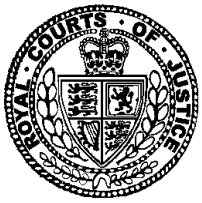

Neutral Citation Number: [2025] EWHC 1430 (Comm)

Case Nos: CL-2022-000294, CL-2022-000557, CL-2022-000611; CL-2022-000662; CL-2022-000697; CL-2023-000148

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 11 June 2025

Before :

MR JUSTICE BUTCHER

- -

AERCAP IRELAND LIMITED v AIG EUROPE S.A. & OTHERS (CL-2022-000294)

DUBAI AEROSPACE ENTERPRISE (DAE) LTD & OTHERS v LLOYD'S INSURANCE COMPANY S.A. AND OTHERS (CL-2022-000557)

FALCON 2019-1 AIRCRAFT 3 LIMITED v LLOYD'S INSURANCE COMPANY S.A. & OTHERS (CL-2022-000611)

KDAC AIRCRAFT TRADING 2 LTD & OTHERS v CHUBB EUROPEAN GROUP SE & OTHERS (CL-2022-000662)

MERX AVIATION SERVICING LTD & OTHERS v CHUBB EUROPEAN GROUP SE & OTHERS (CL-2022-000697)

GASL IRELAND LEASING A-1 LIMITED v THE UNDERWRITING MEMBERS OF KILN SYNDICATE 510 FOR THE 2021 YEAR OF ACCOUNT & OTHERS (CL-2023-000148)

- -

Russian Aircraft Lessor Policy Claims

Mark Howard KC, Stephen Midwinter KC, Edward Ho, Sophie Shaw and Sophie Bird (instructed by Herbert Smith Freehills Kramer LLP) for AerCap Ireland Limited

Alistair Schaff KC, Rebecca Sabben-Clare KC, Alexander MacDonald, Sandra Healy, Frederick Alliott and Daniel Corteville (instructed by Clifford Chance LLP) for (1) Dubai Aerospace Enterprise (DAE) Ltd and Others and (2) Falcon 2019-1 Aircraft 3 Limited

Alexander MacDonald (instructed by Clifford Chance LLP) for KDAC Aircraft Trading 2 Limited

Matthew Reeve KC and Joseph England (instructed by McGuireWoods London LLP) for GASL Ireland Leasing A-1 Limited

Robert-Jan Temmink KC and Tom Nixon (instructed by Morgan, Lewis & Bockius UK LLP) for Merx Aviation Servicing Limited and others

Gavin Kealey KC, Andrew Wales KC, David Murray, Clara Benn and Sophie Hepburn (instructed by Holman Fenwick Willan LLP) for AIG Europe S.A. and/or others in their capacity as all risks insurers in the AerCap, KDAC and Merx Claims

Jonathan Gaisman KC, Adam Fenton KC, Siobán Healy KC, Keir Howie, Jason Robinson and Charles Littlewood (instructed by Wikborg Rein LLP) for the Global Aerospace Underwriting Managers (Europe) SAS and others in the DAE, Falcon and Genesis Claims

Richard Waller KC, Jawdat Khurshid KC, Michael Ryan and Joshua Fung (instructed by Kennedys Law LLP) for Lloyd's Insurance Company S.A. and others in their war risks capacity in the AerCap, Merx and Genesis Claims

David Railton KC, Simon Atrill KC, Adam Sher, Michael Ryan, Ian Bergson and Joseph Leech (instructed by Kennedys Law LLP) for Lloyd's Insurance Company S.A. and others in their war risks capacity in the DAE, Falcon and KDAC Claims

James Cutress KC, Adam Sher, Simon Paul and Ian Bergson (instructed by Stephenson Harwood LLP) for AESA in its capacity as war risk insurer in the DAE and Falcon Claims

Akhil Shah KC, James Duffy KC, Nick Daly and Max Kasriel (instructed by CMS Cameron McKenna Nabarro Olswang LLP) for Tokio Marine Kiln Syndicates 0510 and 1880 for the 2021 year of account and HDI Global Specialty SE in their capacity as war risk insurers in the DAE, Falcon, KDAC, Merx and Genesis Claims

Dominic Kendrick KC, Peter MacDonald Eggers KC, Timothy Kenefick and Rebecca Jacobs (instructed by Reynolds Porter Chamberlain LLP) for Fidelis Underwriting Limited, Fidelis Insurance Ireland DAC and Fidelis Insurance Bermuda Limited

Jeffrey Gruder KC, Ben Lynch KC, David Peters KC, Nathalie Koh and Daniel Schwennicke (instructed by Clyde & Co LLP) for Chubb European Group SE

Stephen Phillips KC, Elizabeth Lindesay, Harry Wright and James Goudkamp (instructed by Penningtons Manches Cooper LLP) for Swiss Re International SE

David Bailey KC, Charles Kimmins KC, Susannah Jones, Michal Hain and Alexandros Demetriades (instructed by Kennedys Legal Solutions Pte Ltd) for Liberty Mutual Insurance Europe S.A and Lancashire Insurance Company (UK) Limited

- -

Hearing dates:

2, 3, 7-11, 14-17, 21-24, 28-31 October 2024; 4-7, 11-14, 18-19 November 2024; 20-24, 27-31 January 2025; 3-7, 10-14 February 2025

Draft judgment was supplied to parties' representatives on 19 May 2025.

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JUDGMENT

This judgment was handed down remotely at 10:30am on 11th June 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Butcher:

Introduction

1. This judgment relates to claims made under insurance policies by aircraft leasing companies in respect of aircraft and aircraft engines which those companies contend have been lost to them following the Russian invasion of Ukraine in February 2022.

2. Each of the Claimants had leased aircraft, and in some cases, engines, to Russian airlines or airlines which operated in Russia. I refer to these of the Claimants' aircraft and engines, as a whole, as the '**Aircraft**' and the '**Engines**' in this judgment. I refer to all the aircraft leased into Russia as of February 2022 by entities affected by EU/UK/US sanctions as the '**Western Leased Aircraft**'. Following the February 2022 invasion the Claimants issued default and termination notices under their leases with lessees. The Aircraft and Engines have not been returned. As a result the Claimants have made claims under their insurance policies.

3. The policies with which this judgment is directly concerned are insurances taken out by the aircraft lessors in respect of their interests in the Aircraft and Engines. They have accordingly been described as '**Lessor Policies**', or by way of shorthand '**LPs**'. They are to be distinguished from the policies which were taken out by the lessees, or operators, of the Aircraft, which have been called the '**Operator Policies**' or '**OPs**'.

4. The relevant coverages of the LPs under which the lessors have claimed an indemnity are the '**Contingent Cover**' and the '**Possessed Cover**'. These are generic types of insurance which aircraft lessors take out in respect of leased aircraft. The respective scope of these coverages was fiercely contested and I set out the relevant terms in due course.

5. The six actions before the court at the outset of the trial were as follows:

(1) AERCAP IRELAND LIMITED v AIG EUROPE S.A. & OTHERS (CL-2022-000294). The Claimant in that action, to which I will refer as '**AerCap**', sues on its own behalf and on behalf of all those other companies in the AerCap group which are insured under insurance policy UMR B1752GE2100325000 (the '**AerCap Policy**'). The Defendants to that action are insurers of that policy.

(2) DUBAI AEROSPACE ENTERPRISE (DAE) LTD & OTHERS v LLOYD'S INSURANCE COMPANY S.A. AND OTHERS (CL-2022-000557). The Claimants in that action are Dubai Aerospace Enterprise (DAE) Ltd, and a series of related companies. I will refer to these companies as '**DAE**'. They are insured under an Aircraft Hull and Spares All Risks Policy (AVXLN2100127) (the '**DAE AR Policy**'), and an Aircraft Hull and Spares War and Allied Perils Policy (AVXLN2100130) (the '**DAE WR Policy**'). The Defendants to that action are insurers under each of those policies.

(3) FALCON 2019-1 AIRCRAFT 3 LIMITED v LLOYD'S INSURANCE COMPANY S.A. & OTHERS (CL-2022-000611). I will refer to the Claimant in that action as '**Falcon**'. It is insured under an Aircraft Hull and Spares All Risks Policy

(AVXLN2100129), and an Aircraft Hull and Spares War Risks Policy (AVXLN2100132). The Defendants to that action are insurers under those policies.

(4) KDAC AIRCRAFT TRADING 2 LIMITED v CHUBB EUROPEAN GROUP SE & OTHERS (CL-2022-000662). I will refer to the Claimant in that action as '**KDAC**'. It is insured under a Contingent and Possessed Aircraft Hull, Spares and Equipment (including War and Allied Perils) Aviation Liability and Personal Accident Insurance (801/204099A21). The Defendants to that action are insurers under that policy.

(5) MERX AVIATION SERVICING LIMITED & OTHERS v CHUBB EUROPEAN GROUP SE & OTHERS (CL-2022-000697). I will refer to the Claimants in that action, save where it is necessary to distinguish between them, as '**Merx**'. They are insured under an Aviation Hull, Spares/Equipment, Liability and War and Allied Perils (including Contingent) Insurance (AVXLN2100104) (the '**Merx Policy**'). The Defendants to that action are insurers under that policy.

(6) GASL IRELAND LEASING A-1 LIMITED v KILN SYNDICATE 510 AND OTHERS (CL-2023-000148). I will refer to the Claimant in that action as '**Genesis**'. It is insured under a Contingent and Possessed Hull and Spares All Risk Policy (which, as far as the London market participation was concerned had the reference B0702AD003640P) (the '**Genesis AR Policy**'), and a Contingent/Possessed Hull and Spares War Risks Policy (B0702AD005170P) (the '**Genesis WR Policy**'). The Defendants to that action are insurers under those policies.

6. These claims have been managed and tried together as a result of a series of orders of the court. In particular, at a CMC on 13 March 2023, I ordered that the AerCap, DAE, Falcon, KDAC and Merx actions should be tried concurrently, with the trial to start on 2 October 2024. Subsequently, at a CMC on 21 July 2023, I ordered that the Genesis action should be tried concurrently with the LP claims already ordered to be tried in October 2024, excluding an alternative claim made by Genesis for actual or constructive total and/or partial loss by reason of the physical deterioration of its aircraft.

7. During the course of the trial, KDAC settled with its insurers, and its action was dismissed. It will not be necessary to say anything further about that claim.

8. As already mentioned, the LP claims which have been the subject of the trial before me and are the subject of this judgment are distinct from the OP claims. The OP claims are a group of claims brought by owners and lessors, financing banks (or their assignees) or managers of aircraft and/or aircraft engines leased to Russian airlines. These claimants include, but are not limited to, companies in the AerCap, DAE, Falcon, Merx and Genesis groups.

9. Under aircraft leases, the lessee airlines were generally required to insure the aircraft in respect of hull all risks (frequently abbreviated to '**AR**') and war risks (similarly abbreviated to '**WR**'). Russian lessees arranged an insurance policy or policies in respect of leased aircraft with a Russian-registered insurance company, in compliance with the requirements of Russian law. The leases generally required the lessee also to ensure that reinsurance

should be obtained, at least for most of the risk, under contracts of reinsurance on the same terms as the underlying OP insurance, and containing a 'cut-through' clause.

10. In accordance with such requirements, OP insurances were typically reinsured under reinsurance policies, primarily with London and international market reinsurers and, often, with one or more Russian co-reinsurers. The operator airline would generally be identified as the insured in the relevant OP insurance and as the 'original insured' in the OP reinsurance slip. Lessors were typically named as an 'additional insured' or as a 'contract party' under such OP insurances.

11. Claims by lessors have been brought under OP insurances and reinsurances principally in this jurisdiction. In relation to a significant number of these claims it is the case, or is arguable, that the OP insurances contained Russian law and jurisdiction clauses, and that the OP reinsurances likewise contained Russian law and jurisdiction agreements.

12. Challenges were brought to the jurisdiction of the English court to hear a number of claims under OP reinsurances, on the basis of Russian law and jurisdiction clauses which they were said to contain. These challenges were rejected by Henshaw J in a judgment handed down on 28 March 2024 (Zephyrus Capital Aviation Partners 1D Ltd v Fidelis Underwriting Ltd and Others [2024] EWHC 734 (Comm); [2024] 4 WLR 47).

13. In brief, Henshaw J decided that, for a number of reasons, the claimants in those actions were very unlikely to receive a fair trial in Russia, and that those actions should not be stayed.

14. The Commercial Court is managing together the OP claims which are proceeding in this jurisdiction, including those which were the subject of Henshaw J's decision on jurisdictional challenges. A trial of those OP claims has now been fixed for Michaelmas 2026.

15. In this judgment I make some reference to a 'Confidential DPSI Schedule'. This Schedule contains Designated Personal Security Information ('DPSI') as defined in a Consolidated Confidentiality Order dated 23 August 2023 and subsequently amended. The information contained in the Confidential DPSI Schedule, while relevant to particular points, is limited in scope and the fact that some material appears in it does not prevent any of my analysis or conclusions from being fully understood without reference to it.

The LP Policies and Claims

AerCap

16. AerCap's claim is brought in respect of 116 aircraft and 15 standalone engines. It is brought under the AerCap Policy, which is an aircraft hull spares and equipment all risks and war risks policy. The AerCap Policy was issued in November 2021 and was in respect of losses sustained during the period 1 November 2021 to 31 October 2022. At Annexe 1, Part 1 to this judgment appear terms of that policy which have been relied upon in argument. Section One of the AerCap Policy provided Aircraft Hull and Spares and Equipment Coverage, i.e. All Risks cover. It may be referred to as the '**AerCap AR Cover**'. Section Three provided Aviation War and Allied Perils Coverage, and may be referred to as the

'**AerCap WR Cover**'. I also note here that I refer to all risks policies generally as '**AR Cover**' and to war risks policies generally as '**WR Cover**'.

17. The policy provided, amongst other things, for 'contingent' and 'possessed' cover in relation to aircraft and engines that AerCap had leased to an airline.

18. The Contingent Cover in Section One (All Risks) was in these terms:

> 1. Contingent Aircraft Hull and Spares and Equipment Coverage
>
> This Section One covers
>
> (a) Aircraft, as per the Schedule of Aircraft, and
>
> (b) Spares and Equipment,
>
> the subject of a Lease Agreement, that are not in the care, custody or control of the Insured or their agents and in respect of which physical damage coverage is required to be provided under the Principal Insurance, against all risks of physical loss or damage howsoever occasioned (including whilst in transit by any means and, in respect of aircraft engines, whilst undergoing test running) except as hereinafter excluded, sustained during the Period of Insurance,
>
> In the event:
>
> (1) (i) that the Insured is not indemnified in whole or in part under the Principal Insurance, or
>
> (ii) that the Principal Insurance fails to respond to any claim within 90 days after the Insured has made a written claim, or
>
> (2) of the lack or insufficiency of required insurance due to error or accidental omission.
>
> The coverage afforded under paragraph 1.(a) also applies to aircraft engines and components as per the Schedule of Aircraft Engines and Components, the subject of a Lease Agreement whilst attached to an aircraft that is not the subject of a Lease Agreement.

19. 'Principal Insurance' is defined to mean 'the insurance or reinsurances required to be effected by the Operator pursuant to the provisions of the Lease Agreement (inclusive of insurances such as hull deductible insurances as may be necessary to meet the lease requirements)'.

20. AerCap's AR Possessed Cover was as follows:

> 2. Possessed Aircraft Hull and Spares and Equipment Coverage
>
> This Section One also covers
>
> (a) Aircraft, as per the Schedule of Aircraft, and

(b) Spares and Equipment,

whilst

(1) awaiting the commencement of a Lease Agreement, or

(2) having been returned on the expiry or termination of a Lease Agreement or where coverage for the Insured has ceased under the Principal Insurance, or

(3) having been repossessed or which are in the course of repossession from a Lease Agreement, or

(4) in the care, custody or control of the Insured or their agents, including for the purposes of parting out or sale against all risks of physical loss or damage howsoever occasioned (including whilst in transit by any means and, in respect of aircraft engines, whilst undergoing test running) except as hereinafter excluded, sustained during the Period of Insurance.

21. Section One provided for an exclusion of 'claims excluded by the WAR, HI-JACKING AND OTHER PERILS EXCLUSION CLAUSE (Aviation) AVN 48B (amended)…'.

22. Section Three (War Risks and Allied Perils), provided, in material part, as follows:

Subject to the terms, conditions and limitations set out below, this Section Three covers loss of or damage to

(a) Contingent Aircraft Hull and Spares and Equipment Coverage

(i) Aircraft, as per the Schedule of Aircraft, and

(ii) Spares and Equipment,

as covered under Coverage 1 - Contingent Coverage - of Section One of this Insurance

(1) in the event that the Insured is not indemnified in whole or in part under the Principal Insurance; or

(2) in the event of the lack or insufficiency of required insurance due to error or accidental omission; or

(3) in the event of the exhaustion of the aggregate limit under the Principal Insurance,

(the coverage afforded under paragraph 1(a)(i) also applies to aircraft engines and components as per the Schedule of Aircraft Engines and Components, the subject of a Lease Agreement whilst attached to an aircraft that is not the subject of a Lease Agreement),

(b) Possessed Aircraft Hull and Spares and Equipment Coverage

(i) Aircraft, as per the Schedule of Aircraft, and

(ii) Spares and Equipment,

as covered under Coverage 2 - Possessed Coverage - of Section One of this Insurance,

(c) Technical Records Coverage

Technical Records of Aircraft, aircraft engines and components as covered under Coverage 3 - Technical Records Coverage - of Section One of this Insurance,

(d) Repossession Expenses Coverage

Expenses incurred in connection with the repossession or attempted repossession of Aircraft, aircraft engines or components in exercise of rights vested in the Insured under the terms of a Lease Agreement as covered under Coverage 4 - Repossession Expenses Coverage - of Section One of this Insurance

against claims excluded from Section One of this Insurance as caused by

(1) War, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, martial law, military or usurped power or attempts at usurpation of power.

(2) Strikes, riots, civil commotions or labour disturbances.

(3) Any act of one or more persons, whether or not agents of a sovereign power, for political or terrorist purposes and whether the loss or damage resulting therefrom is accidental or intentional.

(4) Any malicious act or act of sabotage.

(5) Confiscation, nationalisation, seizure, restraint, detention, appropriation, requisition for title or use by or under the order of any government (whether civil, military or de facto) or public or local authority.

(6) Hi-jacking or any unlawful seizure or wrongful exercise of control of the Aircraft or crew in flight (including any attempt at such seizure or control) made by any person or persons on board the Aircraft acting without the consent of the Insured or the Operator. For the purpose of this paragraph (6) only, an aircraft is considered to be in flight at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation or when the aircraft is in motion. A rotor-wing aircraft shall be deemed to be in flight when the rotors are in motion as a result of engine power, the momentum generated therefrom, or autorotation.

> Furthermore this Insurance covers claims excluded from Section One of this Insurance from occurrences whilst the Aircraft and/or Spares and Equipment are outside the control of the Insured or the Operator by reason of any of the above perils. An Aircraft shall be deemed to have been restored to the control of the Insured or the Operator on the safe return of the Aircraft to the Insured or the Operator at an airfield not excluded by the geographical limits of this Insurance, and entirely suitable for the operation of the Aircraft (such safe return shall require that the Aircraft be parked with engines shut down and under no duress). Spares and Equipment shall be deemed to have been restored to the control of the Insured or the Operator on the safe return of the Spares and Equipment to the Insured or the Operator at a location not excluded by the geographical limits of this Insurance.
>
> However, as regards Spares and Equipment the coverage provided in respect of the perils specified in paragraph (a) of AVN48B shall only apply whilst the Spares and Equipment are in transit by air or by sea as defined in the attached Institute War Duration Transit Clause 576WIL01025 (amended).

23. AerCap contends that it lost the 116 aircraft and 15 standalone engines set out in Schedule 1 (Part A) (the '**AerCap Aircraft**'). That schedule details the Agreed Value for each aircraft and engine, and identifies the lessee to whom the aircraft or engine was leased.

24. AerCap's primary claim is under its Contingent Cover, but it makes an alternative claim under its Possessed Cover. Equally, its primary case is that its aircraft and engines were lost by an All Risks Peril ('**AR Peril**'), that is to say a fortuity cover for which is not excluded from Section One by the War, Hi-Jacking and Other Perils Exclusion Clause and, therefore, that it is covered under Section One; but alternatively it says that the aircraft and engines were lost by reason of a War Risks Peril ('**WR Peril**') and that it is covered under Section Three. It is potentially advantageous to AerCap that cover should be under Section One, given the aggregate limit of US$1.2 billion on insurers' liability under Section Three.

DAE and Falcon

25. DAE's claim is in respect of 22 aircraft (19 of which were lost in Russia and three of which were recovered), one engine and one piece of equipment. It is brought under DAE's WR Policy alternatively under the DAE AR Policy. The policy period of those policies is 1 December 2021 to 30 November 2022. At Annexe 1, Part 2 to this judgment appear the terms of those policies that have been referred to in argument. The following are the most significant terms, which it is helpful to set out in order to outline the issues in dispute.

26. The Risk Details to the DAE AR Policy provided that the 'Interest' was:

> To Cover;
>
> HULLS AND SPARES
>
> a) Aircraft Hulls against all risks of physical loss or damage whilst in the Insured's care, custody or control or for which the Insured is

responsible (including whilst in the course of repossession) whilst on the ground, taxying or in flight.

…

Contingent Aircraft Hulls and Contingent Spares against all risks of physical loss or damage in respect of aircraft and/or Spares leased to others by the Insured as per schedule held on file by the Insured. To pay as a result of the inability of the Insured to recover from insurance (including deductible insurance) required by the Insured to be effected by the lessee or operator including where such inability is due to cancellation or non-renewal of the insurance required to be effected by the Lessee or operator.

…

27. In the DAE AR Policy, Section One provided in part:

1. AIRCRAFT HULL ALL RISKS

COVER

To pay for the physical loss of or damage howsoever sustained (save as excluded) occurring during the Period of Insurance to Aircraft in the care, custody or control of the Insured or for which they are responsible (including whilst in the course of repossession).

…

1.3 LOSS OF AIRCRAFT: AGREED VALUE

In the event of the total loss, constructive total loss or arranged total loss of an Aircraft the Insurers shall pay the Agreed Value of the Aircraft.

The Insured may declare a loss as a constructive total loss and the Insurers shall pay the Agreed Value of the Aircraft in the event that the cost of repair is estimated at 75% (seventy five per cent) or more of the Agreed Value of the Aircraft concerned.

Nothing herein contained shall be deemed to prevent the declaration of an arranged total loss by agreement between the Insurers and the Insured in the event that the cost of repair be estimated at less than 75% (seventy five per cent) of the Agreed Value.

28. Section Five of the DAE AR Policy provided in part:

5. CONTINGENT HULL AND SPARES ALL RISKS

5.1. COVER

To pay for the physical loss of or damage howsoever sustained (save as excluded) occurring during the Period of Insurance to Aircraft and/or Spares leased to others by the Insured (as held on file by the Insured).

Notwithstanding Exclusions 6.2.1. and 6.2.3. of this Insurance cover is provided by this Section 5.1. to engines in which the Insured has a financial interest whilst attached to an aircraft in which the Insured does not have a financial interest.

5.2. CONDITIONS APPLICABLE TO THIS SECTION ONLY

5.2.1. The Insurers will pay under this Section as a result of the Insured not being paid in whole or part under the Principal Policy including where due to cancellation or non-renewal of the Principal Policy.

5.2.2. This Section Five provides cover until the Insured repossesses the Aircraft or Spares or until its interest in the Aircraft or Spares ceases, or until expiry of the Period of Insurance, whichever first occurs. Coverage under this Section for any Aircraft and/or Spares shall also cease when such Aircraft and/or Spares attach for coverage under Section One/Two (as applicable) hereof.

5.3. EXCLUSIONS APPLICABLE TO THIS SECTION ONLY

The Insurers will not pay for loss or damage which is:-

5.3.1. recoverable as a claim under the Principal Policy; or

5.3.2. not recoverable (in whole or in part) under the Principal Policy by reason of the insolvency of an insurer or insurers unless the lessee was insured by such an insurer in order to comply with applicable law.

5.4. LOSS OF AIRCRAFT: AGREED VALUE

In the event of the total loss, constructive total loss or arranged total loss of an Aircraft the Insurers will pay the Agreed Value of the Aircraft.

The Insured may declare a loss as a constructive total loss and the Insurers shall pay the Agreed Value of the Aircraft in the event that the cost of repair is estimated at 75% (seventy five per cent) or more of the Agreed Value of the Aircraft concerned.

29. Section 10 of the DAE AR Policy (Exclusions) provided in part:

10.2. WAR, HI-JACKING AND OTHER PERILS EXCLUSION CLAUSE (AVIATION) AVN 48B

10.2.1 This Insurance does not cover claims caused by

10.2.1.1 War, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, martial law, military or usurped power or attempts at usurpation of power.

10.2.1.2 Any hostile detonation of any weapon of war employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force or matter.

10.2.1.3 Strikes, riots, civil commotions or labour disturbances.

10.2.1.4 Any act of one or more persons, whether or not agents of a sovereign Power, for political or terrorist purposes and whether the loss or damage resulting therefrom is accidental or intentional.

10.2.1.5 Any malicious act or act of sabotage.

10.2.1.6 Confiscation, nationalisation, seizure, restraint, detention, appropriation, requisition for title or use by or under the order of any Government (whether civil, military or de facto) or public or local authority.

10.2.1.7 Hi-jacking or any unlawful seizure or wrongful exercise of control of the aircraft in Flight (including any attempt at such seizure or control) made by any person or persons on board the aircraft acting without the consent of the Insured.

…

30. The DAE WR Policy provided in its Risk Details that the 'Interest' was:

To Cover;

HULLS AND SPARES

1. Aircraft Hulls and Spares War Risks against loss or damage whilst in the Insured's care, custody or control or for which the Insured is responsible whilst on the ground, taxying or in flight.

2. Contingent Aircraft Hulls and Contingent Spares War Risks against loss or damage in respect of aircraft and/or Spares leased to others by the Insured as per schedule held on file by the Insured. To pay as a result of the inability of the Insured to recover from insurance (including deductible insurance) required by the Insured to be effected by the lessee or operator including where such inability is due to cancellation or non-renewal of the insurance required to be effected by the Lessee or operator and exhaustion of any aggregate limit.

…

31. In the Risk Details, under 'Conditions' appeared the following:

In respect of War Risks and Contingent War Risks this Policy subject to (a) 7 days notice by Insurers to review rates and/or Geographical Limits

> subject any cancellation shall only apply to the aircraft the subject of the notice (b) 7 days notice to cancel at quarter dates by either side …

32. In the DAE WR Policy Risk Details, Section One provided:

> SECTION ONE: LOSS OF OR DAMAGE TO AIRCRAFT AND/OR SPARES
>
> Subject to the terms, conditions and limitations set out below, this Policy covers loss of or damage to aircraft and/or spares as defined in the Schedule and held on file by Aon Belgium BV (UK Branch) against claims excluded from the Insured's Hull and Spares "All Risks", Contingent Hull and Spares "All Risks" and Total Loss Only Insurance (hereinafter referred to as the Insured's Hull and Spares "All Risks" Policy) as caused by:
>
> (a) War, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, martial law, military or usurped power or attempts at usurpation of power.
>
> (b) Strikes, riots, civil commotions or labour disturbances.
>
> (c) Any act of one or more persons, whether or not agents of a sovereign power, for political or terrorist purposes and whether the loss or damage resulting therefrom is accidental or intentional.
>
> (d) Any malicious act or act of sabotage.
>
> (e) Confiscation, nationalisation, seizure, restraint, detention, appropriation, requisition for title or use by or under the order of any government (whether civil, military or de facto) or public or local authority.
>
> (f) Hi-jacking or any unlawful seizure or wrongful exercise of control of the Aircraft or crew in flight (including any attempt at such seizure or control) made by any person or persons on board the Aircraft acting without the consent of the Insured. For the purpose of this paragraph (f) only, an aircraft is considered to be in flight at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation or when the aircraft is in motion. A rotor-wing aircraft shall be deemed to be in flight when the rotors are in motion as a result of engine power, the momentum generated therefrom, or autorotation.

33. Section Four contained conditions applicable in respect of the Contingent Cover, and provided in part:

> 1. The Insurers will only pay as a result of the inability of the Insured to recover from the Principal Policy including where such inability is due

> to cancellation or non-renewal of the Principal Policy. This paragraph does not apply to the coverage provided under paragraph 1. of Extensions of Coverage.
>
> 3. Coverage will apply until the Insured repossesses the aircraft or spares or until their interest ceases, or until expiry of this Insurance, whichever first occurs. Coverage provided shall cease once the aircraft and/or spares have been deleted from the Principal Policy, provided that such deletion is with the knowledge and consent of the Insured.'

34. As is obvious from the above, the DAE Policies differed in various respects from the AerCap Policy. One particular difference is that the AerCap Policy, unlike the DAE WR Policy, contained no provision whereby the underwriters to the WR Policy were empowered to review rates and/or geographical limits on notice. There seems no doubt that this, and some other differences in the terms as between AerCap and other insureds, was due to AerCap's superior bargaining power.

35. The aircraft in respect of which DAE brings its claim are set out in Schedule 1 (Part B) to this judgment (the '**DAE Aircraft**'). DAE says that it makes no financial difference as to whether, assuming that there is cover under one or the other, the loss of its aircraft was caused by an AR or a WR Peril. DAE's primary case is, nevertheless, that it lost those aircraft as a result of the incidence of a WR Peril; and alternatively that they were lost as a result of an AR Peril. Furthermore, DAE's primary case is that it has cover under the 'Possessed' section of either policy (i.e. that in respect of loss or damage occurring to '*Aircraft in the care, custody or control of the Insured or for which they are responsible (including whilst in the course of repossession)*'). Alternatively, DAE contends that it has cover under the 'Contingent' section of either policy.

36. Falcon's claim is brought in respect of two aircraft, which are identified in Schedule 1 (Part C) to this judgment (the '**Falcon Aircraft**'). It is brought under policies which were in materially identical terms to those of DAE summarised above. Falcon adopts the same primary and alternative positions in relation to war as opposed to all risks, and Possessed as opposed to Contingent Cover as does DAE. Throughout this judgment, where I refer to DAE I may also be taken to refer to Falcon, except where I say otherwise or context otherwise dictates.

Merx

37. Merx claims in respect of six aircraft, which are identified in Schedule 1 (Part D) to this judgment (the '**Merx Aircraft**').

38. Merx's claim is brought under the Merx Policy, which is an Aviation Hull, Spares/Equipment, Liability and War and Allied Perils (including Contingent) Insurance. The Policy Period of the Merx Policy was 1 August 2021 to 1 August 2022. The terms of the Merx Policy on which the parties relied in argument can be found in Annexe 1, Part 3 to this judgment.

39. In the Risk Details of the Merx Policy, the 'Interest' was specified, in part, as follows:

> Section One – Hulls

> 1.1(a) Contingent Hull – All risks of physical loss or damage to aircraft in which the Insured has a financial interest as per Schedule which are not in the care, custody or control of the Insured or their agents – INSURED
>
> 1.1(b) Possessed Hull – All risks of physical loss or damage to aircraft in which the Insured has a financial interest as per Schedule being aircraft that are (i) awaiting commencement of a Lease Agreement, or (ii) returned on expiry/termination of a Lease Agreement, or (iii) repossessed (or in course of repossession) from a Lease Agreement or (iv) which are in the care, custody or control of the Insured or their agents – INSURED

40. In the Risk Details – Wording, Section One provided in part:

> **HULL ALL RISKS INSURANCE**
> **1.1. Cover**
> This Section One covers:
>
> (a) Contingent Hull, being Aircraft not in the care, custody or control of the Insured or their agents,
>
> (b) Possessed Hull, being Aircraft;
>
> i) awaiting commencement of a Lease Agreement or
>
> ii) returned on expiry/termination of a Lease Agreement or
>
> iii) repossessed (or in the course of repossession) from a Lease Agreement or
>
> iv) which are in the care, custody or control of the Insured or their agents
>
> in which the Insured has a financial interest (as per the Schedule of Aircraft herein) against all risks of physical loss or damage howsoever occasioned, sustained during the Insurance period, except as hereinafter excluded.
>
> The coverage afforded by paragraph 1.1. (a) of this Section One also applies to Engines in which the Insured has a financial interest whilst attached to an aircraft in which the Insured does not have a financial interest against all risks of physical loss or damage howsoever occasioned, sustained during the Insurance period, except as hereinafter excluded.

41. Exclusion 5.1 to the Merx Policy was a War, Hi-Jacking and Other Perils Exclusion Clause (AVN48B amended). There was then an Aviation Hull, Spares and/or Equipment War and Other Perils Endorsement. This provided as follows:

AVIATION HULL, SPARES AND/OR EQUIPMENT WAR AND OTHER PERILS ENDORSEMENT

SECTION ONE: LOSS OF OR DAMAGE TO AIRCRAFT, SPARES AND/OR EQUIPMENT

Subject to the terms, conditions and limitations set out below, this Endorsement covers loss of or damage to the Aircraft, Spares and/or Equipment stated in the Schedule against claims excluded under General Exclusion 5.1. of this Insurance as caused by:

(a) War, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, martial law, military or usurped power or attempts at usurpation of power.

(b) Strikes, riots, civil commotions or labour disturbances.

(c) Any act of one or more persons, whether or not agents of a sovereign power, for political or terrorist purposes and whether the loss or damage resulting therefrom is accidental or intentional.

(d) Any malicious act or act of sabotage.

(e) Confiscation, nationalisation, seizure, restraint, detention, appropriation, requisition for title or use by or under the order of any government (whether civil, military or de facto) or public or local authority.

(f) Hi-jacking or any unlawful seizure or wrongful exercise of control of the Aircraft or crew in flight (including any attempt at such seizure or control) made by any person or persons on board the Aircraft acting without the consent of the Insured and/or operator. For the purpose of this paragraph (f) only, an Aircraft is considered to be in flight at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation or when the aircraft is in motion. A rotor-wing aircraft shall be deemed to be in flight when the rotors are in motion as a result of engine power, the momentum generated therefrom, or autorotation.

Furthermore this Endorsement covers claims excluded from the All Risks Insurance from occurrences whilst the Aircraft, Spares and/or Equipment is/are outside the control of the Insured or operator by reason of any of the above perils. The Aircraft shall be deemed to have been restored to the control of the Insured or operator on the safe return of the Aircraft to the Insured or operator at an airfield not excluded by the geographical limits of this Insurance, and entirely suitable for the operation of the Aircraft (such safe return shall require that the Aircraft be parked with engines shut down and under no duress).

In respect of Spares and/or Equipment, the perils insured by the deletion of clause (a) of General Exclusion 5.1. are insured only whilst the

> property insured is in transit by air or water subject to the attached Duration Transit Clause 823AON00228 (amended).

42. Section Five of the War Risks Endorsement provided in part:

> **Amendment of Terms or Cancellation**: 1. (a) Insurers may give notice, effective on the expiry of 7 days from midnight G.M.T. on the day on which notice is issued, to review the rate of premium and/or the geographical limits. In the event of the review of the rate of premium and/or geographical limits not being accepted by the Insured then at the expiry of the said 7 days, this Endorsement shall become cancelled at that date, it being understood and agreed that such cancellation shall only apply to the Aircraft the subject of the notice.

43. Merx's primary case is that it is entitled to recover under the Possessed Cover of the Merx Policy, alternatively under the Contingent Cover. Its primary case is that its aircraft were lost as a result of a WR, alternatively an AR Peril, although it says that it is 'close to neutral' as between the two.

Genesis

44. Genesis claims in respect of one aircraft, which is identified in Schedule 1 (Part E) to this judgment (the '**Genesis Aircraft**'). Its claim is brought under its Contingent and Possessed AR Policy or its Contingent and Possessed WR Policy. It has '*no hardened position*' as to whether the loss of the aircraft, which it alleges, was caused by an AR or a WR Peril, and so its stance is that the loss is recoverable either under the Genesis AR or the Genesis WR Policy. The policy period of each was 15 March 2021 to 15 March 2022. The terms of the Genesis AR and WR Policies on which the parties relied in argument may be found in Annexe 1, Part 4 to this judgment.

45. In the Genesis AR Policy, Part One provided:

> 1.1 CONTINGENT AIRCRAFT HULL
>
> Insurers agree to cover Aircraft not in the care, custody or control of the Insured or their agents in which the Insured has a Financial Interest (as set forth in the Policy Schedule or added during the Policy Period) against all risks of physical loss or damage howsoever occasioned, sustained during the Policy Period, except as hereinafter excluded.
>
> The coverage afforded by this insuring agreement 1.1 also applies to Engines in which the Insured has a Financial Interest whilst attached to an aircraft in which the Insured does not have a Financial Interest.
>
> …
> 1.3 POSSESSED AIRCRAFT HULL
>
> Insurers agree to cover Aircraft in which the Insured has a Financial Interest (as set forth in the Policy Schedule or added during the Policy Period), being Aircraft that are
>
> a) awaiting commencement of a Lease Agreement

b) returned on expiry/termination of a Lease Agreement

c) repossessed (or in the course of repossession) from a Lease Agreement

against all risks of physical loss or damage sustained during the Policy Period, except as hereinafter excluded.

