Neutral Citation Number: [2022] EWHC 166 (QB)

Case No: QB-2020-004601

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 January 2022

Before:

MR SIMON BIRT QC
(sitting as a Deputy Judge of the High Court)

- -

Between:

(1) NATALIA AKULININA	**Claimants**
(2) ELIZABETH KONDRASHOVA	
- and -	
IFLY S.A.	**Defendant**

- -
- -

John Kimbell QC (instructed by **Stewarts Law LLP**) for the Claimants/Respondents
Tim Marland (instructed by **Kennedys Law LLP**) for the Defendant/Applicant

Hearing date: 12 January 2022

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

SIMON BIRT QC

In accordance with the Covid-19 protocol for handing down judgments, this judgment has been handed down by the Judge remotely by circulation to the parties' representatives by way of e-mail and by release to Bailii. The date and time for hand down is deemed to be at 10:30am on Friday 28 January 2022.

Mr Simon Birt QC:

1. This claim arises out of a fatal helicopter accident in Greece. The Claimants contend that this Court has jurisdiction by virtue of Article 33 of the Montreal Convention 1999. The Defendant has challenged the assertion of that jurisdiction.

Introduction

2. On 20 August 2019, an Agusta A109C helicopter with registration SX-HTO ("**the Aircraft**") crashed shortly after take-off into the sea just off the coast of the island of Poros in Greece. The pilot and the two passengers, Mr Pavel Akulinin and Mr Mikhail Abramov, were killed. The Aircraft (which was registered on the Greek register of aircraft) was owned and operated by the Defendant ("**Ifly**"), a Greek company based at Megara Civil Airport in Megara, Greece.

3. The Aircraft was due to fly from Poros to Athens International Airport, a distance of about 160 miles. The flight had been booked at Mr Abramov's behest through an assistant in Moscow who had contacted Ifly in Greece. At Athens International Airport, Mr Akulinin and Mr Abramov were due to board scheduled flights to Nice and Moscow respectively.

4. The cause of the crash has not yet been determined. The report of the Greek Accident Investigation Authority is awaited.

5. The Claimants claim as dependents of Mr Akulinin. The First Claimant is his mother and is the administratrix of his estate. The Second Claimant was his partner. The Claimants bring their claim for compensation under Article 17 of the Convention for the Unification of Certain Rules for International Carriage by Air – Montreal, 28 May 1999 ("**the Montreal Convention**").

6. Mr Akulinin lived (together with the Second Claimant) in London. It is not in dispute that he had his principal and permanent residence in the UK.

Procedural history

7. The claim form was issued on 22 December 2020, and was subsequently served. The claim form asserted that the court had jurisdiction to hear and determine the claim pursuant to Article 33(1) and/or Article 33(2) of the Montreal Convention. Particulars of Claim were served on 28 April 2021. These set out in greater detail the basis of jurisdiction asserted, and identified only Article 33(2).

8. Ifly filed its application challenging jurisdiction on 19 August 2021.

9. I was told that fall-back proceedings have been commenced against Ifly in Greece (as the domicile of the carrier). Those proceedings are second seised, and are stayed pending the outcome of this application.

The Montreal Convention

10. The Montreal Convention deals with the liability of air carriers in the case of death or injury to passengers, as well as in cases of delay, damage or loss of baggage and cargo. The Claimants bring their claim under Article 17 of the Montreal Convention, as

applied within the EU by Regulation 2027/97 (as amended by Regulation 889/2002), which the parties agree applies to these proceedings as the law in force at the time of the accident, and one effect of which is to remove the distinction between domestic and international carriage within the EU. It is common ground between the parties that the provisions of the Montreal Convention applied to the flight on 20 August 2019, and that the provisions of the Montreal Convention contain the only basis for this Court's jurisdiction in relation to this claim.

11. Where it applies, the Montreal Convention provides an exclusive legal regime. Article 29 provides:

> "In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention, without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable."

12. The House of Lords confirmed in *Sidhu v British Airways Limited* [1997] AC 430, a case under the Warsaw Convention (the predecessor to the Montreal Convention), that "*…the purpose [of the Convention] is to ensure that, in all questions relating to the carrier's liability, it is the provisions of the Convention which apply and that the passenger does not have access to any other remedies, whether under the common law or otherwise, which may be available within the particular country where he chooses to raise his action.*" Although *Sidhu* was considering the Warsaw Convention, it is of equal application to the Montreal Convention (see e.g. the discussion in *Stott v Thomas Cook Tour Operators Limited* [2014] AC 1347 at [34] to [44]).

13. The parties agreed the following principles of interpretation applicable to the Montreal Convention (largely taken from the decision *In Re Deep Vein Thrombosis and Air Travel Group Litigation* [2006] 1 AC 495 at paragraphs 11, 54 and 55 and Articles 31 and 32 of the Vienna Convention on the Law of Treaties) which I gratefully adopt:

    (1) The starting point is to consider the natural meaning of the language of the article itself;

    (2) It is necessary to consider the Convention as a whole and to give it a purposive interpretation;

    (3) The Convention is designed to strike a balance between the interests of passengers and airlines[1] and should not be approached with a view to favouring one side or the other nor distorted by a judicial approach to interpretation designed to reflect the merits of a particular case;

    (4) The language of the Convention should not be interpreted by reference to domestic law or domestic rules of interpretation, but rather as autonomous

[1] In relation to the striking of a balance between interests of passengers and air carriers, see also *Walz v Clickair SA* C-63/09 at paragraph 33 and its reference to the "equitable balance of interests" in the fifth recital in the preamble to the Montreal Convention.

concepts according to broad principles of general acceptation. However, this does not mean that a broad construction must be given to the words used;

(5) It is legitimate to have regard to *travaux préparatoires* or legislative history in order to resolve ambiguities or obscurities in the enacting words, but only when the material is publicly available and points to a definite consensus among the delegates;

(6) It is legitimate to have regard to any subsequent practice in the application of the Convention which establishes the agreement of the parties regarding its interpretation; and

(7) Assistance can be sought from relevant decisions of the courts of Convention countries, but the weight to be given to them will vary depending upon the standing of the court concerned and the quality of the analysis.

14. The provisions relating to jurisdiction are contained in Article 33 of the Montreal Convention:

> "Article 33 - Jurisdiction
>
> 1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the court of the domicile of the carrier or of its principal place of business, or where it has a place of business through which the contract has been made or before the court at the place of destination.
>
> 2. In respect of damage resulting from the death or injury of a passenger, an action may be brought before one of the courts mentioned in paragraph 1 of this Article, or in the territory of a State Party in which at the time of the accident the passenger has his or her principal and permanent residence and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft or on another carrier's aircraft pursuant to a commercial agreement, and in which that carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement.
>
> 3. For the purposes of paragraph 2,
>
> (a) "commercial agreement" means an agreement, other than an agency agreement, made between carriers and relating to the provision of their joint services for carriage of passengers by air;
>
> (b) "principal and permanent residence" means the one fixed and permanent abode of the passenger at the time of the accident. The nationality of the passenger shall not be the determining factor in this regard.

> 4. Questions of procedure shall be governed by the law of the court seized of the case."

15. The provisions of Article 33(2) are often referred to as the "fifth jurisdiction", being an additional basis of jurisdiction beyond the four identified in Article 33(1), those four having been the potential bases for jurisdiction under Article 28 of the Warsaw Convention. The introduction of the fifth jurisdiction was driven by the United States (having been initiated in 1971 in the Guatemala City Protocol to the Warsaw Convention, though that did not come into force and was differently worded to what became Article 33 of the Montreal Convention) which was concerned to allow passengers to bring claims in the countries where they lived. It was, however, opposed by other countries, and by non-US airlines. The result is the terms of Article 33, which do not allow the claimant to sue in the place in which they live unless certain other conditions are fulfilled relating to the carrier's provision of services and conduct of its business from that jurisdiction.

16. I was told that this is the first occasion on which the interpretation of Article 33(2) has come before the English High Court.

