
INDEMNITY IN A HOLDING PATTERN: CAPACITY, CAUSATION AND ACTUAL COST AFTER FW AVIATION V VIETJET, AND WHAT IT MEANS FOR AIRCRAFT LEASING INTO INDIA

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ABSTRACT

The litigation between FW Aviation and VietJet has become one of the leading modern authorities on how English law treats the collapse of a Japanese Operating Lease with Call Option structure after an airline defaults on its rent. The earlier judgments upheld the termination of the leases, refused relief from forfeiture and held that termination sums and liquidated damages of over US\$180 million were recoverable without offending the rule against penalties. Those judgments left open the question of what else a lessor may recover once the aircraft are back on the ground, and the third trial, decided by Birt J in July 2026, answers that question with considerable care. This paper examines the four propositions on which the answer rests, the first being that remedies are cumulative save where a liquidated sum fixes the recovery for a particular head of loss. The second is that a broadly worded indemnity reaches first-party losses on a loose causal test, whereas the third is that an assignee recovers only in the capacity in which it holds the rights assigned to it. The fourth is that a promise to indemnify is a promise to make good costs actually incurred, rather than a promise to pay a notional sum for work that the lessor never chose to carry out. The paper argues that these propositions, read together, yield a structure-sensitive theory of the aircraft lease indemnity, under which the gate to recovery is wide but the purse on the other side of it is narrow. It then sets out what practitioners have made of the judgment, before testing its reasoning against the Indian Contract Act 1872, the Go First insolvency and the Protection of Interests in Aircraft Objects Act 2025. It concludes with drafting and structuring lessons for lessors, lessees and distressed-debt investors operating in the Indian aviation market, where the export risks that drove so much of the loss in this case have recently been reduced by legislation.

Keywords: aircraft leasing, JOLCO, contractual indemnity, Cape Town Convention, export delay, Indian Contract Act, Aircraft Objects Act 2025.

I. INTRODUCTION

The four Airbus aircraft at the centre of the dispute between FW Aviation and VietJet have generated more judicial reasoning than most aircraft generate in their entire operating lives, and the dispute shows little sign of coming to an end. It has passed through several first-instance trials, an appeal to the Court of Appeal, an anti-suit injunction and enforcement proceedings in more than one jurisdiction, with each stage adding a further layer to the law of aircraft finance.¹ The litigation began in October 2021, when four aircraft leases were terminated after VietJet fell into arrears, and when the loans financing those aircraft were bought by entities associated with FitzWalter Capital, a United Kingdom based distressed-credit fund.²

The first judgment upheld the termination of the leases and refused relief from forfeiture, whereas the Court of Appeal later dismissed each of the five grounds on which VietJet sought to challenge that outcome. The first quantum judgment then held that termination sums and liquidated damages of about US\$181.5 million were recoverable, with the termination sums found not to be penalties under the modern law laid down by the Supreme Court.³ The third trial, decided by Mr Justice Birt on 31 July 2026, concerned what remained after those sums had been fixed, namely the costs of restoring and exporting the aircraft and the rent lost while they sat on the ground.⁴

The trial also concerned the costs of enforcing the earlier judgments across several jurisdictions, and one practitioner note placed the total value of the further claims at about US\$140 million, which is a substantial figure by any measure. The same note described the judgment as very well written but heavy going, which is an understandable reaction to a decision that runs to well over four hundred paragraphs of dense contractual analysis.⁵ The outcome was a partial victory for the lessor, since the claims relating to the two newer aircraft succeeded in substantial part, whereas the claims relating to the two older aircraft, the foreign

¹ FW Aviation (Holdings) 1 Ltd. v. VietJet Aviation Joint Stock Co. [2024] EWHC 1945 (Comm) (Eng.); VietJet Aviation Joint Stock Co. v. FW Aviation (Holdings) 1 Ltd. [2025] EWCA (Civ) 783 (Eng.); FW Aviation (Holdings) 1 Ltd. v. VietJet Aviation Joint Stock Co. [2025] EWHC 928 (Comm) (Eng.); FW Aviation (Holdings) 1 Ltd. v. VietJet Aviation Joint Stock Co. [2024] EWHC 3337 (Comm) (Eng.).

² FW Aviation (Holdings) 1 Ltd. v. VietJet Aviation Joint Stock Co. [2026] EWHC 1996 (Comm), ¶¶ 3, 15–16 (Eng.).

³ FW Aviation (Holdings) 1 Ltd. v. VietJet Aviation Joint Stock Co. [2025] EWHC 928 (Comm) (Eng.); Cavendish Square Holding BV v. Makdessi [2015] UKSC 67, [2016] AC 1172 (appeal taken from Eng.).

⁴ FW Aviation (Holdings) 1 Ltd. v. VietJet Aviation Joint Stock Co. [2026] EWHC 1996 (Comm), ¶¶ 1, 30 (Eng.).

⁵ Linklaters, *UK – Indemnity Clauses: Remoteness, Causation, Concurrency and Other Key Issues*, Conventus L. (Sept. 24, 2026), <https://conventuslaw.com/report/uk-indemnity-clauses-remoteness-causation-concurrency-and-other-key-issues/>.

enforcement costs and the alternative claims in conversion failed.⁶

However, scratching beneath the surface of the result reveals that the judgment matters less for the sums it awarded than for the boundary it draws around the recovery available to a lessor. Each of the issues decided turns on a principle of contractual construction that applies well beyond these four aircraft, and the judgment will therefore be read closely by anyone who drafts, negotiates or litigates aircraft leases. The earlier judgments were, in substance, an affirmation of the termination machinery that sits at the heart of Japanese Operating Lease with Call Option [**JOLCO**] financing, and lessors widely welcomed them on that basis.⁷

The third judgment is the necessary counterweight to those decisions, because it explains that the same contracts which entitle a lessor to large termination sums do not, without more, entitle it to recover every cost it later chooses to incur. Nor do they entitle it to recover the cost of work that it never incurs at all, and this second point is likely to prove the more consequential of the two for the leasing market. The judgment therefore completes the picture that the earlier decisions began, by showing that the generosity of English law towards lessors at the point of termination is matched by discipline at the point of measurement.

This paper argues that the third judgment rests on four propositions which, when read together, yield what may be called a structure-sensitive theory of the aircraft lease indemnity, in which the gate is wide but the purse is narrow. The first proposition is that contractual remedies are cumulative save where a liquidated sum fixes the recovery for a particular head of loss, while the second is that a broadly worded indemnity reaches first-party losses on a loose causal test. The third proposition is that an assignee recovers only in the capacity in which it holds the rights assigned to it, whereas the fourth is that a promise to indemnify is a promise to make good costs actually incurred.

This paper is structured as follows: Part II sets out the JOLCO architecture and the earlier judgments in the litigation, which together explain why the third trial was fought on the terms

⁶ Lucy Slaterry, *Commercial Court Hands Down Judgment in Third Trial in FWA v VietJet*, Fountain Ct. Chambers (July 31, 2026), <https://fountaincourt.uk/2026/07/commercial-court-hands-down-judgment-in-third-trial-in-fwa-v-vietjet/>; Guy Marrison, *FWA v VietJet (Second Quantum Judgment): Redelivery Indemnities, Assignments and Recoverable Enforcement Costs*, HFW (Aug. 26, 2026), <https://www.hfw.com/insights/fwa-v-vietjet-second-quantum-judgment-redelivery-indemnities-assignments-and-recoverable-enforcement-costs/>.