In the event of a Lease Agreement being terminated, individual Aircraft are automatically covered from the time the Insured becomes responsible for such Aircraft, including non-renewal or cancellation of any coverage purchased by lessee for the benefit of an Insured hereon. All Additional Insureds and Loss Payees for each aircraft will transfer from Contingent to Possessed Coverage thereon.

46. As Attachment One to the Genesis AR Policy appeared the War, Hi-Jacking and Other Perils Exclusion Clause (Aviation), AVN 48B, 1.10.96. The Genesis WR Policy provided, in Section One, in part:

1. SECTION ONE: HULL, SPARES AND EQUIPMENT - WAR AND ALLIED PERILS

1.1 Contingent Hull All Risks

To cover Aircraft and/or Engines not in the care, custody or control of the Insured or their agents in which the Insured has a Financial Interest as per Schedule of Aircraft, Spares and Equipment against all risks of physical loss or damage howsoever occasioned, sustained during the Policy Period except as hereinafter excluded, in the event that:

a) the Principal Policy fails to respond and/or

b) the Operator fails to fully insure the perils required under Lease Agreement with the Insured.

c) lack or insufficiency of required insurance is due to error or accidental omission.

The coverage afforded by this Section 1.1. also applies to Aircraft Engines and/or Aircraft Equipment in which the Insured has a Financial Interest whilst attached to an Aircraft in which the Insured does not have a Financial Interest.

This Section 1.1. also covers loss or damage to the Aircraft insured hereby insured arising from the action of any Government by reason of actual or alleged infringement of customs, quarantine or public health regulations.

Warranty applicable to this clause:

Warranted that the Insured shall have no knowledge of or consent to any action by the Lessee/Operator as set forth in the Policy Schedule and that the Principal Policy provides the above coverage.

…

1.3 Possessed Hull All Risks

To cover Aircraft and/or Engines in which the Insured or their agents has a Financial Interest as per Schedule of Aircraft/Engines, Spares and Equipment, being Aircraft and/or Engines that are:

a) awaiting commencement of a Lease Agreement,

b) returned on expiry/termination of a Lease Agreement,

c) repossessed (or in the course of repossession) from a Lease Agreement,

against all risks of physical loss or damage, including transits.

…

This Section One to cover the Insured against physical loss or damage caused by the following: (paragraphs (a) and (c) to (g) of the War, Hi-Jacking and Other Perils Exclusion Clause (Aviation) AVN48B)

a) War, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, martial law, military or usurped power or attempts at usurpation of power.

b) Strikes, riots, civil commotions or labour disturbances.

c) Any act of one or more persons, whether or not agents of a sovereign power, for political or terrorist purposes and whether the loss or damage resulting therefrom is accidental or intentional.

d) Any malicious act or act of sabotage.

e) Confiscation, nationalisation, seizure, restraint, detention, appropriation, requisition for title or use by or under the order of any Government (whether civil military or de facto) or public or local authority.

f) Hi-jacking or any unlawful seizure or wrongful exercise of control of the Aircraft or crew in flight (including any attempt at such seizure or control) made by any person or persons on board the Aircraft acting without the consent of the Insured and/or Operator. For the purpose of this paragraph f) only, an Aircraft is considered to be in flight at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for

> disembarkation or when the Aircraft is in motion. A rotor-wing Aircraft shall be deemed to be in flight when the rotors are in motion as a result of engine power, the momentum generated therefrom, or autorotation.
>
> Furthermore, Section One of this Policy is reinstated to cover claims arising whilst such Aircraft and/or Engines and/or Spares and/or Equipment are outside the control of the Insured and/or Operator under the terms of a Lease Agreement by reason of any of the above perils. The Aircraft and/or Engines and/or Spares and/or Equipment shall be deemed to have been restored to the control of the Insured and/or Operator under the terms of a Lease Agreement on the safe return of the Aircraft and/or Engines and/or Spares and/or Equipment to the Insured at an airfield not excluded by the geographical limits of this Policy, and entirely suitable for the operation of the Aircraft (such safe return shall require that the Aircraft be parked with engines shut down and under no duress).

47. Specific Condition 1.7.2 to Section One of the Genesis WR Policy provided:

> **1.7.2 AMENDMENT OF TERMS OR CANCELLATION**
>
> 1. (a) Insurers may give notice, effective on the expiry of seven (7) days from midnight G.M.T. on the day on which notice is issued, to review the rate of premium and/or the geographical limits. In the event of the review of the rate of premium and/or geographical limits not being accepted by the Insured then at the expiry of the said seven (7) days, this Section One shall become cancelled at that date.

The Defendants

48. At trial there were two large groupings of Defendants who made consolidated submissions, the '**All Risks Insurers**' ('**AR Insurers**') and the '**War Risks Insurers**' ('**WR Insurers**'). In addition to and outside those groupings, Chubb made submissions which were substantially independent of the above groupings. There is a full list of the original (prior to any settlement) Defendants to each claim in Schedule 2 to this judgment.

49. The AR Insurers are principally composed of the '**HFW AR Insurers**', a grouping of underwriters to the AerCap, KDAC and Merx AR policies represented by HFW, and the '**Global AR Insurers**', a grouping of underwriters to the DAE/Falcon and Genesis AR policies represented by Wikborg Rein. Swiss Re was also substantially aligned with the AR Insurers, though it filed independent defences to each claim.

50. The WR Insurers consist of four groups. The first is the '**Kennedys Defendants**', which are subdivided between the Kennedys Defendants to the AerCap, Merx and Genesis claims, and the Kennedys Defendants to the DAE/Falcon and KDAC claims. The second is Fidelis, the third is TMK/HDI, and the fourth is AIG Europe in their capacity as a subscriber to the DAE WR policy. AIG Europe in this capacity filed their own defence but almost entirely adopted the case of the other WR Insurers and played almost no role in the trial.

51. It should be noted that some insurers were Defendants to claims by lessors under both their AR and WR insurances. Of the insurers who have not settled their claims, these include:

(1) Fidelis, which subscribed to both the AR and WR policies of every lessor except Genesis,
(2) Chubb, which subscribed to the AR policy of every lessor except Genesis and the WR policies of AerCap, KDAC and Merx,
(3) HDI, which subscribed to the AR and WR policies of every lessor except AerCap,
(4) TMK, which (through various bodies or syndicates) subscribed to the AR policies of DAE/Falcon, KDAC and Merx and the WR policies of KDAC and Genesis.

52. Fidelis filed an independent defence to each claim, but pleaded that, if the aircraft had been lost, then the loss was due to an AR Peril. Its case accorded almost entirely with the Kennedys Defendants. Chubb filed an independent defence to each claim. It adopted the AR Insurers' case that, if the aircraft had been lost, then it was due to a WR Peril. In their capacity as AR insurers, TMK and HDI joined the HFW AR Insurers or the Global AR Insurers; as WR Insurers, they filed their own defences (jointly in the case of KDAC and Genesis) and were represented together by CMS. Their case accorded almost entirely with that of the Kennedys Defendants.

53. Under paragraph [6] of the Seventh Composite Directions Order, dated 30 July 2024, permission was given to serve a skeleton argument of unrestricted length to the following groupings of the parties: 1) AerCap, 2) the other Claimants, 3) the AR Insurers, 4) the WR Insurers. Under paragraph [7] of the same Order, the other parties, whether individually or as a group, were given permission to file other short skeleton arguments insofar as they contained non-duplicative submissions.

54. The parties have, broadly, made submissions in the following pattern. AerCap and DAE have made full-scale submissions. The other Claimants have, for the most part, adopted DAE's submissions on issues affecting all the parties, and made independent arguments on issues particular to themselves. The AR Insurers have made essentially joint submissions. Swiss Re rely on AR Insurers' submissions as well. The WR Insurers have made joint submissions, except where they do not adopt each other's defences on construction or on sanctions. Chubb have adopted much of the AR Insurers' case, but have raised several individual defences.

55. I note one further aspect of the parties' groupings in this case. AerCap's case on peril, to a certain extent, was in line with that of the WR Insurers. That grouping is sometimes referred to as the '**WR Camp**' in this judgment. On the other hand, the other Claimants' case on peril accorded with that of the AR Insurers. I refer to this grouping as the '**AR Camp**'.

Case management

56. Several of the defences raised to the LP Claims required the court to consider whether the alleged losses suffered by the lessors were recoverable by virtue of claims under the OPs, which are governed by Russian law. This posed a serious problem of case management, and at a CMC in June 2024 several ways of proceeding were considered. Ultimately, by an order dated 29 July 2024, the following issues were hived off to be heard in a 'Phase II'

trial: whether the Claimants are entitled to recover under the OPs; all related Russian insurance law issues; and the application of the Phase II Issues to the LP Policies.

The Airlines

57. As set out in detail in Schedule 1 to this judgment, the aircraft and engines relevant to these claims were leased to a number of different Russian lessees. It is convenient to say more about the Russian civil aviation sector and about those lessees at this juncture. This summary is based principally on the Joint Memorandum between the Civil Aviation experts, and other evidence of those experts which was not significantly in dispute.

58. Although there were over 100 airlines registered in Russia in 2022 it was a concentrated sector. At the beginning of 2022 the Aeroflot Group (viz Aeroflot itself, Rossiya and Pobeda, the Group's low-cost airline) had a market share of about 42%. The top six (i.e. the Aeroflot Group, S7, UTair and Ural) accounted for some 69.6% market share of all passengers, and the top 15 for about 95%.

59. The lessees relevant to this action may be briefly described as follows.

Aeroflot

60. Aeroflot was created in 1994 as the assignee of commercial rights to almost all international routes which had been previously operated by Aeroflot – Soviet Airlines.

61. Aeroflot's Director-General from March 2009 – November 2020 was Vitaly Savelyev. Vitaly Savelyev became Minister of Transport and was appointed as Chairman of the Board of Aeroflot in November 2020.

62. In December 2021, Aeroflot was owned in the following shares: The Russian Federation 57.3% (Ministry of Finance 34.1% and Federal Agency for State Property Management 23.2%), free float 40.7%, quasi-treasury shares 2%, management shares 0.0002%. The Russian Federation's shareholding in the Group increased to 73.77% in July 2022.

63. In December 2021, Aeroflot's fleet was 183 aircraft, owned in the following proportions: 15 (8.2%) by the airline, 81 (44.3%) by domestic lessors, 29 (15.8%) by EU/UK/US lessors, 58 (31.7%) by other foreign lessors.

Rossiya

64. Rossiya is a subsidiary of Aeroflot. It was created in 2004 by a government-ordered merger between the state-owned St Petersburg-based Pulkovo airline and the Moscow-based Rossiya airline, which was the commercial part of the State Transport Company (an organisation responsible for transporting government officials).

65. In February 2011, following the financial crisis and a government bailout, Rossiya became a subsidiary of Aeroflot. Since early 2014 Rossiya has been fully under the commercial management of Aeroflot, and in the words of AerCap's civil aviation expert, Mr Rybak, it has effectively 'been transformed into a north-western branch of Aeroflot'.

66. In July 2020, Aeroflot adopted a new development strategy for its group, under which Rossiya would concentrate on regional, social, and subsidised flight destinations, often with fixed tariffs. It was envisioned that the airline would operate 250 aircraft, of which 235 would be Russian-produced. Accordingly Aeroflot transferred all its Sukhoi Superjet ('**SSJ**') 100 aircraft, and its orders for new SSJ 100s and MS-21s, to Rossiya (the transfer being completed in May 2023).

67. Rossiya did not publish data on its ownership structure at the material time. Mr Rybak expects that in February 2022, the position was that 75% minus one share was owned by Aeroflot, and 25% plus one share was held, in effect, by the St Petersburg government.

68. In February 2022, Rossiya's fleet was 125 aircraft, owned in the following proportions: 25 (20%) by the airline, 79 (63.2%) by domestic lessors, 18 (14.4%) by EU/UK/US lessors, and 3 (2.4%) by other foreign lessors.

S7

69. S7 is the brand name of JSC Siberia Airlines. It is the largest private airline in Russia and the second-largest air carrier (after Aeroflot). Prior to 2022 it operated domestic and international flights, although the majority of its business was in the domestic market (the ratio of domestic to international passengers was between 10:1 and 15:1 every year). S7 made domestic operations profitable through aggressive and very strict financial and operational management.

70. All significant decisions in the S7 group are made by the Filev family, in particular Vladislav Filev. Their aim has been to grow the wealth of the family through the commercial efficiency of their enterprise.

71. 100% of the shares of JSC Siberia Airlines were in 2022 owned by the S7 Group. In turn the S7 group was owned by Vladislav Filev (49.94%) and his daughters Tatiana and Maria (25.05% each). This ownership structure developed after the death of Natalia Fileva, the wife of Vladislav Filev and co-founder of S7 Airlines, in March 2019.

72. S7's fleet was 108 aircraft, owned in the following proportions: 2 (1.9%) by the airline, 6 (5.6%) by an SPV, 6 (5.6%) by domestic lessors, 84 (77.8%) by EU/UK/US lessors, and 10 (9.3%) by other foreign lessors.

Ural

73. Ural Airlines emerged in 1993 as a result of privatisation. It stems ultimately from the Sverdlovsk air squadron established in 1943.

74. The primary hub of Ural Airlines is situated in Yekaterinburg. The airline follows the concept of a dispersed route network in which aircraft are stationed in various cities and operate flights to different destinations. At the same time the airline operates a highly condensed schedule, with extensive flight hours. In 2021, Ural Airlines served 9.2 million passengers. The airline served about 6.4 million passengers on domestic flights and 2.7 million on international routes, of which 1.7 million travelled to Commonwealth of Independent States ('**CIS**') countries.

75. In February 2022, Sergey Skuratov owned 90.47% of Ural. An additional 0.0025% was held by Alexandr Zinovev, Mr Skuratov's deputy. 0.0078% was distributed equally among 13 individuals, including Mr Skuratov's son, Kirill, who acts as the first deputy general director and commercial director. It is unclear who holds the remaining 9.5%. Mr Skuratov, who is a former pilot, exercises considerable control over the airline and its management.

76. In February 2022, Ural's fleet was 53 aircraft, owned in the following proportions: 50 (94.3%) by EU/UK/US lessors, 3 (5.7%) by other foreign lessors.

UTair

77. UTair is a public listed company. It is a key part of the transport infrastructure of Western Siberia, the largest oil and gas region of Russia. The UTair group includes passenger and cargo airlines, one of the largest helicopter operations in the world, and a variety of MRO and engineering companies and facilities.

78. UTair's business model focusses on domestic operations in and around the Western Siberia region. It operates from three major hubs: Moscow (Vnukovo), Tyumen, and Surgut.

79. In 2021, AK-Invest, a company affiliated with Surgutneftegaz (one of Russia's oil and gas majors), held 50.11% of UTair's shares. The Khanty-Mansiysk Autonomous Okrug held 38.82% of shares (through its Department for State Property Management). The Tyumen Region held 8.44% of shares (through its Department of Property Relations). The remaining 2.619% was held by minority shareholders.

80. Andrey Martirosov became UTair's CEO in January 1999, having led the largest branch of Tyumenaviatrans (the predecessor of UTair) in Surgut before that. Mr Martirosov has served as the Chair of the Board of the Russian Association of Air Transport Operators (AEVT) for several years.

81. In February 2022, UTair's fleet was 62 aircraft, owned in the following proportions: 46 by the airline (74.2%), 1 by an SPV (1.6%), 6 by domestic lessors (9.7%), 8 by EU/UK/US lessors (12.9%), 1 by other foreign lessors (1.6%).

Aurora

82. Aurora was founded in 2013 by an agreement between Aeroflot (51% owners) and the Sakhalin region. It was intended to serve as an airline for the Russian Far East region.

83. In a second effort to build up air traffic in the Russian Far East, a revamped Aurora was launched in 2021. In March 2021 Aeroflot finalised a deal to sell its 51% stake in Aurora, and Alexey Chekunkov (Minister of Eastern Development) announced funding of 3.5 billion roubles to subsidise the united Far Eastern Airline in 2021. On 27 July 2021 Aurora, as this unified Far Eastern Airline, officially began. The Aurora group now includes regional airlines including Khabarovsk Airlines, Yakutia, Polar Airlines, Kamchatka, and Chukotavia. It was reported on *aviastat.ru* at the end of 2022 that all airlines would transition to a single brand (Aurora).

84. Aurora's principal focus is on transporting passengers and cargo within, to and from the Far East of Russia. It makes some international flights. Even prior to the invasion of Ukraine, Aurora was heavily dependent on subsidies.

85. In February 2022, Aurora was owned in the following shares: 50% minus one share by the Sakhalin Region, 5% each by the other ten regions of the Far East, and a 'golden share' with a decisive vote at shareholder meetings by the Ministry of Development of the Far East.

86. The longstanding leader of Aurora (since its founding in 2013) is Konstantin Sukhorebrik. He also served as Deputy Chair of the Sakhalin Regional Duma between 1996-2000 and 2000-2004.

87. In February 2022, Aurora's fleet was 20 aircraft, owned in the following proportions: 9 (45%) by the airline, 4 (20%) by domestic lessors, 5 (25%) by EU/UK/US lessors, and 2 (10%) by foreign lessors.

Yakutia

88. Yakutia Airlines was established in July 2002 by decree of the President of the Republic of Sakha (Yakutia) as a state unitary enterprise, formed by merging Sakha Avia and Yakutsk Airlines. In 2004 it transformed into a JSC.

89. Yakutia is a small airline focussed on domestic flights on socially valuable routes in the Far East of Russia. It enjoys support at both regional and federal government levels, including approximately 14 billion roubles of subsidies between 2014 and 2021.

90. In February 2022, 98.67% of JSC Air Company 'Yakutia' belonged to the government of the Republic of Sakha, and the remaining 1.33% was owned by JSC 'Komdragmetall Respubliki Sakha (Yakutiya)'. As part of the process of forming a single Far Eastern Airline, 25% plus one share was transferred to Aurora Airlines in November 2022.

91. Andrey Vinokurov has been the CEO of Yakutia since September 2021. Prior to that, he was commercial director from 2018 to 2021 and deputy general director for commerce from February 2021.

92. Yakutia's fleet is 15 aircraft, owned in the following proportions: 1 (6.7%) by the airline, 6 (40%) by domestic lessors, 7 (46.7%) by EU/UK/US lessors, and 1 (6.7%) by other foreign lessors.

Yamal

93. OJSC Yamal Aviation Transport Company was established in 1997 on the initiative of the administration of the Yamalo-Nenets Autonomous Okrug (YaNAO). YaNAO is located in the north of Western Siberia and in the Subpolar Urals, and is rich in oil and gas. Yamal is headquartered in the capital of ('**YaNAO**'), Salekhard.

94. Yamal is a small airline which has been closely tied to local government. Its primary commercial objective is to provide affordable flights between YaNAO and other cities. It received subsidies from both local and central authorities for providing flights on socially

valuable routes. Yamal has also provided some international flights to destinations such as Antalya (Turkey) and Khujand (Tajikistan).

95. Yamal is wholly owned by YaNAO (through its Department of Property Relations).

96. In 2022, Yamal's fleet was 28 aircraft, owned in the following proportions: 20 (71.4%) by domestic lessors, and 8 (28.6%) by EU/UK/US lessors.

Red Wings

97. Red Wings is a subsidiary of the state defence and technology company Rostec, which is Russia's largest defence company. Rostec is headed by one of Vladimir Putin's closest allies, Sergey Chemezov. Red Wings functions as a charter airline.

98. In February 2022, the sole owner of Red Wings' shares was Airline Asset Management LLC. 99% of Airline Asset Management LLC was owned by Ilyushin Finance Co JSC, whose largest shareholder in turn (48.4%) was PJSC United Aircraft Corporation, which was controlled by Rostec.

99. In February 2022, Red Wings' fleet was 27 aircraft, owned in the following proportions: 11 (40.7%) by the airline, 5 (18.5%) by domestic lessors, 7 (25.9%) by EU/UK/US lessors, 4 (14.8%) by other foreign lessors.

Alrosa

100. Alrosa Airlines is a wholly owned subsidiary of ALROSA, a diamond mining company. Its main business is to shuttle workers between the diamond mines at Mirny (in the Republic of Yakutia-Sakha) and Moscow. Since 2021 it has also had permission to perform international flights to Uzbekistan.

101. In February 2022, about 66% of ALROSA (the mining company) was owned by the Russian Federation, the Republic of Yakutia-Sakha and local authorities. The remaining 34% was owned by various legal entities and individuals (presumably mostly private).

102. In February 2022, Alrosa's fleet was 6 aircraft. All 6 aircraft (100%) were leased from EU/UK/US lessors.

Nordwind

103. Nordwind Airlines was founded in 2008 and IKAR Airlines (operated under 'Pegas Fly') was founded in 1997. Each operated charter flights in collaboration with the tour operator Pegas Touristik. Since 2018, IKAR has effectively worked as part of a unified group with Nordwind (by selling flights under the Nordwind brand and code-sharing). They have common ownership and management.

104. Most of Nordwind's business was initially charter passenger flights from Moscow and other Russian cities to resort destinations in Africa, the Middle East, Asia, Europe, North and Central America. However, it grew to include scheduled international flights, domestic Russian flights (initially to ferry Russian tourists through Russia to central hubs for onward flights, but eventually more generally), and cargo flights.

105. Nordwind, IKAR and Pegas Touristik were all founded and run by Ramazan Akpinar, a Turkish businessman who owns hotels around the world (and particularly in Turkey). His CEO Igor Shvetsov is also significant in running the airlines. Before Nordwind, Mr Shvetsov had been involved in S7's charter program.

106. In February 2022, 95.1% of the shares of Nordwind were owned by Pegas LLC, and the remaining 4.9% were owned by Karine Bukrei (Ramazan Akpinar's wife). Pegas LLC was wholly owned by Karine Bukrei.

107. In February 2022, Nordwind and IKAR's fleet was 58 aircraft, owned in the following proportions: 3 (5.2%) by Nordwind, 49 (84.5%) by EU/UK/US lessors, and 6 (10.3%) by other foreign lessors.

Royal Flight and Blue Connect

108. Royal Flight and Blue Connect are part of the OTI Group. Each airline operates charter flights to support the holiday tour operators Coral Travel and Sunmar. These tour operators have their roots in Turkey and are also part of the OTI Group. The airlines transport tourists from Moscow and other Russian cities to international destinations including Turkey, Egypt, Greece, Spain, Thailand, India, Vietnam, and the UAE.

109. In February 2022, the OTI Group (more recently 'Coral Travel Group') was owned by the Turkish businessman Ayhan Bektas.

110. In February 2022, Blue Connect and Royal Flight's fleet was 15 aircraft, and all 15 (100%) were owned by EU/UK/US lessors.

I-Fly

111. I-Fly is a private airline which was established in 2009 to serve the interests of the major tour operator Tez Tour, which has significant Turkish involvements. I-Fly began by transporting tourists from Moscow and other cities to destinations such as Egypt, Turkey, Greece and Spain, and later added other international destinations including China (which became a significant part of its business).

112. In February 2022, I-Fly's shares were owned by: Alexander Burtin (56%); the Unox Company, controlled by Vladimir Skoch and Vitaly Vantsev (30%); Silk Way LLC, a company controlled by the Hong Kong company Joy Tour Global Ltd (9%); and Kirill Romanovsky, the CEO of I-Fly (5%).

113. In February 2022, I-Fly's fleet was 7 aircraft, owned in the following proportions: 1 (14.3%) by the airline, 5 (71.4%) by EU/UK/US lessors, and 1 (14.3%) by other foreign lessors.

NordStar

114. NordStar was created in 2009 by Norilsk Nickel, a large nickel miner. NordStar's operations connect Norilsk to Moscow and Krasnoyarsk. Its primary goal is to facilitate

transport for Norilsk Nickel's employees. It is a small airline which carries about 1 million people a year.

115. In February 2022, NordStar was wholly owned by Norilsk Nickel. However, on 25 March 2022, 100% of NordStar's shares were sold to its management, headed by General Director Leonid Mokhov. This was likely due to the risk of sanctions against Norilsk Nickel. NordStar probably continues to depend heavily on Norilsk Nickel.

116. In February 2022 NordStar's fleet was 10 aircraft, owned in the following proportions: 1 by the airline (10%), and 9 by EU/UK/US lessors (90%).

Smartavia

117. Smartavia is the heir to the Arkhangelsk-Syktyvkar Air Line Directorate established in 1929.

118. Smartavia is a low-cost airline which focusses on domestic routes. Pre-COVID-19 it operated 85% of its flights on domestic routes, and following the Russian invasion of Ukraine it has served only domestic routes.

119. Since April 2021 Smartavia has sought to be the first smart low-cost airline in Russia. As part of a new five-year strategy, it intended to receive 40 new Airbus A320 NEOs with 180 seats and LEAP-1A engines, delivered directly from the factory. It intended to expand its route network and serve 16 million passengers annually by 2025, becoming one of the largest five air carriers in Russia. These plans were frustrated by the invasion of Ukraine.

120. Smartavia was known as Nordavia between 2009 and 2019. Nordavia was owned by Norilsk Nickel until 2016. In 2016 Sergei Kuznetzov and his family acquired Smartavia, both directly and through an investment vehicle (JSC Sky Invest). Sergei Kuznetzov also co-owned Red Wings between 2013 and 2016, when it was acquired by Ilyushin Finance Co.

121. In 2017 it was announced that Red Wings (by that point ultimately controlled by Rostec) and Smartavia would merge, although in the event it appears that the respective shareholders preferred an alliance with some shared management functions. As of February 2022, Smartavia was owned by JSC Sky Invest.

122. In February 2022, Smartavia's fleet was 14 aircraft, owned in the following proportions: 12 (85.7%) by EU/UK/US lessors, and 2 (14.3%) by other foreign lessors.

*AirBridgeCargo ('**ABC**')*

123. ABC was founded in 2005 and became the largest Russian cargo airline. Its route network covered more than 30 destinations around the world and carried out transportation through its cargo hubs based at Sheremetyevo (Moscow), Novosibirsk, and Krasnoyarsk airports. The majority of ABC's customers were in North America, Europe and Asia.

124. ABC has not operated any of its aircraft since March 2022.

125. In February 2022 ABC was controlled by Volga-Dnepr-Moscow LLC which was 100% owned by Volga-Dnepr Logistics B.V., registered in the Netherlands. 49% of ABC was owned by Volga-Dnepr Logistics B.V. The shareholders in Volga-Dnepr Logistics B.V. were Aleksey Isaikin (75%) and his closest associate Sergei Shklyanik (25%). ABC is thus part of what is termed the Volga-Dnepr Group, or '**VDG**'.

126. In February 2022 ABC's fleet was 18 aircraft, owned in the following proportions: 6 (33.3%) by the airline, 2 (11.1%) by domestic lessors, 6 (33.3%) by EU/UK/US lessors, and 4 (22.2%) by other foreign lessors.

Atran

127. Atran is another cargo airline and also part of the VDG.

128. Whereas ABC specialised in transcontinental cargo transport between the USA/Northern Europe and South-East Asia, Atran specialised in cargo transport between Russia and China (occasionally between Russia and Europe) and domestic distribution of cargo delivered from China.

129. In February 2022 Atran's fleet was 8 aircraft, owned in the following proportions: 1 (12.5%) by the airline, and 7 (87.5%) by EU/UK/US lessors.

Azur

130. While none of the claims in this action involves an aircraft or engine leased to it, it is helpful also to mention Azur Air, which featured in the evidence called.

131. Azur Air has existed in its current form since September 2015, when UTair sold its whole stake in the Katekavia charter airline (which operated under the Azur Air brand). Since then, Azur Air has been a strategic partner of the Turkish tourist operator Anex Tour, which was founded in Turkey in 1996, and entered the Russian market in 1998.

132. Azur Air is the largest Russian charter airline. It operates tourist flights to Turkey, Thailand, Spain and other destinations. However, during the COVID-19 pandemic, the airline increased its cargo and passenger traffic in the domestic market.

133. In February 2022, Azur Air was independently owned by One2Fly LLC. One2Fly LLC was owned by the Russian citizens, and sisters, Anna Fukalov (55%) and Natalya Koçkar (45%). Natalya Koçkar's husband, Rustem Koçkar, is a co-owner of Anex Tour. His co-owners are Serhat Koçkar and Neset Koçkar.

134. In February 2022, Azur Air's fleet was 34 aircraft, owned in the following proportions: 4 (11.8%) by the airline, 30 (88.2%) by EU/UK/US lessors.

Categories

135. Although the categorisation does not answer any of the important questions in these actions, it is in some ways helpful to think of these 18 lessees as falling into the following groupings.

(1) First, the state-controlled Aeroflot Group, including, relevantly, Aeroflot and Rossiya.
(2) Second, the three largest private airlines: S7, Ural and UTair.
(3) Third, small regional airlines owned by regional state entities: Aurora, Yakutia and Yamal.
(4) Fourth, 'quasi state-owned companies', namely ones owned through state-owned or majority state-owned companies: Red Wings and Alrosa.
(5) Fifth, private charter airlines with strong Turkish connections or roots: Nordwind, Royal Flight/Blue Connect and Azur.
(6) Sixth, the private charter airline I-Fly, which has Russian rather than Turkish roots but does have significant Turkish investment.
(7) Seventh, smaller private airlines: NordStar and Smartavia.
(8) Eighth, airlines in the pure cargo/air freight sector: AirBridgeCargo and Atran.

The Leases

136. The Aircraft which are the subject of these actions were leased to lessees on the terms of aircraft leases, entered into at different times. The terms of those leases differed, but were relatively standardised.

137. Relevantly for these claims, all the leases contained provisions which required the lessee to effect insurance in respect of the aircraft the subject of the lease.

138. An example of the relevant provisions is provided by those set out in the Common Terms Agreement between AerCap and Aeroflot, which were actually incorporated into various of AerCap's leases. The relevant terms are set out in Annexe 2 to this judgment.

139. As required by such provisions in the aircraft leases, the lessees took out an insurance policy or policies, and often the insurers under that policy or policies reinsured their exposure, typically with London and international market reinsurers. The lessors were typically not directly involved in the placing of the insurance or reinsurance policies, and were not provided with a copy of the policy(ies) placed. Instead they were provided with certificates of insurance and reinsurance recording that cover was provided to the operator, as the 'insured' or 'original insured', in respect of aircraft hull, spares and equipment all risks cover, and in respect of war risks and allied perils.

140. It was not in issue between the insurance broking experts or the parties that the leases required some protection of the lessor's interests to be noted on the OPs, though there was argument as to the extent of the protection required, nor was it in issue that this was often required to be effected through the use of market standard form AVN 67B or 67C, with the lessor being named as an 'additional insured' or as a 'contract party'.

141. The terms of AVN 67B and AVN 67C are set out in Annexe 3 to this judgment. As can be seen from those provisions, AVN 67C, unlike AVN 67B, contains a specific provision that there is no cover for the theft or alleged theft of the aircraft by reason of the actual or alleged dispossession or refusal or failure to redeliver the aircraft by 'the Insured', i.e. by the lessee.

142. Some of the leases relevant to this case provided for the use of AVN 67B, or for AVN 67C, or for AVN 67B or C. In the case of AerCap's leases for the AerCap Aircraft, the lease requirements in this respect can be broken down as follows.

Requirement	**Number of Aircraft**
AVN 67B	2
AVN 67B or its then current equivalent	27
May use AVN 67B	24
AVN 67B or its then current equivalent AND shall be entitled to maintain insurance that reflects AVN 67B	15
AVN 67C	5
May use AVN 67C	4
Either AVN 67B or AVN 67C	3
Not specified	36

143. In DAE/Falcon's case the position was as follows:

(1) In 12 of the 21 DAE leases and both the Falcon leases, only AVN 67B was referred to, and they provided that the lessee should procure endorsements incorporating AVN 67B 'so long as it remains general industry practice to insure aircraft financed by financial institutions and banks on the basis of' AVN 67B;
(2) Seven of DAE's leases stipulated that either AVN 67B or AVN 67C should be incorporated;
(3) Two of DAE's S7 leases provided for the incorporation of AVN 67C, unless that form was not accepted by the lessee's insurers in which case AVN 67B should be incorporated;
(4) The (re)insurances taken out by the lessees incorporated AVN 67B, save in respect of the two S7 aircraft which incorporated AVN 67C in accordance with the requirements of the lease in question.

144. None of the Merx leases specified which of AVN 67B or 67C should be used in the lessee's insurance. In the case of two of the leases, it was specified that a form of AVN67 should be used. In the case of the other four leases, it was specified that the insurance should be in line with best, or prudent, market practice.

145. The lease in respect of the Genesis Aircraft stipulated that AVN 67B should be incorporated.

Summary of Key Events

146. It will be necessary to examine certain of the facts, including communications between lessors and lessees, in considerably more detail in due course. At present it is convenient to summarise the basic facts which have given rise to the current claims and to the issues between the parties. This is intended, at this stage, to be a largely uncontroversial summary of key events, and is not intended to be exhaustive.

147. On **24 February 2022** Russia commenced a military operation in eastern Ukraine, leading to a full-scale military incursion into Ukraine. On the same date the United States Department of Commerce's Bureau of Industry and Security ('**BIS**') and the US Treasury Department's Office of Foreign Assets Control ('**OFAC**') implemented heightened export

controls, including in relation to aircraft leasing and other activity in Russia concerning most commercial aircraft and aircraft parts, and imposed additional economic sanctions against Russia.

148. On **25 February 2022**, the EU amended Regulation No. 883/2014, which had imposed sanctions in relation to Russia's annexation of Crimea, by Council Regulation (EU) No. 2022/328 (together the '**EU Regulation**'). The new Regulation introduced a new Article 3c(1) under which, with effect from 26 February 2022, there should be a prohibition on the sale, supply, transfer or export, directly or indirectly, of goods suited for use in the aviation industry to any natural or legal person, entity or body in Russia or for use in Russia. The EU Regulation permitted a wind down period in respect of certain prohibitions, including ongoing leasing agreements which were concluded before 26 February 2022, such that they did not apply until 28 March 2022.

149. On **26 February 2022**, a meeting was held at the Ministry of Transport ('**MinTrans**') in Moscow between Mr Savelyev, Alexander Neradko (the head of the Russian Federal Air Transport Agency or '**FATA**') and representatives of certain Russian airlines. I will have occasion below to consider in more detail what occurred at that meeting.

150. On the same date, AerCap sent to Aeroflot, Alrosa, ABC, Atran, Aurora, Azur, Blue Connect/Royal Flight, IKAR, Nordwind, Red Wings, Rossiya, Smartavia, S7, Ural, Yamal and Yakutia formal requests to relocate their AerCap Aircraft to France, Spain or Ireland.

151. On **27 February 2022**, AerCap sent ABC and Atran notices of default, and instructions to ferry their AerCap Aircraft out of Russia.

152. Also on 27 February 2022 it was reported that the Russian Prosecutor General had made a statement to the effect that charges of treason carrying a prison sentence of up to 20 years might be brought for providing financial, technical, consulting or other assistance to a foreign state or an international or foreign organisation if aimed against the security of the Russian Federation. The statement said that such assistance would 'contain signs of a crime under Article 275 of the Criminal Code of the Russian Federation ("High Treason")'.

153. On **28 February 2022** a meeting was held at MinTrans in Moscow, involving Deputy Transport Minister Igor Chalik, and representatives from Aeroflot, S7, UTair and probably Ural.

154. On the same day, Merx sent notices of grounding and redelivery to Ural, in respect of MSNs 2175, 2187 and 5055, and to S7 in respect of MSNs 9435 and 9508.

155. On **1 March 2022** the UK issued sanctions similar to the EU Regulation by way of the Russia (Sanctions) (EU Exit) (Amendment) (No. 3) Regulations 2022 (the '**UK Regulations**'). With effect from 1 March 2022, the UK Regulations made it an offence directly or indirectly (i) to supply or deliver 'restricted goods', which included aircraft and aircraft engines, from a third country to a place in Russia or (ii) to make restricted goods available to a person connected with Russia or for use in Russia. The UK Regulations contained no wind-down period.

156. On the same day, AerCap received a letter from the European Commission confirming that leasing fell within the scope of the EU sanctions. AerCap sent that letter to Aeroflot,

Alrosa, Aurora, Nordwind, Red Wings, Rossiya, Smartavia, S7, Ural, Yamal and Yakutia and reiterated its request for the AerCap Aircraft to be ferried out of Russia.

157. Also on 1 March 2022, Genesis sent an event of default and grounding notice to NordStar in respect of MSN 33561, and Merx sent grounding and delivery notices to Alrosa.