17. Various parts of the *travaux préparatoires* to the Montreal Convention – parts of the minutes of the International Conference on Air Law at Montreal between 10 and 28 May 1999 – were drawn to my attention. The parties noted that the context referred to in the relevant discussions relating to Article 33(2) was that of scheduled airline flights, though Ifly accepted that in principle there was nothing that prevented non-scheduled flights being accommodated within its terms.

18. The introduction of the "Fifth Jurisdiction" was driven by the United States. For example, the Minutes for the Eighth Meeting of the Commission of the Whole, on 17 May 1999, record:

> "61. The Delegate of the United States failed to understand the opposition to the proposed creation of the fifth jurisdiction. Noting the general agreement that such a jurisdiction would only apply in a small number of cases, he queried how such few cases could have the major impact which had been described. The United States felt strongly about this issue regardless of the number of cases involving fifth jurisdiction as it had seen the plight of the survivors of aviation crashes when they were in bereavement, their lives devastated by a horrible event, and some were compelled, under those circumstances, to undertake litigation in a distant place that had little or nothing to do with their way of life, with how their financial plans were arranged, or with any of their reasonable expectations as to what life would bring them. This caused a great deal of harm to the people affected. The United States thus considered that the creation of the fifth jurisdiction was necessary in order to protect passengers."

19. However, the provision under debate was not one simply providing for jurisdiction in the courts of the passenger's place of residence or domicile, but required there also be

factors connecting the carrier to the jurisdiction. The United States delegate went on to say this:

> "63. The Delegate of the United States noted that a number of protections for small air carriers had been built in the provision for that jurisdiction ... Paragraph 2, sub-paragraph (c), represented a carefully negotiated compromise on that issue and reflected the fundamental fairness which the United States considered was required to address the concerns of small air carriers. The Delegate of the United States noted that if a small air carrier did not conduct its business in his State - and many did not -, if they did not operate an aircraft to his State or have their code carried on an aircraft which touched his State, the fifth jurisdiction provision would not bring them into a US court even if they were carrying a passenger whose ticket bore the code of a US air carrier and crashed. This constituted substantial protection for small carriers. Not only did air carriers have to have either their code or their aircraft touch his State, they also had to have a place of business in his State, either through which they conducted their business directly or through which their codeshared partner conducted its business. That was significant protection for small carriers who had nothing to do with operations to a State involved with a fifth jurisdiction determination."

20. The provision being debated at that point of the discussions was slightly differently formulated (and numbered Article 27(2)[2]) compared to the final version of Article 33(2), but the gist of the point made is still material, namely that the fifth jurisdiction provision was not intended to bring all carriers within the jurisdiction of the courts of the passenger's place of residence, even if there was some connection between the carrier and a US carrier.

21. Scenarios that the United States intended be caught and not caught by the proposed draft Article 27 were identified by the United States delegate at the ninth meeting of the commission of the whole on 19 May 1999:

> "The Delegate of the United States illustrated his point with a hypothetical situation involving a United States airline flying from New York to Paris. Although the only code that airline bore on tickets for the New York-Paris segment was its own, it had a

---

[2] "(2) In respect of damage resulting from the death or injury of a passenger, the action may be brought before one of the Courts mentioned in paragraph 1 of this Article or in the territory of a State Party:

(a) in which at the time of the accident the passenger has his or her principal and permanent residence; and

(b) to or from which the carrier actually or contractually operates services for the carriage by air; and

(c) in which that carrier conducts its business of carriage by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement. 3. made between carriers and relating to the provision or marketing of their joint services for carriage by air.

In this Article, "commercial agreement" means an agreement, other than an agency agreement, made between carriers and relating to the provision or marketing of their joint services for carriage by air."

> code-sharing arrangement with a carrier from Côte d'Ivoire, whereby the latter flew from Paris to Côte d'Ivoire and carried on that segment a passenger ticketed for the segment on the US airline. If something unfortunate happened on the Paris-Côte d'Ivoire segment, the Côte d'Ivoire carrier would not be subjected to jurisdiction in the United States based on the fifth jurisdiction. The alternate hypothetical situation would, he suggested, involve the same facts but with one alteration, being that the Côte d'Ivoire code was carried on a ticket for the Paris-US sector on an actual US carrier. In that circumstance, the Côte d'Ivoire carrier contractually operated service to the United States, and it would then be covered by the fifth jurisdiction."

22. Part of the history of the development of the clause was described by the United States delegate at the Fourth Meeting of the "Friends of the Chairman" Group on 19 May 1999 as follows:

> "3. Recalling the concerns expressed by the French Delegation regarding paragraph 2, sub-paragraphs (b) and (c), and the notion of a carrier having a presence in a country as a result of a code-sharing relationship, both in terms of operating to the country that way, or in terms of having a business office there, the Delegate of the United States elaborated on the drafting history of those provisions. Observing that sub-paragraphs (b) and (c) had also been the subject of lengthy consideration in the Secretariat Study Group and in the Special Group, he indicated that those bodies had started with the notion that it was not fair to capture a carrier which did not have a "suitable presence" in the country in which it had been captured and brought to Court. That broad concept having been accepted by all Members, the question had been how to put it down on paper in a way that was fair and did not leave any loopholes. It had been suggested that it be put in a somewhat simpler fashion, that if the carrier flew an aircraft to a certain location and had a serious office there, then that was a sufficiently "suitable presence" in the country for it to be fair for that carrier to be sued there. In his view, that was the position of the French Delegation.
>
> 4. A rather large loophole had been perceived, however. In noting that it was now the era of code-sharing alliances, the Delegate of the United States observed that such alliances were a very clever carrier invention, a way for a carrier to deal with the nationality requirements which existed in bilateral air transport agreements and the aviation regime which currently prevailed. Under the bilateral air transport agreements, the carriers exercised their respective State's rights. There was thus a notion of carrier nationality. If two carriers of different nationalities merged, however, they would lose a nationality. As it was not possible to have a multinational airline merger, the code-sharing alliance had been invented. When a code-sharing

> alliance was approved and given anti-trust immunity, the two carriers involved were allowed to function as if they were a single carrier for operational and antitrust purposes. That development was causing carriers involved in such arrangements to rationalize their operations in ways which had hitherto not been possible. The Delegate of the United States noted, in this context, that at least one American carrier had had, for some time, an immunized alliance arrangement with a particular European carrier. The carriers' working relationship was very close and they had decided, for good business reasons, that it did not make sense for the two of them to maintain places of business in Europe and in the United States. Consequently, the European carrier was closing its business offices in the United States, with its business henceforth being conducted in the United States through the offices of its American alliance partner. Furthermore, the American carrier was closing its business offices in Europe, with its business in Europe being conducted by its European alliance partner. Both carriers had substantial transatlantic operations with their own aircraft. Yet if one were to say that the carrier had to actually operate its aircraft to the country in question, and conduct its business out of offices in that country, then the two alliance partners to which he was referring - and which were, perhaps, setting a trend – would have substantial flight operations in and out of both Europe and the United States but would not be captured by a fifth jurisdiction on the opposite side of the Atlantic from where they were based. That was the huge loophole with which the Secretariat Study Group and the Special Group had been confronted. It had led to the reference being made in sub-paragraph (c) to a carrier's conducting its business from the premises of another carrier with which it had a commercial agreement. It was also the reason for the reference in sub-paragraph (b) to the actual or contractual operation of services. Those provisions were intended to close the loophole and to recognize modern business practices. …".

23. It was clear from the above that the drafters had had code-sharing alliances very much in mind, and had intended them to fall within the definition of "commercial agreement". The United States delegate went on to explain (in the paragraph following that set out above) that Article 27 (as it was at the time) had been drafted "in such a way as to capture code-sharing alliances while retaining a sufficient degree of flexibility to capture whatever joint business operations might evolve."