⁷ Kathryn Powell, *Sublet Jet(s)*, 3 Hare Ct. (Sept. 15, 2025), <https://www.3harecourt.com/sublet-jets/>; Peter Sharp, James P. Bradley & Keir Baker, *English High Court Confirms Enforceability of Termination Sum Provisions in JOLCO Structures*, Morgan Lewis (Apr. 28, 2025), <https://www.morganlewis.com/pubs/2025/04/english-high-court-confirms-enforceability-of-termination-sum-provisions-in-jolco-structures>.

on which it was fought. Part III examines each of the principal holdings of Birt J in turn, while Part IV collects what practitioners have said about the judgment in the weeks since it was handed down and identifies the points on which they diverge. Part V develops the paper's own argument on the structure-sensitive character of the lease indemnity, together with the three questions that the judgment leaves unresolved and that future cases will therefore have to answer. Part VI tests the reasoning against Indian law, including the Indian Contract Act 1872, the Go First insolvency and the Protection of Interests in Aircraft Objects Act 2025, before Part VII concludes with lessons for the Indian market.

II. FROM TERMINATION TO TALLY: THE FW AVIATION LITIGATION IN CONTEXT

A. The JOLCO Architecture and the Excluded Property

The four aircraft in question were two Airbus A321-271 NEO aircraft and two Airbus A321-211 CEO aircraft, each of which had been financed through a JOLCO structure in which roughly a quarter of the price came from Japanese equity investors. The remainder was provided by bank debt, with BNP acting as agent for the loans on the CEO aircraft and Natixis Singapore acting as agent for the loans on the NEO aircraft.⁸ In such a structure, a Japanese special purpose company owns each aircraft and leases it to a vehicle associated with the airline, which in turn sub-leases it to the airline itself under a sub-lease that contains most of the operative obligations.

The economic logic of the structure depends on the lease running its full course, since the equity investors obtain tax benefits that are lost or accelerated if the lease is brought to an early end. The court accordingly observed that, for the investors, “early interruption of the lease is highly disruptive for them and there are significant early termination sums” provided for in the transaction documents.⁹ The termination sums are therefore designed to protect the equity investors as much as the lenders, and this feature would prove central both to the penalty question in the first quantum judgment and to the indemnity questions in the third trial.

The lenders took a security package comprising a mortgage governed by New York law, security assignments from both the lessor and the lessee vehicle, and an irrevocable de-

⁸ FW Aviation (Holdings) 1 Ltd. v. VietJet Aviation Joint Stock Co. [2026] EWHC 1996 (Comm), ¶¶ 4–9 (Eng.).

⁹ FW Aviation (Holdings) 1 Ltd. v. VietJet Aviation Joint Stock Co. [2026] EWHC 1996 (Comm), ¶ 7 (Eng.).

registration and export request authorisation. That last instrument is the means by which a creditor may remove an aircraft from its state of registry and export it, and it is the instrument on which lessors place most reliance when an airline defaults.¹⁰ Crucially, however, the lessor's security assignment was only partial, since certain rights described as "Excluded Property" were carved out of it and remained with the lessor rather than passing to the lenders.

Picken J had earlier explained that the Excluded Property provisions "operate to preserve the rights and expectation of the Japanese equity investors", and Birt J adopted that explanation at the outset of the third judgment.¹¹ The significance of that carve-out for the third trial cannot be overstated, because it determined which rights the lenders could pass on when they enforced their security against the aircraft in late 2021 and early 2022. It therefore determined which rights the eventual claimant held, and in what capacity it held them, which became the single most important factor in the outcome on the two older aircraft.

B. Termination, Acquisition and the Earlier Judgments

In October 2021, the loans were bought by FitzWalter Capital Partners (Financial Trading) Ltd ['FWC'], which the court found had co-ordinated the service of termination notices on 18, 22 and 26 October 2021. FWC then became security trustee on 3 November 2021, and by claims assignment agreements dated 8 and 9 November 2021 it assigned part of its rights to the claimant, FW Aviation (Holdings) 1 Ltd ['FWA'].¹²

In January 2022, FWC transferred the aircraft for about US\$138 million to four affiliated owners, the two NEO aircraft through a New York foreclosure sale and the two CEO aircraft through a public auction whose genuineness VietJet disputed. On 11 January 2022, FWA acquired the Excluded Property for the NEO aircraft, but it never acquired the Excluded Property for the CEO aircraft, and that difference would later decide the fate of the claims on those aircraft.¹³

VietJet continued to operate the aircraft for about a year without paying rent, until a consent

¹⁰ FW Aviation (Holdings) 1 Ltd. v. VietJet Aviation Joint Stock Co. [2026] EWHC 1996 (Comm), ¶ 10 (Eng.).

¹¹ FW Aviation (Holdings) 1 Ltd. v. VietJet Aviation Joint Stock Co. [2026] EWHC 1996 (Comm), ¶ 12 (Eng.) (quoting FW Aviation (Holdings) 1 Ltd. v. VietJet Aviation Joint Stock Co. [2025] EWHC 928 (Comm) (Eng.)).

¹² FW Aviation (Holdings) 1 Ltd. v. VietJet Aviation Joint Stock Co. [2026] EWHC 1996 (Comm), ¶¶ 15–18 (Eng.).

¹³ FW Aviation (Holdings) 1 Ltd. v. VietJet Aviation Joint Stock Co. [2026] EWHC 1996 (Comm), ¶¶ 19–20 (Eng.).

order of November 2022 provided for their redelivery on an “as is, where is” basis, after proceedings had been issued in the Commercial Court. FWA alleged that three of the four aircraft were not airworthy when they were handed back, which meant that substantial work was needed before any of them could fly again for a new operator.¹⁴ The aircraft were then de-registered from the Vietnamese register and re-registered in Guernsey without an export certificate of airworthiness, a step that allowed the change of registry to proceed before the aircraft were physically ready to leave.

The aircraft did not, however, leave Vietnam until dates between June 2024 and March 2025, and the causes of that lengthy delay became one of the central factual disputes at the third trial. FWA relied on proceedings brought in Vietnam and on correspondence between VietJet and the authorities, while Picken J had already found that the evidence showed very clearly that VietJet had sought to interfere with the export of the aircraft.¹⁵ The NEO aircraft were eventually leased to Turkish Airlines in June 2025, whereas the CEO aircraft were sold in August 2025, and these later dealings marked the end of the period for which the third trial assessed loss.¹⁶

The earlier judgments had, by then, resolved the questions of liability and of the principal sums due, since Picken J upheld the termination in July 2024 and refused relief from forfeiture on account of VietJet’s conduct. The Court of Appeal dismissed all five grounds of appeal in June 2025, holding among other things that the right to terminate had been validly assigned and that FWC was a financial institution to which the loans could be transferred.¹⁷ In December 2024, Bright J also granted an anti-suit injunction in support of the English proceedings, which illustrates the extent to which the dispute had already spread beyond a single forum.¹⁸

In the first quantum judgment of April 2025, Picken J held that the termination sums under clause 19.3 were not penal under the test in *Cavendish Square Holding BV v Makdessi*, relying

¹⁴ FW Aviation (Holdings) 1 Ltd. v. VietJet Aviation Joint Stock Co. [2026] EWHC 1996 (Comm), ¶¶ 21–24 (Eng.).

¹⁵ FW Aviation (Holdings) 1 Ltd. v. VietJet Aviation Joint Stock Co. [2026] EWHC 1996 (Comm), ¶¶ 25–27 (Eng.).

¹⁶ FW Aviation (Holdings) 1 Ltd. v. VietJet Aviation Joint Stock Co. [2026] EWHC 1996 (Comm), ¶¶ 28–29 (Eng.).

¹⁷ FW Aviation (Holdings) 1 Ltd. v. VietJet Aviation Joint Stock Co. [2024] EWHC 1945 (Comm) (Eng.); VietJet Aviation Joint Stock Co. v. FW Aviation (Holdings) 1 Ltd. [2025] EWCA (Civ) 783 (Eng.); Chris Knight, Hannah Harvey & Tom Coates, *VietJet v FW Aviation: Latest Developments*, Pillsbury (June 30, 2025), <https://www.pillsburylaw.com/en/news-and-insights/uk-court-of-appeal-vietjet-fwaviation.html>.