158. On **2 March 2022** FATA issued a telegram (No. 020710) requiring airlines to ensure the 'rigorous submission' of information about leased aircraft and lessors, including as to any requests from lessors regarding the operation of the aircraft, such as termination of the lease and/or return of the aircraft, by noon on 2 March 2022.

159. Also on 2 March 2022, AerCap sent notices of termination of leasing in respect of certain aircraft which were outside Russia. AerCap was to recover twelve of the aircraft in respect of which these notices were sent.

160. On the same day, 2 March 2022, AerCap sent a notice of default and instruction to ferry to Yakutia in respect of MSNs 30669 and 32684. It also attempted to ground an aircraft leased to Blue Connect (MSN 32714) in the Dominican Republic, but this was unsuccessful and the aircraft was permitted to depart. On the other hand, AerCap was successful in preventing an aircraft leased to Nordwind (MSN 28247) from leaving Turkey, where it had been prior to the invasion. AerCap eventually recovered that aircraft.

161. Also on 2 March 2022 Genesis gave notice of potential claims to its LP WR Insurers.

162. On **3 March 2022**, FATA issued a telegram (No. 031540) recommending that the inter-regional territorial divisions of FATA and all airlines report all instances of the annulment of airworthiness certificates to FATA, and that they do not decide to suspend flights without FATA confirmation. This telegram was posted that day on social media, as well as being reported by the Russian news agencies Interfax and TASS.

163. Also the same day, DAE sent a grounding notice to Nordwind in respect of MSNs 32639, 32640, 37136, 40233 and 40236. It also sent notices of termination of leasing to: (i) Aeroflot in respect of MSNs 39441, 5536, 5565, 5585, 5578, 5614 and 6060; (ii) I-Fly in respect of MSNs 283, 293, 946, and ESNs 41117 and 41250; (iii) Red Wings in respect of MSN 1950; (iv) Smartavia in respect of MSNs 39420 and 39424; (v) S7 in respect of MSNs 8890 and 9193; and (vi) UTair in respect of MSN 39423. Falcon sent a notice of termination of leasing to S7 in respect of MSNs 5031 and 5106.

164. Also on 3 March 2022 AerCap sent Aurora a notice of termination of leasing in respect of MSN 2243, which was undergoing maintenance in Taiwan, and recovered that aircraft. AerCap also sent Azur a notice of termination of leasing in respect of MSN 32729 and Royal Flight a notice of termination of leasing in respect of MSN 34970.

165. On 3 March 2022, AerCap also attempted to prevent MSN 32729, which was leased by AerCap to Azur, from leaving the Dominican Republic, but the attempt was unsuccessful and the aircraft was flown back to Russia.

166. On the same day, MSN 34970, which was leased by AerCap to Royal Flight, was flown from Russia to Turkey, and subsequently recovered by AerCap.

167. By an email of 3 March 2022 from Paul Murray of DAE to Robert Normand of its brokers, Aon (the '**Aon Notice**'), DAE notified their LP Insurers as follows:

> We ask you to relay the following message to the insurers under DAE's Possessed and Contingent insurance policies.
>
> By reason of recent and Russia-Ukraine related EU regulations and UK restrictions there are various ongoing insurance and other defaults under the leases between DAE owned and managed aircraft and Russian airlines identified below (the Subject Leases).
>
> As a result, DAE is in the course of repossessing all aircraft and engines leased under the Subject Leases, and, in furtherance thereof, is in the process of issuing termination notices to its Russian lessees and engaging with them on repossession.

This notice was forwarded by Aon to AXA XL on behalf of DAE's LP WR Insurers by email of 4 March 2022.

168. On **4 March 2022**, it appears that there was a FATA meeting at which FATA's regional offices were instructed to recommend that airlines submit applications to FATA's central office for the re-registration of the aircraft they operated in the Russian register.

169. On 4 March 2022 the head of the Tyumen Interregional Administration of FATA, Pyotr Medvedev, sent a telegram (No. 040634), which said it was 'extremely urgent for the directors of airlines', and directed them to submit applications for the re-registration in the Russian register of all foreign-registered aircraft, including leased aircraft, which were being operated, and to then apply for an airworthiness certificate.

170. Also on 4 March 2022 the Tyumen Interregional Administration of FATA sent a telegram to airlines (No. 040746) stating that if any notices were received from leasing companies demanding termination of leases, it was suggested that airlines should negotiate and correspond with lessors '*regarding the need to continue to comply with the terms of the leases, and in the event of continued unfounded demands*' notify them of the registration of the aircraft on the Russian registry. On the same date the Krasnoyarsk territorial department of FATA sent an email to multiple airlines which said that if an airline received a notice of suspension of airworthiness certificates, they must start negotiations with the lessor, and should it prove impossible to come to a mutually advantageous solution, proposed that the airline submit an application for the re-registration of the aircraft in the Russian register.

171. Also on 4 March 2022 FATA sent a telegram (No. 041405) stating that access to the archives of technical records for foreign leased aircraft should be placed under special control.

172. On 4 March 2022 Russian Federal Law No. 32-FZ was enacted, making it a criminal act in Russia, punishable by a prison sentence or substantial fine, to voice support for the introduction or extension of Western sanctions.

173. It was subsequently reported that it was on this day, 4 March 2022, that Aeroflot's CEO, Mikhail Poluboyarinov, and Pobeda's General Director, Andrey Kalmykov, had resigned.

174. On 4 March 2022 AerCap sent Blue Connect, Red Wings, Rossiya, S7, Smartavia, Ural and Yamal default and grounding notices. AerCap also terminated the leasing of the following aircraft: ABC (all aircraft); Atran (all aircraft); Aeroflot (all aircraft); Alrosa (MSNs 32576 and 32658); Aurora (MSNs 3838 and 2222); Royal Flight/Blue Connect (MSN 28835); Rossiya (all aircraft except MSN 1630); S7 (all aircraft); Ural (all aircraft); and Yamal (MSN 2413).

175. On the same date DAE sent notices of termination of leasing to Nordwind in respect of MSNs 32639, 32640, 37136, 40233 and 40236; and to ABC in respect of MSN 66625.

176. 4 March 2022 also saw S7 announce the cancellation of all flights abroad from 5 March 2022, Smartavia announce the cancellation of international flights until 19 March 2022, Ural announce the cancellation of flights to Thailand from 8 March 2022, and Royal Flight announce the stoppage of flights abroad from 5 March 2022.

177. On **5 March 2022**, FATA published an official information message on its website (the '**FATA Message**'), which stated, in part:

> In connection with unfriendly decisions of a number of foreign states in respect of the civil aviation of the Russian Federation, Russian airline companies and passengers have become tools and hostages of the political fight.
>
> The imposed restrictive measures which are contrary to the provisions of international air law and the basic principles of the Chicago Convention, continue to intensify with respect to the civil aviation of the Russian Federation. In addition to restrictions on the use of airspace, foreign States - parties to the sanctions measures have imposed additional restrictions, including arrests or detentions of aircraft of Russian airline companies registered in foreign states and owned by foreign lessors.
>
> In this connection, FATA recommends to Russian airline companies that have aircraft registered in foreign state registries under a lease agreement with a foreign entity the following:
>
> starting from 00.00 a.m. Moscow time on 06 March 2022, to suspend on a temporary basis the carriage of passengers and cargo from points in the territory of Russia to points in foreign states;
>
> starting from 00.00 a.m. Moscow time on 08 March 2022, to suspend on a temporary basis the carriage of passengers and cargo from points in the territory of foreign states to points in the territory of Russia.
>
> This recommendation is caused by the high risk of detention or arrest of Russian airline companies aircraft abroad.

178. On the same day, Aeroflot announced the temporary suspension of all foreign flights from 8 March 2022, including flights of Rossiya and Aurora; and Azur, Nordwind/Pegas, Pobeda and Royal Flight all announced the imminent suspension of international flights.

179. On 5 March 2022 Aviatorshina, a specialist aviation Telegram channel which often publishes 'leaked' documents from the Russian aviation authorities, reported that MinTrans' legal department had sent a letter stating that 'telegrams issued by FATA have no status of regulatory legal acts'.

180. In the afternoon of 5 March 2022 President Putin visited an Aeroflot training centre, at which he met female air crew to mark International Women's Day. The event included a question-and-answer session with the President, the transcript of which was published on the Kremlin website on the same day. Amongst other things, President Putin said the following:

> [M]uch of what is taking place now, [and] of what we can see and what we come up against are methods of fighting Russia. Incidentally, the sanctions that are imposed on us are like a war.
>
> …
>
> Leasing companies and spare parts - I am not going to go into detail right now, but your former CEO, now Minister of Transport, has some ideas, and he reports them to me regularly, calls me almost every morning. On the whole, I support these considerations. Let's give him the opportunity to negotiate with his partners. I hope they will agree on things that overlap with their own interests. But I am certain that we will fly.

181. Also on 5 March 2022 AerCap sent a notice of termination of leasing to: (i) ABC and Rossiya in respect of all engines on lease; (ii) Royal Flight in respect of MSN 27617; and (iii) Nordwind in respect of MSN 1360.

182. On **6 March 2022** AerCap sent notices of termination of leasing to: (i) Red Wings in respect of both aircraft (MSNs 2793 and 2730); (ii) Royal Flight/Blue Connect in respect of MSNs 28171, 28834 and 38820; (iii) Rossiya in respect of MSN 1630; and (iv) S7 in respect of an A321 NEO aircraft.

183. On 6 March 2022 MSN 1360, leased by AerCap to Nordwind was flown from Russia to Turkey and subsequently recovered by AerCap.

184. 6 March 2022 marked the last international flights to countries outside the Eurasian Economic Union ('**EEU**') by the Aircraft claimed for which were leased to Alrosa and Royal Flight.

185. On **7 March 2022** Merx sent a notice of termination of leasing to S7 in respect of MSNs 9508 and 9435. It also sent notices of claim under the Merx Policy and under the relevant Operator Policies in relation to the Merx Aircraft on lease to Ural, S7 and Alrosa.

186. AerCap sent a notice of termination of leasing to: (i) IKAR in respect of MSN 32719; and (ii) Yakutia in respect of MSNs 32684 and 30669.

187. On 7 March 2022, MSNs 28834 and 28835, leased by AerCap to Royal Flight/Blue Connect were flown from Russia to Egypt, and MSN 32729, leased by AerCap to Azur was also flown from Russia to Egypt. They were ultimately recovered by AerCap. MSN 32707, leased by AerCap to Royal Flight was flown from Russia to Turkey, and subsequently recovered by AerCap.

188. MSN 40233, leased by DAE to Nordwind, flew into and out of Turkey (back to Russia) on the same day.

189. Between 6 and 11 March 2022 Mr David Houlihan of DAE visited Moscow to meet DAE's lessees.

190. On **8 March 2022**, MSN 37136, leased by DAE to Nordwind, was flown from Russia to Mexico City, where it was subsequently recovered by DAE. Also on 8 March 2022 MSN 32639, also leased by DAE to Nordwind, flew from Russia to Hong Kong. It flew back to Russia on 9 March 2022 arriving on 10 March 2022 (local time).

191. AerCap sent termination of leasing notices to Nordwind in respect of the five remaining aircraft which had not had the leasing terminated (MSNs 3034, 3120, 32841, 1391 and 1351), and to IKAR in respect of the two remaining aircraft which had not had the leasing terminated (MSNs 35718 and 35715).

192. On 8 March 2022 President Putin signed Presidential Decree No. 100 ("On Application of Special Economic Measures in the Field of Foreign Economic Activities for the Purpose of Ensuring Security of the Russian Federation") ('**PD 100**'). The preamble below the title stated that PD 100 was additional to both (i) Presidential Decree 79 of 28 February 2022 "On the Application of Special Economic Measures in Connection with Unfriendly Actions of the United States of America and Foreign States and International Organisations Siding with It", and (ii) Presidential Decree 81 dated 1 March 2022 "On Additional Temporary Economic Measures to Ensure Financial Stability of the Russian Federation".

193. Amongst other things, PD 100 imposed bans and restrictions on the export from the territory of the Russian Federation until 31 December 2022 of goods and materials to be specified in government lists. The effect of PD 100 was extended until 31 December 2023 by Presidential Decree No. 773 dated 26 October 2022 and further until 31 December 2025 by Presidential Decree No. 540 dated 20 July 2023.

194. On **9 March 2022** the Russian Government issued Government Resolution No. 311 ("On Measures to Implement Decree of the President of the Russian Federation No. 100 dated 8 March 2022") ('**GR 311**'). It was to come into force on 10 March 2022. Pursuant to GR 311, as originally enacted, aircraft and aircraft engines (amongst other goods and materials) were made subject to an export ban until 31 December 2022. The export ban in GR 311 did not apply to exports to member states of the EEU (Belarus, Kazakhstan, Armenia and Kyrgyzstan) or to 'transport vehicles of international carriage' ('**TVIC**'s). Under GR 311, the Federal Customs Service ('**FCS**') was to ensure control of the implementation of the export ban. The Minister of the Interior, the Border Control Service

of the Federal Security Service ('**FSB**') and the Federal Service of National Guard Troops were to support the FCS.

195. At the same time the Russian Government issued Government Resolution 312 ("On the introduction on a Temporary Basis of a Permit Procedure for the Export of Certain Types of Goods from the Territory of the Russian Federation") ('**GR 312**'). This, as with GR 311, came into force on 10 March 2022. Under GR 312, as originally enacted, the export of listed goods and materials, including aircraft and aircraft engines, to member states of the EEU was only permitted with the prior approval of the Ministry of Transport in the form of an export permit. By paragraph 2, the export permit requirement did not apply to TVICs.

196. Both resolutions were extended by Government Resolution No. 1959 of 2 November 2022 (effecting an extension of a year until 31 December 2023) and then re-extended by Government Resolution No. 2285 of 23 December 2023 (effecting an extension of a further two years, until 31 December 2025).

197. On **10 March 2022** AerCap terminated the leasing of MSN 28825 to Yakutia, of two A321 NEOs on lease to Ural, and the remaining 737-8 MAX on lease to S7.

198. On **11 March 2022** Merx sent a notice of termination of leasing to Alrosa in respect of MSN 32659.

199. On **12 March 2022** Bermuda announced that it had suspended the certificates of airworthiness of aircraft operating in Russia.

200. On 12 March 2022, Merx sent to Ural a notice of termination of leasing in respect of MSNs 2175, 2187 and 5055.

201. On **14 March 2022** President Putin signed Federal Law No. 56-FZ ("On Amendments to the Air Code of the Russian Federation and Certain Legislative Acts of the Russian Federation"), which had been adopted by the State Duma and approved by the Federation Council on 11 March 2022. These amendments made it possible for FATA to issue certificates of airworthiness for foreign-leased aircraft on the Russian registry and for those aircraft to continue operating in Russia. By Article 11 of Federal Law No. 56-FZ, the Russian Government was given the power to determine the particulars of (i) performance of foreign aircraft lease agreements by Russian airlines, and (ii) registration of the aircraft on the State Register of Civil Aircraft of the Russian Federation and in the Register of Aircraft Rights and Transactions.

202. On **15 March 2022** the Russian Government stated that it was suspending the Russia-Bermuda Agreement 1999 which had been concluded on the basis of Article 83bis of the Chicago Convention.

203. On **17 March 2022** the Russian Government Resolution No. 390 ("On amendments to and recognition as inoperative acts of the Government of the Russian Federation") ('**GR 390**') came into force. GR 390 added paragraph 2(1) to GR 311, providing for the possibility of exporting banned goods pursuant to a permit from the Government. GR 390 also amended GR 312 to introduce a new paragraph 4(1) authorising a number of federal executive bodies to exercise control over the implementation of GR 312.

204. On **19 March 2022** the Russian Government adopted Resolutions Nos. 411 and 412, providing details regarding the implementation of Federal Law 56-FZ. Government Resolution No. 411 ('**GR 411**') came into force on 23 March 2022 and Government Resolution No. 412 ('**GR 412**') on 31 March 2022. GR 411 detailed how registration was to be implemented; GR 412 detailed how foreign aircraft leases were to be performed, including that export outside Russia of foreign aircraft and engines was to be in accordance with PD 100. Under the registration procedure introduced by GR 411 neither the lessor's consent nor confirmation of de-registration from the original state of registry was required.

205. On **22 March 2022** Minister Savelyev spoke at a meeting of the Federation Council Committee on Economic Policy. As regards aviation, Mr Savelyev said:

> […]
>
> Well aviation is something that we can't live without. You won't be able to cover a territory of 17 million square kilometres with trains. Special thanks to all of you for the decision on the 56-FZ, which made it possible for us to develop. We have passed a resolution whereby the companies were forbidden to give away aircraft.
>
> Now we are transferring to the Russian register even foreign-leased aircraft, and this is happening all over the world. For example, we would transfer Bermuda aircraft. We have already transferred almost 800 aircraft; we insure them with a Russian insurance company.
>
> The aircraft are staying here.
>
> We are looking for ways, legal ways to reach an agreement with the lessors and resolve this issue. So far, however, we have not been able to [achieve this] because there is a ban and demands for a return.
>
> They do not want to enter into negotiations for us to compensate them with payment and buy the aircraft from them into the property of Russian airlines.
>
> Nevertheless, we do not lose hope. We cannot let go of the aircraft because giving them up means leaving ourselves without aviation.
>
> Do you understand this? That is why the government has made such a decision. We have 114 registered airlines in our country, 111 of which are operating.
>
> Three airlines have not confirmed the certificates of airworthiness but this is a matter of time, or... But 111 operating companies is plenty.
>
> Let me remind you that last year, we transported 111 million people, 87.5 million of them within Russia, and this is 20% more than in pre-COVID 2019. …

> Our objective is to preserve our aviation sector. At present it is in dire straits. We are currently facing tough times. We have stabilised the situation. And now our airlines, if we return to the current situation, they have stabilised, it will not be long, but, we will now fly for several months based on the specific algorithm that we have elaborated. We had in total 1,367 aircraft in the country at these 111 airlines. Today we are left with … We lost 78 aircraft, they were attached during flights, in friendly countries, in Turkey, Azerbaijan, Armenia – they had also received instructions, they hampered us. We lost these 78 aircraft – that is it. We drew a line. Now we only fly abroad using aircraft which are Russian planes or had already been registered from the outset as Russian.
>
> …
>
> [Question: Mr Bryskin] Does this mean that for a period of time, in two or three years, we will not be able to service these aircraft in the territory of Western countries in the same place where they service them?
>
> [Answer] They will not be serviced in the West; they will not even be released due to the fact that we took someone else's property.
>
> […]
>
> [Question: Mr Bryskin] So, these aircraft will never leave the territory of the Russian Federation?
>
> [Answer:] Never, only to friendly countries, only to friendly ones.
>
> […]

206. On **23 March 2022** Minister Savelyev made a speech to the Federation Council. One part of that speech was:

> The thing is, there are northern regions and the Far East where small planes like AN- 2, AN-24, AN-26, and TR-72 operate. We cannot leave these companies without support, so our main issue is quite serious and involves a lot of money. First, we need to decide with the government what the airlines that we essentially encouraged to keep their aircraft, should do. Should the planes be bought out or not? Because the companies still have to continue making lease payments, but the lessors are unwilling to sell us the planes. The companies are trying to negotiate, but so far without success.

There was some debate as to whether the Russian word rendered in this passage as 'encouraged', should rather be translated as 'incited' or perhaps 'pushed'.

207. Also on 23 March 2022, during a video conference with President Putin and other members of the government, Prime Minister Mishustin stated that the government had 'helped carriers keep their fleets of foreign aircraft since the very first days' and that 'we have limited the return of these aircraft and aircraft engines to the owners'.

208. On **24 March 2022** MinTrans issued Order No. 99:

> On Approval of the Procedure for Issuing Permits for the Export outside the Territory of the Russian Federation of Certain Types of Transport Vehicles, their Parts and Components […]

209. On **28 March 2022** the EU prohibition on leasing aircraft to Russian entities took effect, and the UK's General Trade Licence permitting the provision of aviation insurance for aircraft for use in Russia or to persons connected with Russia expired.

210. On **31 March 2022** President Putin spoke at a meeting on the development of air transport and aircraft manufacturing. He referred to '*the economic war that* [the ruling Western elite] *are trying to unleash, or in fact have already unleashed against Russia*'; and said that Russian airlines were '*among the first to feel the consequences of the improper decisions by the Western countries*', and that '*we must certainly respond to them. I suggest proceeding from the premise that we will not be maintaining cooperation with our former partners in the near future*'. President Putin also announced that subsidies would be paid to airlines, saying:

> A few things I would like to say in conclusion. As I said at the start of our meeting, it is certainly necessary to support operations of the Russian air companies, but it is of fundamental importance not to do this at the expense of passengers, as our colleagues have just said. I fully share this view. This certainly should be kept in mind. It is necessary to make air tickets widely available to people and on this basis to expand the potential of air transport, rather than force people to incur additional costs.
>
> Let me outline a specific target: this year, the volume of domestic service should grow in comparison to what it was last year, and the passenger traffic, as of the year end - we have just discussed this and I fully agree with this figure - should reach no less than 100 million people.
>
> Therefore, in addition to the state support measures already in effect, including the reduced-fare tickets for travel to the Russian Far East and other regions, I ask the Government to launch the large-scale programme we have just spoken about, a programme to compensate part of the air fare for domestic flights. I am referring to flights to be performed, as it was also mentioned, between April and October of this year, the most active flying period.
>
> The Minister of Transport has just described the specific parameters of this programme (I am aware of the debates on this matter), but, of course, I suggest that we primarily be guided by this. Nevertheless, the figure that is being mentioned - 65 billion [rubles], or 47 billion, or 113

> billion, since there is no unity in the Government as to how to calculate these subsidies - let us, for starters, put the figure at 100 billion.
>
> If we have in view even ten percent of the reserves, the resultant figure will be exactly 110 billion. But we should also be mindful of the fact that this money comes in with a delay, as Mr Belousov said, and so we will be able to see, during the next four to six weeks, how this programme is implemented and, if necessary, allocate additional funds as needed. But I suggest that the calculations be based on the methodology proposed by the Ministry of Transport.

211. On **1 April 2022**, the European Commission sent the Aviation Working Group and Aircraft Leasing Ireland a letter expressing the Commission's view as to the application of the EU sanctions to insurance and reinsurance. That letter stated, in part:

> … It follows that, in our view, nothing in Regulation (EU) No. 833/2014 prohibits the provision of insurance and reinsurance by EU insurers/reinsurers for the benefit of other EU parties, even after 26 February 2022, as long as the goods and technology in Annex XI under insurance/reinsurance are not intended for a person in Russia or for use in Russia.
>
> It is our view that insurance and reinsurance of the goods and technology in Annex XI are not "for a person in Russia or for use in Russia" where it is provided for the benefit of the non-Russian owner of those goods and not for the benefit of the actual user or operator of the goods, even when they remain in Russia against the will of their non-Russian owner and despite the latter's demand for their return. …

212. On **12 May 2022** Russian Government Resolution No. 850 ('**GR 850**') dated 11 May 2022 entered into force, amending GR 311. Following the amendment, GR 311 provided:

> The measure provided for by paragraph 1 of this Resolution shall not apply to: transport vehicles of international carriage, except for aircraft exported for the purpose of their return to lessors, leasing companies under agreements of financial lease (leasing), lease concluded with lessors, leasing companies of foreign states included in the list of foreign states and territories committing unfriendly acts against the Russian Federation, Russian legal entities and individuals approved by Directive of the Government of the Russian Federation No. 430-r of 05.03.2022.

213. On **9 June 2022** AerCap issued the Claim Form in its present action.

214. On **21 June 2022**, Minister Savelyev was reported as having said, during an interview on the Rossiya-24 TV Channel, inter alia:

> I also want to point out that it is not the case that we did not return the aircraft and seized them. No, we did not expropriate anything from

> anyone. Our airlines continue to accumulate rouble leasing payments on S accounts at the Central Bank, and if the owner wants to obtain the payment, they just convert and collect it, but the sanctions do not enable us to pay in a foreign currency, even though the companies would be able to pay, on the one hand. On the other hand, they are not ready to convert the money that we transfer to the S accounts, that is the truth of the matter.

215. On **25 June 2022**, Mr Mishustin, the Russian Prime Minister, approved a programme described by Russian authorities as a comprehensive development programme for the Russian air transport industry to 2030. This plan included the following features:

(1) As of April 2022, Russian airlines were operating 1,160 passenger aircraft, of which about 700 were leased from foreign lessors. Foreign-made aircraft accounted for about 95% of passenger traffic.
(2) The bans on leasing of aircraft and the supply of parts were identified as geopolitical challenges facing the air transport industry. They were said to give rise to concerns including:
    i. the prospects of the loss of a number of modern aircraft from the aircraft fleet and corresponding air carriage volumes;
    ii. degradation of the route network; and
    iii. insufficiently high rates of substitution of foreign aircraft by domestic aviation equipment.
(3) Were these risks to materialise, '*transport links of regions of the Russian Federation will deteriorate and the aviation mobility of the population will fall*', risking '*protracted degradation of the industry*'.
(4) '*The strategic objective of the air transport industry of the Russian Federation is the accelerated transition to domestic aviation equipment*'.
(5) '*At least 70% of the foreign aviation fleet will remain operational until the end of 2025*'.
(6) '*It will not be possible to rapidly replenish the retired fleet of foreign aircraft with domestic aircraft*'.
(7) Upgrading the fleet in necessary quantities, as well as obtaining spare parts for foreign-made equipment were problems that required a special approach to state regulation.
(8) Forecast scenarios envisaged foreign aircraft remaining part of the Russian civil aviation fleet in significant numbers through to 2030, albeit declining as a proportion of the total over time.

216. On **15 September 2022** there appeared an article in Kommersant, a mainstream Russian news outlet focussed on business and finance, which gave some information as to the possible availability of funds from the Russian Government with which some of the leased aircraft could be 'bought'. It said, in part:

> Kommersant has learned that the Russian Government has offered the airlines to buy out the airplanes of foreign lessors with the help of the National Wealth Fund. The Ministry of Transport is asking the companies to estimate how many airplanes they want to buy and for how much in total. For this purpose the carriers may be given soft loans for

> 15 years at 1.5%. Sources in the aviation industry believe that the deals will be sporadic at best, but more likely they will not develop at all: the conditions of EU and U.S. sanctions do not allow foreigners to make such settlements.
>
> Kommersant has learned that the Ministry of Transport has offered the airlines to buy the aircraft of foreign lessors at the expense of the National Wealth Fund. In a letter sent on August 30 to the 20 largest airlines (Kommersant has it), the Ministry proposes carriers to estimate how many of the planes that they have, they are ready to buy out.
>
> It is assumed that for the repurchase they will be able to receive funds from the National Wealth Fund at a rate of 1.5% for 15 years.
>
> The Ministry of Transport has also asked the carriers to substantiate the market value of the planes and the reasoning behind buying aircraft that are more than 20 years old. In addition, the Ministry asked for legal expertise of "the risks of safe and smooth settlements" with lessors and "possible subsequent claims" from their side.

217. On **21 September 2022** President Putin attended an event at the Novgorod Technical School, at which he made some remarks about civil aviation. In particular, he said that:

> The Ministry of Transport has retained in Russia aircraft which had been taken out on a leasing basis, simply retained them, and that's it, because they held - and correctly held: the lessor had no right to seize them earlier than the contract. They started seizing them - the Ministry of Transport simply refused to hand them over. We fly on them, but how long will we fly on them still - one year, two, three?

218. On **21 October 2022** DAE issued its Claim Forms in the present proceedings.

219. On **16 November 2022** Falcon issued its Claim Form in the present proceedings.

220. On **29 December 2022** Merx issued its Claim Form in the present proceedings.

221. On **9 February 2023** President Putin and Minister Savelyev attended a meeting with aviation industry representatives to celebrate the centenary of Russian civil aviation. The following exchange is recorded to have taken place between them:

> Mr Savelyev: Dear Vladimir Vladimirovich! First of all, on behalf of everyone who works in civil aviation and myself personally, may I thank you for the difficult decision that you took in light of the sanctions – you kept the planes in Russia.
>
> Mr Putin: It was you who kept them – I just agreed to it.

> Mr Savelyev: I agree with that correction, but without you it would not have been possible. Thanks to all of this, we preserved the civil aviation industry and we continued our work in a stable manner.

Later at the same event, President Putin made the following further remarks:

> Vitaly Gennadyevich [Savelyev] made this decision himself: he just went ahead and kept all [the planes] with us. And he did the right thing, because if we are treated in such a rude manner, then to live with wolves, we have to howl like wolves. He preserved the industry, he preserved the fleet and transport volumes, they have even started to grow. And we are not being rude to anyone, we are even ready to pay, and everything, but we simply cannot allow the industry to collapse.

222. On **1 March 2023** the Russian edition of Forbes magazine published an interview with Tatiana Fileva, shareholder in S7 and daughter of its founder Vladislav Filev. This contained, amongst others, the following questions and answers:

> — You resigned as CEO in October. Why? To what extent was your decision affected by 2022?
>
> — What happened at the end of February 2022 was something that I didn't personally expect, and couldn't even imagine. I remember how the Ministry of Transport was holding a meeting on Saturday, 26 February, attended by representatives of all the airlines who were at a loss and did not understand how to go on. And I felt just as confused. After that meeting, we had a family meeting where my dad said: "You realise that this is really bad? Are you ready to keep on standing firm?" At this point I wondered: what is one of my greatest fears? And I understood that I was afraid of letting down my mother who had built the company, believed in us as a family and believed in me. How can I fail her? For example, if S7 were to cease operations or, what was more likely, become part of another state-owned company? And I said to my dad: "Look here, I will stand my ground." I came home, called my son's grandparents from my husband's side, and asked them to pick up my grandson so that he could live with them during the most difficult period.
>
> — What did you hear at this meeting, why did you have such a reaction? What did you know about the subsequent fate of S7 and aviation this year?
>
> — At that time, no specific decisions had been taken at the first meeting on 26 February. At first, everyone was just confused, to be honest. The decisions followed later. And subsequently, we stood our ground, it was hard, at times we just lost heart, but we managed to cope. I knew that it was critical to stay with the team at that point. I saw how other airline executives left at the beginning of March, and management began to change. Meanwhile our key team has survived - and these are people who have worked at S7 for virtually their entire lives, many of them right straight from university. And together we normalised the situation

> somehow. And then I told a small circle back in late March that once the situation had stabilised, I would resign as CEO and Operations Director.

She also told her interviewer that S7's Western partners '*understood and understand the situation we are in: we do not control many decisions, they are made at other levels*'.

She described the experience of sitting in the industry meetings in early 2022 as a representative of S7, where '*the floor is usually given to the state-owned company*', trying to raise a hand so that her airline was not forgotten about. She recalled being the only woman in the meetings, but commented that '*when you sit next to such people, it's no longer a question about men and women. There is a hierarchy there: these men are not equal to the other men at the top*'.

On the return of the two Boeing 737 MAX 8 aircraft, she stated:

> We need to understand that in the current situation we do not control which aircraft remain in the country and which ones leave. This is a decision of the government of the Russian Federation and various authorities. We returned two Boeing 737 MAX 8, the flight of these aircraft in Russia is prohibited. In fact, they have been grounded for years. So we were able to say: "Look, the planes are standing idle, we can't fly them, can we at least return them?" And the process took eight months, and it was not easy. And the airline doesn't control what is returned or is not returned. Airlines can make an effort with paperwork if they are told to do it.

223. On **15 March 2023** Minister Savelyev addressed a meeting of the Russian Committee on Transport and Transport Infrastructure Development of the Duma. In his statement he said that:

> Let me say a few words about civil aviation. You know very well that aviation is always a very sensitive type of transport. That is why all the cataclysms that occur in our country, starting with Covid, all manner of previous pandemics, as well such as swine flu, have an immediate impact on aviation. We had just managed to deal with the pandemic, and then something started that you know about, and we apprehended what was going on very quickly, we picked up on all these issues and talked to the airlines.
>
> Yes, I must admit that airlines, a number of airlines were bewildered, because they had received demands, first and foremost, for the handover of their aircraft. For good measure, out of necessity, they wanted to seize 595 planes from us. However, this is beyond all reason. We would simply not be able to fly, and many airlines, unfortunately, were compelled or agreed to hand over their planes. In the end we lost 75 planes, of which approximately a quarter of them were undergoing maintenance checks abroad, were ready for loading, they remained there, so we lost 75 planes. Well, what else is there to say? This is when

> we passed a law which prohibits companies from taking planes outside the country. Then they were, so to say, unable to hand over aircraft, we covered them with this law, they understand that they cannot take the aircraft out of the country without approval, and it goes without saying that we will not give such approval. We are trying to buy the aircraft from the foreign lessors, we understand this issue well, and the government has already allocated approximately - can we disclose these figures publicly or not? - about 300 billion roubles, and I do not know there, that is, you know this story, and Aeroflot has already used the funds to buy 10 long-haul aircraft…And the aid that was assigned by the budget in total to us with the support of the President equalled 174.2 billion – this the biggest amount of financial assistance in the history of aviation…the airlines met their targets - we carried 95 million people. If we had added another 19 million ([from carriage via] the closed airports), we would have even reached the figure achieved in 2021, we would have carried 114 million people. Therefore, the situation in the aviation sector in Russia is effectively difficult, but the sector is still operating, and we are working with you now to develop aviation and to redirect it, to focus it on domestic flights.

224. On **15 March 2023** Genesis issued its Claim Form in the present proceedings.

225. On **7 February 2024**, Minister Savelyev addressed the Federation Council and took questions about Russia's transport strategy. He told the assembled senators that:

> I want to share the following with you. When we faced the situation, when the sanctions were introduced, and when we, together with you, retained our fleet within Russia – the Russian aviation – we realised what we would face. It was not only about aircraft maintenance and personnel management. In fact, we went through a difficult period when the airlines were confused... I want to tell you that the issue was quite sensitive for everyone because the airlines did not understand where and how they would fly. Then, in 2022, thanks to President Vladimir Vladimirovich Putin, a decision was made to allocate 174 billion roubles to support the aviation industry, including 110 billion for passenger transportation. We made a decision at that time that not everyone liked, but it proved effective. We did not hand out money to the airlines because there was no guarantee that, upon receiving the money, they would do anything with the aircraft. They could simply park the aircraft, sell it, or quit altogether.
>
> As you know, we have prohibited by law the export of domestic, apologies, foreign-made equipment. All the aircraft remained in Russia. So, we provided funds based on passenger kilometres. In other words, we gave a fishing rod rather than a fish – if they wanted to earn money, they needed to carry passengers. And the companies carried. We fully utilised the 174 billion roubles.

Summary of Insurance Settlements

226. From August 2023 onwards, certain lessors entered into a series of insurance settlements (the '**Russian Insurance Settlements**' or '**RIS**'s) in respect of certain of the leased aircraft.

227. AerCap entered into six RISs between August and December 2023 with certain of the lessees and a Russian insurance company. In total AerCap received US$1,302,455,756.57 under these RISs.

228. On 28 November 2023, DAE entered into a RIS with Aeroflot and their Russian OP insurer in respect of the DAE Aircraft leased to Aeroflot. The total sum received by DAE was US$118,567,967.39.

The Issues

229. The issues between the parties narrowed before and during the trial, with the Defendants admitting some matters, which had previously been the subject of non admissions or denials, including as to the insured status of the Claimants, and ownership of the aircraft and engines set out in Schedule 1.

230. The essential issues in each of the claims can be summarised as follows.

231. In the AerCap claim:
(1) Was each of the AerCap Aircraft a total loss within the policy period? If the aircraft were lost after the relevant dates of policy expiry is the 'grip of the peril' doctrine applicable and effective to mean that the loss is to be treated as falling within the relevant policy period?
(2) Is AerCap's claim covered under the Contingent Cover of its policy; and if not, is it covered under the Possessed Cover?
(3) On the basis that there was a loss of the AerCap Aircraft, was its cause a peril excluded from Section One of the AerCap Policy such that cover is under Section Three (i.e. fell within the WR Cover)?
(4) Is payment under the policy rendered unlawful by EU or US sanctions?
(5) Do AerCap's RISs give rise to defences to its claim?
(6) In what amounts is AerCap entitled to be indemnified?

232. In the DAE/Falcon claim:
(1) Have the aircraft been lost at any material time and if so what is the date when they were lost? If the aircraft were lost after the relevant dates of policy expiry is the 'grip of the peril' doctrine applicable and effective to mean that the loss is to be treated as falling within the relevant policy period?
(2) Is DAE's claim covered under the Possessed Cover of its policies (or one of them); and if not, is it covered under the Contingent Cover of its policies (or one of them)?
(3) Was/were the causative peril(s) a WR or an AR Peril(s)?
(4) Is payment under DAE's policy(ies) rendered unlawful by EU or US sanctions?
(5) In what amounts are DAE/Falcon entitled to be indemnified?