24. In presenting the "consensus package", which included the wording of article 27 which ultimately became Article 33, at the Thirteenth Meeting of the Commission of the Whole on 25 May 1999, the Chairman explained:

> "16. … Thus the nexus between the principal and permanent residence must clearly relate to a place to or from which the air carrier operated services for the carriage of passengers by air. Those services might be rendered by its own aircraft or by

> another aircraft pursuant to a commercial agreement. The air carrier must have some presence in that jurisdiction, either in the form of premises which were leased or owned by the air carrier itself or by another air carrier with which it had a commercial agreement. The Chairman averred that it was important to recognize that there was a restricted scope in the application of Article [33]. it would not simply apply because there was an interline agreement between air carriers or because there was some marketing arrangement between them. …"

25. Some care has to be taken with placing too much weight on the various extracts from the minutes set out above, which are part of the debate about the potential terms of the jurisdiction provision and where much of the discussion was undertaken by reference to the previous draft which did not reflect the final version in certain respects. (For example, the definition of "commercial agreement" in the draft Article 27, included agreements for the *marketing* of joint services for carriage by air; the reference to marketing was omitted from the final Article 33). Furthermore, much of the discussion was in respect of scheduled airline flights. However, it is clear that the terms of what became Article 33 had been the subject of careful consideration and represented a compromise between those advocating for a "fifth jurisdiction" and those concerned about its potential reach. In terms of a commercial agreement under Article 33(3), the delegates most obviously had code-sharing arrangements in mind, but they were not seeking necessarily to confine its scope to code-sharing arrangements.

The Court's approach

26. The Court's approach on a question of jurisdiction such as this was addressed by Lord Sumption JSC in *Brownlie v Four Seasons Holidays Inc* [2017] UKSC 80 and in *Goldman Sachs International v Novo Banco SA* [2018] UKSC 34 ("*Goldman Sachs*"). In the second of those cases, Lord Sumption JSC explained the position in this way (at paragraph 9):

> "For the purpose of determining an issue about jurisdiction, the traditional test has been whether the claimant had 'the better of the argument' on the facts going to jurisdiction. In *Brownlie v Four Seasons Holdings Inc* [2018] 1 WLR 192 , para 7, this court reformulated the effect of that test as follows: '(i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it.' It is common ground that the test must be satisfied on the evidence relating to the position as at the date when the proceedings were commenced."

27. The Court of Appeal subsequently examined that reformulated test in *Kaefer Aislamentos SA de CV v AMS Drilling Mexico SA de CV [2019] 1 WLR 3514* ("*Kaefer*") explaining how (among other things) it operated in practice, how it related to the "good arguable case" threshold and how the various limbs interacted with the relative test in *Canada Trust Co v Stolzenberg (No 2)* [1998] 1 WLR 547 and [2002] 1 AC 1 ("*Canada Trust*"). The following appears from the judgment of Green LJ:

    (1) The Supreme Court had, at least in part, confirmed the relative test in *Canada Trust*. The reference to "a plausible evidential basis" in limb (i) was a reference to "an evidential basis showing that the claimant has the better argument" (but not "much" the better argument). The test is not one of balance of probabilities and is context-specific and flexible. The burden of proof is on the claimant. (*Kaefer*, paragraphs 73-77).

    (2) Limb (ii):

> "…is an instruction to the court to seek to overcome evidential difficulties and arrive at a conclusion if it "reliably" can. It recognises that jurisdiction challenges are invariably interim and will be characterised by gaps in the evidence. The Court is not compelled to perform the impossible but, as any Judge will know, not every evidential lacuna or dispute is material or cannot be overcome. Limb (ii) is an instruction to use judicial common sense and pragmatism, not least because the exercise is intended to be one conducted with "due despatch and without hearing oral evidence"…. It should be borne in mind that it is routine for claimants to seek extensive disclosure (as was done on the facts of the present case) from the defendant in the expectation (and hope) that the defendant will resist, thereby opening up the argument that the defendant has been uncooperative and is hiding relevant material for unacceptable forensic reasons and that this should be held against the defendant. Where there is a genuine dispute judges are well versed in working around the problem." (*Kaefer*, paragraph 78).

    (3) Limb (iii) arises where the court is unable to form a detailed conclusion on the evidence before it and is therefore unable to say who has the better argument. "To an extent it moves away from a relative test and, in its place, introduces a test combining good arguable case and plausibility of evidence. Whilst no doubt there is room for debate as to what this implies for the standard of proof it can be stated that this is a more flexible test which is not necessarily conditional upon relative merits." (*Kaefer*, paragraphs 79-80).

Basis upon which jurisdiction is contended for by the Claimants

28. The primary basis upon which the Claimants contend that jurisdiction is established is under Article 33(2) of the Montreal Convention. It is apparent from the text of that provision that, in order to establish jurisdiction under it in this court, there are three conditions that must be satisfied:

    (1) The passenger must have their principal and permanent residence in the UK;

(2) The carrier must operate services for the carriage of passengers by air to or from the UK either on its own aircraft or on another carrier's aircraft pursuant to a commercial agreement; and

(3) The carrier must conduct its business of carriage of passengers by air from premises in the UK leased or owned by the carrier itself or by another carrier with which it has a commercial agreement.

In each case, these conditions are to be assessed at the time of the accident. "Commercial agreement" is as defined in Article 33(3), set out above.

29. There was no dispute about Mr Akulinin's place of residence and Ifly accepted that condition (1) was fulfilled.

30. As to conditions (2) and (3), it was made clear at the hearing that the Claimants did not contend that Ifly (at the time of the accident) operated services on its own aircraft to or from the UK or that it conducted its business of carriage of passengers by air from premises leased or owned by Ifly itself in the UK. There had been some previous suggestions of such a case (indeed, that was a case that was in part set out in the Particulars of Claim), but further investigation of the facts had demonstrated to the Claimants that they could not maintain it.

31. The contentions that were therefore advanced at the hearing were: (as to condition (2)) that Ifly operated services for the carriage of passengers by air to or from the UK on another carrier's aircraft pursuant to a commercial agreement, and (as to condition (3)) that Ifly conducted its business of carriage of passengers by air from premises in the UK leased or owned by another carrier with which it has a commercial agreement.

32. I consider below whether or not those contentions can be made good, to the relevant standard, on the evidence before the court.

33. There was also an alternative case for jurisdiction suggested at the hearing, namely one based upon Article 33(1) and the suggestion that Ifly may be domiciled in London, though it was not put with particular force and it was acknowledged that the evidence did not really support it in certain respects. I will come back to this point.

34. I should note that the Claimants also included in their Particulars of Claim (further or alternatively to the claim for liability under the Montreal Convention) a claim in the tort of negligence, which did not appear to have been included within the scope of the language in the claim form. There was no argument about this, and it was accepted that (even if it was a claim that could be maintained) the presence of this claim did not expand the potential basis for jurisdiction; in other words, it was common ground that the jurisdiction position turned on Article 33 of the Montreal Convention. Both parties took the position that, for the purposes of this application, I should ignore this claim in negligence, and so I say no more about it, save to note that nothing in this judgment should be taken to suggest whether or not such a claim could be maintained (in particular in light of the Montreal Convention providing an exclusive legal regime and/or the scope of the claim form) or whether or not any jurisdictional requirements would be fulfilled in respect of any such claim.

Ifly's history and operations

35. It will be apparent that the basis for the assertion of jurisdiction does not depend on the facts relating to the arrangements for the flight carrying Mr Akulinin on 20 August 2019. They had nothing to do with the UK (save that the UK was the place of Mr Akulinin's principal and permanent residence). It depends on Ifly's business in a more general sense, and this was the focus of much of the evidence at the hearing of this application.

36. Ifly is a Greek company, based at Megara Airport in Greece. It was founded in 2011. Its CEO is Mr George Verbis, who made a witness statement in support of Ifly's application. He stated that he has held the position of CEO since the establishment of the company, is a member of the three-member Board of Directors and, by virtue of a decision of that Board, has been assigned all the Board's responsibilities regarding the management and representation of the company. He said that he has had daily control of the operation and management of the company since it was established.

37. Ifly's business is the provision of VIP air transportation services, mostly by helicopter (but also by fixed wing aircraft, of which Ifly operated one at the time of the accident) and mainly within Greece (although occasionally to/from other countries). Most of its business is operating passenger flights from airports in Greece to high-end tourist destinations in Greece. These do not include regular or scheduled flights – the aircraft are chartered at the request of customers.