¹⁸ FW Aviation (Holdings) 1 Ltd. v. VietJet Aviation Joint Stock Co. [2024] EWHC 3337 (Comm) (Eng.); Peter Sharp, James P. Bradley & Keir Baker, *English High Court Confirms Enforceability of Termination Sum Provisions in JOLCO Structures*, Morgan Lewis (Apr. 28, 2025), <https://www.morganlewis.com/pubs/2025/04/english-high-court-confirms-enforceability-of-termination-sum-provisions-in-jolco-structures>.

on the wider legitimate interests of the equity investors. Those interests included the investors' tax position, the preservation of what the judge described as a system of trade and the lessors' interest in prompt payment, which the judge considered sufficient to justify the sums.¹⁹ He also held that clause 20.4(c), which provided for 150% of the monthly rent between termination and redelivery, operated as a liquidated damages provision, and that finding later proved decisive when the third trial turned to lost rent.²⁰

III. THE THIRD TRIAL: WHAT THE COURT DECIDED

A. Cumulative Remedies and the Pre-emptive Effect of Liquidated Sums

VietJet's first and broadest argument was that clauses 19 and 20, which dealt with termination and its consequences, constituted an exclusive code of remedies for the lessor once the leases had come to an end. On that argument, FWA could not recover anything under the general indemnities once the termination sums and the liquidated rent had been paid, since the parties had chosen to fix the lessor's recovery in those clauses alone. Birt J approached the question as one of construction, drawing on *Wood v Capita Insurance Services Ltd* and on the principle in *Bunge SA v Nidera BV* that a damages clause conclusively governs the loss it addresses.²¹

The judge rejected the exclusive code argument, holding that the termination provisions did not displace the other remedies in the sub-lease, which contemplated overlapping and cumulative rights in favour of the lessor. However, he accepted a narrower version of the argument, holding that where clauses 19 and 20 fix a particular amount for a specific head of loss, the sub-lessor cannot seek a further amount for that same loss under other provisions.²² The practical consequence was that the liquidated rent payable under clause 20.4(c) became the only recovery for loss of use between termination and redelivery, and FWA could not claim a higher figure for that period by invoking the general indemnities.²³

¹⁹ FW Aviation (Holdings) 1 Ltd. v. VietJet Aviation Joint Stock Co. [2025] EWHC 928 (Comm) (Eng.); Cavendish Square Holding BV v. Makdessi [2015] UKSC 67, [2016] AC 1172 (appeal taken from Eng.); Kathryn Powell, *Sublet Jet(s)*, 3 Hare Ct. (Sept. 15, 2025), <https://www.3sharecourt.com/sublet-jets/>.

²⁰ FW Aviation (Holdings) 1 Ltd. v. VietJet Aviation Joint Stock Co. [2025] EWHC 928 (Comm) (Eng.).

²¹ FW Aviation (Holdings) 1 Ltd. v. VietJet Aviation Joint Stock Co. [2026] EWHC 1996 (Comm), ¶¶ 86–93 (Eng.); *Wood v. Capita Ins. Servs. Ltd.* [2017] UKSC 24, [2017] AC 1173 (appeal taken from Eng.); *Bunge SA v. Nidera BV* [2015] UKSC 43, [2015] Bus. L.R. 987 (appeal taken from Eng.).

²² FW Aviation (Holdings) 1 Ltd. v. VietJet Aviation Joint Stock Co. [2026] EWHC 1996 (Comm), ¶¶ 94–97 (Eng.).

²³ *Commercial Court Rules on Aircraft Leasing Indemnities in FW Aviation v VietJet Third Trial*, Solic. J. (July 31, 2026), <https://www.solicitorsjournal.com/sjarticle/commercial-court-rules-on-aircraft-leasing-indemnities->

The judge found support for this conclusion in the Excluded Property structure, reasoning that the parties could not have intended the financing parties to undermine the recovery that the Excluded Property reserved for the lessor and, through it, for the equity investors. He emphasised, equally, that the financing parties' own rights for other losses and other periods were not cut down by this reasoning, so that the pre-emptive effect operated only within the space occupied by the liquidated sum.²⁴ The holding therefore steers a careful course between treating the termination clauses as a complete code and treating them as wholly irrelevant to the scope of the general indemnities that the sub-lease separately provided.

VietJet advanced a related argument that FWA had no remaining loss to recover, because the earlier awards had already compensated it in full, and it relied on a statement in the earlier judgment that the termination values fully compensated the sub-lessor. Birt J rejected this argument, holding that the earlier awards compensated the repayment of the loans and the position of the equity investors, which were losses different in kind from the restoration, export and lost rent claims now advanced.²⁵ He also explained that the earlier statement assumed that the aircraft would be redelivered on time and in the proper condition, an assumption that the events of 2022 to 2025 had plainly falsified.

B. First-Party Losses and the Distinguishing of Pindell

The second issue was whether the general indemnity in clause 23.1 extended to losses suffered by the indemnified party itself, or whether it was confined to claims brought by third parties against that party. Clause 23.1 obliged the sub-lessee to indemnify the indemnitees against losses "imposed on, suffered or incurred by or asserted against" them "relating to, arising out of or resulting from (whether directly or indirectly)" a long list of matters.²⁶ That list included the ownership, redelivery, maintenance and export of the aircraft, and the clause closed with a proviso regulating how the parties would deal with any claim made against an indemnitee by a third party.

in-fw-aviation-v-vietjet-third-trial; Linklaters, *UK – Indemnity Clauses: Remoteness, Causation, Concurrency and Other Key Issues*, Conventus L. (Sept. 24, 2026), <https://conventuslaw.com/report/uk-indemnity-clauses-remoteness-causation-concurrency-and-other-key-issues/>.

²⁴ FW Aviation (Holdings) 1 Ltd. v. VietJet Aviation Joint Stock Co. [2026] EWHC 1996 (Comm), ¶ 98 (Eng.).

²⁵ FW Aviation (Holdings) 1 Ltd. v. VietJet Aviation Joint Stock Co. [2026] EWHC 1996 (Comm), ¶¶ 110–113 (Eng.).

²⁶ Linklaters, *UK – Indemnity Clauses: Remoteness, Causation, Concurrency and Other Key Issues*, Conventus L. (Sept. 24, 2026), <https://conventuslaw.com/report/uk-indemnity-clauses-remoteness-causation-concurrency-and-other-key-issues/> (reproducing clause 23.1).

VietJet relied heavily on that proviso and on *Pindell Ltd v AirAsia Bhd*, in which Tomlinson J had confined an aircraft lease indemnity to third-party claims, so that it could not support a lessor's claim for a sale lost through late redelivery.²⁷ It added arguments based on business common sense, on the supposed redundancy that a wider reading would create for the other indemnities and on a hypothetical involving fraud, which it said exposed the commercial absurdity of FWA's construction of the clause.

Birt J rejected each of these arguments, holding that the definition of losses included costs and expenses and that the words "suffered or incurred" were apt to cover a party's own losses as well as liabilities to others. He held that the claims-handling proviso merely regulated how third-party claims were to be handled if and when they arose, and that several items in the list seemed much more likely to have first-party losses in mind than third-party claims.²⁸ He also noted that an exception for ordinary operating expenses in clause 23.2 would have been unnecessary if the indemnity had covered only third-party claims, which reinforced the wider reading of the clause.

