iv) How it came to the plaintiff's attention;

(v) Whether Aeromatrix provided notice to Shorts (in accordance with clause 9.7 of the Procurement Contract) of its anticipated delay in delivery of the Flap Track Fairings;

(vi) The reasons provided by Aeromatrix for the delay (in accordance with clause 33 of the Procurement Contract), including the estimated period of delay, and the corrective actions being taken by Aeromatrix or its suppliers to prevent or recover from the delay;

(vii) What steps Aeromatrix took to avoid or minimise the delay;

(viii) Details of Aeromatrix's weekly supplier reports and program plans at the relevant time (in accordance with clause 15.2 of the Procurement Contract) if relevant;

(ix) What, if anything, the plaintiff did upon such failure coming to its attention, and give particulars of any and all communications with:

(1) Aeromatrix (including any cure notices or notices of non-compliance in accordance with clause 21.1.1 of the Procurement Contract);

(2) The defendant; and

(3) Anyone else;

(x) Whether Shorts provided notice to Aeromatrix (in accordance with clause 9.8.5 and 11.6 of the Procurement Contract) of the non-conformance of the Products;

(xi) Whether Shorts provided any other notices to Aeromatrix in connection with its failure to perform under the Procurement Contract (including under clauses 9.8.3, 17.1, 18.3, 20.1, and 21.2.1).

Response

7(a) **Aeromatrix failed to deliver Products in a timely manner from around April 2021 onwards. The cumulative delays continued to increase and Aeromatrix did not reach the rate of production required or achieve compliance with the delivery schedules in the Purchase Orders. The detail of each and every instance Aeromatrix failed to deliver on time is a matter for evidence (whether factual or expert) or discovery, to the extent agreed or ordered.**

7(b)(i) **Aeromatrix failed to deliver conforming Products from around April 2021 onwards. The detail of each and every failure to deliver conforming Products is a matter for evidence (whether factual or expert) or discovery, to the extent agreed or ordered.**

7(b)(ii) **The Products were generally non-conforming because Aeromatrix had failed to obtain the requisite certifications for delivery of Flap Track Fairings to Airbus.**

7(b)(iii) **As a result of the non-conformity, there were further delays in the plaintiff meeting its delivery obligations to Airbus, resulting in claims for damages from Airbus as set out in Schedule 1 to the Statement of Claim. In addition, the plaintiff had to spend time conducting additional engineering work to confirm to the satisfaction of Airbus that the Products were suitable from a technical standpoint despite the lack of certification.**

7(b)(iv) **The reference to "quality failures" refers to the non-conforming Products asserted in Paragraph 14.**

7(c)(i) **The plaintiff relies upon: Article 3.1; Article 4.1; Article 9.8; Article 9.10; Article 10.1; Article 11.1; Articles 2.2.4-2.2.6. The plaintiff further relies upon the Procurement Contract in its entirety for its full content and effect.**

7(c)(ii) **Aeromatrix was in breach of the contractual delivery schedules and Purchase Orders. Given Aeromatrix's inability fully to recoup delays, even with the plaintiff's extensive assistance, from May 2022 the plaintiff was obliged to prioritise fairings required for aircraft delivery.**

7(c)(iii) **Aeromatrix's failures to deliver in a timely manner first came to the attention of the plaintiff in or around April 2021.**

7(c)(iv) **Aeromatrix's failures came to the plaintiff's attention because it**

failed to deliver the Products under the Procurement Contract in accordance with the delivery schedules in the applicable Purchase Orders.

7(c)(v) **Aeromatrix did not provide notice to the plaintiff of its anticipated delay in delivery of the Flap Track Fairings.**

7(c)(vi) **Aeromatrix did not provide reasons for the delay in accordance with clause 33 of the Procurement Contract. Aeromatrix's initial recovery plan forecast that it would be compliant with the delivery schedules in the Purchase Orders by March 2022. However, Aeromatrix was unable to meet the production rates envisaged by its recovery plans and continued to fall further behind schedule.**

7(c)(vii) **In the second half of 2021, Aeromatrix provided recovery plans to the plaintiff, but it failed to achieve the forecast levels of production and continued to revise the plans, pushing back the date by which it expected to achieve compliance.**

7(c)(viii) **By 31 July 2021, the backlog of Products as against the purchase orders was 15 shipsets. This backlog continued to increase until after the execution of the TSA and Bill of Sale. Further details are a matter for evidence (whether factual or expert) or discovery, to the extent agreed or ordered.**

7(c)(ix) **The plaintiff made numerous complaints to Aeromatrix regarding its failures under the Procurement Contract but also worked with Aeromatrix to assist in getting the requisite certification as soon as possible. The plaintiff conducted additional engineering work to ensure the products were suitable from a technical standpoint despite the lack of certification and provided personnel to support Aeromatrix from January 2022.**

7(c)(x)-(xi) **The plaintiff sent a notice to cure under Article 17.1 of the Procurement Contract to Aeromatrix on 20 January 2022.**