233. In the Merx claim:

(1) Have the aircraft been lost at any material time and if so what is the date when they were lost? Were the various Notices of Review/Cancellation served by WR Insurers invalid? If the aircraft were lost after the relevant dates of policy expiry is the 'grip of the peril' doctrine applicable and effective to mean that the loss is to be treated as falling within the relevant policy period?
(2) Is Merx's claim covered under the Possessed Cover of its policy; and, if not, is it covered under the Contingent Cover of its policy?
(3) Was the causative peril(s) a WR or an AR Peril(s)? If the loss arises under the War Risks Endorsement, does the 'Government of Registry' exclusion apply?
(4) Is payment under Merx's policy rendered unlawful by EU or US sanctions?
(5) In what amounts is Merx entitled to be indemnified?

234. In the Genesis claim:
(1) Has the aircraft been lost and if so what is the date it was lost? What was the effective date of policy expiry of the Genesis WR Policy? Was there leader authority for Endorsement 6? If the aircraft was lost after the relevant dates of policy expiry is the 'grip of the peril' doctrine applicable and effective to mean that the loss is to be treated as falling within the relevant policy period?
(2) Is Genesis's claim covered under the Possessed Cover of its policies; and, if not is it covered under the Contingent Cover of its policies?
(3) Was the causative peril(s) a WR or an AR Peril(s)?
(4) In what amount is Genesis entitled to be indemnified?

235. Because each of the issues of whether there was a loss, the date of any loss, the relevant peril and causation require an examination of the same or overlapping facts, while the issue of whether each Claimant had a claim under the Possessed or Contingent Cover of its policy(ies) does not require such a detailed scrutiny of those facts, I consider that it is convenient to commence with the latter question first.

Contingent or Possessed Cover?

236. The terms of the policies insuring the Claimants in each of the actions differ, and the Claimants do not all put forward the same primary case as to whether they are covered under their Contingent or Possessed Cover. Accordingly, it is necessary to consider their cases on this issue one by one. I will commence with AerCap.

AerCap

AerCap's case: Contingent Cover

237. As set out above, AerCap's primary case is that it is entitled to recover under its Contingent Cover, and only as an alternative under its Possessed Cover. That is so, AerCap contends, whether any causative peril was an AR Peril, in which case it would be cover under Section One of its policy, or a WR Peril, in which case it would be under Section Three.

238. AerCap contended that what it needs to show, in order for there to be cover under its Contingent Cover, is as follows:
(1) That the AerCap Aircraft were the subject of a Lease Agreement. This is a requirement under both Section One (1) and Section Three (1)(a). In Section One

it is expressly provided ('*… Aircraft … and Spares and Equipment the subject of a Lease Agreement'*), and in Section Three which provides cover for Aircraft and Spares and Equipment '*as covered under Coverage 1 – Contingent Coverage – of Section One of this insurance.*'

(2) That the AerCap Aircraft were not in the care, custody or control of AerCap or its agents when lost. This again is expressly provided for in Section One (1) ('*… that are not in the care, custody or control of the Insured or their agents…*'), and is again a requirement of Section Three by reason of its insuring Aircraft and Spares and Equipment as covered under Section One, Coverage 1.

(3) That physical damage coverage was required to be provided for the AerCap Aircraft under the Principal Insurance (viz the relevant OPs). That is provided for expressly in Section One (1) ('*… and in respect of which physical damage coverage is required to be provided under the Principal Insurance …*'), and again by reference to the Section One coverage in Section Three.

(4) That the AerCap Aircraft should have suffered physical loss or damage which was sustained during the period of insurance. That is required by the words of Section One (1) ('*… against all risks of physical loss or damage howsoever occasioned …*') and again by reference to the Section One coverage in Section Three. In Section Three, there is only cover for such physical loss or damage if the claim is excluded from Section One as being caused by a WR Peril.

(5) That AerCap has not been indemnified in whole or in part under the Principal Insurance. In addition, the Contingent Cover under Section One, but not Section Three, of the Policy is triggered if the Principal Insurance fails to respond to any claim within 90 days after AerCap has made a written claim. This reflects the fact that Section One (1)(1)(i) ('*… that the Insured is not indemnified in whole or in part under the Principal Insurance…'*) appears also in Section Three (1), as (a)(1), while Section One (1)(1)(ii) ('*… that the Principal Insurance fails to respond to any claim within 90 days after the Insured has made a written claim…*') does not appear in Section Three.

239. AerCap contended that all those requirements are satisfied in relation to the AerCap Aircraft:

(1) There was by the end of the trial no dispute that all the AerCap Aircraft were the subject of a Lease Agreement.

(2) AerCap contended that the AerCap Aircraft were plainly not in the care, custody or control of AerCap or its agents when any loss occurred.

(3) There is no dispute that all the Lease Agreements required the Lessees to take out physical damage insurance cover in respect of the AerCap Aircraft.

(4) As to the requirement that the AerCap Aircraft should have been physically lost within the policy period, that is an issue which I will consider at a later stage in this judgment. For present purposes, it is assumed that that is a matter which AerCap will be able to demonstrate.

(5) AerCap further contended that it has not been indemnified in whole or in part under the Principal Insurances; and that the OPs did not 'respond to' AerCap's claim within 90 days of a written claim being made. AerCap's contention is that 'indemnified' means 'paid'; and that 'respond to' means 'accept cover in respect of'.

240. On these bases, AerCap contended that its ability to claim under its Contingent Cover is straightforward.

The Defendants' Arguments

241. A number of different arguments to the effect that there is no cover under AerCap's Contingent Cover were advanced by the Defendants. These may be grouped as follows:

(1) A series of arguments to the effect the Contingent Cover only covers losses which fall within the scope of the insurance policies that are required by the Leases to be taken out, and those policies were not required to and did not cover losses caused by conversion of the aircraft by the lessee, or by refusal by the lessee to redeliver the aircraft, or by WR Perils which did not deprive the lessee of care, custody or control of the aircraft, or a situation where the Russian lessee was unaffected in its use of the aircraft but the lessor was unable to repossess the aircraft due to government action. Those arguments were first introduced by Fidelis, but have been adopted by the other insurers except Chubb. They may be called, for convenience, the '**Fidelis primary case**'.

(2) An argument that, irrespective of the relationship between the Contingent Cover and the Principal Insurance, on a proper construction there is no 'loss' under the Contingent Cover where the lessee airline remains in possession and the aircraft is undamaged. This may be called the '**Fidelis alternative case**'.

(3) Arguments advanced by Chubb that there is no cover under the Contingent Cover unless the claim is not recoverable under the relevant OPs. Chubb contends that the relevant test is legal recoverability; that is, the Contingent Cover does not respond where AerCap is legally entitled to an indemnity under the Principal Insurance. If that is not right the test is, in any event, one of 'recoverability'. Chubb's position is that there is cover under the WR cover of the OPs. Significantly for the present claims, however, it argues that AerCap has not shown, as it would have to in order to succeed, that there is irrecoverability. This may be called the '**Chubb case**'. The First Defendant to the AerCap claim (AIG Europe SA and the following AR Insurers) and Swiss Re submitted that they would rely on the Chubb case if it was successful.

(4) Alternative cases, advanced by WR Insurers, that if, contrary to their primary cases, there may be coverage under the Contingent Cover depending on whether there is a practical inability to recover or obtain an indemnity from the OP insurances, it cannot be determined at this trial that there is any relevant practical inability, or that it has not been shown that there is. These may be called the '**WR alternative cases**'. The case was advanced in its entirety by the Second Defendant to the AerCap claim (LIC and the following WR Insurers). Fidelis and TMK/HDI adopted the case as far as the general proposition that coverage under the Contingent Cover depended on a practical inability to recover under the OPs, which had not yet been established. However Fidelis and TMK/HDI did not adopt certain of LIC's arguments as to why a 'practical inability to recover' could not be determined at this trial. They also did not adopt certain ancillary arguments relating to the 'Other Insurance' clauses, and Fidelis did not adopt arguments relating to Russian law, which were made as part of the WR alternative cases.

242. I will consider these arguments in more detail in turn.

The Fidelis primary case

243. The first limb of the Fidelis primary case was that the Contingent Cover taken out by AerCap was intended by all parties to cover a minimal exposure at a minimal premium. Its objective, Fidelis argued, was simply to give the Lessor the reassurance that it would have the cover which the relevant Lease required, and which the OP should have provided. Contingent Cover is intended only to provide cover for the Lessor when something 'has gone wrong', for example if there was no OP in force, 'or perhaps there was but it fails to respond as required by the lease'. As Fidelis's counsel put it, '*the parties aimed for the confined exposure of a "mirror policy"* [viz one mirroring the cover required by the lease], *no more and no less*'.

244. The second limb of the Fidelis primary case was that the Leases did not require cover for any of the risks which AerCap alleges occurred in this case (whether by way of AerCap's primary case that an AR Peril caused loss, or its alternative case that a WR Peril caused loss). This is because the Leases' insurance provisions required lessees: (i) to maintain the Hull AR and WR cover which a prudent operator would hold; and (ii) to incorporate the terms of AVN 67B or C into the required insurance. What was thus required by the lease was an insurance taken out by the lessee which:

(1) Covered conversion of the aircraft by a third party (but not by the lessee);
(2) Did not cover a lessor against the risk that the lessee would refuse to redeliver the aircraft in breach of the lease and thereby convert the aircraft;
(3) Covered WR Perils, such as seizure, restraint and detention through which the lessee was deprived of care, custody or control and the aircraft was lost;
(4) Did not cover a situation in which a Russian lessee was unaffected in its use of the aircraft, but the lessor was unable to repossess due to Government action.

245. In support of the first limb of this argument, Fidelis made a number of different points.

246. In the first place, it was said that there was a market understanding, or widespread market practice or background knowledge, to the effect that Contingent Cover was designed to mirror the cover required to be effected by the lessee pursuant to the lease. In this regard, the Defendants relied on expert evidence from Mr Farmer, and on statements in a number of books, publications and other sources. The Defendants also relied on the existence of a type of insurance, namely Non Repossession Insurance (or '**NRI**'), a type of Political Risks insurance. This, they contended, was cover complementary to Contingent Cover, and would have covered losses of the present sort, where the lessee was left in possession of the aircraft; but such cover was not taken out here.

247. Secondly, it was said that the fact that the cover was, and was intended to be, minimal was shown or at least indicated by the very low premiums charged for it. The Defendants pointed to the fact that for the 2021-2022 cover the Hull AR rates for AerCap were 0.00217617 for the Contingent Cover, but 0.033852 (<3m), or 0.026598 (>3m) for Possessed Cover; while the WR rates were 0.00186793 for Contingent Cover, but 0.009340 for the Possessed Cover. The disparity with the Possessed Cover was itself significant. In addition, the Contingent Cover rate should be compared with rates for NRI. The Defendants calculated, on the basis of an indicative premium rate for NRI which AerCap had received, that the comparative premium rates for AerCap for a limit of US$100 million for one year would have been: Contingent, US$1,868; Possessed, US$9,340; and NRI, US$900,000. The Defendants argued that AerCap, and the other Claimants, had chosen not to take out NRI, thereby saving themselves very significant sums by way of premium; but also leaving themselves uninsured in relation to the events which had happened.

248. Thirdly, it was argued that the interpretation of the Contingent Cover advanced by the relevant Defendants was supported by an examination of the detailed terms of the AerCap Policy.

249. Fourthly, it was said that AerCap's interpretation lacked commercial sense. It lacked commercial sense that lessors should wish to obtain, by way of back up cover, insurance beyond what they had stipulated for in the leases. Its lack of commercial sense was further illustrated by consideration of the issue of deductibles. OPs would have a deductible, which the lease would require the lessee to bear. But on AerCap's case, the Contingent Cover would respond to the amount of that deductible if the lessee did not pay it.

250. As to the second limb of the Fidelis primary case, the relevant Defendants contended that the purpose of the insurance which was to be taken out by the lessee pursuant to the relevant lease was to protect against loss of or damage to the aircraft while in the possession of the lessee. Loss and damage which occurred whilst in the lessee's possession was physical damage and deprivation of possession which affected the party in possession. Consistently with this, the leases did not require the lessor to be a full composite insured on the hull policy, in contrast with the position on the liability insurance. Instead they required only that the airline obtain insurance with anti-avoidance provisions, generally by use of standard endorsement AVN 67B or C. The relevant Defendants further contended that whilst AVN 67 gives certain rights under the policies to lessors, it does not allow the lessor to claim when the lessee has not suffered a loss. AVN 67 does not make the lessor a full composite insured for its own interests under the hull policies. AVN 67C expressly does not provide cover for theft by the lessee, which clearly indicates an intention that the lessor is not given rights to claim for a loss which the lessee has not suffered. On its proper construction, so the Defendants argued, AVN 67B also gives no cover to the lessor for theft by the lessee.

The Fidelis alternative case

251. The Fidelis alternative case was that, regardless of its relationship with the Principal Insurance, the Contingent Cover, on its proper construction, provided cover for 'loss' by deprivation of possession only when it was the airline which was in possession when the peril struck and it was the airline which was deprived of possession thereby.

252. This alternative case was said to be supported by the fact that the Contingent Cover was premised on the aircraft being in the lessees' care, custody or control. It was outside the scope of the cover for there to be a loss under the Contingent Cover by reason of deprivation of possession where the party intended to have possession of the aircraft – viz the airline – still had possession. The proposition that a 'loss' under the Contingent Cover must affect the lessee was, it was said, supported by Piraeus Bank AE v Antares Underwriting Ltd [2022] Lloyd's Rep IR 441. It was also said to be supported by the adaptation of the standard form 'outside the control' provisions which are typically included in aviation insurances in a non-leasing structure to add a reference to the operator. Thus, the WR exclusion from the AR cover in the AerCap Policy excludes from the AR cover losses occurring while the aircraft are 'out of the control of the Insured or operator' by reason of a WR Peril, and the WR cover in the policy is expanded to cover losses occurring while the aircraft are 'out of the control of the Insured or the Operator' by reason of a WR Peril. The addition of the word 'operator' indicated that under the Contingent Cover any loss by

way of deprivation of possession by a WR Peril must take the aircraft out of the control of the Operator.

Chubb's case

253. Chubb's case had certain similarities with the Fidelis primary case, but also certain significant differences, and a different objective. Entities within the Chubb group are AR and WR LP Insurers of AerCap, but are not reinsurers in any of AerCap's ongoing War Risks OP claims. Its commercial interest will therefore be served if there is found to be no cover under the LPs but that there is cover under the War Risk OPs.

254. Chubb's case was that if there was a loss of aircraft and engines, it was caused by a WR Peril. Accordingly, in relation to the issue of whether there was Contingent Cover, it focussed on the 'triggers' in Section Three of the AerCap Policy.

255. Chubb's case was that the contingency on which the Contingent Cover depends is whether a claim falls within the scope of the cover provided by the OP (re)insurance which the relevant Lessees put in place in relation to the relevant aircraft. If the claim fell within those policies, then AerCap should look to that coverage and cannot recover under the Contingent Coverage in its LP insurance. Chubb's position was that the claim does fall within the WR cover of the OP insurance. It does not agree with or rely on Mr Farmer's evidence as to a market understanding of the intended width of OP covers, or the proposition that cover under the OP policy must be viewed from the perspective of the lessee.

256. Chubb contended that AerCap's argument that it can rely on 'trigger' (1) in Section Three if there is simply a failure of the Principal Insurance to indemnify, necessarily means that, on that case, AerCap's right to recover under Section Three would arise immediately on its suffering a relevant loss. That would mean that the LP Contingent Cover was primary cover, not contingent in any meaningful sense, and that it would be open to AerCap simply to choose which cover to claim under. This would be inconsistent with the factual context in which the Contingent Cover was placed, namely that the leases required the taking out of policies which are intended to be the lessor's primary source of recourse, and the Contingent Cover was intended to be a 'back up' for that.

257. Chubb further contended that AerCap's construction of the 'triggers' in Section Three meant that 'trigger' (1) swallowed up 'triggers' (2) and (3) robbing the latter two of any meaning. Indeed, on AerCap's case, there was no need for Section Three to contain any contingency wording at all: it could simply have been framed as primary cover for any loss of the aircraft as a result of a WR Peril. AerCap's case was also said to be inconsistent with Endorsement 12, which gives Chubb 150 days to 'investigate' any claim following a denial of cover under the Principal Insurances. That was inconsistent with AerCap having an immediate right to an indemnity under the LP policy simply because it has not received payment under the Principal Insurance. Equally, Chubb argued, the notification requirements in General Condition 1(a) of the AerCap policy are inconsistent with AerCap's case. If that case were right, there would be no need or reason for such requirements.

258. Chubb say that contingency, or 'trigger', (1) should be construed so that 'is not indemnified' is read as '*is not indemnified because there is no entitlement to an indemnity under the Principal Insurance*'.

259. In relation to Section One of the AerCap Policy, AerCap's case suffered from the same essential flaws as its case in relation to Section Three. Specifically, on AerCap's case, the absence of immediate payment under the Principal Insurances would result in the contingency at Section One (1)(1)(i) being satisfied, which would render the contingencies in both (1)(1)(ii) and (1)(2) redundant. This was symptomatic of the fact that AerCap's case converted contingency into primary cover. Chubb contended that the contingency in (1)(1)(i) conveys '*that there is no cover available or that an indemnity is otherwise not payable under the policy*'. It was said that this is reinforced by the usage of the phrase 'may not respond' in General Condition 1. Thus contingency (1)(1)(ii) '*addresses the situation where it is clear after 90 days that the Principal Insurance does not respond i.e. that there is no coverage…*'. Alternatively Chubb contended in its written opening that (1)(1)(ii) applied where '*no response at all has been given by the Principal Insurer to any claim (within 90 days) – i.e. no acknowledgement of the claim, no email receipt, no contact via the broker or similar examples.*' Chubb subsequently modified this to a suggestion that the reference was to a failure properly to engage with a claim.

260. Chubb therefore argued that, on a proper analysis of the contingency 'triggers', cover is provided under the Contingent Cover only if there is legal irrecoverability under the Principal Insurance. AerCap would have to demonstrate that its claims are irrecoverable under the OPs. This is not a question of whether AerCap has taken reasonable steps or whether a reasonable time has elapsed. The issue of whether AerCap's claims are (ir)recoverable under the OPs is a matter which has to be addressed at Phase 2 of these proceedings. Alternatively, Chubb contended that the contingency in Clause 1(1)(i) of AerCap's cover is not triggered until AerCap has taken '*any and all reasonable steps to obtain an indemnity under the* [OPs] *but has been unable so to make a financial recovery in respect of its losses.*'

261. Chubb also contended that, even if AerCap's case on 'not indemnified in whole or in part' were correct, that contingency has not been satisfied in relation to the aircraft in respect of which AerCap has received payments pursuant to Russian Insurance Settlements, because AerCap has been 'indemnified … in part'.

WR Insurers' Alternative Cases

262. The Kennedys Defendants and AESA put forward an alternative case, adopted for the most part by Fidelis and TMK/HDI, if the Fidelis Primary and Alternative Cases are not accepted. This was that under Section Three of the AerCap policy, 'trigger' (1) ('*in the event that the Insured is not indemnified in whole or in part under the Principal Insurance*'), is engaged only once AerCap is on the balance of probabilities practically unable to obtain an indemnity in respect of its claim.

263. This construction of 'trigger' (1) is, it was argued, supported by the terms of Exclusions 6(f)(1) and (2) in Section One. The first of those is incorporated into Section Three by Condition (4)(4).

264. The issue of whether AerCap is, on the balance of probabilities practically unable to obtain an indemnity under the Principal Insurance is fact sensitive and will depend on the outcome of the OP Claims and whether AerCap is entitled to an indemnity in those claims. On this approach, it was argued, as the outcome of the claims under the OPs is not known,

and as it cannot be said at this trial that AerCap is practically unable to obtain an indemnity under the OP (re)insurances, the Contingent Cover is not 'triggered'.

265. Alternatively, as a matter of construction or an implied term, the AerCap Policy should be read as requiring AerCap to take reasonable steps to recover under the OP, and whether that has been done is not a matter which can be decided in Phase 1.

Analysis

266. The essential issues which arise are issues of construction of the AerCap Policy, and in particular of the 'triggers' or contingencies stipulated in Section One (1), and Section Three (1)(a).

267. In what follows I intend first to identify the main principles of construction which fall to be applied. I will then consider the key provisions in the AerCap Policy and their context. Next I will consider the various cases made by the Defendants as to why AerCap's Contingent Cover is not engaged. I will then give my overall conclusions on the issue.

Principles of Construction

268. There was no significant dispute as to what are the principles of construction which the court should employ, but it is convenient to refer to certain statements of the correct approach.

269. In Wood v Capita Insurance Services Ltd [2017] UKSC 24, Lord Hodge said, at [10]-[13]:

> [10] The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. In Prenn v Simmonds [1971] 1 WLR 1381 (1383H-1385D) and in Reardon Smith Line Ltd v Yngvar Hansen-Tangen [1976] 1 WLR 989 (997), Lord Wilberforce affirmed the potential relevance to the task of interpreting the parties' contract of the factual background known to the parties at or before the date of the contract, excluding evidence of the prior negotiations. When in his celebrated judgment in Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896 Lord Hoffmann (pp 912-913) reformulated the principles of contractual interpretation, some saw his second principle, which allowed consideration of the whole relevant factual background available to the parties at the time of the contract, as signalling a break with the past. But Lord Bingham in an extra-judicial writing, A new thing under the sun? The interpretation of contracts and the ICS decision Edin LR Vol 12, 374-390, persuasively demonstrated that the idea of the court putting itself in the shoes of the contracting parties had a long pedigree.

[11] Lord Clarke elegantly summarised the approach to construction in Rainy Sky at para 21f. In Arnold all of the judgments confirmed the approach in Rainy Sky (Lord Neuberger paras 13-14; Lord Hodge para 76; and Lord Carnwath para 108). Interpretation is, as Lord Clarke stated in Rainy Sky (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause (Rainy Sky para 26, citing Mance LJ in Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2) [2001] 2 All ER (Comm) 299 paras 13 and 16); and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: Arnold (paras 20 and 77). Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.

[12] This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: Arnold para 77 citing In re Sigma Finance Corpn [2010] 1 All ER 571, para 10 per Lord Mance. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.

[13] Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be

> particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance spoke in Sigma Finance Corpn (above), assists the lawyer or judge to ascertain the objective meaning of disputed provisions.

270. In FCA v Arch Insurance (UK) Ltd [2021] UKSC 1, Lords Hamblen and Leggatt JJSC identified the essential approach as follows, at [47]:

> The core principle is that an insurance policy, like any other contract, must be interpreted objectively by asking what a reasonable person, with all the background knowledge which would reasonably have been available to the parties when they entered into the contract, would have understood the language of the contract to mean. Evidence about what the parties subjectively intended or understood the contract to mean is not relevant to the court's task.

271. One matter which can form part of '*the background knowledge which would reasonably have been available to the parties*', is a market practice or understanding, if it is shown that there was one. This was recognised, for example, in Crema v Cenkos Securities plc [2010] EWCA Civ 1444, especially at [42]-[47] per Aikens LJ. As Aikens LJ there stated, at [46], it will be necessary for the court to consider whether and what 'market practice' is established by the evidence, and, if there was one, whether it is useful background evidence against which to construe the contract in question. Evidence of what is usually done in a market may not assist in resolving the particular issue of construction with which the court is confronted. By way of example, in Ted Baker plc v AXA Insurance UK plc [2012] EWHC 1406 (Comm), it was held (at [93]) that the evidence of 'practice' could not displace the ordinary meaning of the words used, and could not incorporate an exclusion by implication.

272. I also consider the following statement to be sound and a useful guide, from LCA Marrickville Pty Limited v Swiss Re International SE [2022] FCAFC 17, in the Federal Court of Australia, per Derrington and Colvin JJ at [15]:

> The ease with which an insured may establish matters relevant to its claim for indemnity may influence questions of construction … a construction which advances the purpose of the cover is to be preferred to one that hinders it.

273. Finally I bear in mind that recently the 'pick and mix' approach which is sometimes taken to drafting insurance contracts has been identified and recognised as relevant to their construction. In *Bellini N/E Ltd v Brit UW Ltd* [2024] EWCA Civ 435 at [34] Sir Geoffrey Vos MR described the 'pick and mix' approach as follows:

> Insurance policies are, as the judge said at [31], often somewhat repetitive. They are also sometimes clumsily drafted. Without giving

> evidence, I think it is fair to say that this can arise, even if it did not in this case, from the "pick and mix" approach to the insertion of various possible clauses that insurers sometimes adopt.

274. In *International Entertainment Holdings v Allianz* [2024] EWCA Civ 1281, Males LJ quoted the passage from *Bellini* and described how a 'pick and mix' approach might affect the exercise of contractual construction:

> Where a contract shows signs of having been drafted as a coherent whole, it must be construed accordingly, and it is often a reasonable inference that terminology has been used consistently as between the various clauses. But it is commonly the case that insurance policies are not drafted in this way. Rather, as in the present case, they appear to include a selection of different clauses adopted from other contracts, with no attempt to ensure that language is used consistently throughout the policy. This 'pick and mix' approach means that the inference of consistent usage has little or no force, and that reference to the same or similar language in other clauses of the policy may shed little light on the meaning of the term in question. As Mr Charles Dougherty KC for the insurer recognised, there is an obvious danger in trying to find coherence between clauses which have been stitched together with no attempt to ensure such coherence.

The Key Provisions and their Context in the Policy

275. It is convenient to start with the words used in both Section One and Section Three. AerCap relies principally on the 'trigger' (1)(1)(i), '*that the Insured is not indemnified in whole or in part under the Principal Insurance*'. It also relies, on the basis that the causative peril was an AR Peril, on 'trigger' (1)(1)(ii), '*that the Principal Insurance fails to respond to any claim within 90 days after the Insured has made a written claim*'. As set out above, the (1)(1)(ii) 'trigger' does not appear in Section Three of the policy. There was no evidence as to why this was so, and no party put forward any plausible explanation as to why that 'trigger' appears only in the AR and not in the WR Section of the AerCap Policy.

276. AerCap's contention is that 'is not indemnified' means 'not paid'. It also contends, by way of primary case, that it means 'not paid', whether or not a claim had been made by it under the Principal Insurance. But AerCap submitted that it made no difference if it was implicit that a claim had to be made under the OPs before it could be said not to have been indemnified, because a claim had been made.

277. AerCap's interpretation of 'is not indemnified' was disputed by the Defendants. WR Insurers referred to the case of Sobrany v UAB Transtira [2016] Lloyd's Rep IR 266, in which it had been said, obiter, that the words '*any claims that you are indemnified for under any other policy of insurance*' referred to claims for which the second policy provided an indemnity according to its terms, whether or not the insurers had honoured those terms: in other words they looked to whether there was a contractual entitlement to an indemnity, not whether there had been a payment.

278. There are, in my view, at least three senses in which the words 'is (or is not) indemnified' is used in an insurance context, and which is the one which is being employed depends on context. One is that illustrated by Sobrany, namely whether or not a party has a contractual entitlement to an indemnity. Another is whether the party has been held harmless against a loss. This usage reflects the legal position that under an indemnity policy, the insurers' obligation to indemnify arises at the point at which a loss occurs which is proximately caused by the insured event: see for example Callaghan v Dominion Insurance Co Ltd [1997] 2 Lloyd's Rep 541. With this usage, a person can be said to be 'not indemnified' as soon as a loss occurs which is not immediately paid. The third usage looks at whether a party has or has not been paid after an interval since the loss, and usually after a claim has been made in respect of it.

279. In the present case, it is to my mind clear that 'indemnified', in the relevant 'triggers', is not being used in the first sense. Light on how the term is being used is shed by Exclusions (6)(f)(1) and (2) in Section One. (6)(f)(1) refers to an indemnity being 'obtained as a claim' under the Principal Insurance, and (6)(f)(2) to an indemnity under the Principal Insurance not being obtained due to the insolvency of the insurers of the Principal Insurance. Those provisions are clearly not looking at whether the insured can obtain a contractual right to an indemnity, but rather are looking at whether the insured has been paid (or otherwise held harmless e.g. by repair) in respect of a loss which has occurred.

280. I do not, however, consider that the words 'is not indemnified' are used to denote a situation in which the insured has not been paid, irrespective of whether it has made a claim. That the insured must at least have made a claim on the Principal Insurance appears to me to be supported by the terms of Exclusion (6)(f)(1), which envisages that 'an indemnity' will be obtained by the making of a claim. This interpretation also appears to me to be more consistent with the contingent nature of the cover.

281. It is also more consistent with the juxtaposition of 'trigger' (1)(1)(i) with 'trigger' (1)(1)(ii) in Section One. While there was some argument as to what 'trigger' (1)(1)(ii) involves, I think that its clear meaning is that the Principal Insurance should have failed to pay a claim, or at least to have responded positively by way of an accepted liability to pay a claim, within 90 days after the Insured has made such a claim. On that basis, both 'triggers' (1)(1)(i) and (ii) are looking at a failure of the Principal Insurance to provide an indemnity in response to a claim. Though, on this approach, they very significantly overlap, they can be read together, with (1)(1)(ii) providing a clear 'cut off' date after which the Insured can claim on the Contingent Cover, without there being the possibility of argument as to whether it has done enough or waited long enough to establish that it 'is not indemnified' for the purposes of 'trigger' (1)(1)(i).

282. There are three other matters of principally textual and contextual construction which need to be addressed at this stage.

283. The first is as to the meaning of 'Principal Insurance'. This is defined in Definition (16) as '*the insurance or insurances to be effected by the Operator pursuant to the provisions of the Lease Agreement (inclusive of insurances such as hull deductible insurances as may be necessary to meet the lease requirements).*'

284. There can, in my view, be no doubt that 'Principal Insurance' is used to refer to actual, not simply hypothetical insurances. That is most conspicuous in the terms of Exclusions

(6)(f)(1) and (2) of Section One. As is clear from those provisions, the 'Principal Insurance' is one which can be claimed under, and which has Insurers who may become insolvent after the commencement of the AerCap Policy. In the second place, nowhere in the AerCap Policy is there any express contemplation of a case in which the 'Principal Insurance' is other than the physical damage policy(ies) actually taken out by the lessee. Accordingly, third, before balancing against it the implications of Fidelis's primary case, the 'triggers' in Sections One (1)(1) and Three (1)(a)(1) can be read without difficulty as referring to non-payment under the policies actually effected by the lessee, i.e. the relevant OPs.

285. The second is the obvious negative point that neither the 'triggers' in Sections One (1)(1)(i) or that in Section Three (1)(a)(1) contain any express language to the effect that the 'trigger' only operates when there is non-indemnification under the Principal Insurance '*when there should have been*'. Equally the 'trigger' in Section One (1)(1)(ii) contains no language to the effect that it operates only where there is a failure of the Principal Insurance to respond to a claim '*to which it ought to respond*'. The 'triggers' say nothing expressly about the reasons why there is non-indemnification or non-response.

286. The third relates to an argument advanced by Chubb. This is to the effect that Endorsement 12 shows that the non-payment under, or non-response of, the Principal Insurance cannot itself 'trigger' coverage under the Contingent Coverage of the AerCap Policy. It is said that Endorsement 12 makes it clear that, if the Insurers of the Principal Insurance deny the Insured coverage or fail to investigate, adjust, defend or enter into settlement negotiations within 150 days after the Insured has submitted a written request thereto, the Contingent and Possessed Insurers will investigate and defend any such claim. Chubb further argues that the obligation on the Contingent and Possessed Insurers is not to investigate a claim on the Contingent Cover, but to investigate the claim on the Principal Insurance; and it is an obligation to investigate, not to pay. Chubb argues that the purpose of that investigation is as to the Principal Insurers' reasons for not paying.

287. This argument appears to me to be unsound. Endorsement 12 is, to my mind, concerned with claims by third parties against AerCap, and which might be relevant to the liability coverage under the AerCap Policy (Section 2). It is because it is concerned with third party claims that it is headed 'Investigation and Defence', and it envisages that the OP Insurers should 'investigate adjust [or] defend' such claims. The Endorsement provides for the circumstances in which the Contingent and Possessed Insurers must take on the investigation and defence of such third party claims. It would clearly make no sense for AerCap to be agreeing that the Insurers must 'defend' AerCap's own claim, whether that claim is supposed to be against the Principal Insurers or the Contingent and Possessed Insurers. Furthermore, if Chubb's construction of the Endorsement were correct, it would be inconsistent with the 'trigger' in Clause 1(1)(ii) of Section One. The incorporation and wording of Endorsement 12, which sits easily alongside the Section Two liability insurance but uneasily alongside the Sections One and Three hull insurance, seems likely to be an instance of the 'pick and mix' tendency in insurance contracts identified in paragraph [274f.] above.

The Fidelis Primary Case: First Limb

288. As I have said, in support of the first limb of its primary case Fidelis contended that there was a relevant market practice or understanding. This was said to be supported by the expert evidence of Mr William Farmer, who is a retired insurance broker, consultant and

underwriter. Mr Farmer's evidence in his first report was, in summary, that there was a market practice and understanding that Contingent Cover gives the lessor comfort that the required insurance protections under the lease will remain available for its interests, regardless of the actual operator's insurance; and that contingent policies do not provide cover wider than that which is required to be taken out under the leases, unless, exceptionally, there are express words in the Contingent Cover itself which specifically extend cover.

289. I did not consider that I could rely on Mr Farmer's evidence as establishing any market practice or understanding in the relevant market at the time the AerCap Policy was placed. In the years 2007 to 2021 Mr Farmer had no direct involvement in the contingent aviation insurance market, as he accepted. Further, his evidence was contradicted by that of Ms Catherine Quinlan, who has long experience of aviation insurance in the aviation industry. Specifically, she worked at Ansett Worldwide Aviation Services as Head of Insurance, where she was responsible for all aviation and non-aviation insurance matters from 2011 until 2016, and subsequently for her own aviation insurance training and consulting business, which has provided training and consultancy services to various lessors. This was more recent relevant experience and involvement in contingent aviation insurance than Mr Farmer's. Her evidence was that there was no market practice that coverage under contingent policies is limited by (a) what was required to be taken out under the leases, or (b) what was in fact taken out by the lessee. Her evidence was that '*the market understands that the scope of the Contingent cover can be broader than the cover provided by the Principal Insurances and there is no market understanding that controls or limits what can be agreed.*'

290. Fidelis relied in addition on a number of different statements in lectures or publications. Several of these appeared to me to be capable of being read as supporting either side's case. Thus, an article by Rod D. Margo, 'Aspects of Insurance in Aviation Finance', in *Journal of Air Law and Commerce*, 62(2) (1996), says not only that '*contingent hull all risks and war risk insurance is designed to protect the financier in circumstances where the hull all risks or hull war risk coverage of the financed airline is cancelled or not renewed for any reason*', but also '*In addition, coverage will exist if the policy limits of the airline's policy prove to be insufficient to meet liabilities or if the airline's liability policy fails to respond for any reason.*' Fidelis draws attention to the limited circumstances of protection (cancellation or non-renewal) referred to in the first passage; while AerCap points to the words '*for any reason*' in the second, and contends that contingent liability insurance is not relevantly different from contingent hull or war insurance. The same applies to *Margo on Aviation Insurance*, (4th ed) [28-60 - 28-61].

291. Fidelis referred to an internal Insurance Review Report prepared by Mr Treacy of AerCap in August 2014. This had stated that the Contingent Covers were '*designed to respond to a claim in the event that the Lessees' insurance policy fails to operate for any reason including cancellation, non renewal, placement error etc. The coverage is contingent upon failure of an operator's policy and provides the same range of protections as the aviation covers required of Lessees …*'. That does indicate an understanding of a close relationship between the cover under the Principal Insurance and under the Contingent Cover, but it is non-exhaustive as to what '*failures* [of the lessees' insurance] *to operate*' are referred to, and the phrase '*same range of protections*' is a rather broad one. Its use was clearly not intended to rule out that there might be wider cover provided under the

Contingent Cover, as indeed is shown by the following reference in the paragraph to Technical Records coverage.

292. Similarly with a presentation to Lloyd's made by Mr Treacy on 8 October 2015. In it he referred to Contingent Cover as '*basically provid*[ing] *a backstop against situations where the Lessee's cover fails to operate*', and to there being '*a minimal exposure … but … an exposure nonetheless*'. While doubtless, as he said in evidence, Mr Treacy did not say anything he believed to be untrue at the lecture, it is obvious that he was seeking to persuade his audience (formed substantially of insurers) that the price of Contingent Cover should come down. The presentation was neither an exhaustive description of Contingent Cover nor, because of Mr Treacy's desire to make the point about premium, entirely free from advocacy.

293. Fidelis also relied on certain brokers' presentations. One was authored by Robert Normand of Aon and dated 18 September 2019. It referred to contingent insurance '*protect*[ing] *against the inability to recover fully from the operator's insurance policies*' and '*cover*[ing] *perils required to be insured by the operator*'. These statements do not, again, seek to describe a precise limit to the circumstances in which a Contingent Cover would respond. Moreover, an 'inability to recover fully from' the OP is capable of being read as arising when there is such an inability other than for the narrow range of reasons for which Fidelis contends.