He distinguished *Pindell* on its wording and its commercial context, observing that it is axiomatic that each contract is to be construed by reference to its own language and in its own context. The indemnity in *Pindell* had been framed around claims rather than losses, while a lessor in a JOLCO structure was never meant to end up holding the aircraft, and that difference in context weighed heavily against importing the earlier construction.²⁹ The judge also considered it entirely understandable why the contracts would include wide indemnities, even if overlapping, to ensure full coverage, since the sub-lessor was never intended to bear the cost of owning the aircraft.³⁰

The redundancy argument failed because a belt and braces approach to drafting is entirely plausible in contracts of this kind, and because an express exclusion in clause 23.2 prevented

²⁷ *Pindell Ltd. v. AirAsia Berhad* [2010] EWHC 2516 (Comm) (Eng.).

²⁸ *FW Aviation (Holdings) 1 Ltd. v. VietJet Aviation Joint Stock Co.* [2026] EWHC 1996 (Comm), ¶¶ 114–125 (Eng.); *Commercial Court Rules on Aircraft Leasing Indemnities in FW Aviation v VietJet Third Trial*, Solic. J. (July 31, 2026), <https://www.solicitorsjournal.com/sjarticle/commercial-court-rules-on-aircraft-leasing-indemnities-in-fw-aviation-v-vietjet-third-trial>.

²⁹ *FW Aviation (Holdings) 1 Ltd. v. VietJet Aviation Joint Stock Co.* [2026] EWHC 1996 (Comm), ¶¶ 118–122 (Eng.); Linklaters, *UK – Indemnity Clauses: Remoteness, Causation, Concurrency and Other Key Issues*, Conventus L. (Sept. 24, 2026), <https://conventuslaw.com/report/uk-indemnity-clauses-remoteness-causation-concurrency-and-other-key-issues/>.

³⁰ *FW Aviation (Holdings) 1 Ltd. v. VietJet Aviation Joint Stock Co.* [2026] EWHC 1996 (Comm), ¶¶ 129–131 (Eng.).

the lessor from recovering twice for the same loss. The judge further observed that clause 23.7 used materially the same language, so that VietJet's own reading would have produced the very redundancy of which it complained, while its fraud hypothetical would have operated equally on its own construction.³¹

C. Causation, Remoteness and the “Directly or Indirectly” Formula

The third issue concerned the causal link required by clause 23.1, and VietJet argued that FWA had to show that each cost was proximately caused by a matter within the clause. On that argument, costs attributable to the long delays in exporting the aircraft from Vietnam would fall outside the indemnity unless FWA could prove that VietJet's own conduct was the proximate cause of those delays and of each cost incurred during them. The judge held that the words “relating to, arising out of or resulting from (whether directly or indirectly)” were a strong indication that the parties intended a looser causal connection than the one that VietJet proposed.³²

The proximate cause test therefore did not apply to the indemnity, and this finding disposed of much of VietJet's case on the export delays, since the costs incurred during those delays could fall within the indemnity without proof of proximate causation. The court also held that costs invoiced to other FitzWalter entities were recoverable by reason of a costs acknowledgement deed between the entities concerned, so that the corporate route by which the costs had been invoiced did not defeat the claim.³³

The court then drew a distinction between clause 23.7, which the parties accepted was a breach-triggered damages indemnity subject to the ordinary rules of remoteness and mitigation, and clause 23.1, which operated independently of any breach as a true indemnity. In respect of clause 23.1, the judge held that the breadth of the causal language left no room for a remoteness limitation, a conclusion that one leading practitioner note has treated as significant given earlier

³¹ FW Aviation (Holdings) 1 Ltd. v. VietJet Aviation Joint Stock Co. [2026] EWHC 1996 (Comm), ¶¶ 130–133 (Eng.).

³² FW Aviation (Holdings) 1 Ltd. v. VietJet Aviation Joint Stock Co. [2026] EWHC 1996 (Comm), ¶¶ 134–149 (Eng.); *Commercial Court Rules on Aircraft Leasing Indemnities in FW Aviation v VietJet Third Trial*, Solic. J. (July 31, 2026), <https://www.solicitorsjournal.com/sjarticle/commercial-court-rules-on-aircraft-leasing-indemnities-in-fw-aviation-v-vietjet-third-trial>.

³³ Guy Marrison, *FWA v VietJet (Second Quantum Judgment): Redelivery Indemnities, Assignments and Recoverable Enforcement Costs*, HFW (Aug. 26, 2026), <https://www.hfw.com/insights/fwa-v-vietjet-second-quantum-judgment-redelivery-indemnities-assignments-and-recoverable-enforcement-costs/>.

decisions that suggested otherwise.³⁴

D. Capacity-Bounded Recovery: Why the CEO Claims Failed

The fourth issue, and the one with the most dramatic effect on the outcome, concerned the capacity in which FWA could enforce clause 23.1 in respect of the two CEO aircraft, for which it had never acquired the Excluded Property. The judge held that, for those aircraft, FWA could claim only as successor to or affiliate of a Financing Party, enforcing the indemnity as a third party through the Contracts (Rights of Third Parties) Act 1999 rather than as sub-lessor or owner.³⁵ The court had already noted that clause 23.1 in the CEO agreements “was drafted to include a Financing Party”, and the consequence of that drafting became clear once the security had been realised.³⁶

Once the security had been realised through the sale of January 2022, the financing parties had no further interest in the aircraft, and the costs of maintenance, repair, storage and export were therefore not incurred to preserve any security interest. Those costs had instead been suffered in FWA’s capacity as owner rather than as a lender’s successor, and the claims for maintenance, storage and lost rent on the CEO aircraft accordingly failed in their entirety.³⁷ Enforcement costs on those aircraft remained recoverable only so far as they served to preserve or enforce the rights of a Financing Party, such as the right to the termination sums already awarded.

The NEO aircraft were unaffected by this reasoning, since FWA held the Excluded Property for those aircraft and could therefore claim as successor or assign of the lessor itself, which carried with it the full benefit of the indemnities in the sub-lease.³⁸ The contrast between the two pairs of aircraft is striking, because their condition and VietJet’s conduct were broadly similar across all four, and the difference in outcome flowed entirely from the chain of title to

³⁴ FW Aviation (Holdings) 1 Ltd. v. VietJet Aviation Joint Stock Co. [2026] EWHC 1996 (Comm), ¶¶ 150–151 (Eng.); Linklaters, *UK – Indemnity Clauses: Remoteness, Causation, Concurrency and Other Key Issues*, Conventus L. (Sept. 24, 2026), <https://conventuslaw.com/report/uk-indemnity-clauses-remoteness-causation-concurrency-and-other-key-issues/>.

³⁵ FW Aviation (Holdings) 1 Ltd. v. VietJet Aviation Joint Stock Co. [2026] EWHC 1996 (Comm), ¶¶ 99–101 (Eng.).

³⁶ FW Aviation (Holdings) 1 Ltd. v. VietJet Aviation Joint Stock Co. [2026] EWHC 1996 (Comm), ¶ 35 (Eng.).

³⁷ FW Aviation (Holdings) 1 Ltd. v. VietJet Aviation Joint Stock Co. [2026] EWHC 1996 (Comm), ¶¶ 102–108 (Eng.); *Commercial Court Rules on Aircraft Leasing Indemnities in FW Aviation v VietJet Third Trial*, Solic. J. (July 31, 2026), <https://www.solicitorsjournal.com/sjarticle/commercial-court-rules-on-aircraft-leasing-indemnities-in-fw-aviation-v-vietjet-third-trial>.

³⁸ FW Aviation (Holdings) 1 Ltd. v. VietJet Aviation Joint Stock Co. [2026] EWHC 1996 (Comm), ¶ 109 (Eng.).

the contractual rights.