38. Mr Verbis's evidence emphasised that most of Ifly's flights were within Greece, and when they made flights outside Greece it was usually to countries that were near to Greece. Flights further afield had been made, he said, to Spain, Denmark and Poland, but only once or twice in the history of the company. He said that Ifly had never operated flights to England. Ifly had an Air Operator Certificate from the Hellenic Civil Aviation Authority to operate flights over a large area, which stretched as far as the UK and Scandinavia, as well North Africa and parts of India and Russia, but Mr Verbis said that Ifly did not have any real intention to operate to or from these destinations.

39. The Claimants' investigations identified that Ifly's fixed wing aircraft had undertaken at least 65 international flights in the first nine months of 2021. None of those appear to have been to the UK.

40. As to capabilities to fly to the UK, the helicopters operated by Ifly would not have been able to reach the UK without making a number of stops. At the time of the accident, Ifly had only one fixed wing aircraft (a Cessna Citation CE-550B). This did have the range to reach England from Greece without a stop, but was said never to have done so (at least not whilst under Ifly's operation).

41. Mr Verbis explained that the usual way in which Ifly's aircraft were engaged was that one of the luxury hotels in Greece to which Ifly regularly flew would contact Ifly with details of the guests who wanted to book a flight. Ifly would offer a price and, if that was agreed, Ifly would usually ask the customers to sign a charter agreement specifying the details of the flight, including its price and the terms of the charter. He said that the charter agreements are made directly between Ifly and its passengers, and are not made with the hotel. He exhibited a sample Ifly charter agreement (which among its terms provided for Greek law and jurisdiction).

42. Because of the particular way in which the Claimants seek to demonstrate that the requirements of Article 33 are fulfilled, it is necessary to understand in a little more detail Ifly's relationship with one of the luxury hotels to which it flies and some other aspects of travel to that hotel.

43. The hotel in question is the Amanzoe resort, located in Greece on the Peloponnese, to which a helicopter flight from Athens International Airport takes about 30 minutes. The relationship between Ifly and Amanzoe appears to be long-standing. The Claimants adduced a witness statement from Mr Athanasios Gavriil, a former Flight Operations Manager for Ifly, who said that the idea for Ifly as a company had originated with the individual who developed and owned Amanzoe (as well as another luxury resort) who wanted to carry guests to and from those resorts by helicopter. Amanzoe is one of the three "partner destinations" advertised by Ifly on its website and, in turn, it was said that Amanzoe actively encourages the use of Ifly services to carry their guests to and from Athens International Airport. Two of the Ifly helicopters bear the Amanzoe name on their fuselage. Flight data analysed by the Claimants shows that, during August 2019, Ifly flew to or from the Amanzoe resort 148 times using four helicopters (amounting to around 60% of the flights undertaken by those four helicopters that month).

44. The second aspect relating to Amanzoe that the Claimants maintain is important is the fact that the Aman group offers its own private jet service, such that someone in the UK wishing to stay at Amanzoe could chose to travel from the UK to a Greek airport on an Aman liveried aircraft ("**the Aman Jet**") and then take an Ifly helicopter from that airport to Amanzoe. The Claimants said that the Aman Jet (a Bombardier BD-700 Global 5000, which is registered in Malta) uses London Biggin Hill as its "homebase", and travelled to the UK on 10 occasions over the last twelve months.

45. The evidence about the commercial arrangements by which the Aman Jet is operated is relatively thin, perhaps not surprisingly given that no Aman entity is party to this litigation (and the flight the subject of this case, from Poros to Athens International Airport, was not to or from any Aman property). In addition to its being registered in Malta, the Aman Jet's registered operator is a company called Emperor Aviation Limited with an address in Malta. It is not clear on what basis any entity within or on behalf of the Aman group contracts with Emperor Aviation Limited.

46. It appears that there must be some commercial arrangement between an Aman entity and Emperor Aviation Limited (even if through a series of one or more intermediate contracts) relating to the Aman Jet, which appears to bear the Aman name and logo and is advertised on the Aman website. The Aman entity identified by the Claimants is Aman Group S.a.r.l., a company registered in Switzerland which, on the Aman website, states that its customer services and legal departments are both based in London. The Claimants pointed out that the Aman website includes a page through which potential passengers can make an enquiry in relation to the Aman Jet, and the "legal notice" on the Aman website said that services would be purchased from Aman Group S.a.r.l.. However, the precise nature of the relationship between Aman and Emperor Aviation Limited is not clear.

47. Also unclear is the relationship between Aman Group S.a.r.l. and the entity which the Claimants identified as the developer and owner of Amanzoe, namely Dolphin Capital Investors. There was no evidence about that at all.

48. For completeness, Ifly confirmed in its evidence that there was no commercial relationship between it and Emperor Aviation Limited. The Claimants confirmed at the hearing that they did not maintain any case that there was a commercial agreement within Article 33 between Ifly and Emperor Aviation Limited.

The case advanced by the Claimants – Article 33(2)

49. On the basis of the evidence set out above, the Claimants maintain that jurisdiction under Article 33(2) can be established through what they describe as a commercial partnership or joint business operation between Ifly and Aman Group S.a.r.l. (below, "**Aman**") for the carriage by air of passengers to and from the UK to Amanzoe. In more detail, what was said was:

    (1) Aman sells holidays at Amanzoe via its customer services department in London.

    (2) Aman contracts to carry its UK Amanzoe clients from the UK by air (by private jet) to Athens International Airport. Aman is the contracting carrier for that flight.

    (3) For that purpose, Aman uses the Aman Jet, which is based in the UK. The Aman Jet is operated by Emperor Aviation Ltd which, although its head office is in Malta, has a representative office in London. (The Claimants also say that the Aman Jet appears to be chartered out by another company, Quantumvia Ltd, which they say is based in London).

    (4) Aman's clients transfer to one of the helicopters operated by Ifly to travel from Athens International Airport to Amanzoe.

    (5) The terms of the commercial relationship between Ifly and Aman are not known, but the Claimants rely on the fact that:

        a) Two of the Ifly helicopters display the Amanzoe name/branding;

        b) Amanzoe is one of only three "partner destinations" on Ifly's website; and

        c) In August 2019, Ifly flew to Amanzoe 148 times, which they say makes up more than 50% of the work carried out by helicopters in the fleet.

50. The Claimants case, as explained at the hearing, was that Article 33(2) applied to the facts of the case in light of those factual propositions because (when the relevant parties were substituted into the wording) at the time of the accident:

    (1) Ifly (i.e. "the carrier") operated services for the carriage of passengers by air to or from the UK on Aman's (i.e. "another carrier's") aircraft, pursuant to a commercial agreement; and

    (2) Ifly conducted its business of carriage of passengers by air from premises in the UK leased or owned by Aman, with which Ifly has a commercial agreement.

51. The "commercial agreement" was said to be a commercial partnership or similar arrangement pursuant to which Ifly and Aman provided their joint services for carriage of passengers by air from the UK to Amanzoe. The Claimants acknowledged that a relationship of agency, or one involving the provision of marketing services, would not be sufficient to meet the definition. It had to be one for the provision of joint services for carriage of passengers by air.

52. Some of the above factual propositions (at paragraph 49) may be relatively uncontroversial. Others may be more difficult to make out or are relatively speculative on the current evidence. Proposition (2) above assumes that Aman (i.e. Aman Group S.a.r.l.) is the party that enters into a contract with passengers and is the contracting carrier, for which the only evidence relied upon appears to be the general legal notice on the Aman website stating that services would be purchased from Aman Group S.a.r.l.. It is far from clear whether that means that any flight booked on the Aman Jet (which it appears cannot be booked directly through the website, but only an enquiry made) would be a service for which Aman Group S.a.r.l. would be the contracting party. For current purposes, I will assume that it could be established that Aman was the contracting carrier, though I set out some further comments about this point later.

53. There was no detailed evidence as to how many passengers/hotel guests may have followed the particular route postulated by the Claimants (namely, Aman Jet from the UK to Athens, followed by Ifly helicopter from Athens to Amanzoe), or whether in fact anyone had done so. No doubt hotel guests also arrive in Athens on scheduled flights, even if they book a helicopter for the last part of their journey to the hotel (though some may travel by car instead), or use their own private jet, or another private jet or chartered service, rather than travelling on the Aman Jet.