294. Fidelis pointed to another Aon presentation, to BOC Aviation of August 2021. This referred to '*the concept of contingent insurance* [as being] *that it will respond if there is a failure in the operator's policy: it is a mirror policy*', and to '*whatever insurance requirements are imposed upon the Lessee within the lease will be mirrored in the Lessors programme*'. These form part of a very brief summary of the nature of Contingent Cover: a summary which is not exhaustive, or precise. It should also be noted that the policy which Aon was considering that it might put in place for BOC Aviation 'as a core product', was one on terms similar to those of the Merx Policy, not of the AerCap Policy in the present case. The Aon presentation may also be compared with Marsh's equivalent presentation to BOC Aviation in August 2021. This stated that '*Marsh's contingent cover serves as a back-up policy for the financial institution where primary insurers do not pay a claim for reasons other than insolvency of the insurer. These circumstances can include breach of cover, breach of warranty or non-disclosure or mis-disclosure of facts by the lessee/operator.*' The first sentence does not place a limit on the situations in which non-payment of a claim by the primary insurers would lead to a claim on the Contingent Cover, and the second sentence is expressly non-exhaustive as to those circumstances. Further, the Marsh presentation contains, later, an example, said to relate to a Mexican operator, where '*the Lessor presented a claim to the Lessee's insurers for the loss of the aircraft and engines* [but] *regrettably, the Lessee's policy denied cover to the Lessor*'; but that Marsh then entered into negotiations with the contingent insurers and '*following protracted negotiations, Marsh was able to secure a multi-million dollar settlement on behalf of the Lessor.*' It is not stated as to why the primary insurers had denied cover; but this example, taken with the earlier text, would, in my view, lead the reader to think that Contingent Cover might be useful in a range of circumstances in which the Principal Insurance did not pay, although the ambit of that range was not clearly delimited.

295. This and other material referred to by Fidelis does show, I conclude, that participants in the market regarded contingency cover broadly as 'back up' cover; that it would not

respond if the Principal Insurance responded; and that the principal risks it typically covered were that the Principal Insurance was not properly in place or was defective. What I do not consider that it shows is that there was a universal, or near unanimous, understanding as to the circumstances in which a Contingent Cover would respond to a loss if the Principal Insurance did not do so, nor that there was a particular understanding of what the phrases 'is not indemnified' or 'fails to respond' meant in the context of a Contingent Cover.

296. Fidelis also relied, as I have said, on the existence of NRI. That, Fidelis argued, was a type of insurance which was and was understood by the market to be complementary to Contingent Cover, and to insure risks not covered by Contingent Cover, the key one being inability to repossess due to government action. That, Fidelis contended, would have been the type of insurance which would have been expected to cover losses of the present type, but it was not taken out by the Claimants, in whole or in part because it would have been very expensive.

297. The existence of other types of insurance which might have covered the relevant risks, but which was not taken out, is an uncertain guide to the ambit of cover which was taken out.

298. The materials which were relied on by Fidelis to show that NRI was understood as complementary to Contingent Cover – Aon's presentation of 18 September 2019, Marsh's proposal to BOC Aviation of 13 August 2021, and Margo's textbook at [28.41] – all treat the subject in a general way. They do not provide a detailed analysis of how NRI cover would relate to Contingent Cover provided by any particular form of policy wording. Furthermore, Mr Treacy's evidence in cross-examination was that he considered that the perils which might be insured under NRI were adequately covered under the lessees' policies.

299. I am accordingly not persuaded that there was any market practice or understanding that NRI was necessarily complementary to, rather than overlapping with, Contingent Cover, nor that losses of the present type would be covered under NRI and not under Contingent Cover.

300. The second principal matter relied on by Fidelis as part of the first limb of its primary case was the point as to the low level of premiums for Contingent Cover, both by comparison with Possessed Cover, and by comparison with NRI.

301. It is hazardous to attempt to draw inferences as to the ambit of insurance cover from the premium charged. The premium rate may not accurately or adequately reflect the extent of the risk for a number of reasons, which can include misapprehension as to the nature of the risk assumed by the contract.

302. In the present case, the experts were effectively in agreement that the reasons why premium rates for Contingent Cover had historically (i.e. up to the invasion of Ukraine) been relatively low included the fact that in the majority of cases a relevant loss would be covered and paid under an OP and/or would be indemnified by the lessee under the lease, and that there had not been a significant history of claims. That position does not, by itself, shed any meaningful light on the ambit of coverage actually afforded by the contingent policies at issue here.

303. Furthermore, what has happened since the invasion is that premiums for Contingent Cover have been very significantly increased. In the case of AerCap, between its 2021/22 and 2022/23 insurance programmes there was a 42-fold increase in the premium for Contingent WR Cover, and a 25-fold increase for Contingent AR Cover, while restrictions on the cover were also imposed. I consider that AerCap (and others) were correct to say that if the level of premium charged is relevant to the cover provided, or to the market understanding about the scope of Contingent Cover, as Fidelis's own case suggests, then the logic of that is that the higher premiums in 2022/23 must have been for wider coverage than in previous years. Yet that is a suggestion for which there is no support and which is implausible. What this tends to indicate is rather that the level of premium being charged is a very uncertain guide to the scope of cover.

304. Insofar as Fidelis relied on the disparity of premiums between Contingent Cover and NRI, I was not persuaded that this revealed very much about the risks assumed by each. I accept AerCap's argument that it is likely that the disparity arises because contingent insurers consider it unlikely that they will ultimately have to bear the cost of a loss, either because the OP Insurers will pay a claim without any recourse being made to the Contingent Cover, or because, if contingent insurers have to pay, they will have subrogated or contribution claims against the OP Insurers, and possibly subrogated claims against third parties.

305. The third principal matter relied on by Fidelis was a series of points as to the wording of AerCap's Contingent Covers. I will consider the principal points made in turn.

306. One is that 'all risks of physical loss and damage' in the first paragraph of Section One (1) is a reference only to the 'physical damage' for which coverage is required to be provided under the Principal Insurance, referred to previously in the same sentence.

307. I consider that the words 'all risks of physical loss or damage howsoever occasioned' are ordinary words of an AR cover, and have their usual meaning. They denote that the property in question is covered against all risks of fortuitous loss or damage: see British and Foreign Marine Insurance Co Ltd v Gaunt [1921] 1 AC 41. I do not consider that they can be read as limited by the previous words, '*in respect of which physical damage coverage is required to be provided under the Principal Insurance*'. Those words are part of the identification of the property covered, and are a provision that the relevant aircraft or spares and equipment should be the subject of physical damage cover, without specifying what that physical damage cover is or needs to be.

308. The second is that the words 'not indemnified … under the Principal Insurance' in Section One (1)(1), and the equivalent in Section Three, mean '*not indemnified under the Principal Insurance when it should have been*'. That, however, is a significant interpolation, with significant ramifications. In my view, it imposes a constriction on 'is not indemnified' which is not implicit in the words themselves. Those words, to my mind, most naturally look to the factual question of whether the Insured has received, from the Principal Insurance, an indemnity for the physical loss or damage which it has sustained. Had it been intended to limit the cover under the Contingent Cover to a case in which there was actually an obligation under the Principal Insurance, which had not been performed, it would in my view have been necessary for it to be said.

309. Fidelis contends, however, that the reading for which it argues, is supported by the terms of Section One (1)(ii) and (2). As to (1)(ii), a 'failure to respond' is not, in my view, and as a matter of ordinary usage, confined to a case in which the Principal Insurance *should* have responded. The clause says nothing about the reasons for the 'failure'. A justified and an unjustified 'failure to respond' can equally be said to be 'failures'. To introduce the notion that there would only be a 'failure to respond' if it was unjustified would be to make (1)(ii) a 'trigger' of difficult and uncertain application, when, on its face, it appears to be straightforward and easy to apply.

310. Fidelis also relies strongly on the terms and existence of 'trigger' (1)(1)(2). I accept that (1)(1)(2) will, on AerCap's construction of the 'triggers' add nothing to (1)(1). I do not however consider that this point would cause a reasonable person to understand the words in (1)(1)(i) and (ii) to mean other than I have set out above.

311. Fidelis also makes the point that cover under 'trigger' (1)(1)(2) only arises where the lack or insufficiency of required insurance is due to error or accidental omission. It argues that that is in keeping with the principle that Contingent Cover in general only responds where the required insurance itself should have responded, but failed to do so. In my judgment, the scope of 'trigger' (1)(1)(2) does not shed any clear light on that of the 'triggers' in (1)(1), and is not sufficient to displace the ordinary meaning of the words used in (1)(1).

312. Fidelis also made a more general case that the interpretation advanced by AerCap lacks commercial sense. It illustrated this contention by referring, in particular, to the issue of deductibles, as I have referred to above.

313. I do not consider that AerCap's construction can be said to lack commercial sense. Subject to the issue of its price, it cannot be said to lack commercial sense for a lessor to take out insurance coverage which is independent of and wider than the Principal Insurance. It is equally not lacking in commercial sense for an insurer to provide such cover, subject, again, to its being content with the premium.

314. Equally, I do not consider that the specific instance of deductibles indicates that AerCap's construction is uncommercial. It is not lacking in commercial sense that lessors should wish to protect themselves against exposure to the amount of deductibles under the OPs. Cover for failure of a lessee to pay a deductible was one of the benefits of contingency cover mentioned by Mr Treacy in his presentation to Lloyd's in October 2015. Nor is it lacking in commercial sense that Contingent Cover insurers should agree to insure this exposure, again, subject to being satisfied with the price. In this regard, it may be noted that the leases provide that the lessee should pay the deductibles under the OPs, and so the exposure of Contingent Cover insurers is likely to be limited.

Fidelis's primary argument: Second Limb

315. The second limb of Fidelis's primary argument, to recap, is that the hull and spares insurances required by the leases to be taken out by the lessees are ones which do not require the Lessor to be insured for its own rights and interests, and accordingly do not require cover under which the lessor has suffered a loss of possession but the lessee has not.

316. Fidelis's argument is that leases typically provided for the lessee to take out insurance under which: (i) the lessee alone settles claims with insurers, and the lessor was a 'loss payee', with limited rights in the case of a partial loss; (ii) the lessor is to be an 'Additional Insured', but, unlike in the case of the required liability insurance, there is no requirement for a severability of interest clause, and thus no full composite insurance. Further, in the case of leases which provide for the use of AVN 67B or C endorsements, those forms do not allow a claim by the lessor where there is no loss suffered by the insured.

317. The question of the coverage which the AerCap leases require is a question of English law. All AerCap's relevant leases were expressly governed by English law, save four. Those four were governed by the law of California, but no party pleaded or suggested that the law of California was materially different from English law.

318. In my judgment, Fidelis's argument is wrong. The leases required that AR and WR insurance be effected. The lessors were to be named as additional insureds. In all or almost all the AerCap leases this requirement was specified as being that the lessor should be named 'as additional insureds for their respective rights and interests.' This is language which indicates that the policy will be a composite one, under which the lessor would be entitled to be indemnified for a loss sustained to its own interest in the property lost or damaged: General Accident Fire & Life Assurance Corp Ltd v Midland Bank Ltd [1940] 2 KB 388, 408 per Sir Wilfred Greene MR.

319. Insofar as the leases specified the use of AVN 67B or C, the position is no different. Each of those forms stated, in the opening paragraph that '*it is noted that the Contract Party(ies) have an interest in respect of the Equipment*' … '*Accordingly … in respect of the said interest … it is confirmed that the Insurance afforded by the Policy is in full force and effect.*' Each also provides that the Contract Parties are included as Additional Insureds. I consider that these provisions have materially the same effect as the wording considered in the last paragraph. It is also consistent with the contracts to be provided being ones of composite insurance that each of AVN 67B and C contains a clause (3.2) whereby the cover afforded to each Contract Party is not to be invalidated by any act or omission of any other person or party unless the Contract Party has caused, contributed to or condoned that act or omission.

320. Fidelis relies on the facts that AVN 67B and C provide (in 2.1) that in respect of liability insurance, the cover is to '*operate in all respects as if a separate Policy had been issued covering each party insured*', and that that provision does not appear in relation to Hull and Aircraft Spares Insurances in clause 1. I do not consider that those points give rise to the conclusion that the hull and equipment insurance is not composite. As I have said, in my view the opening paragraph of the Endorsement makes it clear that it is. In addition, the AVN 67B and C (Hull War) Endorsements contain no equivalent of clause 2.1 of the AVN 67B and C Endorsements. I do not think that they can be read as if they did contain such a provision. If, without such a provision, those Endorsements effect composite insurance, it is difficult to see how the existence of such a provision in AVN 67B and C, in relation to liability cover, means that there is not composite insurance in relation to hull cover.

321. This conclusion, it may be noted, is consistent with the view expressed in a 2013 article '*AVN 67: what can you buy for $100? Issues arising out of AVN 67B*', where the author, Ross Williams of Clyde & Co, opines that the contract of insurance between the Contract Party and the Underwriters containing the provisions of AVN 67B would normally be

characterised as part of a contract of composite insurance; and that it would be unlikely that the AVN 67B Hull and Spares Insurance would be held by an English court not to be composite in nature.

322. Given that what the leases require is that the lessor should be insured in respect of its own interests under a composite policy against all risks and war risks, in my judgment the leases do require the provision of cover which, at least in some circumstances, will respond where the lessee remains in possession of the aircraft or equipment. To my mind this is clear in the case of some war risks. If there were a government order for the grounding and impounding of an aircraft in a state hangar, there seems no reason why, if the deprivation were sufficiently permanent, the lessor should not be able to recover for it. If, instead, the government ordered the grounding of the aircraft, and that it should be kept in the lessee's possession, then I would consider, again assuming the deprivation to be sufficiently permanent, that the result should be the same. To attempt to draw a distinction between the two cases would appear to me to be unrealistic and uncommercial.

323. More debatable is the question of whether an AR cover would, unless it is excluded, cover the lessor in respect of theft of the property by the lessee. It was common ground that, if the insurance was to be on the terms of Endorsement AVN 67C there would be no such cover. The controversy was about whether a lease which provided simply that there should be all risks cover without any restrictions specified, and also that the lessor should be insured for its own rights and interests, or one which provided for AR cover and for the use of AVN 67B, required cover for theft by a lessee.

324. Given that a decision on this point is not necessary in order to reject Fidelis's primary argument, and will make no difference to my final decisions in this case, I consider that it is preferable not to express a view on this point.

Fidelis's Alternative Case

325. The argument with which I am dealing here is the contention that, irrespective of the relationship between the Contingent Cover and the Principal Insurance, as a matter of the proper interpretation and construction of the Contingent Cover, there is no cover under it if the lessee has possession of the aircraft. The argument is that, under the Contingent Cover, any claim for loss by deprivation of possession falls to be assessed from the perspective of the lessee and requires that the lessee should have been deprived of possession.

326. I do not consider that this argument is correct. There is nothing in the AerCap Policy to limit the scope of the AR and WR Cover provided in the Contingent Cover in the manner suggested. The lessors, not the lessees, are the named Insureds under it; and the Contingent Cover is taken out in respect of the lessor's insurable interest, not the lessee's. The AR and WR Perils are unlimited in material respects, and there are no relevant exclusions. In those circumstances it is difficult to see how the limitation contended for by Fidelis can be read into the Contingent Cover.

327. Part of Fidelis's argument is that the Contingent Cover is '*premised on the Aircraft being in the Lessees' care, custody or control*'. I do not consider that is correct either. What the Contingent Cover provides is that the aircraft or equipment should not be in the care, custody or control of the lessor or its agents. In any event, there is nothing which has the effect that if aircraft are in the care, custody or control of the lessee the lessor cannot have a

claim. Fidelis referred to the decision in Piraeus Bank AE v Antares Underwriting Ltd [2022] EWHC 1169 (Comm) to suggest that the issue of deprivation of possession had to be judged from the perspective of the lessee. In my view Fidelis gained no assistance from that authority. The reason why, there, loss had to be judged from the perspective of the owners, not the bank, was because of the definition of 'loss' in the MII policy, which bore the meaning adopted by the war risks policy; and because the interest insured under the MII policy was the Bank's interest as assignee and loss payee, not mortgagee, and the Bank only suffered a loss to that interest when there was an event which would have been a CTL as between the owners and their insurers. That reasoning is inapplicable to the present case, which has differently worded cover and different commercial relationships.

328. The other point made by Fidelis was by reference to the so-called '*outside the control provisions*'. In Attachment No. 1 in the AerCap policy, the AVN 48B provision, it is provided: '*Furthermore this insurance* [i.e. the All Risks cover] *does not cover claims arising whilst the Aircraft or Non-Owned Aircraft is outside the control of the Insured or operator by reason of any of the above* [war] *perils*', while the War Risk Coverage Section contains an equivalent provision to the effect that it does cover claims arising from occurrences whilst the aircraft and equipment are '*outside the control of the Insured or the Operator*' by reason of the WR Perils. These, Fidelis points out, are an amendment of standard form '*out of the control provisions*' as found in insurances in non-leasing structures (i.e. an insurance in which the insured is both owner and operator) by adding '*or operator*'. This, Fidelis says, indicates that any loss by way of deprivation of possession by a WR Peril must take the aircraft out of the control of the operator.

329. This appears to me to be a non sequitur. At most these provisions provide that the further exclusion from the AR cover would not apply to an AR Peril (such as a bird strike) which occurred whilst the aircraft or equipment remained in the possession of the operator. It does not indicate that, more generally, there can be no claim for loss of possession if the aircraft or equipment remains in the possession of the operator; and it does not appear to me to bear on a case in which the lessor may have been deprived of possession by a WR Peril which itself proximately causes the loss.

330. For those reasons, I do not accept Fidelis's alternative case.

Chubb's case

331. I have already summarised Chubb's case, and have already considered significant parts of it in what I have said up to now.

332. I have given reasons why I consider that the meaning which should be accorded to 'is not indemnified' is that there should not have been payment after a claim has been made. Equally I have already given reasons as to why I do not consider that Endorsement 12 provides support for Chubb's position.

333. While Chubb can fairly point to the fact that AerCap's interpretation of the 'trigger' in Section One (1)(1)(i) makes the 'triggers' in (1)(1)(ii) and (2) largely if not entirely redundant, and the same applies in relation to the 'triggers' in Section Three (1)(a)(2) and (3), the presence of those additional 'triggers' would, I consider, be understood by a reasonable person to be providing clarity as to particular situations.

334. Further, the meaning of the 'trigger' in Section One (1)(1)(i) and Section Three (1)(a)(1) necessarily takes some colour from its juxtaposition with the 'trigger' in Section One (1)(1)(ii). If that 'trigger' has no reference to whether the claim was in fact and law covered under the Principal Insurance, then that adds some support to the contention that the parties were not requiring legal (or factual) recoverability in using the phrase 'is not indemnified'. I have already said that, in my view, 'failure to respond' is a reference to a failure to pay or accept responsibility to pay. I do not consider that it can be read to mean 'that there is no coverage': that is not the natural meaning of the words. Nor do I consider that Chubb's case gains any support from General Condition 1. That Condition provides that further notice of developments will need to be given to insurers if the Insured becomes aware or suspects that the Principal Insurance may not 'respond to' the claim, or 'may delay the settlement of a claim to which this Insurance applies'. The provision is consistent with my interpretation of 'not respond': its first part provides that notification needs to be given if it becomes apparent that the Principal Insurance will not pay or accept responsibility for a claim made; and the second part covers a situation in which, even though the Principal Insurance may have accepted responsibility for the claim, it delays settlement thereof.

335. Chubb makes an overarching point, to the effect that AerCap's case, especially in relation to the non-indemnification 'trigger', makes the Contingent Cover primary insurance, and that this is inconsistent with the commercial context and intended role of a Contingent Cover. This argument overlaps with Fidelis's primary case, which I have already considered. I would add here, that, even on the interpretation I favour of the 'triggers', a Contingent Cover such as this will still be, in a real way, contingent. There was no dispute before me that, in the ordinary way, lessees will make insurance claims under their OPs in respect of loss or damage, and they will be dealt with by the (re)insurers under the OPs without any involvement of the lessors or their LP Insurers. Second, in the present case, on the construction I favour, the Contingent Cover will respond under Section One (1)(1) or Section Three (1) if there has been no payment under the Principal Insurance after a claim is made. I do not consider that there will be cover even without a claim made on the Principal Insurance. Thus the Principal Insurance remains that which is first looked to and which, if and to the extent it pays, will preclude recovery under the Contingent Cover. Third, and fundamentally, the contingencies on which there is cover under the Contingent Coverage depend entirely on what was agreed between the parties. While it is necessary to take into account the commercial context and factual matrix, the ultimate question remains one of construction, and the features Chubb draws attention to do not cause me to reach a different conclusion than the one I have expressed as to the construction of the 'triggers'.

336. Chubb made an alternative case to the effect that the 'trigger' for coverage in Clause 1(1)(i) of Section One is not satisfied unless AerCap can establish that it has taken any and all reasonable steps to pursue an indemnity under the OPs. Chubb's case is that these steps must have been taken prior to making a claim under the Contingent Cover. In my judgment this cannot be read into the 'trigger' in Section One (1)(1)(i), or Section Three (1)(a)(1). I accept, as I have said, that it is implicit in this 'trigger' that the Insured should have made a claim, and AerCap had in fact made claims under the OPs in respect of all aircraft prior to the issue of the present proceedings. But I do not consider that it is possible to say, either as a matter of construction, or by way of an implied term, that the insured should have taken all reasonable steps to obtain a recovery before it can claim under the Contingent Cover. The language of 'is not indemnified' does not itself imply that all reasonable steps have been taken. Such a requirement would, in my view, need to have been stated, especially given that the Section One (1)(1)(ii) 'trigger' envisages that there will be cover on the expiry of

90 days from the making of a written claim, without any reference to whether the insured has taken reasonable steps to secure the payment of the claim.

337. I should add that Chubb sought to rely again, in the context of this argument, on Endorsement 12, contending that it contained an express obligation on AerCap to use best efforts to pursue a claim under the OPs. I have already given reasons why I consider that Endorsement 12 is concerned with third party claims against AerCap. It imposes an obligation on AerCap to use its best efforts to get the OP Insurers to investigate, adjust, defend or enter into settlement negotiations in respect of a third party claim. It does not, in my view, impose an obligation on AerCap as to the progress of its own claims under the OPs. It would not make sense for AerCap to have an obligation to use best efforts to make OP Insurers 'investigate', still less 'defend' AerCap's own claim against them.

338. Chubb makes a further alternative case, to the effect that, given that AerCap has made certain recoveries under insurance settlements with a Russian insurer of certain lessees, it has been indemnified 'in part' under the Principal Insurance (for the purposes of the Section One (1)(1)(ii) and Section Three (1)(a)(1) 'triggers'), and thus it cannot claim on the Contingent Cover. On this argument, although AerCap has given credit for the sums recovered, it would not be entitled to succeed in its claim for the balance because of the partial indemnity.

339. I consider this argument to be unfounded. I leave on one side the question of whether it avails Chubb to point to these recoveries, given that they occurred after the point at which AerCap's claim under the Contingent Cover was first made. I also assume, for these purposes, that the recoveries can be said to be 'an indemnity under the Operator Policies'. The short answer to Chubb's point appears to me to be that it rests on an unsustainable interpretation of the Contingent Cover. The 'trigger' is that '*the Insured is not indemnified in whole or in part under the Principal Insurance*'. That naturally and in context would be understood to mean that AerCap is entitled to recover under the Contingent Cover if and to the extent that it has not received a full indemnity for its loss under the Principal Insurance.

340. As AerCap submits, there are two ways of reading the phrase, depending on how the words 'in whole' are understood, namely whether they refer to all or to nothing. Thus, one reading is that the Contingent Cover is triggered if AerCap receives nothing under the Principal Insurance (i.e. it is 'not indemnified in whole'), or if the payment under the Principal Insurance has provided only a partial indemnity (i.e. 'not indemnified in part'). The other is that the Contingent Cover is triggered if AerCap is not fully indemnified under the Principal Insurance ('not indemnified in whole'), but this is qualified such that, to the extent that AerCap receives a partial indemnity, then its claim under the Contingent Cover relates to the remaining 'part' that has not been indemnified. I prefer the second reading, but either way I regard the sense as clear. What the clause does not mean is that any payment under the Principal Insurance prevents the Contingent Cover from being triggered. This would have the entirely uncommercial result that a payment of US$100 by way of a 'partial indemnification' under an OP would prevent any recovery under the Contingent Cover.

War Risks Insurers' Alternative Cases

341. The essence of these alternative cases is that AerCap cannot recover under the Contingent Cover unless it can show, on a balance of probabilities, practical irrecoverability under the OP.

342. I do not consider that this requirement can be read in, or into, the terms of the AerCap Contingent Cover. It is not stated. It would be an unclear requirement, which would present difficulties of application. It was not readily apparent what would be sufficient to satisfy it. Mr Railton KC for WR Insurers suggested that practical irrecoverability might be established if an insured '*has gone to court and has lost, has no prospects of an appeal*', or '*has obtained an enforceable judgment against the operator policy insurers which remains unsatisfied despite all enforcement avenues being pursued.*' That submission envisages that AerCap must take very extensive steps to seek recovery under the OPs before there can be recovery under the Contingent Cover. Had that been intended by the parties, however, I consider that it would have needed to be stated. As with Chubb's alternative case, considered above, this suggested requirement is also difficult to reconcile with the fact that the AerCap Policy contains the 90-day trigger in Section One (1)(1)(ii). That indicates that it was not envisaged by the parties that there should necessarily be extensive efforts to obtain recovery under the OP.

343. WR Insurers relied in particular on the terms of Exclusion 6(f)(1) in Section One. It was said that that provision targets not only past recoveries, but ongoing and future recoveries, and that the reference to an indemnity which is obtained 'as a claim' indicates an intention that the claim process should have been sufficiently pursued that it can be said, if the exclusion is not to apply, that there is practical irrecoverability. In my judgment this is to seek to read too much into the Exclusion. On its face, it excludes loss and damage for which an indemnity 'is obtained', which I consider is naturally directed to whether there has been a payment by the time that the Contingent insurers are being called on to pay. The reference to 'as a claim', while, as I have said, supporting a construction of the non-indemnification 'trigger' whereby there should have been a claim made on the OP, says nothing about that claim having to have been progressed to any particular extent.

344. WR Insurers also rely on Exclusion 3(2) in Section Three. They contend it gives an example of practical irrecoverability; the argument being that it envisages that the insured has to pursue an indemnity under the OP up to the point at which recoverability is resolved before Contingent Cover is obtained. Again, it appears to me that this attributes too much significance to this provision. In context it is to be read as dealing with a particular circumstance in which there is non-payment of the claim under the Principal Insurance, rather than indicating what must be shown in relation to any claim under the Contingent Cover. In circumstances where the Principal Insurance has failed to respond at the first instance to a claim for indemnity, and it is at least possible that that failure is due to the insolvency of the Principal Insurers, then it is comprehensible that Contingent Cover insurers should not be obliged to indemnify the Insured until the reason for the Principal Insurers' failure has been ascertained. However, in my view both the existence and the limits of this exclusion themselves seem to indicate that there is no broader principle that no indemnity under the Contingent Cover would be available until the outcome of a claim to the Principal Insurers, and the reasons for that outcome, have been ascertained.

Conclusion

345. Having considered both the text and context of the key insuring provisions in the AerCap Policy, and the various arguments addressed by the Defendants, including reference to a wider market context and to commercial considerations, and having gone back to consider whether any such considerations alter my construction of the key insuring

provisions, my conclusion is that AerCap's case on construction of its Contingent Cover is to be preferred.

346. In those circumstances it is not necessary to address AerCap's alternative case as to Possessed Cover.

DAE/Falcon

347. DAE's primary case is that it is entitled to cover under the Possessed Cover of its Policies; and its alternative case is that it is entitled to cover under its Contingent Cover. I will consider them in turn.

DAE's Primary Case: Possessed Cover

DAE's Argument

348. DAE relies on two principal provisions in the DAE AR Policy. In the first place, upon Section One Clause 1.1 of the DAE AR Policy, which provides:

> To pay for the physical loss of or damage howsoever sustained (save as excluded) occurring during the Period of Insurance to Aircraft in the care, custody or control of the Insured or for which they are responsible (including whilst in the course of repossession).

349. Secondly, upon the terms of clause 11.6 (and in particular 11.6.2) of the DAE AR Policy, which provides:

> Additions, Deletions, Amendments of Aircraft
>
> 11.6.1 This insurance automatically extends to include additions or deletions of Aircraft of any type and including amendments of Agreed Values and/or Total Loss Only Amounts during the Period of Insurance provided always that in respect of additions or amendments of Agreed Values and/or Total Loss Only Amounts the maximum values specified in Section Thirteen are not exceeded.
>
> 11.6.2 The Insured may transfer Aircraft between various Sections of this Insurance as required.
>
> 11.6.3 The Insured shall notify the Insurers of all such additions, deletions, amendments and transfers made under paragraphs 11.6.1 and 11.6.2 as soon as practicable after the expiration of the Period of Insurance.
>
> 11.6.4 Additions of Aircraft or amendments to Agreed Value or Total Loss Only Amounts not made in accordance with paragraph 11.6.1 shall be subject to prior agreement of Insurers.

> 11.6.5 Premium adjustment in respect of the foregoing shall be made as soon as practicable after the expiration of the Period of Insurance in accordance with the terms of this Insurance.

350. DAE also refers to the terms of Condition 5.2.2 of Section Five of the DAE AR Policy, which deals with the temporal scope of the Contingent Cover, as follows:

> This Section Five [viz the Contingent Cover] provides cover until the Insured repossesses the Aircraft or Spares or until its interest in the Aircraft or Spares ceases, or until expiry of the Period of Insurance, whichever first occurs. Coverage under this Section for any Aircraft and/or Spares shall also cease when such Aircraft and/or Spares attach for coverage under Section One/Two (as applicable) hereof.

351. The terms of the DAE WR Policy either incorporate or include terms to similar effect as those already set out in relation to the DAE AR Policy. Section Five, General Condition 1 of the DAE WR Policy provides that that Policy is 'subject to the same warranties, terms and conditions' of the DAE AR Policy, 'except as otherwise provided herein'.

352. The DAE WR Policy Schedule provided:

> Aircraft and/or Spares hereby Insured:
>
> (i) Aircraft in the care, custody or control of the Insured or for which they are responsible (including whilst in the course of repossession) and spares for which the insured is responsible (including whilst in the course of repossession) or which is in the care, custody of the Insured or in the care custody or control of a third party (hereinafter referred to as "possessed aircraft and/or spares")
>
> As held on file by Aon Belgium BV (UK Branch).

353. In the Extensions to Cover in the DAE WR Policy, clause 10 provides:

> 'Additions and deletions and amendments in agreed values and total loss amounts of aircraft not exceeding maximum agreed value hereon and transfers between various Interests are automatically covered hereon. Such changes are to be advised to Insurers as soon as practicable after expiry with premium adjustment at expiry subject to Policy terms.'

354. DAE refers to the fact that the terms of the leases of all DAE Aircraft provided, and would have been expected to provide, that certain events would constitute 'Events of Default' and that upon occurrence (or the continuing and unrectified occurrence) thereof, the lessor would be entitled, amongst other things, to (i) terminate the leasing and in particular terminate the lessee's right to retain possession, (ii) direct the lessee to redeliver the aircraft, and (iii) take all steps necessary to retake possession. The remedies available to the lessor upon the occurrence of an Event of Default contemplate the repossession of the aircraft in circumstances other than those where the detailed provisions for redelivery are

voluntarily complied with by the lessee. This is a recognition of the fact that there may be 'hostile' or 'forcible' repossessions.

355. Mr Lopes gave uncontested evidence that the preliminary steps which might need to be taken prior to an arrest or seizure include: the tracking of flight schedules and movements of aircraft, obtaining a court order and arranging support on the ground to effect the arrest or seizure.

356. DAE's primary case is that all of its aircraft were covered under its Possessed Cover from 3-4 March 2022. DAE's case is that they were, from that point, 'in the course of repossession'.

357. As to this, DAE's contention is that, as a matter of construction, 'responsibility' in Section One Clause 1.1 of the DAE AR Policy can extend to situations in which the lessor may want and need to assume an insurance-related responsibility for the aircraft. Further and in any event, the phrase 'in the course of repossession' is not to be given a narrow meaning by reference to the word 'responsibility', or the words 'care, custody or control'. The words 'in the course of repossession' are words of ordinary meaning, to be construed against the background of the wide range of circumstances in which terminations of leases may occur and repossessions may be sought and/or effected.

358. Here, it is now common ground that DAE validly terminated the leasing of the DAE Aircraft on 3 and 4 March 2022 and was thereby entitled to repossession of those aircraft. The principal grounds for termination, as set out in the Termination Notices, were the Insurance Events of Default. Because of EU and UK sanctions, the continued provision of cover by western reinsurers to the Russian insurers under the OPs was prohibited. From 28 February 2022 onwards, the OP reinsurers were duly serving notices of review. These Insurance Events of Default, DAE argues, provided not only a valid basis for the termination of the leasing of the DAE Aircraft, but also a reasonable justification for DAE to assume insurance responsibility for the DAE Aircraft by transferring them to the Possessed Cover.

359. In any event, DAE contends that factually the DAE Aircraft were in the 'course of repossession' from 3-4 March 2022. DAE relies on the following matters as constituting or evidencing the course of repossession:

(1) The service of the Termination Notices themselves on 3-4 March 2022.
(2) The service of the Aon Notice on 3 March 2022, stating that DAE was in the course of repossessing all the relevant aircraft, which is quoted above.
(3) Various efforts of DAE's Technical Team, which are described in Mr Lopes's evidence, and which included:
    (i) Arranging or attempting to arrange on-site inspections of the DAE Aircraft and their technical records;
    (ii) Having technical representatives on stand-by to assist in the event that access was given to the DAE Aircraft;
    (iii) Arranging for digital access to records in circumstances where physical access was not permitted;
    (iv) Engaging with airlines in relation to the possibility of flying certain of the DAE Aircraft to locations outside Russia for the purpose of obtaining repossession.

(4) Continual tracking of flight movements and, in due course, the successful repossession of MSN 37136 (in Mexico) and the unsuccessful seizure of MSN 32639 (in Hong Kong).
(5) The successful repossessions of I-Fly aircraft MSN 293 and MSN 946.
(6) Mr Houlihan's trip to Moscow, which was itself an effort to get the DAE Aircraft back.

360. Further or alternatively, DAE contends that it was entitled to transfer aircraft from the Contingent to the Possessed Sections of the Policies by virtue of Condition 11.6.2 of the DAE AR Policy, set out above; and this was done by the Aon Notice on 3 March 2022.

The Defendants' case on Possessed Cover

361. All concerned Defendants deny that there was cover for DAE under its Possessed Cover.

362. The Defendants contend that the Possessed Cover has no application to aircraft which have, at all relevant times, remained and remain in the possession, care, custody and control of the lessees. That the DAE Aircraft so remain is fundamental to DAE's claim that it has lost its aircraft.

363. More specifically, the word 'responsibility' is closely connected to the concepts of 'care, custody or control', and must mean responsibility for the aircraft to the outside world. The parenthetical words 'including whilst in the course of repossession' do not extend the cover beyond the requirements of care, custody, control or responsibility.

364. Insofar as it is necessary to investigate what is meant by 'the course of repossession', the starting point is the distinction between redelivery and repossession. Redelivery occurs where the lessee complies with its obligations to return the aircraft; a repossession is where the lessee has failed to redeliver as required by the lease and the lessor therefore takes steps to implement its contractual rights by taking back possession. The course of repossession applies to the period when the lessors are taking active steps to retake physical possession sufficient for the lessors to have assumed at least responsibility for, if not control over, the aircraft. Further, 'in the course of' envisages that the aircraft are part of an ongoing process, which is underway towards an anticipated completion. It does not apply to a situation in which the process has not yet been, and cannot be, physically commenced.

365. Clear guidance as to what is encompassed by the concept of 'repossession', and therefore by that of 'the course of repossession', is provided by the Repossession Expenses Coverage under DAE's policies. In the relevant Endorsement it is provided that expenses incurred in connection with the repossession or attempted repossession of an aircraft or engines are covered, up to a limit; and that expenses shall mean: (a) the cost of engaging and positioning the statutory minimum flight crew and technical engineers for the purposes of the flight; (b) the cost of fuel, lubricants and hydraulics necessarily incurred for the purposes of the flight; (c) all airport dues and air navigation charges incurred during the course of the flight; (d) with respect to engines, all transportation costs incurred in connection with the engine delivered to the Insured's base. It is further provided that 'flight' here means '*all flying, taxiing, hangarage or parking necessary to return the Aircraft from the airport at which repossession takes place, to the airport stipulated in the lease agreement for return of the Aircraft…*'. What this shows is that the parties contemplated

that the course of repossession involves the steps taken in relation to an imminent or actual re-possessing of the aircraft.