E. “Indemnify” Is Not “Pay”: Actual Cost and the Return Condition Claim

The fifth issue concerned the return condition indemnity in clause 20.4, under which the sub-lessee was to indemnify the lessor for the cost of putting the aircraft into the condition required on return. The court had earlier described that condition as “an exacting set of conditions, in many ways equivalent to having to put the aircraft in an ‘as good as new’ state”, which explains why the sums claimed under this head were so large.³⁹ FWA had not carried out the full return condition work, having instead leased the NEO aircraft to Turkish Airlines in an improved but non-compliant state, and it nevertheless claimed the hypothetical cost of the work required.⁴⁰

Birt J held that the indemnity covered only costs actually and reasonably incurred, reasoning from the choice of the word “indemnify” rather than “pay” and from the need to avoid conferring a windfall on the lessor. He observed that there was only so far the incentives of the JOLCO structure could be pushed before the consequences appeared commercially unreasonable, which is a striking acknowledgement of the limits of the very structure that the earlier judgments had upheld.⁴¹ The effect of this holding was to reduce a claim pleaded at about US\$31.1 million to about US\$5.3 million, which made it by some distance the most significant reduction in the case.

FWA was then required to elect between its claim for costs actually incurred and an alternative claim for diminution in the value of the aircraft, on which the court preferred the evidence of VietJet’s valuation expert to that of FWA’s expert. The recoverable heads of loss on the NEO aircraft nevertheless included project management and remarketing, parking and storage, loss of maintenance utility, re-registration, return to a flight-ready condition, non-revenue flights and insurance.⁴²

³⁹ FW Aviation (Holdings) 1 Ltd. v. VietJet Aviation Joint Stock Co. [2026] EWHC 1996 (Comm), ¶ 39 (Eng.).

⁴⁰ *Commercial Court Rules on Aircraft Leasing Indemnities in FW Aviation v VietJet Third Trial*, Solic. J. (July 31, 2026), <https://www.solicitorsjournal.com/sjarticle/commercial-court-rules-on-aircraft-leasing-indemnities-in-fw-aviation-v-vietjet-third-trial>.

⁴¹ FW Aviation (Holdings) 1 Ltd. v. VietJet Aviation Joint Stock Co. [2026] EWHC 1996 (Comm), ¶¶ 250–278 (Eng.); Guy Marrison, *FWA v VietJet (Second Quantum Judgment): Redelivery Indemnities, Assignments and Recoverable Enforcement Costs*, HFW (Aug. 26, 2026), <https://www.hfw.com/insights/fwa-v-vietjet-second-quantum-judgment-redelivery-indemnities-assignments-and-recoverable-enforcement-costs/>.

⁴² Guy Marrison, *FWA v VietJet (Second Quantum Judgment): Redelivery Indemnities, Assignments and Recoverable Enforcement Costs*, HFW (Aug. 26, 2026), <https://www.hfw.com/insights/fwa-v-vietjet-second-quantum-judgment-redelivery-indemnities-assignments-and-recoverable-enforcement-costs/>; *Commercial Court*

F. Lost Rent, Conversion and Enforcement Costs

The claim for lost rent on the NEO aircraft succeeded for the period between redelivery and their re-lease to Turkish Airlines, calculated by reference to market rates supported by expert evidence, and it amounted on one practitioner's calculation to about US\$18.4 million. The corresponding claim on the CEO aircraft failed for the reasons already given, since the liquidated rent was the exclusive remedy before redelivery and FWA held no relevant capacity after it.⁴³ The alternative claims in conversion and for mesne profits, which sought to recover the value of VietJet's use of the aircraft, also failed, and that result sits comfortably with the pre-emptive effect of clause 20.4(c).⁴⁴

The claim for the costs of enforcing the earlier judgments in foreign jurisdictions largely failed for want of evidence, since FWA had not shown at trial what the costs related to or that they fell within the scope of the indemnities. The court refused a late proposal to refer the matter to a costs judge without trial evidence on those questions, and practitioners have rightly noted that the difficulty of evidencing legal costs without waiving privilege made this claim vulnerable from the start.⁴⁵ VietJet's counterclaim concerning two engine stands was dismissed, and the final figures were left to be agreed between the parties or determined at a further hearing on consequential matters, interest and costs.⁴⁶

IV. WHAT PRACTITIONERS HAVE BEEN SAYING

The practitioner response to the third judgment has been notably more measured than the response to the earlier judgments, which lessor-side commentators greeted as a vindication of

Rules on Aircraft Leasing Indemnities in FW Aviation v VietJet Third Trial, Solic. J. (July 31, 2026), <https://www.solicitorsjournal.com/sjarticle/commercial-court-rules-on-aircraft-leasing-indemnities-in-fw-aviation-v-vietjet-third-trial>.

⁴³ FW Aviation (Holdings) 1 Ltd. v. VietJet Aviation Joint Stock Co. [2026] EWHC 1996 (Comm), ¶¶ 429–451 (Eng.); Guy Marrison, *FWA v VietJet (Second Quantum Judgment): Redelivery Indemnities, Assignments and Recoverable Enforcement Costs*, HFW (Aug. 26, 2026), <https://www.hfw.com/insights/fwa-v-vietjet-second-quantum-judgment-redelivery-indemnities-assignments-and-recoverable-enforcement-costs/>.

⁴⁴ FW Aviation (Holdings) 1 Ltd. v. VietJet Aviation Joint Stock Co. [2026] EWHC 1996 (Comm), ¶¶ 452–478 (Eng.).

⁴⁵ FW Aviation (Holdings) 1 Ltd. v. VietJet Aviation Joint Stock Co. [2026] EWHC 1996 (Comm), ¶¶ 479–493 (Eng.); *Commercial Court Rules on Aircraft Leasing Indemnities in FW Aviation v VietJet Third Trial*, Solic. J. (July 31, 2026), <https://www.solicitorsjournal.com/sjarticle/commercial-court-rules-on-aircraft-leasing-indemnities-in-fw-aviation-v-vietjet-third-trial>.

⁴⁶ FW Aviation (Holdings) 1 Ltd. v. VietJet Aviation Joint Stock Co. [2026] EWHC 1996 (Comm), ¶¶ 494–498 (Eng.); Lucy Slattery, *Commercial Court Hands Down Judgment in Third Trial in FWA v VietJet*, Fountain Ct. Chambers (July 31, 2026), <https://fountaincourt.uk/2026/07/commercial-court-hands-down-judgment-in-third-trial-in-fwa-v-vietjet/>.

JOLCO termination sums. Lessee-side commentators had, by contrast, read those earlier judgments as a warning about the severe consequences of default, with one firm suggesting that airlines might prefer Singapore law, under which the penalty question would be less clear.⁴⁷ The third judgment has drawn comment of a different kind, which concentrates less on whether lessors win and more on the precise limits of what they can recover when they do.

The note published by Holman Fenwick Willan, which is perhaps the most detailed account of the judgment so far, reads it as providing further support for the key contractual provisions in JOLCO transactions. It also emphasises that only actual costs are recoverable, that any party seeking a narrower indemnity must draft for it clearly and expressly, and that problems in evidencing losses must be ventilated early in future proceedings.⁴⁸ This reading treats the judgment as broadly favourable to lessors, subject to the important qualification that the generosity shown at the point of the trigger does not extend to the measure of recovery that follows.