54. In fact, the data obtained by the Claimants relating to the flights made by the Aman Jet from 22 December 2020 to 4 December 2021 (a period of time commencing more than a year after the accident, no flight data having been produced for the Aman Jet for any earlier period) showed that, over that period at least, the Aman Jet had not taken such a route (at least not directly). The Claimants said that the Aman Jet had travelled to the UK on 10 occasions over that period, though the flight data appeared to show that was mainly flights to and from Moscow. The Claimants pointed out that the Aman Jet had travelled to or from main airports in Greece on thirteen occasions over that period, but the data showed those were (again) mainly flights to/from Moscow. It was said by the Claimants that there had been one flight by the Aman Jet in that period from Mykonos, Greece to Farnborough, UK, although the flight data showed that was in fact one flight from Mykonos to Moscow (on 11 July 2021) and then another flight from Moscow to Farnborough (on 12 July 2021). It was far from clear, therefore, that the passengers from Mykonos were travelling to the UK (rather than to Moscow). The Claimants also pointed out that Ifly has operated services to Mykonos, noting that in the 40-day period between 2 August and 10 September 2019 (not an overlapping period with that for the Aman Jet's flight data), there had been at least two Ifly helicopter trips between Amanzoe and Mykonos. The suggestion being that it is conceivable that the passenger(s) said to have boarded the Aman Jet at Mykonos could have been guests at Amanzoe who had flown to Mykonos on an Ifly helicopter – that is conceivable, but speculation.

55. It should also be noted that use of the Aman Jet is not confined to trips for the purpose of visiting an Aman property. The website makes it clear that it can be booked to fly to

other destinations. The fact that it might have flown to Greece does not therefore mean that the flight was connected to a visit to Amanzoe by the passenger(s) – it might or might not have been.

56. Although the Claimants made the submission that Ifly got a "*steady stream of international passengers from the UK*" by virtue of the Aman Jet flying people to Athens who would then want to take a helicopter to Amanzoe, there in fact was no evidence to support any sort of volume.

57. However, it is possible that this is a route taken by some travelling from the UK to Amanzoe to stay in the hotel and, for present purposes, I assume that to be the case and that that is sufficient though, again, I will return to consider this separately below.

58. The difficulty for the Claimants is that even if each of the above factual propositions at paragraph 49 were plausible, it would not fulfil the requirements of Article 33(2). There is no evidence as to what the commercial relationship is (or was, at the time of the accident) between Ifly and Aman Group S.a.r.l., or whether there is one at all. It appears likely there is a contract of some sort between Ifly and an Aman entity relating to the display of the Amanzoe name and branding on two of the Ifly helicopters, but whether that is Aman Group S.a.r.l. is not clear (the Aman website defines "Aman" (to which it is said the trademarks are proprietary) broadly to include Aman Group S.a.r.l. and "its subsidiaries, affiliates and related entities"). But even if there is an agreement with Aman Group S.a.r.l. in *that* respect, dealing with the display of the Amanzoe name on two Ifly helicopters, that would not itself amount to an agreement relating to the provision of joint services between Aman Group S.a.r.l. and Ifly for carriage of passengers by air, and certainly not one pursuant to which Ifly operated services from/to the UK on an Aman aircraft.

59. Beyond an agreement relating to the display of the Amanzoe name on the helicopters, the Claimants must rely on inference, and speculation, as to what the commercial arrangements are. There is nothing of any substance to suggest that those arrangements extend to an agreement between Aman and Ifly relating to "their joint services for carriage of passengers by air."

60. But even that would not be enough if the joint services for carriage by air related to the Ifly helicopter flights to/from Amanzoe (which are flights from/to other places in Greece). In order to fall within Article 33(2) for the purposes of establishing jurisdiction in this country, it would have to be pursuant to such a commercial agreement that Ifly (on Aman's aircraft) operates services to or from the UK.

61. There is nothing in the evidence which suggests that flights on the Aman Jet to/from the UK were part of Ifly's operation or that Ifly conducted its business from Aman's premises in London. As I say above, there is no evidence that there was an agreement relating to the provision of joint services between Ifly and Aman as carriers within the definition of "commercial agreement" in Article 33(3). However, even if there was any such agreement, the most that the evidence would suggest (even based upon inference) would be some form of an arrangement relating to the helicopter flights to/from Amanzoe (though if there is such an arrangement, it is not clear what it is). Entirely absent from the evidence was any suggestion that Ifly was operating a service by way of the Aman Jet or conducting its business from Aman's premises in London.

62. In relation to a flight on the Aman Jet from the UK to Athens, the Claimants' case was that Aman would be the contracting carrier (and Emperor Aviation Limited no doubt the actual carrier). It was not clear what was said to be the role of Ifly in that flight. There was no suggestion that Ifly was somehow entering into an agreement with passengers in relation to a flight on the Aman Jet or that it was in any way a contracting carrier for such a flight, or otherwise had responsibility, to anyone, in relation to such a flight. There is nothing to support the suggestion that Ifly was operating (even jointly) a service for the carriage of passengers on the Aman Jet.

63. There may well have been liaison between Aman and Ifly in relation to any passengers who wanted to travel from the UK to Amanzoe, because Ifly were in a position to carry passengers from places in Greece (in particular Athens International Airport) to Amanzoe (and appear to have been a, or the, preferred carrier of Amanzoe to do so). But that does not mean that the carriage of the passengers from the UK to Athens International Airport (or to another airport in Greece) was a joint service between Aman and Ifly. The evidence does not support any suggestion that Ifly's involvement in the arrangements went beyond the helicopter flight to/from Amanzoe.

64. This is not equivalent to the codeshare situation for scheduled airlines. As described by the Claimants, a codeshare agreement is a business arrangement under which two or more airlines publish and market the same flight under their own airline designator and flight number (the airline flight code) as part of their published timetable or schedule. The code refers to the identifier used in a flight schedule, generally the two-character IATA airline designator code and flight number. Typically, a flight is operated by one airline (technically called an "administrating carrier" or "operating carrier") while seats are sold for the flight by another airline using their own designator and flight number. Thus, XX224 (flight number 224 operated by the airline XX), might also be sold by airline YY as YY568 and by ZZ as ZZ9876. But here, there is no suggestion that Ifly was selling, publishing or marketing any Aman Jet flight from the UK, or in any sense associating itself with such a flight. There was nothing equivalent to a code for Ifly being carried on the Aman Jet flight.

65. Moreover, even if one was trying to analyse the Ifly-Aman relationship as one akin to a codeshare or something similar (which, as I have said above, it does not seem to me that one can), this still does not get away from the problem that there is nothing to suggest that Ifly had anything to do with any UK-Athens flight (as opposed to Aman potentially having some involvement in the Athens-Amanzoe flight, if the Claimants were correct that there was any agreement at all). Mr Marland (on behalf of Ifly) relied upon the distinction drawn between two potential scenarios by the US Delegate at the Conference leading to the conclusion of the Montreal Convention, relating to flights from the US to Paris and then to the Côte d'Ivoire (at the ninth meeting of the commission of the whole on 19 May 1999), as set out at paragraph 21 above. In the first hypothetical situation there posited, it was not envisaged that the requirements of the fifth jurisdiction would be fulfilled (compared to their fulfilment in the alternative hypothetical situation). It is that first situation which closer reflects (in a code share situation) the fact pattern here, if there is any relationship at all between Aman and Ifly which comes close to the necessary "commercial agreement" (which, as I have said, there does not appear to be). Whilst this was only a hypothetical illustration deployed by a delegate during the discussions, the delegate in question was the main proponent of the fifth jurisdiction, and he was here explaining its limits, so it seems to me that the

first hypothetical situation he posited is a helpful illustration (and there being no intention that jurisdiction would be established in that situation is consistent with the words of the final version of Article 33).