366. A demand for return of the aircraft is not an act of repossession; it is instead a demand for redelivery, which is a separate right and step under the lease. The steps taken by DAE's Technical Team, referred to above, were merely precursors to possible repossession. They were done in the hope that, if the time and place were right, DAE would be able to start the course of repossession. But throughout them, care, custody, control and responsibility of the DAE Aircraft remained with the lessee.

367. More generally, the Defendants say that '*the world of the Possessed Cover is clearly intended to be the Lessor's world, where Aircraft are in their hangar, and undertaking an occasional ferry flight. If the Possessed Cover extended to a situation where it covered Aircraft being flown around by Lessees, it would be covering risks well outside its anticipated scope ...*'. Whereas when an aircraft remains in a lessee's care, custody and control it is within the territory of the OP and thus the Contingent Cover.

368. The Defendants point to the decision of the District Court of Minnesota in Castlelake LP v Lancashire Airline War Consortium and Others (27-CV-22-17450) (30 September 2024) and of the Superior Court of California in BBAM US LP and Others v KLN 510 Tokio Marine Kiln (Case CGC-22-603451) (5 December 2024) as supporting the conclusion that the aircraft were not 'in the course of repossession'.

369. In the first of those cases, Judge Robiner said (at page 15):

> Castlelake has not provided any language from the policies or leases defining repossession or the "course of repossession". Hence the Court relies on a plain meaning construction. "In the course of" means "during"…. "Repossession" requires acts to retake physical possession. … Tracking the Aircraft, arranging for safe locations in the event of their future return, hiring legal counsel, and demanding return do not equate to being "in the course of repossession" given the plain meanings of the operative words and the context in which they are used.

370. The second case involved three aircraft leased to Aeroflot and Izhavia, insured against All Risks and War Risks by a policy governed by California law. The aircraft had been in Russia at the time of the invasion. Despite the termination of the leases, and repeated demands for their return, the lessees had not returned the aircraft. In a ruling on a summary judgment motion by the defendants Judge Schulman rejected an argument that the aircraft there involved were 'in the course of repossession'. He said, in part:

> The plain language of the phrase "in the course of repossession," together with a reasonable reading of the Policy language as a whole, makes clear the intended meaning of that phrase. … [citations omitted] Thus, "in the course of repossession" logically means during the repossession of the aircraft, i.e., while the repossession of the aircraft is actually in process.
>
> …

For these reasons, "in the course of repossession" must be read to refer to a situation where the lessor has taken some physical act to initiate repossession of the aircraft, such as where it is in the process of being transferred back to the lessor, even if the lessor does not yet have physical possession. For example, the lessor may engage a third party to seize the aircraft at a foreign airport and fly it back to its home port.

…

Here it is undisputed that Plaintiffs never took possession of any of the Aircraft, nor did any third party do so on their behalf, in order to transfer them to Ireland (or any other location outside Russia). As Plaintiffs have previously conceded without qualification, "BBAM never repossessed the Aircraft". Further, Plaintiffs admit that the Aircraft "have not been recovered and are not subject to recovery". Thus, Plaintiffs' claimed loss did not occur "in the course of repossession" of the Aircraft. Plaintiffs' contrary arguments are not persuasive.

First, Plaintiffs contend that "BBAM's termination of the leasing and demands for return of the Aircraft necessarily placed the Aircraft 'in the course of repossession from a Lease/Finance Agreement' even in the absence of any further action at all." Defendants, for their part, disagree, contending that " 'course of repossession' must involve at least some overt act to physically regain the Aircraft from Lessees". For the reasons discussed above, the Court agrees. A lessor that has merely sent written notice terminating a lease and demanding that the lessee return its property is not engaged in "repossession", which necessarily entails some physical acts to regain possession of the property. … It is not sufficient that the insured merely intends or hopes to repossess the property, or plans to do so in the future if it is able to do so, yet that is all that Plaintiffs point to as the basis for their contention that the loss occurred "in the course of repossession" of the Aircraft.

Second, Plaintiffs contend that, at a minimum, there are triable disputes as to whether their alleged loss occurred in the course of repossession of the Aircraft. Plaintiffs assert they did undertake overt acts to repossess the Aircraft, including tracking the location of the Aircraft to determine whether it might land in a location where BBAM might attempt to repossess the Aircraft directly and "reaching out to other relevant parties" to look into other possible ways to secure the Aircraft's return. Plaintiffs contend that "BBAM did all it could reasonably have done" to try to regain the Aircraft. That may well be so. But its acts, like those of sending a notice of termination and demanding the Aircraft's return, do not constitute physical acts of regaining possession, but at most planning for the possible future repossession of the Aircraft, and do not establish that its alleged loss occurred "in the course of repossession" of the Aircraft.

Third, Plaintiffs assert that BBAM directed its insurance brokers to "put the Aircraft on possessed cover", and notified Defendants of that direction. Again, however, that Plaintiffs may have taken such a position

> vis-à-vis their insurers in anticipation of the claims giving rise to this litigation cannot establish that the alleged loss took place in the course of repossession of the Aircraft.

371. As to DAE's argument that it has a contractual right to transfer aircraft to the Possessed Cover under clause 11.6.2, the Additions and Deletions Clause, this, the Defendants argued, is 'hopeless'. Clause 11.6.2 is a mechanical adjustment clause, an administrative provision governing the procedure for moving aircraft between covers and how the consequential premium adjustment will be done. It does not permit the lessor to state that an aircraft is within the Possessed (or the Contingent) Cover, unless, objectively, the requirements of the relevant Section are met in relation to that aircraft.

Expert evidence on Possessed Cover

372. Both Claimants and Defendants relied on expert evidence in relation to the Possessed Cover: the Claimants on Ms Quinlan and the Defendants on Mr Farmer.

373. Ms Quinlan says in the Joint Memorandum that there is '*a clearly established market understanding that (a) Contingent insurance applies while the lessee is 'responsible' for the aircraft, and (b) Possessed cover applies when the lessor is 'responsible' for the aircraft (i.e. the Lessor is concerned for the aircraft such that they decide that they are or should be responsible for insuring it and have nominated that it be covered under their Possessed cover).*' Mr Farmer, by contrast stated that he did not agree that the market would ever view an aircraft as being put in the Possessed Cover as a result of the lessor having concerns about the ongoing validity of the lessee's insurance; and that he did not believe that a lessor would be considered by the market to be 'responsible' for an aircraft while it remained in the care, custody or control of the lessee.

374. I was not persuaded that there was any market understanding to the effect suggested by Ms Quinlan. She did not produce any publication or source in support of it. She accepted in cross-examination that Possessed Cover is intended, essentially, to cover aircraft when on the ground and on ferry flights, and was 'not really' intended to cover aircraft when being flown commercially by lessees. Yet her suggested market understanding would cut across this.

375. The other relevant matter addressed by the experts was as to whether there is any market understanding as to the 'course of repossession'. Again, I was not persuaded that there was any understanding which was relevant to the construction of the policy terms. Mr Farmer stated that he had never come across a situation which has turned on the meaning of 'in the course of repossession'. Ms Quinlan referred to a case involving Siam Air, where the lessor had procured the grounding in Thailand and the deregistration of the aircraft, but there was then a subsequent court order which prevented the lessor from taking possession of the aircraft. The claim appears to have been paid under the insured's Possessed Cover; and the insurers were subsequently able to repossess the aircraft. As Ms Quinlan accepted, that appears to be a case in which the lessor had managed to exercise control over the aircraft, including by procuring its deregistration. It does not appear to me to show a market understanding which helps resolve the issues which are contested here as to the ambit (and in particular the commencement) of the 'course of repossession.'

Analysis on Possessed Cover

376. Putting on one side for the moment DAE's argument in relation to Clause 11.6.2, whether DAE can claim on the Possessed Cover depends on whether it can be said that the DAE Aircraft were in the '*care, custody or control of the Insured or for which they are responsible (including whilst in the course of repossession)*'.

377. As a matter of its ordinary syntax and punctuation, there are four categories here in which the Possessed Cover may operate: when the aircraft (i) is/are in the care, (ii) is/are in the custody, (iii) is/are in the control of the Insured, or (iv) when the Insured is responsible for the aircraft. There are not five categories: that is to say, 'the course of repossession' is not a fifth. I consider, however, that the bracketed words are intended to indicate that an aircraft may be within any of the four categories if it is in the course of repossession.

378. The word 'responsible' takes colour from the surrounding words. In context, it envisages a responsibility on the part of the Insured for the aircraft to third parties. I tend to agree with the submission made by Mr Gruder KC for Chubb, that it is intended to deal with borderline situations around cases of care, custody or control, including situations arising from repossessions. These could include cases where there was shared control, or where the location of care, custody or control was debatable, such as where the lessee's and the lessor's crew were present.

379. I regard it as doubtful that any situation is covered where the 'responsibility' of the lessor is simply to insure the aircraft but this is divorced from any imminently anticipated care, custody or control. If any such cases fall within the term, it would only, in my view, be cases in which the lessor had undertaken to the lessee or to a third party to be responsible for the effecting of insurance, but would not include a case in which the lessor merely decided that it was in its interests to have its own insurance cover for the aircraft. On any view, I do not consider that the facts of the present case qualify as being a situation where DAE was 'responsible for' the DAE Aircraft. They were aircraft which remained in the possession, care, custody and control of the lessees; where there was no agreement at the material time between the lessors and the lessees that DAE, as opposed to the lessees, should have current responsibility for the relevant aircraft, whether for insuring them or otherwise; and where, equally, the authorities where the aircraft were located, viz Russia, did not consider that DAE, as opposed to the lessees, was, in any meaningful sense, 'responsible' for the aircraft.

380. As I have said, I do not regard the parenthetical words 'including whilst in the course of repossession' to establish a separate fifth category in which there is Possessed Cover. I think rather they were intended to indicate that there will be Possessed Cover, when aircraft are the subject of a process of repossession, and care, custody, control or responsibility has been assumed by the lessor, or is intended to be assumed imminently by the lessor. They indicate, I think, that there can be cover where, in the course of repossession, there may be doubt as to whose care, custody or control the aircraft is in.

381. Whether on this basis, or if DAE is right that the phrase is effectively a fifth category of circumstance in which Possessed Cover should apply, it is necessary to consider in more detail what is meant by 'whilst in the course of repossession', and when the 'course of repossession' of an aircraft may begin.

382. As to the parenthetical phrase, I agree with the Defendants' contention that what the words 'in the course of repossession' are referring to is a process which is underway towards an anticipated repossession of an aircraft. I consider that the cover for Repossession Expenses does give an indication of the nature of the process contemplated: namely a process involving actions directed to securing the possession of a particular aircraft at a particular location and returning it to the lessor's chosen airport. Whilst it may be difficult in a particular case to identify the precise point at which 'the course of repossession' starts, I do not find it difficult to conclude that the DAE Aircraft, here, were not at any material time 'in the course of repossession'. Repossession in Russia was not at any material time a possibility. A process leading to an anticipated repossession there was never underway, and no repossession of the DAE Aircraft resulted.

383. As to the steps relied on by DAE, service of Termination Notices, or the Aon Notice did not, in my view, commence a process of repossession in respect of any particular aircraft. They were steps preparatory to the start of such a process. So were the efforts of the Technical Team described by Mr Lopes and the tracking of flight movements. They involved making plans and preparations for a repossession exercise, should one appear practicable: they anticipated but did not form part of a course of repossession. The repossession of MSNs 293 and 946 were indeed repossessions, and involved courses of repossession, but the repossession of those aircraft does not mean that there was a course of repossession of the other DAE Aircraft. Mr Houlihan's visit to Moscow was an attempt to persuade lessees to redeliver or permit the repossession of aircraft; it was not in my view part of a course of repossession of the aircraft themselves.

384. While I recognise that the arguments in the two US cases differed from those before me, I consider that they provide some support for my conclusions. In particular, and while in that case the policy was governed by the law of California, and was not identically worded to the DAE policies, I found the decision in BBAM v KLN 510 Tokio to be in line with my own conclusions on the issue discussed above. In particular, I agree with Judge Schulman's view that it is not sufficient to commence the 'course of repossession' that the insured should have taken steps in planning for the possible future repossession of the aircraft. It may be that the formulation of what is required as being 'some physical acts to regain possession' is not apt in every case. The notification to the lessee of an arrest order made by the courts of the country where the plane is located might count as being part of the course of repossession, but is not perhaps most naturally described as a 'physical act'. But I agree with what I perceive as the thinking behind this description: namely that there must be overt acts which have a direct link to an actual or imminent physical repossession of the aircraft.

385. In relation to DAE's reliance on Clause 11.6.2, I am of the view that this does not allow the Insured to transfer aircraft from the Contingent to the Possessed Cover (or vice versa) unless the aircraft, objectively, falls within the coverage clause of the Cover to which the aircraft is transferred. The terms of Clause 11.6.2 do not suggest or require that the lessor should be the judge of when the criteria for coverage under the relevant insuring clause have been met. Clause 11.6.2 is, in my view, an essentially administrative provision. Where it states that 'the Insured may transfer the Aircraft between sections as required', that permits the making of transfers as required by the terms of the policy applied to the facts. It is envisaged that this will be an uncontroversial matter: hence the provisions whereby notice of transfers (11.6.3) and consequential premium adjustments (11.6.5) are to be made after the end of the Policy year. This is not what would be expected if Clause 11.6.2 gave to the

Insured a contractual discretion allowing it to deem a matter to fall within one or the other Cover, even if that was not in accordance with the objective facts.

386. It follows from the above that I consider that DAE does not have a valid claim in respect of the DAE Aircraft on its Possessed Cover.

DAE's Alternative Case: Contingent Cover

DAE's case

387. DAE's alternative case is that its loss falls under the Contingent Cover.

388. The relevant insuring clause under the DAE AR Policy, Clause 5.2.1, provides:

> The Insurers will pay under this Section as a result of the Insured not being paid in whole or in part under the Principal Policy including where due to cancellation or non-renewal of the Principal Policy.

389. Exclusion 5.3 in the DAE AR Policy provides:

> The Insurers will not be liable for loss or damage which is:-
>
> 5.3.1 recoverable as a claim under the Principal Policy; or
>
> 5.3.2 not recoverable (in whole or in part) under the Principal Policy by reason of the insolvency of an insurer or insurers unless the lessee was insured by such an insurer in order to comply with an applicable law.

390. The Risk Details of the DAE AR Policy summarises the Contingent cover as:

> To pay as a result of the inability of the Insured to recover from insurance (including deductible insurance) required by the Insured to be effected by the lessee or operator (including where such inability is due to cancellation or non-renewal of the insurance required to be effected by the Lessee or operator.

The Risk Details of the DAE WR Policy is in similar terms, save that after the words 'or operator' appeared the words 'and exhaustion of any aggregate limit'.

391. Section Four Condition 1 of the DAE WR Policy provides:

> The Insurers will only pay as a result of the inability of the Insured to recover from the Principal Policy including where such inability is due to cancellation or non-renewal of the Principal Policy. This paragraph does not apply to the coverage provided under paragraph 1 of Extensions of Coverage [the 'Total Loss Only' cover].

392. 'Principal Policy' is defined at Definition 12.9 of the DAE AR Policy as meaning '*any one or more policies of insurance (including deductible policies) required to be effected by any aircraft operator pursuant to agreements with the Insured*'. This is a materially identical term to 'Principal Insurance' in the AerCap Policy. I use whichever term is used in each lessor's LPs in my discussion of their respective cases.

393. DAE's case is that the defined term 'Principal Policy' looks to whether the policy actually effected by the lessee was required to be effected pursuant to the lease; and further that it does not look at whether the individual terms of the policy actually effected were required to be included in or applicable to the policy.

394. DAE contends that it has not been paid, in whole or in part, under the OPs, save for a RIS with Aeroflot. Condition 5.2.1 of the DAE AR Policy has accordingly been satisfied. Further, and without prejudice to the burden of proof, the loss it claims is not 'recoverable as a claim' for the purposes of exclusion 5.3.1 of the DAE AR Policy. Equally, and again without prejudice to the burden of proof, which it contends is on WR Insurers, DAE has been unable to recover, and, if relevant, is presently unable to recover from the OPs for the purposes of Section Four Condition 1 of the DAE WR Policy.

395. DAE contends that there must be some constructional or implied limitation on what is required to establish (or rebut) an asserted (ir)recoverability and 'inability' to recover. The correct constructional or implied limitation is that DAE must have made reasonable efforts to recover under the OPs and a reasonable time for the pursuit of such reasonable efforts must have expired. Assuming those to be the case, it will have been sufficiently demonstrated that the loss is not recoverable as a claim under and/or that there is an inability to recover from the OPs.

396. DAE relies on (i) what it says have been its reasonable efforts made to recover under the OPs; (ii) the lapse of a reasonable time despite such efforts; (iii) the repeated and continuing denials of liability by those OP reinsurers who are participating in the OP claims in this jurisdiction; and (iv) the fact that those denials of liability are supported by expert evidence of Russian insurance law.

397. DAE's alternative case, that on the balance of probabilities it will be unable to make a recovery under the OPs, is a matter reserved for Phase II, if DAE is unsuccessful in its primary case.

The Insurers' Cases

398. Insurers' cases mirror their cases in relation to AerCap's claim on its Contingent Cover.

399. Fidelis's primary case is, in brief, that as a matter of construction of the Contingent Cover, the loss must fall within the scope of the policies which were required by the relevant leases to be effected, and it did not.

400. Fidelis's alternative case is that, as a matter of construction of the Contingent Cover, there is no loss under where the airline remains in possession.

401. Chubb's case is that it is necessary, in order for there to be a claim under the Contingent Cover, for it to be demonstrated that the claim is irrecoverable under the Principal Policy. Its primary case is that 'irrecoverable' means legally irrecoverable; but if it means practically irrecoverable, that makes no difference, as it has not been established.

402. WR Insurers' alternative case is that DAE cannot recover unless it has shown, on the balance of probability, practical irrecoverability under the Principal Insurance, and this it has not done.

Analysis

403. DAE's case depends, in summary, on the simple contention that it has not been paid under the OPs (for the DAE AR Policy). The definition of 'Principal Policy' points, in my view, clearly to the actual policy(ies) which were effected by the lessee in accordance with the requirements of the lease. Accordingly, DAE is prima facie entitled to claim under Clause 5.2.1 of the DAE AR Policy when it has not been paid under such policy(ies). Similarly, DAE's case under the DAE WR Policy is the straightforward one that it is unable to recover under the actual OPs. The strength of these arguments can only be judged by a consideration of the various arguments advanced by insurers; and, as with AerCap, I will consider the insurers' cases in turn, albeit much more briefly as many of the points which arise have already been dealt with in the context of AerCap.

Fidelis's case

404. For reasons I have already expressed in the context of AerCap, I do not consider that the points it made in relation to an alleged market understanding of Contingent Cover, as to levels of premium, or as to the existence of NRI establish the construction of, or the implication of a term into, Clause 5.2.1 of the DAE AR Policy (or Section Four Condition 1 of the DAE WR Policy) so that it is 'triggered' by a claim which is unpaid (or which DAE is unable to recover) under the Principal Policy only where it was a claim which was required to be covered under the insurances stipulated by the leases.

405. I also do not accept the second limb of Fidelis's primary case in the context of DAE's claim, any more than in the context of AerCap's. Each of DAE's leases, except for two S7 leases, contained an express requirement that the hull and spares insurance to be effected should '*name the Owner, the Lessor and any Finance Party nominated by the Lessor as additional insured for their respective rights and interests.*' The requirement was therefore for composite insurance under which DAE would be entitled to recover for loss sustained to its own insurable interest in the relevant property. The two S7 leases each provided for the use of AVN 67C, or if the lessee's insurers would not accept that, then for AVN 67B. As I have set out above, these too provide for the insurance to be composite; and thus for cover to DAE in respect of at least some circumstances in which the lessee is in possession (but, given the provision for AVN 67C, do not require the cover to respond to theft by the lessee).

Chubb's case

406. Chubb is only an AR Insurer of DAE, and its case addressed only the DAE AR Policy.

407. Chubb accepts that DAE has not been paid under the Principal Policies. It points, however, to the terms of Clause 5.3.1 of the DAE AR Policy, which refers to an exclusion of loss or damage which is 'recoverable as a claim' under the Principal Policy, and to the summary of the cover in the Risk Details as being in respect of '*the inability of the Insured to recover from insurance (including deductible insurance) required by the Insured to be effected by the lessee or operator*'. Chubb contends that these are 'strong words', and contemplate circumstances where there is in principle no cover under the Principal Policy in respect of the loss or damage claimed, alternatively where the policy ceased to exist due to cancellation or non-renewal. Further, Chubb contends that it is important that the word used in Clause 5.3.1 is 'recoverable', not 'recovered'; and that there is no reference to whether reasonable steps have been taken to advance a claim. The meaning of the words used, Chubb says, is accordingly that there is no coverage under the Contingent Cover if a claim can be recovered or is capable of being recovered as a claim on the Principal Policy. Further Chubb contends that the words of Clause 5.2.1, '*including where due to cancellation or non-renewal of the Principal Policy*' indicate the circumstances contemplated by the cover, i.e. where there is no legal recoverability.

408. The case that there must be legal irrecoverability, i.e. that there could be no cover under the Contingent Cover if DAE had a legal entitlement to recovery under the OP, does not, in my view, reflect the terms of the relevant clauses. The words used in Clause 5.3.1 are 'recoverable as a claim'. Those words are general, and do not necessarily imply legal recoverability. Further, Clause 5.3.2 looks to a type of practical irrecoverability. It covers a claim where there is a legal entitlement under the OP but there can be no recovery under that policy because of the insolvency of the OP insurer. Given the use of the words 'not recoverable' in Clause 5.3.2 to refer to a type of practical irrecoverability, this supports the view that 'recoverable' in Clause 5.3.1 is used to embrace practical recoverability.

409. Moreover, if recovery under the Contingent Cover depended on there being no legal recoverability under the policies taken out by the various lessees, this would mean that it was dependent on the specific terms of the OP wordings, as judged by their respective, and potentially numerous and diverse, governing laws. As would have been known to all parties, however, the Lessors would not have been expected to see the lessees' policies in advance of entering into the Contingent Cover. This is a part of the background which appears to me to support giving a meaning to the Contingent Cover which does not make cover dependent on legal irrecoverability.

410. Chubb submits further, however, that whether or not the question is one of legal or practical irrecoverability, that cannot be shown without the court grappling with the coverage position under the Principal Policies, and that is not something which can be done as part of this Phase I trial. There is no basis for reading the Policy as having the effect, whether by way of construction or implication, that a loss is recoverable if DAE has not been paid *provided that it has taken reasonable steps to secure such recovery*.

411. This case is similar to insurers' cases in relation to Clause 5.5 of the Merx Policy, which are considered and rejected below.

412. As will be apparent from that treatment, and my treatment of WR Insurers' alternative case in relation to DAE, to which I will come shortly, I do not consider that the effect of the language in Clause 5.3.1 of the DAE AR Policy is significantly different from that of the language in Section Four Condition 1 of the DAE WR Policy. That there is not intended to

be a difference is indicated by the terms of the Risk Details of the DAE AR Policy, which summarise the Contingent Cover as being '*to pay as a result of the inability of the Insured to recover from insurance … required by the Insured to be effected by the lessee or operator…*'. The terminology 'inability … to recover' does not appear in the wording of the DAE AR Policy, and must be intended as a summary of the provisions of Clauses 5.2 and 5.3.

413. Chubb (and the Kennedys Defendants in the alternative) also made the point that the Principal Policies constitute 'any other policies' within the meaning of DAE AR Policy Section 11.2, the 'Other Insurance' clause, which was incorporated into the DAE WR Policy by Section Five, Condition 1. The wording of the 'Other Insurance' clause is as follows:

> 11.2. OTHER INSURANCE
>
> This Insurance does not cover any loss, damage or liability which, at the time of the happening of the event giving rise thereto, is insured by or would, but for the existence of this Insurance, be insured by any other policy or policies except in respect of any excess beyond the amount which would have been payable under such other policy or policies had this insurance not been effected.

This condition applies to DAE's Contingent and Possessed cover, unlike AerCap's 'Other Insurance' clause (General Condition 2 of the AerCap Policy), which is expressly disapplied from the Contingent Cover. Accordingly Chubb argues that the DAE Contingent Cover only provides insurance for loss in excess of any cover under the Principal Policies.

414. I do not accept that argument. Where the DAE Policies refer to the relevant OPs, they do so almost always by using the defined term 'Principal Policy', except in some few instances where they refer to 'the insurances that are required to be maintained by the lessee' or equivalent wording. That is true, importantly, in clauses which deal with the relationship between the Principal Policy and the Contingent Cover, including DAE AR Policy clause 5.3 and DAE WR Policy Section Four, Condition 1. Given that, I do not think that a reasonable person would have understood the words used as including the Principal Policy amongst the policies referred to in the standard-form Other Insurance clause without using the defined term.

415. I therefore conclude that the Principal Policies, which in this case are the OPs, do not amount to 'Other Insurances' for the purposes of General Condition 11.2.

WR Insurers' alternative case

416. WR Insurers' alternative case in relation to DAE is that DAE must prove, on a balance of probabilities, that there is an inability to recover or obtain an indemnity under the OP. While WR Insurers agree with DAE that the touchstone is practical not legal recoverability, what is involved is not simply a historic assessment, of whether there has been an inability *thus far*; it is an assessment which involves considering whether there can be a recovery *in the future*. There is also no basis for reading into the DAE WR Policy, whether by construction or implication, a qualification on inability to recover, such that it can be said to have been established if DAE has taken reasonable steps to recover and has not done so.

417. WR Insurers rely on the fact that DAE itself claims that it can recover under the OPs; and that DAE accepts that at this hearing the court must proceed on the basis of an assumption that the losses may be held to be recoverable under the OPs. On that basis, WR Insurers say that the court cannot find at this stage that there is an inability to recover under the OPs. Moreover, even if, contrary to WR Insurers' primary case on this, there is a reasonable time/efforts qualification to be read into the DAE Policy, the court should not make any determination of the application of such a qualification at this trial as it would be bound up with Phase II issues. If, nevertheless, the court were to look at whether reasonable efforts had been made, it has not been established that reasonable efforts have, as yet, been made.

418. There was some debate as to where the relevant burden of proof lay. As I understood it, there was no dispute that, under the DAE AR Policy, the burden of showing the application of Clause 5.3.1 lies on the AR Insurers. In relation to the DAE WR Policy, there is more room for argument. Clause 5.3.1 from the DAE AR Policy might itself be said to be incorporated into the DAE WR Policy by reason of Section Five, Condition 1. A question would then arise as to how it related to Section Four, Condition 1. One analysis, favoured by DAE, is that Section Four Condition 1 of the DAE WR Policy should be construed, in effect, as an exclusion, on which insurers bear the burden of proof.

419. I do not believe that anything turns on these points. I will, however, express my views in relation to them. I consider that Clause 5.3 from the DAE AR Policy is not incorporated into the DAE WR Policy, because its subject matter is dealt with in other clauses in the DAE WR Policy, namely Section Three (i) and Section Four, Condition 1. If, however, it is incorporated, and might, on its own, be regarded as having a different effect from Section Four, Condition 1, it is the latter term which prevails, pursuant to the exception stipulated in Section Five, 1. I also consider that Condition Four, 1 cannot be regarded as an exclusion. It is not expressed as such, nor included in the list of Exclusions in Section Three. I will accordingly proceed on the basis that it is the Insured which has the burden of establishing the applicability of an 'inability to recover from the Principal Policy'.

420. The question to be addressed is as to the proper construction of 'the inability to recover'. These are ordinary words. In my view, the phrase looks to present 'inability', and connotes that the Insured has taken reasonable steps to recover, that those steps have been unavailing, and that no recovery is anticipated in the immediate future.

421. This is what is meant in very many contexts, in ordinary speech, by an 'inability' to do something. I think this can be illustrated by the following example: if one asked a pupil at a school whether (s)he was able to clear 1.5 metres in the high jump, and (s)he said (s)he was unable to do so, that would convey a number of things. In the first place, it would ordinarily imply that (s)he had made such efforts to jump 1.5 metres as to know whether (s)he could or could not jump it. Second it would convey that (s)he could not currently clear the height. Thirdly, it would ordinarily convey that (s)he did not think that (s)he would imminently be able to jump it, for if (s)he thought that, (s)he would not assert inability. But fourth, it would not, in my view, be a statement that (s)he would never in the future, given further practice and training, be able to jump 1.5 metres. If (s)he wanted to say something about whether it would remain beyond his or her capacity into the future, more would need to be said to show that.

422. Section Four, Condition 1 makes entire sense if understood in this sense. As to the first of the aspects of meaning identified in the previous paragraph, namely what steps must have been taken before it can be said that there is an 'inability to recover', I consider that it must be such steps to make a recovery as allow it to be said that a recovery cannot currently be made and is not imminently expected. I think it implicit that such steps would need to amount to reasonable steps taken over a reasonable time. Unless such reasonable steps had been taken, then the Insured could not demonstrate current inability. But I do not consider that the clause could be read as requiring more than reasonable steps to have been taken: had that been intended it would need to have been spelled out. As to the fourth aspect, I see no basis in the language used for saying that the Insured must be able to prove, on the balance of probabilities, that it will not in the future be able to make a recovery, whatever the expenditure of time and effort. The reference to inability to recover due to cancellation or non-renewal of the Principal Policy does not dictate such a conclusion. A 'cancellation' of the OP might be ill-founded and contestable, and thus not necessarily a case in which there would, if the matter were pursued to final judgment in a dispute under the OP policy, be found to be no cover thereunder. In any event, cancellation and non-renewal are expressly stated to be non-exhaustive instances of an 'inability to recover'.

423. The interpretation of the clause which I favour is, I consider, supported by a consideration of the implications of the rival interpretations of the clause. These implications need to be considered on the basis of the type and range of claims which might arise under the Contingent Cover, rather than only on the basis of the presently claimed loss, in relation to which the fact that the relevant OP claims will be adjudicated in this court is essentially adventitious, and is in part because exclusive jurisdiction clauses in favour of another forum were not enforced.

424. On the interpretation advanced by WR Insurers, in order to recover under the Contingent Cover, the Insured would have to establish on a balance of probabilities that it would not, in future, be able to recover under the policies effected by its lessees. However, the Insured would not typically have seen these policies. The relevant policy might be governed by one of a wide range of different governing laws, depending on the domicile of the lessee, and subject to the jurisdiction of a wide range of courts. Furthermore, to claim under the Contingent Cover before any disputed claim under the OP has been pursued to judgment in a jurisdiction chosen under that Policy, would involve asking the English court to determine on the balance of probabilities whether there would be a recovery in the action being conducted abroad between different parties from those before the English court, namely the lessors and the insurers of the OP. The alternative would be that the Insured had to await the outcome of those proceedings; but, in some jurisdictions, that could take a very long time.

425. By contrast, if 'inability to recover' is understood to have the meaning I favour, the LP Insurers have the protection that the Insured must have taken reasonable steps to recover under the OP before it can claim under the Contingent Cover. Furthermore, in considering the implications of this construction of the clause, it is significant to recall that, if LP Insurers are called upon to pay the Lessor under the Contingent Cover in advance of a final determination of recoverability under the OP, they will be entitled to subrogated or contribution rights against the OP Insurers.

426. Applying the approach in Marrickville, referred to above, the considerations which I have mentioned in the previous two paragraphs tend in favour of DAE's construction of the

clause, as advancing the purpose of the cover, rather than hindering it. I do not consider that a reasonable person would have understood the words 'inability to recover' to have had a meaning which involved the inconvenient consequences involved in WR Insurers' construction; and would have considered the construction which I favour to have been what the parties meant.

427. In support of their interpretation of the words 'inability to recover' in the DAE WR Policy, WR Insurers advanced three further points. First they relied on the analogous wording, in the DAE AR Policy and other LPs, which excludes recovery under the Contingent Cover where the lessor's loss is 'recoverable as a claim' under the Principal Policy. WR Insurers argued that this shows that a consideration is required of whether recovery may be made in the future, including through legal proceedings. I do not find that argument persuasive, on the basis of my analysis of the words 'recoverable as a claim', which I set out in the context of Clause 5.5 of the Merx Policy, below.

428. Second, WR Insurers relied on the exclusion of cover at Section 3, (i) of the DAE WR Policy for loss not recoverable as a claim under the Principal Policy '*by reason of the insolvency of an insurer or insurers*'. They argued that this exclusion can only be applied if the outcome of a claim under the Principal Policy, and the reason for the failure to obtain indemnity, is known. I do not consider that Section 3, (i) stands for such a proposition, for the reasons I gave in respect of the AerCap 'insolvency exclusion' above.

429. Third, WR Insurers relied on Extension of Cover 8, which provides cover where the aggregate limits under the Principal Policies have been exhausted. The Extension provides that LP WR Insurers are to '*pay the difference between the aggregated limits available under the Principal Policy and a total of USD750,000,000 being within the overall Insurance aggregate hereon of USD750,000,000 and not in addition thereto*'. It was submitted that this is another instance in which the DAE WR Policy envisages that the possibility and extent of recovery under the Principal Policy is determined before the Contingent Cover applies.

430. The argument in respect of Extension of Cover 8 suffers the same flaw as that in respect of the 'insolvency exclusion'. The fact that the application of this particular extension will normally follow a determination of the value of the indemnity owed under the Principal Policy does not mean that the application of Contingent Cover as a whole must follow such a determination. That is particularly the case where, as here, such a construction would be contrary to the ordinary meaning of the triggers for Contingent Cover.

Has DAE shown an inability to recover under the OPs?

431. The question then arises, in respect of coverage under the DAE WR Policy, as to whether DAE has shown an 'inability to recover' in the sense I have described. This must be judged on the basis of the particular facts of the present case, and involves the question of whether DAE has taken reasonable steps to make a recovery. If an assessment of this question involves an enquiry into Russian insurance law or practice, then an answer could not be given as part of this judgment, and the matter would need to be investigated at Phase II.

432. DAE contends that it can be seen that it has taken reasonable steps to make a recovery under the OPs. By way of example, it pointed to the OP claim under the Nordwind programme in respect of MSN 32639. This involved, in summary:

(1) That DAE gave notice of claim under the OP insurance and OP reinsurance on 29 April 2022. It was met by what it characterised as either 'stonewalling' or 'nil returns'. AR OP reinsurers raised the application of Russian law and jurisdiction on 20 September 2022. WR OP reinsurers denied that DAE had any direct rights of suit under the OP reinsurances, albeit by reference to an ABC aircraft, on 6 July 2022.

(2) Other Claimants (represented by Morgan Lewis Bockius) had issued OP Claims in November 2022, and were met by a jurisdictional challenge, initially by all OP reinsurers.

(3) DAE issued its OP Claim Form under the Nordwind programme on 17 August 2023, and those proceedings were subject to the same jurisdictional challenge. DAE's OP Claims under the Nordwind programme were made against, inter alios, a number of WR OP reinsurers who are also LP WR Insurers represented by LIC, including Chaucer 1084, Liberty 4472, IQUW and Amlin.

(4) The jurisdiction challenge was resolved by Henshaw J's decision in Zephyrus on 28 March 2024.

(5) Since then OP Defences have been served at various times. The Chaucer/Liberty WR Defences include a range of defences which are raised in substantially the same terms in relation to DAE's Nordwind, S7, I-Fly, Smartavia and ABC programmes, including: that the obligations under the reinsurances have been discharged by reason of sanctions or supervening illegality; that the claimants do not have title to sue under the relevant OPs or OP reinsurances; that the alleged loss is not within the scope of the OPs or OP reinsurances; and if there was a loss, it did not occur within the period of the reinsurance.

(6) Chaucer/Liberty also raised specific defences in relation to DAE's claim on the Nordwind programme, including: that the incorporation of the 'Cut Through Clause' was not admitted; the cancellation date of cover was said to be 'before 4 March 2022'; and that parts of the OP reinsurance programme were cancelled by an agreement between an OP Insurer (Sogaz) and Liberty with retrospective effect from 1 March 2022.

(7) The OP WR Insurers and reinsurers represented by HFW have put in a defence to DAE's Nordwind OP Claim which takes numerous points, including: that the claimants do not have title to sue directly under the WR reinsurance; that the claimants' claims are not within the scope of cover under the OP or WR OP reinsurance because there has been no loss of or damage to the aircraft from the perspective of the insuring party (the lessee) under the OP; that it is denied that the claimants have suffered any relevant loss of the aircraft, and/or any relevant loss was caused by the failure or refusal of the claimants to enter into an insurance settlement and/or by the lessee's breach of the leases in failing to redeliver the aircraft; that any loss was not caused by a war or allied peril; and that any loss was not sustained prior to or by reason of a peril incepting prior to specified dates, from which there is no cover by reason of the Sanctions and Embargo clause or because of notices of termination of leasing.