The note published by Linklaters on the general law of indemnities, and republished on Conventus Law, is the most critical of the commentary, since it treats the judgment as an illustration of a broader lack of coherence in English law. In its view, indemnities are often dealt with piecemeal, and the court disappointingly failed to explain what causal test should replace proximate cause or to consider the effective cause test in *Petroleo Brasileiro SA v ENE Kos 1 Ltd*.⁴⁹ The note further suggests that decisions such as *The Eurys* have created an urban myth that indemnities are never subject to remoteness or mitigation, and it advises against relying on open-ended and non-specific wording.⁵⁰

⁴⁷ Siva Subramaniam, *English High Court Finds Early Termination Sums Under JOLCO Arrangement Not a Penalty*, Allen & Gledhill (May 13, 2025), <https://www.allenandgledhill.com/sg/perspectives/articles/30575/sgkh-english-high-court-finds-early-termination-sums-under-jolco-arrangement-not-a-penalty>; Peter Sharp, James P. Bradley & Keir Baker, *English High Court Confirms Enforceability of Termination Sum Provisions in JOLCO Structures*, Morgan Lewis (Apr. 28, 2025), <https://www.morganlewis.com/pubs/2025/04/english-high-court-confirms-enforceability-of-termination-sum-provisions-in-jolco-structures>.

⁴⁸ Guy Marrison, *FWA v VietJet (Second Quantum Judgment): Redelivery Indemnities, Assignments and Recoverable Enforcement Costs*, HFW (Aug. 26, 2026), <https://www.hfw.com/insights/fwa-v-vietjet-second-quantum-judgment-redelivery-indemnities-assignments-and-recoverable-enforcement-costs/>.

⁴⁹ Linklaters, *UK – Indemnity Clauses: Remoteness, Causation, Concurrency and Other Key Issues*, Conventus L. (Sept. 24, 2026), <https://conventuslaw.com/report/uk-indemnity-clauses-remoteness-causation-concurrency-and-other-key-issues/>; *Petroleo Brasileiro SA v. ENE Kos 1 Ltd.* [2012] UKSC 17, [2012] 2 AC 164 (appeal taken from Eng.).

⁵⁰ Linklaters, *UK – Indemnity Clauses: Remoteness, Causation, Concurrency and Other Key Issues*, Conventus L. (Sept. 24, 2026), <https://conventuslaw.com/report/uk-indemnity-clauses-remoteness-causation-concurrency-and-other-key-issues/>; *Total Transp. Corp. v. Arcadia Petroleum Ltd. (The Eurys)* [1998] 1 Lloyd's Rep. 351 (CA)

The barristers' chambers and the trade press have, by contrast, concentrated on the result rather than its reasoning, with Fountain Court Chambers noting that the judgment addresses important issues regarding the scope and operation of contractual indemnities in aircraft leases. The trade press has reported the additional liability of about US\$18 million on the NEO aircraft, although that figure appears to reflect the lost rent claim rather than the total sum that will ultimately be payable after the consequential hearing.⁵¹

The enforcement story has since moved on, since the Irish High Court has held that recognition of the English judgments in Ireland would confer a practical benefit on FWA, treating VietJet's rights to maintenance reserves held by Irish lessors as potential assets. The practitioners who acted in that application have described the practical benefit requirement as a relatively modest hurdle, which suggests that recognition elsewhere in the common law world is likely to follow the same course.⁵² The Commercial Court has also held it appropriate in principle to appoint receivers over VietJet's non-Vietnamese assets, and the commentary on that decision records that the judgment debt now exceeds US\$250 million.⁵³

V. A WIDE GATE AND A NARROW PURSE: TOWARDS A STRUCTURE-SENSITIVE THEORY OF THE LEASE INDEMNITY

A. The Four Propositions Read Together

The practitioner commentary has understandably treated the holdings of *Birt J* as a series of separate points of construction, but their real significance only emerges when they are read together as a single account of what an aircraft lease indemnity is for. The breadth of the trigger in clause 23.1, which reaches first-party losses on a loose causal test without any remoteness limitation, means that the gate through which a lessor's claim must pass is wide. It is, in fact,

(Eng.).

⁵¹ Lucy Slattery, *Commercial Court Hands Down Judgment in Third Trial in FWA v VietJet*, Fountain Ct. Chambers (July 31, 2026), <https://fountaincourt.uk/2026/07/commercial-court-hands-down-judgment-in-third-trial-in-fwa-v-vietjet/>; *London Court Rules VietJet Air Liable for Additional \$18m to Shannon Based Lessor FW Aviation*, TravelExtra (Aug. 6, 2026), <https://www.travelextra.ie/london-court-rules-vietjet-air-liable-for-additional-18m-to-shannon-based-lessor-fw-aviation/>.

⁵² *FW Aviation (Holdings) 1 Ltd. v. VietJet Aviation Joint Stock Co.* [2026] IEHC 459 (Ir.); Ruairi Rynn, Barbara Galvin & Declan Keane, *High Court Clarifies "Practical Benefit" Test in Aviation Enforcement Case*, William Fry (Aug. 24, 2026), <https://www.williamfry.com/knowledge/high-court-clarifies-practical-benefit-test-in-aviation-enforcement-case/>.

⁵³ *FW Aviation (Holdings) 1 Ltd. v. VietJet Aviation Joint Stock Co.* [2026] EWHC 2454 (Comm) (Eng.); Elaina Chandler, *Judgment Hand Down: FW Aviation v VietJet Aviation Joint Stock Company* [2026] EWHC 2454 (Comm), South Square (Sept. 30, 2026), <https://southsquare.com/fw-aviation-v-vietjet-aviation-joint-stock-company-2026-ewhc-2454-comm/>.

wider than the gate that the ordinary law of damages would provide, since a claimant in damages must establish both a sufficient causal link and that its loss was not too remote.

The pre-emptive effect of liquidated sums, the capacity-bounded standing of assignees and the actual-cost measure of recovery then operate together to ensure that the purse on the other side of that gate is narrow. That purse contains only what the structure of the transaction justifies, and it is this combination of a wide gate and a narrow purse that distinguishes the lease indemnity from both the ordinary damages claim and the ordinary debt claim. It may therefore be described as a structure-sensitive theory of the lease indemnity, because each narrowing proposition was derived from the particular structure of the JOLCO transaction rather than from any general rule.

The pre-emptive effect of clause 20.4(c) was tied to the Excluded Property and the equity investors' entitlement, while the capacity holding was tied to the partial security assignment and to its realisation in January 2022. The actual-cost holding was, in turn, tied to the judge's view of how far the incentives of the structure could sensibly be pushed before they produced commercially unreasonable results for the lessee.⁵⁴ The lesson for practitioners is that the outer limits of an indemnity in a structured financing cannot be read from the indemnity alone, and must instead be read from the transaction as a whole.

B. The Excluded Property Trap for Distressed-Debt Buyers

The capacity holding has a consequence that the practitioner commentary has not yet fully explored, namely that a purchaser of distressed aircraft debt which acquires the lenders' rights without the Excluded Property may find that its recovery ends on enforcement. The point is not confined to this litigation, since the partial security assignment is a common feature of JOLCO financings, and Allen & Gledhill had already noted that the earlier judgments led to closer scrutiny of the scope of excluded property.⁵⁵ It is respectfully submitted that the third judgment will intensify that scrutiny, because the price of a distressed loan must now reflect

⁵⁴ FW Aviation (Holdings) 1 Ltd. v. VietJet Aviation Joint Stock Co. [2026] EWHC 1996 (Comm), ¶¶ 98, 104 (Eng.); Guy Marrison, *FWA v VietJet (Second Quantum Judgment): Redelivery Indemnities, Assignments and Recoverable Enforcement Costs*, HFW (Aug. 26, 2026), <https://www.hfw.com/insights/fwa-v-vietjet-second-quantum-judgment-redelivery-indemnities-assignments-and-recoverable-enforcement-costs/>.

⁵⁵ Siva Subramaniam, *English High Court Finds Early Termination Sums Under JOLCO Arrangement Not a Penalty*, Allen & Gledhill (May 13, 2025), <https://www.allenandgledhill.com/sg/perspectives/articles/30575/sgkh-english-high-court-finds-early-termination-sums-under-jolco-arrangement-not-a-penalty>.

the narrower set of indemnity rights that survive enforcement.