66. The Claimants also suggested that the arrangements they described as existing between Aman and Ifly were equivalent to a modern interline arrangement, which they said would fall within Article 33. This does not seem to me to advance the matter. "Interline", as described in an extract from the IATA website relied on by the Claimants, is a broad term used to describe one airline selling an itinerary to a customer that involves services provided by another airline.[3] To say any of the arrangements in this case meet such a description assumes that the Claimants are correct in their arguments, rather than assisting in resolving whether or not they are. (I also note in passing that the Chairman when presenting the "consensus package" at the Thirteenth Meeting of the Commission of the Whole on 25 May 1999 (set out above) said that it was not envisaged that Article 33 would apply simply because there was an interline agreement or some marketing arrangement between carriers. The Claimants sought to sideline that by saying that the notion of interline agreements had moved on since 1999, which may be the case, but that seems to me to underline that this is not a particularly useful concept to use in this case to answer the jurisdiction question). It is the provisions of Article 33 that need to be fulfilled, and seeking to describe an arrangement as equivalent to an interline arrangement does not advance matters.

67. In addition, insofar as there was a suggestion from the Claimants that passengers who wanted to fly from the UK to Amanzoe would have made a single contract for that journey (whether with Aman or with another entity), the evidence was to the contrary:

    (1) The Aman website included an enquiry form for the Aman Jet, but not for any further transport. In particular, there was no evidence that it contained such an inquiry form for helicopter transport from Athens International Airport (or anywhere else in Greece) to Amanzoe.

    (2) There was no suggestion on the Aman website that Ifly would be operating, in any sense, the flight from the UK, or that it was a joint service with Ifly or part of a joint service with Ifly.

    (3) Even if the agreement for carriage of passengers from the UK to Athens by way of the Aman Jet was with Aman (which was not clear, but is at least plausible on the evidence before the court) there was no evidence to suggest that the contract for carriage of passengers from Athens to Amanzoe would be with Aman. The evidence from Mr Verbis was that, generally, Ifly asked passengers to sign a charter agreement with them – in other words there was a direct agreement between passengers and Ifly in respect of the helicopter flight. (This was also supported by evidence adduced by the Claimants, by way of a travel

[3] The full description relied on by the Claimants from the IATA website is:
"Interline is a broad term used to describe one airline selling an itinerary to a customer that involves services provided by another airline. The term has also expanded to include ancillary products and services, and to intermodal transport. Interline itineraries sometimes involve connections between different airlines, but often do not. Interline occurs within many different commercial agreements which include the IATA Multilateral Interline Traffic Agreement (MITA), individual interline agreements, codeshare agreements, joint ventures and alliances. Interline relationships are often supported by other agreements such as frequent flier earn and redemption agreements, and premium guest recognition agreements and other forms of cooperation."

writers' account of his trip to Amanzoe including a helicopter flight to Athens airport with Ifly, which suggested he had contracted directly with Ifly although having been introduced to them by Amanzoe).

(4) In other words, the evidence suggested two separate contractual arrangements for any such trip. In addition, there is nothing to suggest that any such passengers would necessarily have regarded their journey as a single operation, rather than two operations – one on the Aman Jet and one with the Ifly helicopter.

68. In short, the Claimants have failed to establish to any extent that, at the time of the accident:

(1) Ifly operated services for the carriage of passengers by air to or from the UK on Aman's aircraft; or that

(2) Ifly conducted its business of carriage of passengers by air from premises in London leased or owned by Aman (or, indeed, from premises in the UK at all).

69. The fact that there may be some arrangement of some description between Ifly and Aman does not remove these difficulties. There is no suggestion in the evidence that any arrangement or agreement that there might be between Ifly and Aman (even assuming there is one at all) is such as to provide that there is a joint service between Ifly and Aman for the carriage of passengers by air from the UK to Amanzoe, or that Ifly operates services to/from the UK (on Aman's aircraft) or that Ifly conducts <u>its</u> business of carriage of passengers by air from Aman's premises in London.

70. That is so on the face of the language in Article 33 itself, giving that language its natural meaning and taking into account its purpose. One does not need to resort to the *travaux préparatoires* in order to reach these conclusions, but for the sake of completeness these conclusions seem to me entirely consistent with those parts of the discussions preceding the conclusion of the Convention that the parties highlighted.

71. Whilst there may be some gaps in the evidential picture, I am satisfied there is sufficient evidence to determine that Ifly has the better of the argument that the two propositions identified in paragraph 68 above are not established on the facts of this case (i.e. applying limb (i) of the test in *Goldman Sachs* as explained in *Kaefer*). It seems to me I can reliably take that view on the material available. I also add that even if I had concluded otherwise, such that I could not reliably have formed a view as to who had the better of the argument, I would have nonetheless concluded there was not a plausible evidential basis (under limb (iii)) supporting either of those two propositions in any event. The evidence just does not go that far, and those propositions fall beyond any reasonable inference, and could only be reached through unsupported speculation. The Claimants have accordingly failed to supply a plausible evidential basis for the application of Article 33(2). To put it in other language (which Green LJ in *Kaefer* said still had currency) they do not have a good arguable case that it applies.

72. The Claimants pointed out that there was a large difference in the value of a claim brought in England compared to that which could be maintained in Greece. That may be so, but it is irrelevant to the question whether the test for jurisdiction under Article 33 is met, and if anything that underlines why Article 33 has to be applied according to

its terms (and without a slant in favour of one or the other party). Those terms were the product of a detailed and careful negotiation between the contracting State parties to the Montreal Convention aiming to strike a balance between the competing interests and views, and where it was clear that the introduction of the "fifth jurisdiction" was not intended to give jurisdiction to the courts of the claimant's residence without there also being a connection between the defendant carrier and the jurisdiction that fell within the carefully drafted requirements of Article 33.

73. The Claimants case on Article 33(2) therefore fails.

74. For the sake of completeness, I should also say something about two of the assumptions that I made above in considering the position.

75. *i) The evidence about flights:* I have considered the above, and reached the conclusion that I have, on the assumption that, if there was an agreement for a joint service as alleged by the Claimants, that was something that was actually being provided to passengers at the time of the accident, in August 2019. However, as I have mentioned above, the evidence that the Aman Jet flew regularly from the UK to Greece is thin, to say the least, and there was no evidence that the particular travel arrangements relied upon by the Claimants to establish their case had ever actually been followed by anyone. The Claimants' evidence only goes so far as showing that an Aman Jet flight from the UK to Athens was something that was made available by Aman and that might have been provided (but there is no evidence that it actually was provided to anyone at the time), and that any passengers on it may have then used an Ifly helicopter to fly from Athens to Amanzoe. It is a matter of speculation as to whether this was a service provided or, if it was used at all, by how many passengers or how frequently.

76. This seems to me to provide a further reason why the requirements of Article 33 are not fulfilled here. There is no plausible evidential basis that any such service was actually being operated in 2019, in the sense of passengers being carried in this combination of transport over this route. There is no evidence that they were.

77. It does not seem to me to be sufficient that it is merely conceivable that such a service was provided. Article 33 requires the carrier to have been operating the service at the time of the accident. On the Claimants' case, that means the joint service that they contend was provided by Aman and Ifly to transport passengers from the UK to Athens on the Aman Jet and then from Athens to Amanzoe on an Ifly helicopter. The most they can say is that there was an Aman Jet that was available to be booked by passengers to fly from the UK to Athens in August 2019, but they have no evidence that any passengers actually took such a flight on that aircraft (whether in August 2019, or in 2019 at all), still less that any such passengers then took an Ifly helicopter to Amanzoe. This is not just a point about the particular month or year in question, or indeed about Athens International Airport in particular (there is no evidence that any particular passengers took the Aman Jet followed by an Ifly helicopter in travelling from the UK to Amanzoe at all). As mentioned above, the Claimants have not identified any particular journey that fits the pattern they rely upon. In other words, they have no evidence that the "joint service" relied upon (even if that were an accurate description) was actually provided to any passengers.

78. This is not something I have relied upon in coming to my conclusion at paragraph 73 above, but as I say it seems to me to be an additional reason why the requirements of Article 33 are not fulfilled.