433. DAE contended that, to the extent relevant, a reasonable time for recovery from OP reinsurers had long since elapsed. It was, at the time of the trial, more than two and a half years since the insured perils giving rise to the claimed loss occurred. On a realistic view

of the matter, the final resolution of the OP Claims would not be before the trial of the OP Claims fixed for Michaelmas 2026. DAE said that, even judging the matter at the commencement of the present claim, a reasonable time had passed, and reasonable efforts had been made to obtain recovery, in that a claim had been made but 'stonewalled', and about eight months had elapsed since the invasion.

434. DAE also emphasised that what were to be regarded as reasonable steps must be judged in the context of what the LP Insurers' stance was, in the present action, as to whether DAE was entitled to make a recovery under the OPs. As to this, DAE pointed out that Fidelis's positive case is that any loss which DAE has suffered is not recoverable under the OPs, including as a matter of Russian law. The Kennedys Defendants put forward Fidelis's case as a primary position, and as an alternative case simply that, if the loss falls within the scope of the OP, it is to be inferred that it is recoverable as a claim for the purposes of DAE's Contingent Cover. DAE further points out that this is put forward in circumstances where various of those Defendants, in their capacity as OP reinsurers, are denying that there is any liability under the OP reinsurances, as set out above.

435. The Kennedys Defendants, although not Fidelis or TMK/HDI, raised a number of points in answer to DAE's case that the court can and should decide as part of this trial that reasonable steps to recover have been taken. Some of these points depended on or overlapped with issues going to the construction of 'inability to recover', which I have already dealt with.

436. As I understood it, the relevant WR Insurers' case, on the assumption that my preferred construction of 'inability to recover' was correct involved the following points.

(1) That DAE has not properly identified the reasonable steps which it had taken either at the time it made a claim under the Contingent Cover in the DAE Policies, and issued the DAE proceedings involved in this trial, when any steps which had been taken were limited, or up to the present; and had not identified what a reasonable time was.
(2) That in relation to the Russian OP Insurers and reinsurers, the claims against them have not been denied. Instead, DAE has entered into significant insurance settlements with Russian OP Insurers in relation to an airline, and there is a realistic likelihood of further such settlements in the future. The English OP proceedings have not been served on many, if any, of the Russian OP Insurers and reinsurers, and it is unclear what stance they will adopt.
(3) In relation to non-Russian OP reinsurers, what would constitute reasonable steps cannot be judged without reference to the merits of the Russian law defences raised. And more generally, given the current situation, it must be reasonable for the Claimants now to pursue their OP claims to trial.
(4) In relation to the balance of claims where there has been a settlement with Russian insurers, the question of whether that balance is recoverable would depend on the reasonableness of the settlements. Chubb has contended that the settlements are not reasonable; and the Kennedys Defendants have not admitted their reasonableness. Until Chubb's allegations have been determined, the Claimants cannot prove reasonableness; and issues of the reasonableness of the settlements need to be addressed in Phase II.

437. I will consider these issues in turn.

438. As to the first point, I considered that what DAE was saying were the steps which it has taken to recover were, at trial, sufficiently clear, and that it contended that they were reasonable at any given time. Although WR Insurers raised the question of what steps had been taken as at the time when a claim was first made on the DAE Policies and/or when DAE commenced its current proceedings, I did not understand WR Insurers to contend that, if the steps taken by that point were not reasonable ones, but reasonable steps had since been taken, DAE could not rely on those subsequent steps for the purposes of establishing an inability to recover. If that case was being made, I would not accept it. As I see it, the issue of whether there is an 'inability to recover' must be assessed at whatever point the issue arises as to the liability of insurers under the DAE Policies. This could cut both ways. If, since the commencement of the claim and action, the Insured had recovered or had become able imminently to make a recovery, it could not establish, for the purposes of any court determination occurring after that development, that there was an 'inability to recover.' On that basis, there would be no need for the Insured to issue a new Claim Form to rely on steps taken up to date.

439. In relation to the second point, there are two aspects. One is whether, in order to have taken reasonable steps, DAE needs to sue the Russian OP Insurers and reinsurers in Russia. I do not consider that a failure to do so means that reasonable steps have not been taken. For the reasons given by Henshaw J in Zephyrus it is unlikely that Claimants (including DAE companies) will receive a fair trial of claims under the OP insurances and reinsurances in Russia.

440. The second aspect is whether the prospect of further settlements with lessors or their Russian insurers mean that it cannot be said that at this point that there is an 'inability to recover'. As to this, I do not consider the point to be supported by the evidence. DAE's Aeroflot RIS contains releases as against the OP Insurers and reinsurers in respect of any further liability. That precludes DAE making any further recovery under those OPs. As to further settlements in the future, the evidence of Mr McCray Smith for AerCap and Mr Houlihan for DAE indicates that this is a speculative possibility. It is apparent from Mr Houlihan's evidence that DAE has not been able to conclude any further settlements, despite efforts to do so. Mr McCray Smith's evidence was that, from what he had read and been told by his contacts in Russia, it appeared unlikely at present that any further Russian state funds would be made available to fund insurance settlements. He also said that there was little evidence that airlines could obtain other financing for settlements. On this basis, I conclude that further settlements are not sufficiently definite or imminent to negative DAE's 'inability to recover'.

441. As to the third point, given the meaning I ascribe to 'inability to recover' it is not necessary that there should be an investigation of the merits of the Russian law position under the OPs for its establishment. As to the point that, having got this far, DAE should pursue the OP Claims to a hearing, this has a superficial attraction. But I think it is sufficiently answered by DAE's point that, had the insurances functioned as they should, it would (assuming loss caused by an insured peril, to which I will come) have been indemnified under one or other insurance some time ago; and that it cannot be obliged to expend very substantial further sums in order to proceed with an OP action which should not have been necessary. Further, on no view can the OP trial be said to be imminent.

442. My conclusion is that DAE has taken reasonable steps to recover under the OPs, and has demonstrated an 'inability to recover' under them.

Merx

443. In the case of Merx, its Policy is in rather different terms from those of AerCap and DAE. The relevant coverage terms are set out in clause 1.1. Contingent Cover covers '*Contingent Hull, being Aircraft not in the care, custody or control of the Insured or their agents*'. The Possessed Cover is said to cover Aircraft (i) awaiting commencement of a Lease Agreement, (ii) returned on expiry/termination of a Lease Agreement, (iii) repossessed (or in the course of repossession) from a Lease Agreement, or (iv) in the care, custody or control of the Insured or their agents. The contingency on which the Contingent Cover is to pay is not further specified in Clause 1.1. Both Contingent and Possessed Covers are, however, subject to the General Exclusions in Section Five, which includes, at 5.5, that '[t]*his Insurance does not cover loss or damage which is recoverable as a claim from the Principal Policy.*' 'Principal Policy' is defined as '*the policy or policies required to be effected by the operator pursuant to the provisions of the Lease Agreement …*'. General Condition 6.5 provides that it is a condition of the contingent insurance cover that the aircraft should be subject to a lease agreement the terms of which require that the 'Principal Policy' be endorsed with AVN 67B or AVN 67C endorsements or comparable language. There is a further clause, 6.6, which provides that '[t]*his Insurance does not cover claims which are recoverable under any other policy in favour of the Insured except for any excess beyond the amount which would be payable under such other policy had this Insurance not been effected.*' Merx accepts that the OPs, both insurance and reinsurance, count as an 'other policy' for the purposes of Clause 6.6.

444. Merx contends that it makes little difference whether its claim is under the Possessed or the Contingent Cover, given that the exceptions in Clauses 5.5 and 6.6 apply to both. Nevertheless, Merx's primary case is that it can claim under its Possessed Cover. It contends that the Merx Aircraft were 'in the course of repossession' from 28 February/1 March 2022 when Notices of Grounding were sent requiring lessees to take steps to redeliver the Aircraft. Although Merx only formally terminated the leasing of the Merx aircraft on 7 March (S7), 11 March (Alrosa) and 12 March (Ural), from 28 February/1 March 2022 Merx had '*manifested its unequivocal intention to begin the process of recovering the Aircraft and began discussions with their Lessees to determine how that was to take place.*' Merx's case as to what constituted the 'course of repossession' mirrored that of DAE. Merx did not, however, contend that it had an express contractual entitlement to transfer the Merx Aircraft between Contingent and Possessed, unlike DAE.

445. For the reasons which I have given in relation to DAE's case on the matter, I do not consider that the Merx Aircraft were 'in the course of repossession' from a Lease Agreement. The steps taken by Merx in relation to the Aircraft were at most preliminary steps before the commencement of a 'course of repossession'.

446. Merx's alternative case is that it is covered under its Contingent Cover. As it contends, its claim falls within Clause 1.1(a) as the Merx Aircraft were not in its care, custody or control or those of its agents. Further, it says that the burden of establishing the application of the exception in Clause 5.5, namely that its loss is 'recoverable as a claim' under the OPs, or is 'recoverable' for the purposes of Clause 6.6, is on Insurers, and none of the remaining Defendants in the Merx action makes any positive case that either exception applies.

447. The counter-arguments advanced by Insurers include Fidelis's arguments, and also an adoption of the case advanced by Chubb and what I have called above WR Insurers' alternative case. Insofar as the points are the same, I adopt what I have said about those arguments above. I add the following specifically in relation to the Merx Policy.

448. First, in relation to the Fidelis arguments on the scope of Contingent Cover, I agree with Merx's submission that, given the sparse nature of the Merx Policy wording, and the absence of any specified contingencies for the Contingent Cover, other than by the exceptions I have mentioned, the Merx Policy provides little textual support for Fidelis's argument that the Contingent Cover is subject to a limitation or restriction to that cover which ought to have been effected in accordance with the provisions of the relevant leases. There is even less language in the insuring clauses of the Merx Policy on which such an argument can be hung than in the case of AerCap or DAE.

449. Fidelis sought, in relation to the Merx Policy, to rely on the Claims Procedures Clause (Clause 6.2) and the Government of Registry Exclusion in Section Three: General Exclusions, in particular (b)(ii) thereof. I did not consider that either provided significant support for Fidelis's case. As to the first, the Claims Procedures Clause, which deals with the manner in which claims are to be notified, is not concerned with seeking to define the scope of cover provided under the Contingent Cover. Moreover, the clause does not say that it is only a claim which is payable under the Principal Policy that may be the subject of the notification procedure. On the contrary, the clause envisages that there may be notification to the insurers of the Principal Policy of claims to which that policy may not respond. As to the latter, although Fidelis pointed to it as showing that the LP is expected to mirror the OP, I thought that it rather pointed up the fact that the parties could, when they wished, expressly state that the policies should mirror one another, and that there is no such language in the insuring clause.

450. In relation to Fidelis's alternative case, the wording of the Merx Policy provides no support for the contention that there is no cover for a loss by deprivation if the lessee remains in possession. The Contingent Cover insures Merx as the Insured against all risks of physical loss or damage to Aircraft '*in which the Insured has a financial interest*' if '*not in the care, custody or control of the Insured or their agents*'. The definition of 'Insured' states, in part, that '[i]*n no event shall the term Insured include any operator of the Aircraft…*' This tends to confirm that the Merx Policy is concerned with losses to the lessor and is not predicated on there being a loss to the lessee.

451. The second point relates to Chubb's arguments, and what may be called WR Insurers' alternative arguments. These involve invoking exclusions 5.5 and 6.6, and contending, in broad terms, that there cannot be found to be coverage under the Merx Policy unless it has been shown that the loss is 'not recoverable as a claim' under the OPs.

452. Merx has in fact settled with Chubb. No other Defendant pleads any positive case that Merx's loss is recoverable under the OPs. Given that it is Insurers who bear the burden of proof in relation to both exclusions 5.5 and 6.6, I think Merx is right to say that, for this reason alone, it does not need to proceed to a Phase II trial to determine whether there is recoverability under the OPs. Put simply, no one is actually saying that there is and so the exclusions are not applicable.

453. Third, and if the previous point is wrong, Merx's case is that Chubb's arguments (adopted by others) place an unwarranted and uncommercial meaning on the words '*recoverable as a claim*' in exclusion 5.5. It amounts, Merx argues, to a case that '*claim*' means '*judicial process litigated to judgment*', and '*recoverable*' means '*recoverable by a contested judicial process, notwithstanding vehement denials of liability.*' It cannot have been intended, Merx argued, that, to claim under the Merx Policy, Merx would be required first to spend limitless money and unspecified and infinite time chasing down recovery from OP (re)insurers, potentially in a wide range of jurisdictions, in the face of adamant denials from those (re)insurers that there is any liability. Merx contends that '*claim*' means simply the making of a formal request for indemnification; and '*recoverable*' simply means reasonable steps must have been taken to present and advance such a claim.

454. I agree that Clause 5.5 of the Merx Policy would not have been understood by a reasonable person to mean that recovery under the LP might require the Insured to expend effort and money, with no limitation in amount, on establishing that no recovery could be made under the OP. Instead, I consider that a reasonable person would understand the words 'recoverable as a claim' implicitly to mean, 'recoverable by the taking of reasonable steps in claiming'. The concept of 'recoverability' is often one which imports implicit limitations to what steps may be involved in seeking the recovery. Very frequently, in ordinary speech, the word is used to mean, '*recoverable given the level of effort and expenditure which is reasonable to devote to seeking to recover it*'. 'Recoverable oil reserves', for example, is often if not invariably used in this sense. Or, by way of more humdrum example, if one dropped something in a pond, and said it was 'not recoverable', that would in most contexts not be understood as saying that the object could not be retrieved in any circumstances and despite the application of unlimited resources. The present context is one which supports rather than counts against the word being read as subject to limits. In the context of a commercial insurance, it is implausible that the insured should be agreeing that it has to expend limitless amounts of time and money, even extending to amounts beyond what was reasonable, in seeking to establish that it cannot make a recovery under the OP.

455. I also consider that a limitation is suggested by the words 'as a claim', though I recognise that the exact nature of the limit suggested is not easy to define. 'As a claim' adds the connotation that the recovery should be capable of being made by way of a claim being presented. I accept, against this, that the phrase does not exclude the possibility that the recovery may need to be effected by taking steps to enforce the claim. Nevertheless, I think that the phrase does tend to suggest that the recovery should be capable of being made as part of a normal process of claiming under an insurance, rather than by way of having to take steps going beyond the reasonable to seek to effect a recovery.

456. Thus I accept Merx's case that 'recoverable as a claim' means, in effect, recoverable given the taking of reasonable steps.

457. Fourth, if the test is as to whether Merx has taken reasonable steps to obtain a recovery under the OP, I am of the view that it has. Merx sent a notice of event to the OP Insurers on 7 March 2022, noting that the event was likely to give rise to a claim under the policies; and asserted a claim under the OPs on 15 April 2022. Those claims have been rejected. Merx has brought legal actions against the OP (re)insurers, which continue to be defended. Some of the defendants to the OP claims are defendants to Merx's LP claim. Merx has already incurred costs of over US$2,500,000 in pursuit of the OP claim.

Genesis

458. Genesis's policies are rather different again.

459. The Genesis AR Policy provides that there will be Contingent Aircraft Hull cover for Aircraft not in the care, custody or control of the Insured or their agents in which the Insured has a Financial Interest (Clause 1.1). Possessed Aircraft Hull cover is stated to be for Aircraft: (a) awaiting commencement of a Lease Agreement, (b) returned on expiry/termination of a Lease Agreement; and (c) repossessed (or in the course of repossession) from a Lease Agreement (Clause 1.3). Clause 1.3 further provides:

> In the event of a Lease Agreement being terminated, individual Aircraft are automatically covered from the time the Insured becomes responsible for such Aircraft, including non-renewal or cancellation of any coverage purchased by lessee for the benefit of an Insured hereon. All Additional Insureds and Loss Payees for each aircraft will transfer from Contingent to Possessed Coverage thereon.

460. Clause 1.10 provides, in relation to Contingent Cover, that:

> This Policy does not cover
>
> 1.10.1 Claims which are recoverable under the Principal Policy;
>
> 1.10.2 Claims which are not recoverable under the Principal Policy by reason of the insolvency of any Insurer(s).
>
> By Clause 3.10, it is provided that 'Principal Policy' 'means the policy or policies required to be effected by the Operator pursuant to the provisions of the Lease Agreement…

461. In the Genesis WR Policy, by contrast, the Contingent Hull All Risks Cover provision (1.1) sets out a series of contingencies on which it operates. It provides that there is cover for Aircraft not in the care, custody or control of the Insured or their agents in which the Insured has a Financial Interest in the event that:

> a) the Principal Policy fails to respond and/or
>
> b) the Operator fails to fully insure the perils required under the Lease Agreement with the Insured.
>
> c) lack or insufficiency of required insurance is due to error or accidental omission.

462. The Possessed Cover provision of the Genesis WR Policy (1.3) is in essentially the same terms as the Possessed Cover provision in the Genesis AR Policy. The Genesis WR Policy has, in Endorsement 3, paragraph 3, a provision as to automatic cover in the event of

a Lease Agreement being terminated in the same terms as that which forms part of clause 1.3 of the Genesis AR Policy, and which has been set out above. Paragraph 4 of Endorsement 3 of the Genesis WR Policy provides that coverage in respect of Contingent Cover '*shall include Automatic movements between Contingent and Possessed coverage at pro rata Policy terms to be agreed by Insurers as soon as practicable.*' The definition of 'Principal Policy' is in the same terms as that in the Genesis AR Policy. The Genesis WR Policy has (at Clause 3.4) an exclusion as to loss or damage 'recoverable as a claim' under the Principal Policy, and (at Clause 3.5) an exclusion for loss not recoverable as a claim from the Principal Policy by reason of insolvency of its insurers.

463. Genesis's primary case was that there was cover under the Possessed Cover, and alternatively that there was cover under the Contingent Cover.

464. The principal issue in relation to the Possessed Cover is as to the meaning of 'course of repossession'. I repeat what I have said on that above. For similar reasons as in relation to other Claimants, I am not persuaded that the Genesis Aircraft was 'in the course of repossession'. The steps relied on by Genesis as constituting the start of the course of repossession – the grounding notice of 28 February 2022 and the start of arrangements such as the engagement of a flight crew and CAMO, notification of a potential 'Possessed' section claim to insurers, discussions with NordStar about a potential consensual return of the Genesis Aircraft – were in my view all steps anterior to or preparatory for a course of repossession which never took place.

465. Genesis made, somewhat tentatively, the suggestion that there may have been an automatic transfer to the Possessed Cover, under the terms of the automatic cover provision in Clause 1.3 of the Genesis AR Policy or of Endorsement 3, paragraph 3 of the Genesis WR Policy. I do not consider that that automatic cover provision applies prior to the Lease Agreement being terminated. That I regard as the effect of the words 'in the event of…'. Here, notice of termination of the leasing of the Genesis Aircraft was only served on 16 March 2022, the policy period (for both the Genesis AR and WR Policies) having terminated at latest on 15 March 2022. Accordingly I do not consider that there can have been any Possessed Cover provided pursuant to the automatic cover provision.

466. Genesis also made, again tentatively, the suggestion that their LP Insurers had agreed the transfer to Possessed Cover. Genesis pointed to a Certificate issued by US brokers, Crystal IBC LLC, in relation to the Genesis AR policy on 4 March 2022 which it suggested indicated an agreement by AR Insurers that Possessed Cover was in force; and contended that the WR insurance would be subject to the same agreement by reason of Section 4.1 of the Genesis WR Policy. As to this case, the evidence is very sparse. I am not persuaded that the Certificate indicates an agreement by Genesis's LP Insurers that the Genesis Aircraft should be on the Possessed Cover if it was not otherwise within the terms of the Possessed Cover. The Certificate clearly states that it is not intended to alter, amend or extend the coverage provided under the Policy.

467. For these reasons, I do not consider that the Possessed Cover was applicable to Genesis's claim.

468. As to the alternative case under the Contingent Cover, it was, as I understood it, not disputed that the Genesis Aircraft was outside Genesis's care, custody or control for the purposes of Clause 1.1 of the AR and WR Policies.

469. Although Fidelis is not a party to the Genesis claim, the Defendants have adopted Fidelis's arguments, discussed above. As appears above, I do not accept those arguments.

470. One particular feature which arises in relation to the Genesis claim is that one contingency specified in the Genesis WR Policy is that the Principal Policy should have 'failed to respond'. This language is similar to that found in the AerCap AR Cover, albeit without a specified 90 day period. I consider that it means here the same as it means there, namely that the Principal Policy fails to pay, or accept responsibility to pay, a claim made on it. As indicated above, I do not accept the aspect of Fidelis's argument which would interpret a clause in these terms as meaning 'fails to respond when it should have done', or that the reference to the Principal Policy is other than to the actual policy or policies taken out by the operator in pursuance of its obligations under the lease.

471. Apart from the issue as to what 'fails to respond' means, I did not understand there to be any other dispute that the Principal Policy had failed to respond. It appears to me that it has. Genesis's letter of claim on the OPs to the OP reinsurers was sent on 18 April 2023. There has been no payment under the OP nor acceptance of the claim. Genesis is pursuing OP Claims in this jurisdiction against OP reinsurers, who are defending the action.

472. The WR Insurers advanced their alternative case by reference to the exclusion as to losses recoverable as a claim under the Principal Policy. In circumstances in which none of the Defendants advances a positive case that there is recoverability under the Principal Policy, I consider that the exclusion is not applicable, and that there is no reason why the issue of potential recoverability should go to a Phase II hearing. Even if that is wrong, however, my interpretation of the exclusion for losses 'recoverable as a claim' is the same as in the case of the Merx Policy. If the touchstone is whether Genesis has taken reasonable steps to seek recovery under the OP (re)insurances, then I consider that it has.

473. One particular point relied on by the Defendants is the contention that Genesis should sue the Russian OP Insurers and reinsurers in Russia and cannot claim on its Contingent Cover without doing so and/or that such suit should be commenced pursuant to an implied term that Genesis should take all reasonable steps to recover under the OPs. For reasons already given, by reference to the judgment of Henshaw J in Zephyrus, I do not consider that it is unreasonable for Genesis not to have sued in Russia. Furthermore, I do not consider that there is any language in the Genesis Policies which can be said to make such suit a condition precedent or essential precondition for a successful claim under the Contingent Cover.

Loss, Peril and Causation

474. As I have said above, the facts and evidence relevant to these issues overlap. In what follows, accordingly, I will structure my analysis of these matters as follows: first, I will consider the issues of law which arise in relation to each of loss, peril, and causation; second, I will review the evidence which was available; third, I will consider the facts relevant to these issues and express my findings on them; and fourth, I will give my overall conclusions on the issues as to whether there was a loss, and what was the operative cause.

Legal Issues as to Loss

475. Each of the Claimants claims for the 'loss' of their Aircraft, under a policy which insures against 'physical loss or damage'. It was not in dispute that a permanent loss of possession would constitute 'physical loss'.

476. Five legal issues arose as to what it would be necessary for the Claimants to establish in order to show that their Aircraft were lost.

477. In order to frame these points it is helpful to recall certain features of the law of marine and of non-marine insurance. Thus, the Marine Insurance Act 1906 ('**MIA**'), contains the following provisions:

> 56 (1) A loss may be either total or partial. Any loss other than a total loss, as hereinafter defined, is a partial loss.
>
> (2) A total loss may be either an actual total loss, or a constructive total loss.
>
> (3) Unless a different intention appears from the terms of the policy, an insurance against total loss includes a constructive, as well as an actual, total loss.
>
> …
>
> 57 (1) Where the subject-matter is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof, there is an actual total loss.
>
> (2) In the case of an actual total loss no notice of abandonment need be given.
>
> …
>
> 60 (1) Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred.
>
> (2) In particular, there is a constructive total loss –
>
> (i) Where the assured is deprived of the possession of his ship or goods by a peril insured against, and (a) it is unlikely that he can recover the ship or goods, as the case may be, or (b) the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered; or
>
> (ii) In the case of damage to a ship, where she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired

…

> 61 Where there is a constructive total loss the assured may either treat the loss as a partial loss, or abandon the subject-matter insured to the insurer and treat the loss as if it were an actual total loss.
>
> 62 (1) Subject to the provisions of this section, where the assured elects to abandon the subject-matter insured to the insurer, he must give notice of abandonment. If he fails to do so the loss can only be treated as a partial loss.
>
> …

478. The test for Constructive Total Loss (or '**CTL**') in MIA s. 60(2)(i)(a), of there being an unlikelihood that the assured can recover the ship or goods represented, it has been held, was a change in the law introduced by the MIA. Previously, at common law, the test had been one of 'uncertainty of recovery': see Polurrian Steamship Company Ltd v Young [1915] 1 KB 922, at 935-7.

479. The present cases involve non-marine insurances. The concept and rules relating to CTL have no place in the law of non-marine insurance, unless incorporated by the parties.

CTL Concept Incorporated?

480. The first argument is that the parties have indeed incorporated the concept of a CTL into the policies at issue here; with the result that the test for loss by reason of deprivation of possession is either the 'unlikelihood of recovery' of s. 60 MIA, or 'uncertainty of recovery' of the common law of marine insurance.

481. This point was most strongly argued by DAE. It relies in particular on Section One, clause 1.3 of the DAE AR Policy, and the references there to 'constructive total loss'. It contends that though the specific reference there is to the cost of repairs exceeding a specified amount of the Agreed Value, it incorporates the marine concept of a CTL by reason of deprivation of possession.

482. I cannot accept this argument. In my view the reference to 'constructive total loss' is only to refer to the situation in the second paragraph of clause 1.3, namely where '*the cost of repair is estimated at 75% or more of the Agreed Value of the Aircraft concerned.*' That is the sole situation referred to in the clause, which is headed 'Loss of Aircraft: Agreed Value'. I do not consider that the reference to constructive total loss brings into the policy the concept of a CTL based on the other type of circumstance in which there may be a CTL under s. 60 MIA, namely deprivation of possession.

483. I agree with WR Insurers that it is difficult to know, on DAE's case, what features of the marine insurance concept of a CTL are incorporated. If the clause were incorporating the concept of a CTL within s. 60 MIA, one would expect to see a provision as to there being a CTL if the costs of recovering the aircraft exceeded 75% of the Agreed Value (i.e. a version of the s. 60(2)(i)(b) provision, modified in line with the 75% provision as to

repairs). Yet there is no such clause. Equally, it is unclear whether, on DAE's case, the MIA provision that there can be a CTL if an actual total loss appears unavoidable (i.e. the equivalent of the first limb of s. 60(1) MIA) is incorporated. That too is not provided for in the clause. The simplest explanation of this is that the parties were not seeking to incorporate any aspects of the concept of a CTL other than as specifically referred to.

484. The DAE policies provide that, unless the Insurers agree to take the Aircraft or spares as salvage, the Insured shall have no right of abandonment to the Insurers: see Section Seven, clause 7.3 of the DAE AR Policy. This, as recognised by Leeming JA in the New South Wales case of Mobis Parts Australia Pty Ltd v XL Insurance Co SE [2019] Lloyd's Law Rep IR 162 at [190], is another indication that there is no assimilation into the Policies of the MIA concept and rules relating to CTLs.

485. The AerCap Policy gives even less basis for concluding that the marine position as to a CTL by reason of deprivation of possession was incorporated. The Total Loss of Aircraft Provision (Section One, 7 (b)) provides that a total loss may be declared, at the option of the Insured, in the event that the cost of repair of the damage together with the cost of salvage and transport and return to service '*be estimated at 75% or more of the Aircraft's agreed value (constructive total loss)*'. The phrase 'constructive total loss' is used to denote a shorthand for the situation in the sub-paragraph, which relates only to cost of repairs.

486. In the Merx Policy, there is a provision (Section One, 1.4, Total Loss) which is similar to the provision in the AerCap Policy considered in the previous paragraph, but it does not contain a reference to 'constructive total loss'. The subsequent provision (1.9: Total Loss Only) does refer to the possibility of Aircraft being settled '*as a total loss, arranged total loss, constructive total loss or compromised total loss…*'. The reference to 'compromised total loss' is read most naturally as referring to the circumstances in which a total loss may be declared referred to in clause 1.4(b). Here again there is a no abandonment clause (1.7).

487. The Genesis WR Policy at Endorsement 4 contains a Total Loss Only provision, with a reference to constructive total loss rather similar to clause 1.9 of the Merx Policy. The Genesis AR Policy contains (clause 1.13.1.2) a provision that a constructive total loss may be declared in the event that the cost of repair together with salvage and transport and return to service be estimated at 75% or more of the Agreed Value of the Aircraft. Again, there is a No Abandonment provision (Clause 1.13.3).

488. To my mind none of these provisions requires or effects the incorporation of the marine CTL position as to deprivation of possession.

The test for 'loss'

489. There was a significant argument between the Claimants and the WR Insurers as to what was the relevant 'test' for a loss by deprivation in non-marine insurance. 'Test' is a shorthand for what must be proved by the Insured as to the length and degree of probability of any deprivation of possession.

The Arguments of the Parties

490. AerCap's position was that the test was whether the Insured could show, on a balance of probabilities, that the deprivation was permanent. It contended further that the authorities

demonstrate that there will be a total loss by reason of deprivation of possession if recovery of the property is a 'mere chance', which in this context means that the insured has taken all reasonable steps to recover the property and recovery is uncertain. Where the situation at the time of deprivation of possession is subject to development and change, it may be appropriate to 'wait and see' until matters settle down and the situation becomes clear before deciding whether the test has been met.

491. DAE adopted AerCap's position, but added observations of its own. Specifically, it contended, in essence, that the Insured should succeed in establishing a loss by deprivation of possession if it can show, on the balance of probabilities, that it is unlikely to recover the insured property, either at all or, if at all, only long in the future and in such different circumstances that it would probably amount to a different thing commercially. That test of unlikelihood of ultimate recovery is not the same as the marine CTL test of unlikelihood of recovery within a reasonable time. If an insured establishes unlikelihood of ultimate recovery then any 'chance' of recovery will be less than 50% and that can properly be described as a 'mere chance'.

492. Merx's position was that the common law test for a non-marine total loss is one of uncertainty of recovery.

493. WR Insurers' position was that the Insured must establish that, at the relevant date, there was no realistic prospect of recovering the aircraft at any time within the commercial lifetime of the aircraft. This is what is established by the authority of Moore v Evans [1917] 1 KB 458 (CA), [1918] AC 185 (HL) and is inherent in the concept of a 'mere chance' referred to by Bankes LJ in the Court of Appeal in that case.

494. AR Insurers' position was that '*it appears unlikely that the answers to these* [debates about the nature of the test] *will matter because it is difficult to envisage a finding that some tests for loss are satisfied and others are not.*' AR Insurers did not deny that there had been a loss of the aircraft, by reason of a WR Peril. WR Insurers denied that the aircraft were or are lost.

The Authorities

495. Both sides of the debate referred to the body of case law, stretching back for more than 100 years, which bears on the question of the test.

496. The first case which needs mention is Moore v Evans itself. That was a case which concerned a claim for loss by deprivation of possession of jewellery consigned on a 'sale or return' basis to trade customers in Frankfurt and Brussels which were insured under a time policy running from January 1914 to January 1915 and which became irrecoverable by the owner by reason of the onset of World War I.

497. The facts of the case are of importance, because the owner's claim that it had suffered a loss was rejected on the facts. These were, materially, as follows: (1) the jewellery had been consigned to the Frankfurt and Brussels dealers in June-July 1914; (2) in the ordinary course of business the consignees were bound to return the goods (if not purchased) after about 2-3 weeks, unless time was extended by the consignor; (3) on 31 July 1914, the owner wrote to the Frankfurt customer, asking him to return the jewellery by registered post if safe to do so, but received no reply; (4) in early August 1914, the owner enquired of the Brussels

customer and was informed by him that it was impossible to return the jewellery since postal communication was no longer assured, that the jewellery had been placed safely in the bank and that they would be sent back only if the plaintiff accepted responsibility for the transit; (5) the owner had replied 'leave goods in safety in bank'; (6) there was no evidence to show that the jewels had not remained in the custody of the Frankfurt dealer to whom they had been entrusted or in safety in the Brussels bank; (7) as at the date of the writ (February 1915) and subsequent stages of the proceedings, the inability of the plaintiff to recover possession or control of the goods was likely to continue for an indefinite time.

498. The Court of Appeal, reversing the trial judge, held that the claim failed. The leading judgment was given by Swinfen Eady LJ and Lawrence J. During the course of that judgment, Swinfen Eady LJ said (at 465):

> Again the policy is to cover loss, damage, or misfortune sustained by the assured "by or from any of the causes or defects hereinafter mentioned," i.e., the loss of, damage or misfortune to the property arising from any cause whatever, save and except as therein mentioned. There must either be loss of the property or part of it, or damage or misfortune to it. There is no evidence that anything has happened to the goods themselves beyond what I have already mentioned. The goods have not been returned to the plaintiffs. That is all. If the plaintiffs' customers to whom the goods were sent, availing themselves of the difficulties created by the war, dishonestly refused to return the goods and appropriated them to their own use, this event would be covered by an exception contained in the policy, and would not occasion a loss giving rise to a claim. The assured would not have any claim against the insurers if the jewels were lost to the plaintiffs under such circumstances. There is not any suggestion of this having happened in fact.

499. At 466 he added:

> We recognize, however, that it is quite possible that the plaintiffs may have a present right of action, although they have not been able to adduce evidence which proves it. If the plaintiffs had desired it, we should have been prepared to make an order under Order xxvi., r. 1, that the action be discontinued, instead of simply allowing the appeal and directing the judgment to be entered for the defendant. The effect of this would have been that the plaintiffs would have been able at a future time to bring a fresh action if further evidence were available to prove their loss. Mr. Leslie Scott, however, intimated that he did not desire to elect to take any order in that form…

500. The judgment of Bankes LJ dealt in more detail with what is entailed by proof of a total loss in non-marine insurance. He emphasised that the marine insurance concept of CTL did not apply. At 469 he said:

> …the correct view appears to me to be that the law of marine insurance does not apply to the present case at all. Some of the considerations

> which are material when dealing with the case of a constructive total loss may be material when dealing with a case like the present, but if so it is not because the law of marine insurance can be applied to this case, but because there are certain considerations which may be common both to a contract like the present and to a contract of marine insurance.

501. At 471, Bankes LJ identified that the relevant question was ultimately one of construction of the word 'loss' as it appeared in the policy. He said:

> A case like the present must, I think, be dealt with on the general principles applicable to the law of contract, and the meaning of the parties must be ascertained by reference to the language they have used, and without any reference to the artificial definitions which are applied to an actual and to a constructive total loss in the law of marine insurance. The risk undertaken by the insurers under the policy under consideration was "the loss of damage or misfortune to" the goods arising from any cause whatever. The language used is that in general use in policies intended to cover all kinds of risks. Having regard to the nature of the goods covered by this policy, no meaning can, I think, be given to the word "misfortune". The word "loss" in such a policy as this may have a very different meaning when applied to perishable goods, or to goods warehoused at a heavy rent, from what should be attributed to it when applied to such goods as pearls and jewellery when detained under the circumstances of the present case. As applied to this last mentioned class of goods the first and natural meaning of the word "loss" seems to me to be the being deprived of them. It is manifest, however, that it is not every kind of deprivation which was within the contemplation of the parties. Mere temporary deprivation would not under ordinary circumstances constitute a loss. On the other hand complete deprivation amounting to a certainty that the goods could never be recovered is not necessary to constitute a loss. It is between these two extremes that the difficult cases lie, and no assistance can be derived from putting cases which are clearly on the one side or the other of the dividing line between the two.

502. At 471-2 Bankes LJ gave certain examples where he considered that there would not be a loss. He said:

> If assistance is to be obtained at all from considering a hypothetical case it can only be done by taking one which raises somewhat similar considerations to the case which we have to decide. One such case occurs to me. Assume that from fear of a bombardment a man places his safe containing his jewels which are insured against loss in his cellar. His house is bombarded and reduced to ruins, and many tons of debris are piled upon the cellar, which is itself uninjured. Has the owner of the jewels sustained a loss of them merely because he cannot get at them until the debris is removed? I think not. Assuming that the time when he will be able to get at them is quite indefinite owing to the mass of

> material to be moved and the lack of labour, has he under those circumstances sustained a loss of the jewels? I think not. Assume that the military authorities for sufficient reasons connected with the defence of the realm take possession of the ruins and refuse the owner access to them until the termination of hostilities, or for an indefinite time, does that constitute a loss of the jewels within the meaning of the policy? I think not. In the cases I am putting the jewels are known to be in the cellar and unharmed. They must remain where they are till the debris can be cleared, but they will be ultimately recoverable. When that can be done is quite uncertain. It may not be for a very considerable time. In the case of the military taking possession the owner may be said to be dispossessed, but in my opinion none of the circumstances I have indicated constitute such a loss of the jewels as is contemplated by the parties to a policy such as the one we are now considering, and that whether the owner be a trader or a private person.