The trap operates in a manner that may seem counter-intuitive, since FWA, as the party that ultimately owned the CEO aircraft, bore the very costs that the indemnity was designed to cover but could not recover them. It could not do so because it held the indemnity only in a capacity that had ceased to carry any relevant interest, and the court declined to look through the chain of title to the group's commercial reality. In a structure in which ownership and the right to indemnity can be separated, the party that bears a loss and the party entitled to be indemnified may therefore diverge.

The third judgment confirms that the court will not bridge that gap by construction where the parties have not bridged it by drafting, which is consistent with the Court of Appeal's focus on the precise terms of the assignment. The practical message for distressed-debt investors is that the debt and the excluded rights must be acquired together, since any gap between them can only be closed by agreement with the equity side and not by later argument.⁵⁶

C. Actual Cost and the Re-entry of the Compensatory Principle

The actual-cost holding raises a more theoretical tension, because the court refused to import remoteness and proximate cause into clause 23.1, yet imported into clause 20.4 something very close to the compensatory principle of damages. The reasoning that a promise to indemnify is a promise to make good loss actually incurred, and that a lessor should not obtain a windfall from work it never carried out, is in substance the reasoning that limits damages to actual loss. The judgment therefore suggests that an indemnity may be freed from the limits of damages at the point of entry, while remaining subject to the logic of compensation at the point of measurement.

That is a distinction that the authorities have not yet stated in terms, and it is submitted that it is a coherent one, since the breadth of the trigger reflects the parties' allocation of risk between them. The actual-cost measure, by contrast, reflects the nature of an indemnity as a promise to hold harmless rather than to enrich, and the two ideas therefore operate at different stages of the analysis without contradicting each other. The distinction also explains why the lessor could recover costs that it actually incurred during the export delays, but could not recover the

⁵⁶ VietJet Aviation Joint Stock Co. v. FW Aviation (Holdings) 1 Ltd. [2025] EWCA (Civ) 783 (Eng.); Chris Knight, Hannah Harvey & Tom Coates, *VietJet v FW Aviation: Latest Developments*, Pillsbury (June 30, 2025), <https://www.pillsburylaw.com/en/news-and-insights/uk-court-of-appeal-vietjet-fwaviation.html>.

notional cost of return condition work that it chose not to perform.

The difficulty is that the court did not articulate the causal test that replaces proximate cause, and the criticism that it left the effective cause test in *ENE Kos* unaddressed is, with respect, a fair one. The looser test must now be developed case by case without guidance from the judgment that introduced it, leaving parties uncertain about how remote a connection may become before the indemnity ceases to respond.⁵⁷ This is an area in which the courts, rather than the parties, have left the law less settled than it ought to be, and an appellate statement of the causal standard would be of considerable value to the leasing market.

D. Questions the Judgment Leaves Open

The judgment leaves at least three questions open, the first being whether costs that a lessor has contracted to incur, but has not yet paid, count as costs actually incurred for the purposes of a return condition indemnity. The reasoning of *Birt J* was directed at costs that were never going to be incurred, because the lessor had leased the aircraft in a non-compliant state, and it does not necessarily exclude committed costs certain to be paid. That question matters a great deal in practice, since return condition work is often contracted for before it is performed and paid for in stages over a period of months.

The second question is how the capacity holding interacts with assignments that are expressed to transfer all rights under a lease, including excluded rights, but which are made by a party that does not itself hold those rights. The third question is whether the pre-emptive effect of a liquidated sum extends to related but distinct heads of loss, such as the cost of preserving an aircraft during the period already covered by the liquidated rent. Each of these questions will need to be answered in later cases, and each is likely to arise wherever JOLCO structures unwind in the years ahead, whether in England or in the lessee's home jurisdiction.

VI. LESSONS FOR LEASING INTO INDIA

A. The Relevance of English Law to Indian Lessees

The relevance of the judgment to India is direct rather than academic, because aircraft leases

⁵⁷ Linklaters, *UK – Indemnity Clauses: Remoteness, Causation, Concurrency and Other Key Issues*, Conventus L. (Sept. 24, 2026), <https://conventuslaw.com/report/uk-indemnity-clauses-remoteness-causation-concurrency-and-other-key-issues/>; *Petroleo Brasileiro SA v. ENE Kos 1 Ltd.* [2012] UKSC 17, [2012] 2 AC 164 (appeal taken from Eng.).

to Indian airlines are very frequently governed by English law and subject to the jurisdiction of the English courts. The Commercial Court has already decided significant disputes between lessors and Indian airlines, including a case in which it rejected frustration and illegality defences raised by SpiceJet after the grounding of the Boeing 737 MAX.⁵⁸ An Indian lessee that defaults under an English law lease would therefore face indemnity claims construed in precisely the manner set out by Birt J, including the loose causal test and the absence of any remoteness limitation in a true indemnity.

B. Indemnities under the Indian Contract Act 1872

The reasoning of Birt J would not transfer to an Indian law contract without modification, because the Indian Contract Act 1872 defines a contract of indemnity in section 124 in terms narrower than those of clause 23.1. Section 124 describes such a contract as one by which a party promises to save the other from loss caused to him by the conduct of the promisor himself or by the conduct of any other person.⁵⁹ Read literally, that definition might exclude losses arising without human conduct, but the Bombay High Court has long treated sections 124 and 125 as not exhaustive, so that a lease indemnity would be read according to its own language.⁶⁰

The more interesting divergence concerns the timing and the measure of recovery, since the same decision held that an indemnity holder may compel the indemnifier to make good a liability once it has become absolute, without first having to discharge it. That principle sits comfortably with the actual-cost holding, because a liability that has become absolute is real rather than notional, and it would not support recovery for work that a lessor has neither performed nor committed to perform. It does suggest, however, that an Indian court might allow recovery for return condition work that a lessor has contracted to carry out before the costs have been paid, which would answer the first of the open questions identified above.

The pre-emptive effect of liquidated sums would also find a ready parallel in Indian law, since section 74 of the Indian Contract Act limits the compensation for a breach to a reasonable sum not exceeding the amount named in the contract. The Supreme Court in *Kailash Nath Associates v Delhi Development Authority* confirmed that the named sum operates as the outer

⁵⁸ *Wilmington Trust SP Servs. (Dublin) Ltd. v. SpiceJet Ltd.* [2021] EWHC 1117 (Comm) (Eng.); *English High Court Takes a Firm Stance on Frustration and Illegality Defences in Aviation Leasing Matter*, Bird & Bird (2021), <https://www.twobirds.com/en/insights/2021/uk/english-high-court-takes-a-firm-stance-on-frustration-and-illegality-defences-in-aviation-leasing>.

⁵⁹ Indian Contract Act, No. 9 of 1872, § 124 (India).

⁶⁰ *Gajanan Moreshwar Parelkar v. Moreshwar Madan Mantri*, (1942) 44 Bom. L.R. 703 (India).

limit of recovery, and that actual loss must be proved wherever it is capable of proof.⁶¹ An Indian court faced with a lessor's attempt to recover more than the stipulated rent for the period between termination and redelivery would therefore likely reach the same result as Birt J, although by a statutory rather than a purely interpretive route.