79. *ii) Whether Aman was a "carrier".* The above consideration of the Claimants' case also proceeds on the basis that Aman was a "carrier" within Article 33. As I have explained above, it seems to me that the Claimants' contentions fail even if it was. However, Ifly also contended that the Claimants' case had to fail because Aman was not a "carrier" such that it could not be the counterparty to any "commercial agreement" under Article 33(3).

80. There is no definition of "carrier" in the Montreal Convention, although Article 39 makes it clear that it can encompass a contractual carrier as well as the actual carrier. However, Ifly noted that the claim was brought under Regulation 2027/97 (as amended by Regulation 889/2002) which defines, under Article 2, "air carrier" as "an air transport undertaking with a valid operating licence" and "Community air carrier" as "an air carrier with a valid operating licence granted by a Member State …". Ifly sought to say that meant that the reference to "carrier" in Article 33 had to mean an entity with a valid operating licence. It pointed out that there was no evidence that any of the Aman entities fitted either of those definitions or had a valid operating licence.

81. The difficulty with this point is that it conflates two different things. The first is the scope of the meaning of "carrier" in Article 33 of the Montreal Convention. The second is the scope of the instrument that applies the Montreal Convention for the purpose of this case, namely Regulation 2027/97 (as amended). The latter is concerned with identifying which entities fall within the scope of the liability regime established, in other words setting the boundaries of which entities' liability is covered under it. For that purpose, the status of the defendant or potential defendant is relevant. However, when looking to see whether there is a commercial agreement with "another carrier" under Article 33, it is not the defendant or potential defendant's status that is relevant, but that of another entity, and it is not that other entity's liability which is in issue.

82. Moreover, it does not seem to me that one can superimpose on the wording of the Montreal Convention particular definitions used in implementing legislation of one or more individual States (or, here, the EU). The Montreal Convention is not to be interpreted by reference to domestic law, but rather its concepts are autonomous. The words of Article 33 are intended to mean the same in whichever of the Convention States they apply, rather than to have different meanings in different states.

83. Imposing the test for "carrier" sought by Ifly would add an additional requirement to the jurisdictional test that would appear not to be warranted. If, for example, a defendant carrier (outside the jurisdiction) had (what would otherwise be) a commercial agreement with another carrier who was based in the jurisdiction, where that agreement would fall within Article 33(3) and where the requirements of Article 33(2) would otherwise be fulfilled, the fact that the other carrier turned out not to have a licence (or, if it had a licence which turned out not to be valid, or had lapsed) ought not to make a difference to this jurisdictional question. The defendant carrier's position would be the same, and its connection with this jurisdiction the same. The lack of a licence may have ramifications and consequences for the other carrier, but it is difficult to see why it should result in the jurisdictional basis against the defendant carrier being eroded when otherwise it would be established.

84. The Montreal Convention does not narrow the meaning of the term "carrier" in any particular manner or by reference to particular qualifying criteria. Article 39 makes it clear that a carrier can be a contracting carrier as well as an operating carrier. It provides that a party which, as principal, makes a contract of carriage governed by the Montreal Convention with a passenger, but where the carriage is performed by another carrier (by virtue of authority from the contracting carrier, which is presumed in the absence of proof to the contrary), is a contracting carrier, and is subject to the provisions of the Convention. That is straightforward. There is no additional requirement that it carry any particular licence or other status. It seems to me there is no reason to add the qualifying criteria to the words of the convention that Ifly suggests in this respect.

85. As a result, there is no requirement, for the purposes of Article 33 of the Montreal Convention, that the "commercial agreement" necessarily needs to be with a carrier which has a valid operating licence. (I note in passing that, although I have not relied on these cases in coming to this conclusion, the decisions of the US District Court in *Re West Caribbean Airways SA* 619 F Supp 2d 1299 (SD Fla, 2009) and of the New South Wales Court of Appeal in *Air Tahiti Nui Pty Ltd v McKenzie* [2009] NSWCA 429 appear to be consistent with it). The fact that there is no evidence that Aman has such a licence is not, therefore, by itself, a knock-out blow for Ifly.

86. That is not to say that this point necessarily has no relevance at all. For the Claimants' case to succeed on jurisdiction, they must at least show that there is a plausible evidential basis for the contention that Aman was a carrier i.e. (on the Claimants' case on the facts) a contracting carrier, rather than participating in some other role, for example putting passengers in touch with the carrier or another entity acting for the carrier (whether Emperor Aviation Ltd or Quantumvia Ltd or another entity) or otherwise acting as an intermediary in a way that did not amount to acting as a carrier itself. It was accepted by the Claimants that it was likely that an entity capable of being described as a carrier under the terms of the Convention would have a valid operating licence, and (if it is a carrier as the Claimants contend) Aman may have one – but there is just no evidence either way in relation to that point.

87. On my analysis and conclusions set out above, this does not matter – I have decided that the terms of Article 33 are not fulfilled, such that there is no jurisdiction, even assuming Aman was a "carrier". I therefore do not need to determine whether or not Aman was a carrier within the terms of Article 33. The evidence on the point is thin, and this may well be the sort of point to fall under limb (iii) of the test as described in *Goldman Sachs* and *Kaefer*. There is little evidence in relation to Aman's role regarding the Aman Jet and there is no evidence as to the contractual relationships Aman has relating to the Aman Jet. At the end of the day, one is left with the reference on the Aman website to the entity with which a customer contracts as Aman (although whether that applies to the Aman Jet is not clear, given that a customer can only enquire about the Aman Jet, rather than book it directly through the website) and the fact that the Aman Jet bears the Aman brand/name. If I had to determine the point, it seems to me that may (just) qualify as a plausible evidential basis that Aman was a contracting carrier within that description at Article 39 of the Montreal Convention (even though contested). However, as I have said, this is not a matter I need to determine because, even if Aman is a carrier, the requirements of Article 33 are not fulfilled.

88. Two other points relating to the evidence for the application deserve to be noted. First, in relation to the Claimants' primary case, the Claimants sought to pray in aid of their

contentions a Part 18 request that they had served on Ifly shortly before the hearing. It was served on Friday 7th January 2022, requesting a response by 4pm on Monday 10th January. It was framed in broad terms and sought information about any commercial agreements concerning or relating to the carriage of passengers by air that Ifly had (in August 2019) with any company in the "Aim of Emperor Group of companies" (including Emperor Aviation Ltd and Quantumvia Ltd) or any company in the Aman Group of companies (including the Amanzoe Resort). Ifly refused to answer it. However, its failure to do so cannot, in the circumstances of this case, improve the Claimants' position. There was no suggestion in the evidence that there was any relevant commercial agreement for the carriage of passengers by air between Ifly and any such company, and the failure of Ifly to answer the broad questions cannot, in these circumstances, amount to plausible evidence of the existence of such an agreement by itself. I also note what was said by the Court of Appeal in the *Kaefer* decision at paragraph 102 in relation to a request for disclosure at the jurisdiction stage ("*Given that jurisdiction disputes are determined on the basis of the available evidence, not as trials or mini-trials, the mere fact (assuming it to be the case) that the respondents dug their heels in and did not disclose all that was demanded of them is not, in itself, a reason to conclude that the non-disclosure was material and culpable.*")

89. Second, Mr Neenan (a partner at Stewarts Law LLP acting on behalf of the Claimants) explained in his witness statement opposing the application that, prior to issuing proceedings, he had instructed a Greek speaking paralegal working for him to call Ifly and ask them if they could fly, and had flown, to England, suggesting that the paralegal speak in Greek for these purposes and create a backstory. Few details of this call were given (and no note or other written record of it was produced) but Mr Neenan said that Ifly stated on the call they were able to fly to the UK, suggesting their Cessna fixed wing aircraft for such a flight, and said they had flown to the UK before, asking for an emailed request to take matters further and respond with a quotation. The enquiry was not taken further. Mr Neenan said that the intention of the call was to determine whether there might be any basis for asserting jurisdiction in England under Article 33(2) and that, if Ifly had stated that they did not fly to the UK and were not able to do so, then it is unlikely that proceedings would have been issued in England.

90. Ifly did not deal with this in reply evidence, and dismissed it in their submissions, pointing out the lack of documentary record of the call and the failure to identify the person at Ifly who it is said dealt with the call, and saying it had no evidential value and was irrelevant.