The question of remoteness would be more difficult, since section 73 of the Act excludes compensation for remote and indirect loss in cases of breach, and an Indian court may hesitate to treat a broad indemnity as displacing that limit. It is submitted that the better view is that section 73 governs compensation for breach and does not control a true indemnity that operates independently of breach, which would bring the Indian position into line with the distinction drawn by Birt J.⁶²

C. Export Delay after Go First and the Aircraft Objects Act 2025

The export delays that dominated the third trial will be familiar to every lessor that dealt with the Go First insolvency, in which the moratorium imposed by the National Company Law Tribunal in May 2023 prevented lessors from recovering their aircraft. During that period, the Directorate General of Civil Aviation ['DGCA'] could not process de-registration applications in the face of the moratorium, until the Delhi High Court directed it in April 2024 to de-register 54 aircraft within five working days.⁶³

It is respectfully submitted that the tribunal's reasoning, which treated the recovery of aircraft by lessors as the corporate death of the debtor, gave insufficient weight to the Cape Town Convention, to which India had acceded in 2008. That reasoning also overlooked the commercial reality that lessors price the risk of recovery into every lease, so that uncertainty about recovery is ultimately borne by Indian airlines and their passengers through higher lease rentals.⁶⁴

⁶¹ Indian Contract Act, No. 9 of 1872, § 74 (India); *Kailash Nath Assocs. v. Delhi Dev. Auth.*, (2015) 4 S.C.C. 136 (India).

⁶² Indian Contract Act, No. 9 of 1872, § 73 (India).

⁶³ *Accipiter Invs. Aircraft 2 Ltd. v. Union of India* (Del. HC Apr. 26, 2024) (India), <https://indiankanoon.org/doc/54766013/>; 'Inconvenience of Specific Party Cannot Outweigh Statutory Provisions'; *Delhi High Court Directs DGCA to Process Deregistration of 54 Leased GoAir Aircrafts*, SCC Online Blog (Apr. 30, 2024), <https://www.sconline.com/blog/post/2024/04/30/dhc-directs-dgca-to-process-deregistration-of-54-leased-goair-aircrafts-scc-times/>; Sourabh Bhattacharya & Sidanth Rajagopal, *Indian Aviation and Cape Town: Part II*, Morgan Lewis (May 21, 2025), <https://www.morganlewis.com/pubs/2025/05/indian-aviation-and-cape-town-part-ii>.

⁶⁴ Abir Lal Dey, Arnav Sinha & Sandeep Golani, *India's Protection of Interests in Aircraft Objects Rules, 2026*:

The Government's response in the Protection of Interests in Aircraft Objects Act 2025 deserves considerable credit, since the Act gives overriding effect to its provisions and applies Alternative A of the Protocol with a two-month waiting period. It also gives effect to the Protocol's regime for de-registration and export, subject to the Bharatiya Vayuyan Adhiniyam 2024, and it confers jurisdiction on the High Courts, which marks a welcome move away from tribunals in matters of this kind.⁶⁵ The Rules notified in 2026 complete that framework by requiring the DGCA to acknowledge and publish a creditor's notice of default promptly, while the Protocol requires de-registration and export to proceed within five working days of the creditor's request.⁶⁶

One of the present authors has elsewhere argued that the Act is best understood as an Indianised Cape Town Convention, adopted selectively to fit domestic priorities, and *FW Aviation* shows why its export timelines matter so much in money terms.⁶⁷ The costs at stake in the third trial, namely parking, storage, preservation and lost rent, are precisely the costs that accumulate when export is delayed, and the broad causal language of clause 23.1 allowed FWA to recover them. For a lessee operating in India, the 2025 Act therefore reduces both the lessor's risk of being unable to recover its aircraft and the lessee's own exposure under the general indemnities, since a shorter export process leaves fewer costs to indemnify.

D. Drafting and Structuring Implications

Several practical implications follow for parties drafting aircraft leases with Indian lessees, whether those leases are governed by English law, as remains common in the international market, or by Indian law through the growing leasing market in the International Financial Services Centre. Lessees seeking to resist the breadth of clause 23.1 should insist on causal language narrower than "directly or indirectly", on an express remoteness limitation and on an

A New Dawn for Aviation Finance, Legal 500 (Aug. 10, 2026), <https://www.legal500.com/intelligence/india/finance-and-banking/indias-protection-of-interests-in-aircraft-objects-rules-2026-a-new-dawn-for-aviation-finance>; Convention on International Interests in Mobile Equipment, Nov. 16, 2001, 2307 U.N.T.S. 285.

⁶⁵ Protection of Interests in Aircraft Objects Act, No. 17 of 2025, §§ 6–9 (India).

⁶⁶ Abir Lal Dey, Arnav Sinha & Sandeep Golani, *India's Protection of Interests in Aircraft Objects Rules, 2026: A New Dawn for Aviation Finance*, Legal 500 (Aug. 10, 2026), <https://www.legal500.com/intelligence/india/finance-and-banking/indias-protection-of-interests-in-aircraft-objects-rules-2026-a-new-dawn-for-aviation-finance>.

⁶⁷ Sanat Nandkishore & Jagyansh Kumar, *Collision Course or Clear Skies?: Realigning the IBC and the Cape Town Convention Through India's Aircraft Objects Act 2025*, 3 *Solventia J. on Insolvency & Bankr. L.* 163 (2026).

express confinement of the indemnity to third-party claims if that is intended.⁶⁸ The judgment shows that none of these limitations will be implied into a broadly worded indemnity, and a lessee that does not negotiate them at the outset will find it very difficult to argue for them after a default.

Lessors, for their part, should ensure that any assignment to a successor carries the rights needed to recover owner-type losses, and should state whether a return condition indemnity covers the notional cost of the work or only costs actually incurred. Distressed-debt investors should examine the Excluded Property provisions in any JOLCO financing before pricing the debt, since the third judgment shows that the indemnity rights surviving enforcement may be considerably narrower than those that existed while the lease was running.

VII. CONCLUSION AND WAY FORWARD

The discussion in this paper shows that the third judgment in *FW Aviation v VietJet* completes the picture that the earlier judgments began, by confirming that the generous termination machinery of a JOLCO structure is accompanied by a disciplined recovery regime. The four propositions on which the judgment rests, namely the pre-emptive effect of liquidated sums, the reach of the general indemnity, the capacity-bounded standing of assignees and the actual-cost measure, together describe a structure-sensitive approach to the lease indemnity. That approach will influence the drafting of aircraft leases well beyond the four aircraft in issue, and it is likely to be cited wherever a lessor seeks to recover the costs that follow an airline's default and the recovery of its aircraft.

The principal weakness of the judgment lies in its treatment of causation, since the court rejected proximate cause without stating the test that replaces it, and it is to be hoped that an appellate court will supply that guidance in due course. In India, the reasoning of Birt J would largely carry across, subject to sections 73, 74 and 124 of the Indian Contract Act, while the Aircraft Objects Act 2025 substantially reduces the export risk that drove so much of the loss

⁶⁸ Guy Marrison, *FWA v VietJet (Second Quantum Judgment): Redelivery Indemnities, Assignments and Recoverable Enforcement Costs*, HFW (Aug. 26, 2026), <https://www.hfw.com/insights/fwa-v-vietjet-second-quantum-judgment-redelivery-indemnities-assignments-and-recoverable-enforcement-costs/>; Linklaters, *UK – Indemnity Clauses: Remoteness, Causation, Concurrency and Other Key Issues*, Conventus L. (Sept. 24, 2026), <https://conventuslaw.com/report/uk-indemnity-clauses-remoteness-causation-concurrency-and-other-key-issues/>.

here.⁶⁹

The central takeaway is that an aircraft lease indemnity is now best understood as a promise to keep the lessor whole within the structure that the parties have built, rather than a promise to pay whatever the lessor may choose to claim. Parties on both sides of the Indian market would do well to draft with that understanding firmly in view, while the litigation itself, with enforcement continuing and the final figures still to be settled, will continue to shape aircraft finance law.

⁶⁹ Indian Contract Act, No. 9 of 1872, §§ 73, 74, 124 (India); Protection of Interests in Aircraft Objects Act, No. 17 of 2025 (India).