91. Ultimately, at the hearing no weight was placed on this call by the Claimants in support of their case on jurisdiction. I was told that, by the time of the hearing, the Claimants had received from Ifly the flight logs of Ifly's aircraft for the three years leading up to the accident, which showed that none had flown to or from the UK during that period, which rendered any other evidence about whether Ifly might have flown to the UK in the more distant past of historic interest only. The Claimants did not base their argument at the hearing on any suggestion that Ifly was operating a service to fly to or from the UK on its own aircraft. The only case they pursued was that Ifly was doing so on Aman's aircraft.

The Claimants' alternative case – Article 33(1)

92. The Claimants' alterative case on jurisdiction was based on art 33(1) of the Montreal Convention, on the basis that Ifly might be domiciled in London.

93. It has to be said that this was advanced somewhat as a post script, and without a great deal of analysis or support in submissions. It is also the case that, whilst Article 33(1) was identified in the claim form as a potential basis of jurisdiction, it was not so identified in the Particulars of Claim (whilst, by contrast, the basis for jurisdiction under Article 33(2) was there pleaded out). This was consistent with Mr Neenan's statement served in response to the application which identified only Article 33(2) as the basis for jurisdiction. Ifly did not seek to argue that these matters prevented the Claimants from seeking to rely on Article 33(1) at the hearing, but they did confirm the view that this was advanced as something of an afterthought.

94. The background to the point was the Claimants' attempts to identify links between Ifly, a group called the iGroup and the individual that the Claimants said appeared to be behind both, namely Mr Anastasios Economou ("**Mr Economou**"). There clearly is some connection. Ifly's own website previously stated that Ifly was "a company member of the iGroup of Companies …" and, although that statement has (relatively recently) been removed from the Ifly website, there are other statements to the same effect (e.g. on Ifly's Facebook page, and on the website of another company, ICSS SA, which appears to be involved in maintenance of Ifly's aircraft). Mr Economou describes himself (on website pages that the Claimants exhibited to their evidence) as the founder and managing director of the iGroup, which is described as an investment holding company with office in Monaco, London and Athens.

95. Mr Economou has also been a shareholder in Ifly itself, including at the time of the accident in August 2019. Mr Verbis confirmed that Mr Economou was one of the founders of Ifly in 2011, and owned 39% of the share capital (with his father, Mr Spyros Economou owning 51%) until December 2020.

96. The suggestion that it appears the Claimants had set out to make was that Mr Economou was the controlling mind of Ifly, that wherever he was principally based was therefore Ifly's principal place of business, and that there was reason to think that Mr Economou might be based in London because the iGroup has an office in London and because of various other business connections he had there. My attention was drawn to the decision of Langley J in *MODSAAF v Faz Aviation Limited* [2007] EWHC 1042 (Comm), in particular the cases cited at paragraph 27 and the conclusions reached at paragraph 29. As Langley J there identified (at paragraph 29(iii)), the "*principal place of business is likely to be the place where the corporate authority is to be found (shareholders and directors), and to be the place from where the company is controlled and managed.*"

97. The case that Mr Economou might be the controlling mind of Ifly was largely speculative, on the basis that the Claimants said that he was the only candidate they had identified as such. Two matters were relied upon: first what was said about iGroup and the links (whatever form they might take) between iGroup and Ifly, although there was nothing about how that might have included iGroup having control over Ifly; and second, there was Mr Economou's 39% shareholding in Ifly, although that obviously is not a majority holding. As to the second point, the majority of the shares were held by Mr Spyros Economou, and there was no case advanced that he held those shares for his

son or acted in accordance with his son's direction or otherwise that Mr Economou (junior) controlled Ifly through his father's shareholding. In short, there was no specific case as to how Mr Economou was said to control Ifly.

98. The evidence from Ifly was that Mr Verbis was the CEO (he was also a 5% shareholder), one of the three members of the Board of Directors, had been assigned all the responsibilities of the Board of Directors regarding the management and representation of the company, and had daily control of the operation and management of the company. Mr Verbis said Ifly is based in Greece. He also said that Mr Spyros Economou and Mr Economou had initially served on Ifly's Board of Directors (as Chairman and Vice Chairman respectively), along with Mr Verbis, but they had both resigned those positions in 2012.

99. As to Mr Economou's residence or base, at the hearing the Claimants confirmed that they did not have any concrete or positive evidence as to where Mr Economou was based or where he spends his time, saying it could be Monaco, Athens or London. Mr Marland told me in his reply submissions that publicly available Companies House records showed Mr Economou as resident in Monaco – that was not recorded in the evidence, but it was not contradicted by the Claimants (who had searched some Companies House records). In fact, of the Companies House records that had been exhibited to the witness statements served for this application (in relation to Ginuine Limited and Anegada (UK) Limited which identified Mr Economou as a director), Athens addresses were given as Mr Economou's usual residential address (though those records were rather old, being dated July 2008 (Ginuine Limited) and June 2000 and 2010 (Anegada (U) Limited)). For completeness, I also note that there was no evidence about where Mr Spyros Economou (the majority shareholder in Ifly) might be based, save that the Companies House records for Anegada (UK) Limited also listed his address (in 2000 and 2010) as in Athens.

100. Ultimately, Mr Kimbell QC on behalf of the Claimants was not able to, and did not, put this particularly high, recognising the difficulties he faced given the lack of evidence to support the point. In his skeleton argument, the highest it was put was "*<u>If</u> the controlling mind of Ifly is in reality Mr Economou and he is based in London then … Ifly <u>may</u> be considered to be domiciled in London…*" (my underlining).

101. In other words, the Claimants did not advance a positive case either (i) that Mr Economou was Ifly's controlling mind, or (ii) that he was based in London, and therefore could not advance a positive case that Ifly ought to be considered as domiciled in London.

102. That is not sufficient to fulfil the test for jurisdiction. On the evidence that was put forward, Ifly clearly has the better of the argument that Ifly is not domiciled in the UK. If it were to be suggested that this was not a point on which the court ought to take a decision under limb (i) of the *Goldman Sachs* test because of the lack of evidence or the dispute between the parties (which I do not think is the case) I would go further and say that no plausible evidential basis has been put forward for the proposition that Ifly is domiciled in the UK.

103. The thrust of Mr Kimbell QC's submission on this point was not so much that the court ought to decide now that jurisdiction was established under Article 33(1), but that (if the Claimants failed on their arguments under Article 33(2)) the Court could adjourn

this application to give the Claimants a further opportunity to seek further evidence on what they say are relevant relationships and/or order Ifly to provide disclosure relating to this point. However, no application to adjourn or for such disclosure was made before or at the hearing. The invitation to adjourn for further investigation is not an attractive one. Jurisdiction battles are not supposed to be long drawn out affairs (they should be determined "with despatch" (see *Kaefer* at paragraph 58 and *Canada Trust* [2002] 1 AC 1 at 13H), and the parties have had their opportunity to gather relevant evidence and place it before the court at the hearing of this application. No explanation was provided as to why the seeking of such evidence (about the relationship between Mr Economou, Ifly and the iGroup) was not gathered in time for this hearing or what steps it was anticipated would be taken to gather it if an adjournment was granted. As things stand, the suggestion that there may be a real prospect of establishing jurisdiction under Article 33(1) seems to me to be entirely speculative.

104. As I say, there is no application before me to adjourn or to order any further information or disclosure, so I do not need to determine any such application. Insofar as this was advanced as a suggestion that the court might, of its own motion, adjourn to allow further investigation of the point if it decided that the Claimants' points under Article 33(2) failed, I decline the invitation. In the absence of any explanation why this point was not and could not have been ventilated in more detail and supported by evidence at the hearing of the application, there seems to me to be no reason to contemplate such an adjournment.

105. The point before the Court is whether there is jurisdiction under Article 33(1), and for the reasons I have explained, on the evidence before the court, there is not.

Conclusion

106. For the reasons given in this judgment, on the evidence before the Court, the Court does not have jurisdiction over the claims under Article 33(1) or 33(2) of the Montreal Convention.