503. Finally at 472-3 Bankes LJ addressed the position in the particular case before the court, and introduced, from an earlier marine case, the concept of a ‘mere chance’. He said:

> In the present case it is, I think, very material to keep steadily in mind the fact that at the time of action brought there was no evidence that the subject-matter of the insurance was not in the custody of the persons to whom it had been entrusted by the plaintiffs, or in the custody of the bank to which with the plaintiffs' subsequent approval a portion of the goods had been sent. It is quite inadmissible to conjecture whether since the policy expired they may have been improperly dealt with. If they have, they may have been lost, but any such loss occurred after the policy had ceased to attach. The most, I think, that can be said in relation to these goods is that during the currency of the policy a state of things was set up in consequence of the war which rendered it impossible for the plaintiffs either to obtain access to their goods, or for the persons in whose hands they were to return them; and that, forming the best opinion that could be formed at the time of action brought, it was probable that that state of things would continue for some considerable time. Does this constitute a loss within the meaning of the policy? I think not. I cannot attempt a definition of what constitutes a loss, but I find in the language of Blackburn J. in Wilson v. Jones (1867) LR 2 Ex 139, 152 a sentence in which I think I see a clue which may help to solve the problem in hand. It is true that he is speaking of a marine insurance and of a total loss when he says: If the interest was an interest in the cable being laid at any time, there was still a total loss; for although there was some chance of the cable being recovered, it was a mere chance." I think these last words are applicable to a case like the present. If the true conclusion from the facts existing at the time of action brought was that the plaintiffs' chance of recovering their jewels was a mere chance, then the plaintiffs might be entitled to recover on the ground of a loss of the jewels. On the other hand, if the facts indicated that the chance was all the other way, and that there was no reason to suppose from anything that had happened up to the date of trial that the plaintiffs would not

> ultimately recover their goods, though they might have to wait a long time for them, then I consider that what the plaintiffs have lost is, not their goods, but the commercial adventure of sending their goods out on approval and getting them back in due course. The latter is the conclusion at which I have arrived upon the facts as they appeared upon the evidence …

504. The House of Lords dismissed the appeal. Lord Atkinson described the argument for the insured as follows (at 191):

> But the whole argument addressed to your Lordships on behalf of the appellants resolved itself into a sustained and elaborate endeavour to apply to the non-return of these goods the principles of the law of maritime insurance applicable to ships.

505. Lord Atkinson rejected that argument, saying (at 193):

> It does not appear to me that there is any true analogy whatever between this case and the case of the loss of a ship or the goods it carries under a marine policy. I do not think the principles of the law of marine insurance apply, or that the numerous authorities which have been cited, other than two with which I shall presently deal, afford any help to the construction of this non-marine policy, or to the ascertainment of the true meaning of the word "loss" used in it …

506. Dealing with the facts of the instant case, Lord Atkinson said that he considered the Court of Appeal was correct, but added that he thought that '*the appellants should even now be given an order made under Order xxvi.r. 1, that the action be discontinued*'.

507. Lord Parker of Waddington's speech was as follows (at 198):

> It appears to me impossible to say that the goods in question were during the currency of the policy "lost" within the ordinary meaning of that word, and there is no evidence whatever of any damage or misfortune having occurred to the goods themselves. So far as the evidence goes the goods remain safe and undamaged in the custody of persons who are in the position of bailees for the appellants, but who cannot at present return them because of the war. It is only by introducing, in the construction of a non-marine policy, considerations which by the custom of merchants are no doubt material in construing a marine policy that the case for the appellants becomes in any way arguable. For the reasons given by my noble and learned friend Lord Atkinson and by Bankes L.J. in the Court of Appeal I do not think that such introduction is admissible. In my opinion, therefore, the appeal fails.

508. There are seven subsequent authorities which it is necessary to consider.

509. The first is Holmes v Payne [1930] 2 KB 301, a decision of Roche J, who had been one of the counsel for the insurers in Moore v Evans. That was a case where a pearl necklace had been mislaid by Mrs Payne. She had claimed on her insurance which was '*against all loss wheresoever which the assured may sustain by the loss of or damage to the property herein specified*' during a period of a year. The insurance claim was settled. When the necklace was subsequently found – by Mrs Payne's sister trying on one of her evening cloaks – the underwriters sought to rescind the settlement and claimed a declaration that the necklace was never lost. Roche J rejected the claim to rescind the settlement, and then dealt, obiter, with the question of loss. What he said (at 310) was:

> I desire, however, to avoid the impression that in my view the contention that there was no loss is well founded. It was at one time contended that a thing cannot be lost when it is in the owner's house. The contention is not supported by experience. It would be as unwise, as it is unnecessary, that I should attempt a definition of the word "loss" under a policy such as this. Losses are of many kinds and happen under diverse circumstances: see Bankes L.J. in Moore v. Evans. The Marine Insurance Act has now defined losses for the purposes of marine insurance and, in the view of the Court of Appeal, in so doing has made some change from the common law rule: see Polurrian Steamship Co. v. Young, unlikelihood of recovery being substituted for uncertainty as to recovery as the test. Uncertainty as to recovery of the thing insured is, in my opinion, in non-marine matters the main consideration on the question of loss. In this connection it is, of course, true that a thing may be mislaid and yet not lost, but, in my opinion, if a thing has been mislaid and is missing or has disappeared and a reasonable time has elapsed to allow of diligent search and of recovery and such diligent search has been made and has been fruitless, then the thing may properly be said to be lost. The recovery of the thing is at least uncertain and, I should say, unlikely.
>
> In this case, in the view of the underwriters' representative as well as of the assured, a reasonable time elapsed before they settled and, as I have already found, diligent search was made and was fruitless. Subsequent discovery or recovery of the thing assured is, of course, of itself no disproof of the loss. …

510. In Webster v General Accident Fire and Life Assurance Corporation Ltd [1953] 1 QB 520, the claimant had been induced to part with possession of a car by fraudulent misrepresentation by T, who had then sold the car in his own name and misappropriated the proceeds. The claimant had approached the police, but had been told that any attempt to recover the car would be unavailing, and had taken no further steps, though he knew in whose hands the car was. He claimed on his insurance for loss of the car. The arbitrator had found he was entitled to succeed. Parker J upheld the award. As part of his reasoning Parker J said:

> An additional point is, however, made that even if what happened could constitute a loss, there is, on the facts, no loss proved, because the claimant at all times knew where the chattel was, and that he has not

> shown that it was irrecoverable. In this connexion it is important to bear in mind that we are dealing here with a non-marine policy and no questions of constructive total loss or of such principles of marine insurance applying. At the same time it is clear from the passage that I have read from the judgment of Bankes L.J. in Moore v. Evans that it is never necessary for a claimant to prove that in all circumstances the chattel is irrecoverable. Every case depends upon its own facts. An assured is not entitled to sit by and do nothing. Equally, he is not bound to launch into legal proceedings or if necessary carry them to the House of Lords. The test, as it seems to me, is whether, after all reasonable steps to recover a chattel have been taken by the assured, recovery is uncertain.

511. In the Dawson's Field Award (April 1972) Michael Kerr QC, as arbitrator, considered a reinsurance claim in respect of the hijacking of four aircraft in 1970 by members of the Popular Front for the Liberation of Palestine. One was destroyed at Cairo and three at Dawson's Field. A question arose as to whether the planes had been lost when hijacked or only subsequently, when blown up. In the course of this, the arbitrator considered an issue which arose as to whether the doctrine of CTL was applicable to aircraft insurance. He said (paragraph 5) that the relevance of this issue turned on the difference between unlikelihood of recovery and uncertainty of recovery; because, he said, before the MIA the test for a CTL had been uncertainty of recovery, but under the MIA it was unlikelihood of recovery. He said:

> If I had to decide between these two tests for present purposes I would … hold that after the aircraft had been hijacked their recovery was clearly uncertain, but I would not hold that it was unlikely. I would say … that if I had been asked the question at the time I would have replied: "I don't know". … But if I had taken the view that it was necessary to decide whether or not the doctrine of constructive total loss and section 60 of the Act of 1906 apply and whether the test is unlikelihood or uncertainty of recovery, I should have felt bound to hold on the basis of Moore v Evans that the doctrine and the Act do not apply and that the test is accordingly merely uncertainty of recovery.

512. At paragraph 6, however, Mr Kerr QC said that considerations of that sort ought not to be decisive. He said:

> In my view, however, these are not considerations which are or ought to be decisive of this case or any similar factual situation. If a lorry is hijacked on the M1 near London and the driver is forced to drive the hijackers to Scotland, then the position under an insurance policy on the lorry should in common sense be the same as if a similar incident happened in relation to a yacht off the South Coast and the crew were ordered to take the hijackers (whether or not they be called pirates) to France.

> If the persons in control then refused to release the lorry and yacht and their crews unless and until certain demands were met, then again the position should not in common sense be any different. Nor do I believe that there is a difference in law between these two situations. If the owners of the lorry or of the yacht claimed for a total loss in this situation, while the ultimate fate of their property was still uncertain, then the test must in each case be whether or not a court would be bound to give judgment for them if a writ had been issued at once (a notice of abandonment having been given in relation to the yacht) and the action had come on for trial before the outcome was known. In my view such an action would not succeed.

513. At paragraph 7, he expanded on the need, in some dispossession cases, to 'wait and see', saying:

> …even in the Act of 1906 this concept [i.e., deprivation of possession] is only a prima facie basis for a case of total loss. It is qualified by unlikelihood of recovery (for which I substitute uncertainty of recovery in the present context) and, as shown by Polurrian v. Young, this in itself is qualified by the notion of non-recovery within a reasonable time. "Wait and see" is therefore to some extent always an essential ingredient of a claim for a total loss in circumstances involving deprivation of possession, unless (perhaps) there is a deprivation within the terms of specifically enumerated perils such as "capture" or one can infer from the circumstances that there was a clear intention at the time of the dispossession permanently to deprive the owner of possession and ownership. This is quite different from a "ransom" situation such as in the present case. […] In my view, as was said by Parker J. (as he then was) in Webster v. General Accident (1953) 1 Q.B. 520 at pp. 531/2 every case in which there has been a dispossession must depend on its own facts as to whether and at what stage a total loss has occurred. One must consider the facts concerning the dispossession, the apparent intention of the person or persons concerned, whether or not or to what extent the whereabouts of the subject-matter are known, and allow for the lapse of a period of time to form a view about the prospects of recovery; i.e. whether the loss is total or partial. In the circumstances of the present case I do not believe that any Court could probably have held that the owners of the hijacked aircraft at Dawson's Field were entitled to recover for a total loss if such an action had been brought to trial between 6th and 12th September. I therefore reject the contention that these aircraft were total losses before they were blown up.

514. In Kuwait Airways v Kuwait Insurance [1996] 1 Lloyd's Rep 664, the invasion of Kuwait by Iraq led to the capture of Kuwait airport and the subsequent taking by Iraqi forces of fifteen aircraft, as well as spares and equipment, owned by Kuwait Airways. The central issue was one of aggregation, namely whether each subsequent Iraqi taking from Kuwait airport was a separate loss or whether all the aircraft were lost on the Iraqi overrunning of the airport and the capture of the Kuwait Airways fleet.

515. At first instance, in an analysis which was not disturbed on appeal, Rix J addressed the test for loss to be applied. He said (at 686):

> I have already made my findings of fact regarding the circumstances of the aircraft's loss. In my judgment the aircraft were already lost on Aug. 2, and not merely when flown away. On that day KAC lost possession and control of their aircraft and it was both uncertain and, if it be relevant (as Mr. Webb submits it is, on the ground that although the risk was not a marine risk, it was written in the marine market by marine underwriters), unlikely that possession would be recovered within a reasonable time. As it is, the relevant test outside the field of marine insurance would appear to be uncertainty and not unlikelihood of recovery: see Polurrian Steamship Co. Ltd. v Young, [1915] 1 K.B. 922, Moore v Evans, [1918] 1 A.C. 185, Webster v General Accident Fire and Life Assurance Corporation Ltd., [1953] 1 Lloyd's Rep. 123; [1953] 1 Q.B. 520, and, in the case of aircraft themselves, the Dawson's Field Award.

516. Later in the judgment Rix J explained why the facts of that case were different from those in the Dawson's Field Award:

> As for the Dawson's Field Award, the decision there was plainly correct, but that was a case of ransom, where "wait and see" is the order of the day. Mr. Kerr, Q.C. specifically distinguished cases within specifically enumerated perils such as "capture" or where it can be inferred that there was a clear intention at the time of dispossession permanently to deprive the owner of possession and ownership. Such a case, in my judgment, is the present case, where the aircraft, wholly unlike the timber or the pearls or the diamonds in the bombed cellar, had in my view been taken out of the possession and control of KAC by enemies whose present intent it was to exercise dominion over them and to make them permanently their own as an exercise of war-time plunder.

517. In Scott v Copenhagen Reinsurance Co (UK) Ltd [2003] EWCA Civ 688, another aggregation case which also arose from the Iraqi invasion of Kuwait which began on 2 August 1990, Rix LJ returned to these topics. Whereas the Kuwait Airways aircraft were flown to Iraq by Iraqi forces shortly after the invasion, the single British Airways aircraft at issue in Scott had remained stranded in Kuwait airport until the outbreak of the Gulf War in 1991, with no hostile Iraqi intent towards it, and was only later destroyed by allied bombing. At first instance ([2002] Lloyd's Rep. IR 775), Langley J found that once the airport had been captured, all the Kuwait Airways assets were immediately lost. Conversely, with respect to the BA aircraft, Langley J considered that the BA aircraft was not lost as a result of the invasion and capture of the airfield on 2 August, notwithstanding '*real difficulties for BA in accessing and recovering its aircraft*'; rather, '*the position was analogous to ransom and "wait and see"*'.

518. The Court of Appeal upheld the conclusion that the BA aircraft was lost by destruction, in February 1991, and not by reason of deprivation of possession in August 1990. Rix LJ had, in the course of his judgment, reviewed the cases as to deprivation of possession, including Holmes v Payne and Webster v General Accident without any adverse comment. At [76], he proceeded to say that if, contrary to his conclusion that the aircraft was lost by destruction, it was lost by deprivation of possession, it was not lost until 1991 either. In this regard he said:

> The present case differs from Moore v Evans in that the BA aircraft was in the control of the Iraqis from the beginning, whereas the pearls remained in the hands of the jewellers to whom they had been consigned, or in a bank with the plaintiff's consent. Nevertheless, as in Moore v Evans, it is impossible on the judge's findings to say that BA was irretrievably deprived of its aircraft from the first, whatever the content of that test may be. It was a 'wait and see' situation. Care must no doubt be taken with that expression, because it is capable of being used in two senses. In its real sense, it refers to a situation which is subject to a process of development and change. Will a ransom be paid and honoured and the property recovered? Will the property be released? That is the sense in which it was used by Mr Kerr in Dawson's Field and again by the judge in this case. In another sense, it might be used to refer to the emergence of evidence about the initial deprivation. Was the car taken by a joyrider or a thief? If by a joyrider, the probability is that it will soon be found and recovered and there is no total loss. If by a thief, the probability is the other way. In the latter case, where the inference of theft is drawn from the very fact that the car is not found abandoned, it seems to me to be right to say that the total loss occurred at the time of theft. Therefore the agreement with the insurance industry brokered by the insurance ombudsman referred to in the course of submissions seems to me to do no more than reflect the realities: but it tells one nothing about the current problem. The case of missing property (Holmes v Payne) is again another situation. A total loss cannot be proved without a proper search, or more than one, and perhaps also without the passing of a certain period of time just in case the property "turns up" (like the pearl necklace). Where, however, loss is proved, I can see arguments both ways for saying that the loss occurs when it is first discovered (perhaps even earlier), or only after further search. That is not this case: and in practice the problem does not appear to have caused litigation.

519. In TKC London Ltd v Allianz Insurance plc [2020] EWHC 2710 (Comm), Richard Salter QC, sitting as a Deputy High Court Judge, considered Moore v Evans, Holmes v Payne and Webster v General Accident. At [119] he said:

> Taken as a whole, these matters in my judgment show that mere temporary loss of use is not "Damage" … I accept Mr Kealey QC's argument that to amount to "loss … of … Property Insured" within the cover provided by the Property Damage Section of the Policy, the insured must show that it has been physically deprived of that property

> in circumstances (where it is not plainly irrecoverable) making its recovery uncertain.

520. Finally it is necessary to refer again to the decision of the New South Wales Court of Appeal in Mobis v XL. Meagher JA considered Moore v Evans (at [98]-[100], and set out the passages from KAC v KIC and Holmes v Payne which I have set out above, and which refer to the test as being 'uncertainty' of recovery. At [103]-[105] Meagher JA said this:

> [103] These passages seem to assume that the common-law test of uncertainty for constructive total loss in marine insurance extends to non-marine insurance. Such an assumption was not necessary to either decision and, in my respectful opinion, does not accord with the general principles stated by the Court of Appeal and House of Lords in Moore v Evans. On those principles, it is for the insured to prove not only that a deprivation has occurred but also that the deprivation will, more probably than not, be of sufficient permanence to constitute a "loss".
>
> [104] Secondly, even if loss by deprivation could be established by proof that recovery of any of the undamaged stock was "uncertain", a question would remain as to the relevant meaning of uncertainty. The term was explained by Lord Wright in Rickards v Forestal Land, Timber and Railways Co [1942] AC 50 at page 87, another case of marine insurance:
>
> "There is a real difference in logic between saying that a future happening is uncertain and saying that it is unlikely. In the former, the balance is even. No one can say one way or the other. In the latter, there is some balance against the event. It is true that there is nothing in the Act to show what degree of unlikelihood is required. If on the test of uncertainty the scales are level, any degree of unlikelihood would seem to shift the balance, however slightly."
>
> [105] Thus, to describe the recovery of insured property as "uncertain" in this context is to attribute an equal probability to recovery and non-recovery. Neither Rix J in Kuwait Airways Corporation v Kuwait Insurance Co nor Roche J in Holmes v Payne advanced any wider understanding of "uncertainty" in non-marine insurance (if applicable). In particular, neither suggested that an insured could recover by merely proving that recovery of the property was not absolutely certain.

Analysis

521. WR Insurers' case, that to show 'loss' the Insured must establish that there is no realistic prospect of recovering the property, is said to be based on the decision in Moore v Evans. I do not accept that that case is support for such a test.

522. The specific passage on which WR Insurers most rely is Bankes LJ's reference to a 'mere chance'. This, it is said, shows that the Insured must show that there is at most only a very limited chance of recovery. Mr MacDonald Eggers KC, in argument, quantified this as something in the order of, at most a, 10% chance. In this regard, however, Bankes LJ himself made it clear that he was not attempting a definition of what constitutes a loss. The 'clue' which he saw in the language of Blackburn J in Wilson v Jones was clearly not

intended to be a precise test: the phrase 'mere chance' is inexact and idiomatic. Furthermore, Moore v Evans was one where the meaning of the phrase – and the degree of likelihood intended – was not tested. There, '*the chance was all the other way* [i.e. in favour of ultimate recovery]'; and '*there was no reason to suppose that the plaintiffs would not ultimately recover their goods*'. That was a case, therefore, in which Bankes LJ regarded it as likely that the goods would be recovered.

523. Mr MacDonald Eggers KC argued that in rejecting the applicability of the marine concept of a CTL, the Court of Appeal and the House of Lords in Moore v Evans were rejecting the applicability of a test of unlikelihood of recovery, and were instead suggesting that the test must be something more arduous for the insured to establish. I do not think that this is a fair reading of the case. The focus of the judges in rejecting the relevance of notions of a CTL was not to reject the 'unlikelihood of recovery' test for a CTL. It was instead to reject the idea that there might be a loss of the goods if, 'in a commercial sense' the insureds could not get them; and that, as the insured could not dispose of them in their trade, the goods were lost though they might not be to an owner who merely acquired them for ornament (see in Lord Atkinson's speech at 192-3).

524. The WR Insurers' test is, in my view, not one which can be reached by a proper construction of the word 'loss' in property insurances such as have been considered in the authorities and are in issue here. It is relevant to test the interpretation WR Insurers would put on the concept of loss and how it can be established by reference to the consequences of that interpretation. It would mean that an insured had to establish that there was no realistic prospect of recovery. On WR Insurers' case, it would specifically mean that the insured had to show that any prospect of recovery was 10% or less. That would often be a very difficult thing for an insured to prove, even if the insured could show that it was unlikely that there would be a recovery. It would, for example, be difficult to show when the insured simply did not know where or in whose hands the item was. In my view, the application of such a test would mean that the insured was not entitled to recover in many instances which fell within the meaning of 'loss' as it would be understood by a reasonable person in the context of a property cover.

525. It is clear that subsequent cases have not considered that Moore v Evans establishes the test for which WR Insurers contend. What is noticeable is that a series of judges over a very long period, including Roche J who had appeared in Moore v Evans himself, did not consider that case as establishing the test for which WR Insurers contend. Whilst the 'test' which was adopted in those cases requires further consideration, to which I am about to turn, they all adopt an approach to what needs to be proved by the insured which is markedly less demanding than that contended for by WR Insurers. Whether explicit in their reasoning or not, this doubtless reflects the fact that the judges involved considered such a less demanding test to be consistent with the proper interpretation of the word 'loss' in the contracts with which they were concerned, for otherwise they would not have applied it.

526. What was adopted or referred to as the 'test' or relevant approach in non-marine cases has been stated in terms of 'uncertainty' of recovery in five cases (Holmes v Payne, Webster, Dawson's Field, KAC v KIC and TKC v Allianz), and statements in some of those authorities to that effect were not adversely commented on in Scott v Copenhagen Re. Mr MacDonald Eggers KC criticised all these cases on the basis that they all contained the same 'cardinal and categorical error'. I do not accept that, but I do consider that care must be taken to see exactly what was being said in those cases and why.

527. In the first place, in some of the cases, including Dawson's Field, the reasoning appears to be, in essence, that because the insurance was non-marine, therefore the definition of a CTL in the MIA was not applicable, and therefore the relevant test should be the common law test for a CTL. I accept that that is a non sequitur. The fact that it is not the MIA test for a CTL which is applicable does not mean that it is any other test for a CTL which is applicable. As was pointed out in Moore v Evans the concept of a constructive total loss has no place in non-marine insurance. I thus agree with what I understand to be the criticism of such an approach made by Meagher JA in the first two sentences of paragraph [103] of Mobis.

528. Secondly, it is necessary to consider what is meant by 'uncertainty' of recovery in the cases which refer to that as the test or main consideration as to whether a 'loss' has been shown. I do not think that it can have been intended to mean that there might be said to be a loss by deprivation of possession even though recovery was likely, or even very likely, provided it was not certain. I agree with what Meagher JA says in the last sentence of paragraph [105] of Mobis.

529. Thirdly, it is not apparent that the judges in all the five authorities envisage that a test of 'uncertainty of recovery' will apply to every type of alleged loss by reason of deprivation. In TKC v Allianz the judge confined the test of deprivation in circumstances making the recovery of the item 'uncertain' to cases other than those where the property was 'plainly irrecoverable'. In Holmes v Payne, Roche J's reference to 'uncertainty as to recovery' was said in the context of the case before him, namely of a mislaid item. In such a context, if the insured has taken all reasonable steps to look for the item, and has not found it, and simply does not know where it is and thus whether or not it may be recovered, it makes perfect sense to say that there has been a 'loss' by reason of uncertainty of recovery after taking reasonable steps. Indeed, in such a case, it might be said by many that those facts were sufficient to establish that recovery was unlikely. That was, apparently, Roche J's own view, as he said that such facts would establish that 'the recovery of the thing is at least uncertain *and, I should say, unlikely*' (my emphasis).

530. In my judgment, the best formulation of the test which is to be applied is that proposed by AerCap, namely that one should ask whether the deprivation of possession is, on a balance of probabilities, permanent. I consider that where that question is answered in the affirmative, such answer will be consistent with what would commonly and reasonably be regarded as a 'loss' by deprivation under a property insurance. I consider it to be consistent with Moore v Evans where, as I have said, the facts before the court indicated that recovery was likely, and thus that the insured could not show, on a balance of probabilities, that the deprivation was permanent. Such a test is also in line with the approach of Meagher JA in the last sentence of paragraph [103] of his judgment in Mobis (especially its reference to proof of permanence to the standard of 'more probably than not'), which he also considers to be in accordance with the principles established by Moore v Evans.

531. It is thus this test which, when I consider the facts as to whether and if so when there was a loss, I will primarily apply. I will nevertheless seek to answer those questions both on that basis and on other possible versions of what the test is.

The length of deprivation

532. A further issue was raised, as to the length of future deprivation of possession which the insured must show (to whatever standard of likelihood) in order to establish a 'loss'.

533. As I have mentioned, WR Insurers contended that the Insured must show that there would be a deprivation for the commercial lifetime of the aircraft. AerCap contended that what needed to be shown was that the aircraft would not be returned within a reasonable time, with reasonableness to be judged by all the circumstances. DAE expressly disassociated itself from AerCap's position on this issue.

534. I agree with WR Insurers on this point. There will be a loss only if the deprivation is permanent. In the context of an insurance of aircraft, permanence naturally means, for the commercial life of the aircraft. Although AerCap protests that that is a long time, and it is difficult to say what will happen during such a long time, this is catered for by the test as to the degree of certainty there must be. As I have said, I consider it to be whether, on the balance of probabilities, the deprivation is permanent. That there is a possibility of return during the lifetime of the aircraft does not exclude that the insured may be able to show, on the balance of probabilities, that the deprivation is permanent.

535. The concept that there should be irrecoverability within a reasonable time is one which is derived from cases on marine CTLs. The idea that it is applicable to non-marine losses is, in my view, inconsistent with Moore v Evans. There was no consideration of what might be a reasonable time. Instead, it appears that Bankes LJ was considering that whether there had been a 'loss' by reason of deprivation would depend on the commercial or useful life of the item in question. This is why he said, at 471 that 'loss' might mean a different thing when applied to perishable goods or goods warehoused at a heavy rent as opposed to jewellery or pearls. Consistently with this, Bankes LJ considered that there would not be a loss of jewellery, notwithstanding that it was in a cellar buried under rubble and might remain there 'for a very considerable time'. What he clearly regarded as material to the view that there would be no 'loss' was not the reasonableness or otherwise of the length of time, but the nature of the goods involved. His assumption was that they were jewels and remained 'unharmed'.

536. The only authority pointed to by AerCap as indicating that irrecoverability meant irrecoverability within a reasonable time was the Dawson's Field Award. Mr Kerr QC relied on Polurrian v Young. That, however, was a marine insurance case, concerned with concepts of CTL. It was, in my judgment, no support for any qualification of irrecoverability by reference to a reasonable time in the context of non-marine insurance.

What is meant by deprivation of possession?

537. WR Insurers raise a further issue. They contend that there is only a deprivation of possession if the insured is unable to exercise any of the benefits of ownership. Insofar as the insureds may have been able to exercise any of the benefits of ownership, for example by agreeing to sell the aircraft, or to continue the leasing of the aircraft, they should be regarded as having recovered the aircraft, or at least as not having been deprived of possession of the aircraft. WR Insurers contend that this approach is supported by The Bamburi, where Staughton J was considering what constituted 'possession' in the context of a claim for a CTL at common law and under s. 60 MIA, and also by Royal Boskalis Westminster NV v Mountain [1997] LRLR 523. In the former, Staughton J said, at 320-321:

> I prefer the view that, when Parliament used the word "possession" in 1906 – a word which, it is conceded, may have a wider or a narrower meaning – the intention was to re-enact what had apparently been settled law for nearly 50 years. The cases since the Act lend some support to either view, but on balance I consider that they are more in favour of the "free use and disposal" construction than against it. … I therefore conclude that the loss of "free use and disposal" in this case amounted to loss of possession within the meaning of the policy.

538. In Royal Boskalis Rix J said, at 534, by reference to Staughton J's judgment:

> Mr Justice Staughton was not, I think, saying that the statutory word "possession" meant "free use and disposal", but rather that the latter expression was a test which could be usefully applied to the facts of that case, particularly in the face of the contrary argument advanced there by underwriters that the true test was that of loss of the adventure … Above all, I think that care has to be taken with the word "free" in that expression. It may be argued that an owner has lost the "free" use and disposal of his property if he has suffered any more than merely minimal interference with his rights as an owner. I do not, however, believe, and I am sure that Judge Story and Mr Justice Staughton did not think, that any minor interference, even if likely to last for a long time, would constitute such loss of possession as to amount to a constructive total loss. On the contrary, Mr Justice Staughton emphasized that the owners of Bamburi had been "wholly" deprived of the free use and disposal of their vessel… That is consistent with what Arnould … lays down as the general rule under the rubric "There must have been a total deprivation"...

539. As I understood WR Insurers' argument, I considered it misconceived. An insured may be deprived of possession while retaining, and indeed exercising, benefits of ownership. If a thief steals my car, I can still sell my title in the car to a third party. The amount I might receive is another matter, but the fact that I have lost possession and cannot give possession does not prevent my selling my title as owner. Moreover my act of selling that title does not in some way re-confer possession of the car upon me.

540. I do not consider that either case relied upon by WR Insurers assisted. In The Bamburi a ship remained in the insured's physical possession and control but the Iraqi authorities prohibited all merchant ship movement. Staughton J held that the fact that the insured was still in possession of the ship did not mean that it was not lost because by virtue of the Iraqi authorities' order the insured was wholly deprived of the 'free use and disposal' of the vessel. That does not assist in this case where the insureds were deprived of possession of the aircraft, and could not control how they were used or employed. In Royal Boskalis the dredging fleet remained in the insured's possession and control, but following Iraq's invasion of Kuwait, Iraq passed legislation the effect of which was that there would have to be negotiations between Iraq and the insureds about the terms on which the fleet would be released from Iraq when its work was done. Rix J emphasised that The Bamburi required

proof that the insured was 'wholly' deprived of free use and disposal of the asset. But he did not suggest that where the insured is actually deprived of possession of the asset and of the ability to control its future disposition, that it was nonetheless relevant that the insured could sell their title in the insured property. Instead, Rix J, in common with Staughton J, considered 'physical loss of use' as being of central importance (551 LHC), and held that the insureds whose fleet was still performing the dredging contract in accordance with the insureds' wishes had not lost possession of the fleet. That is a very different situation from the present case, where the insureds have no physical use of the aircraft.

Determining whether there has been a loss

541. A final matter was debated, but was not, in the event, significantly in issue. This is how the court should approach the question of determining whether and when a 'loss' occurred, and on the basis of what material.

542. In a case such as the present where it is necessary to determine when any loss occurred, the court has little alternative to considering, for all the potentially relevant dates, whether, as of that date, the deprivation of possession was, on the balance of probabilities, permanent. Clearly, the court will be seeking to answer that question by carrying out a notionally forward-looking assessment as at the date in question: that is to say an exercise designed to assess, judged at the relevant date, the probability of the deprivation proving to be permanent. In carrying out that assessment, the court will look at the true facts as at that time, and not simply at the facts as they may have then appeared, in the same way as the identification of an 'occurrence' would be for the purposes of aggregation, or a CTL would be in the context of marine insurance: see KAC v KIC at 686 per Rix J.

543. Further, in making that assessment, the court may have regard to material which was not yet available to the parties as at that date. This may be in one of two ways. The first is that there may be a current period of evidential 'wait and see': that is to say a period of 'wait and see' in the second of the two senses identified by Rix LJ in Scott v Copenhagen Re in the passage I have quoted above. The court can make its assessment of whether there has been a loss on day 1 taking into account the evidence which became available during the 'wait and see' period. The second is that the court can have regard to subsequently-occurring matters (including matters after the end of any evidential 'wait and see' period), as a sense check on any preliminary conclusion reached as to whether or not there was a loss on day 1. This is in line with the approach in a case of frustration, and with the approach to assessing aggregation: again, see KAC v KIC at 686.

Legal Issues as to Peril

544. There were only limited issues of law in dispute in relation to the ambit of the perils insured under the insurances.

All Risks

545. In relation to the AR Policies, in the ordinary way, there is no specification of the insured perils, and the cover is expressed in unlimited terms, subject to specified exclusions, including WR Perils.

546. The breadth of AR Cover is well established as a matter of authority.

(1) In British and Foreign Marine Insurance Co v Gaunt [1921] 2 AC 41, Lord Birkenhead LC held (at 47) that 'all risks' cover was intended to cover 'all loss by any accidental cause of any kind'. The damage must be 'due to some fortuitous circumstance or casualty'.

(2) In London & Provincial Leather Processes Ltd v Hudson [1939] 2 KB 724, Goddard LJ had to consider a case in which skins were entrusted to a German firm for processing and insured against 'all and every risk whatsoever, howsoever arising'; the insured's contractual counterparty went bankrupt and the sub-contractor which carried out the processing wrongfully retained the skins in exercise of a purported general lien. The loss of the skins to the insured plaintiff was held to be covered under its all risks policy. Goddard LJ explained that an '*accidental or fortuitous casualty*' involves that the loss is '*accidental and fortuitous in the sense that the assured is deprived by some unexpected acts of his property in the goods or of his possession of the goods*'. In the course of his judgment he said:

> … For my part I am unable to see why, if goods which are insured against all-risks are converted so that the true owner, the assured, is deprived of the possession of the goods, he is any less entitled to recover under the policy than he would be if the goods were stolen.

(3) It is not necessary for an insured under an all risks policy to establish the precise mechanism of the loss, provided it has not been caused by something excluded or non-fortuitous: British & Foreign Marine Insurance Co v Gaunt, at 46-47 per Lord Birkenhead LC.

(4) In MacGillivray on Insurance Law (15th ed, at 19-010) the burden of proof is accurately described as follows:

> … the same rules apply to all risks policies as to ordinary contracts of insurance and that the onus will be on the insured to prove that the loss was accidental in the sense that it was occasioned by the intervention of something fortuitous which could be regarded as a casualty within the meaning of an insurance contract. It will then be for the insurer to prove that it was caused by an excepted peril.

(5) In Leeds Beckett University v Travelers Insurance [2017] Bus. LR 2022, Coulson J summarised the position relating to accidental or fortuitous damage as follows (at 2069):

> […] (b) Accidental damage means damage that was not wilful or deliberate […] (c) Accidental damage means damage that was caused by a chance event, against the risk of which the insurance was taken out […]. (d) Accidental damage does not mean damage that was inevitable […]

(6) As there stated, accidental loss or damage must not be 'wilful or deliberate', but this refers to the behaviour of the insured, not third parties. I agree with the summary in Margo (at 11.31) as follows:

> The deliberate conduct of another person, for whom the insured is not to be held accountable under the policy, and which causes damage to the aircraft, would be "accidental" from the point of view of the insured. Thus, the term "accidental loss of or damage" not only covers damage to aircraft arising from collision or impact, i.e. aircraft accidents, but also loss or damage through fire or theft, and any other deliberate acts of third parties, such as vandalism…

547. Given this breadth of cover, there was, as I understood it, no dispute that, assuming the Contingent or Possessed Cover was engaged (considered above), if there was a loss of the aircraft within the policy periods involved, then it was covered under the Claimants' AR insurances, unless it fell within the exception of war risks.

War Risks

548. Certain issues did arise as to the ambit of the WR Perils relied on in these cases by the Claimants and the AR Insurers.

549. I have already quoted the full terms of the WR Perils set out in each Claimant's insurance. They are materially the same for each.

550. No party contended that any loss of the aircraft was caused by the war peril itself (i.e. the peril commencing with the words 'War, invasion, acts of foreign enemies …'). There were, however, two groups of perils said to be relevant. The first is what has been called, and which I will term the **'Political Peril**', as follows:

> Any act of one or more persons, whether or not agents of a sovereign power, for political or terrorist purposes and whether the loss or damage resulting therefrom is accidental or intentional.

The second is what I will call the '**Government Perils**', as follows, using the punctuation in the AerCap Policy:

> Confiscation, nationalisation, seizure, restraint, detention, appropriation, requisition for title or use by or under the order of any Government (whether civil, military or de facto) or public or local authority.

Political Peril

551. The issue in relation to the construction of the Political Peril related to what is meant by an 'act … for political … purposes.' Those in the AR Camp (i.e. those contending that the operative peril was a WR Peril) argued that these words should be given an ordinary wide meaning, which can encompass any act carried out to implement or further a government policy. Those in the WR Camp argued, in summary, that the phrase encompasses only acts of individuals which are directed at changing either a government or government policy.

552. The argument for those in the AR Camp is straightforward. It is that the words 'for political purposes' is very broad language, and should be given its natural meaning. It is

further said that the argument to the contrary is based, essentially, on the premise that the Political and Government Perils clauses should be construed in a way so that they are mutually exclusive, i.e. that since government acts are explicitly provided for as Government Perils, the Political Perils clause does not cover them. That, the AR Camp say, is incorrect. The 'no overlap' approach has been rejected in a number of authorities. The fact that under the clause the qualifying act may be carried out by 'agents of a sovereign power' itself indicates that they can be carried out by agents of the government. The AR Camp further rely on what is said in Arnould at 24-37, albeit in relation to slightly different words, as follows:

> … the broader exception "any person acting from a political motive" … has yet to be judicially construed in the context of the Institute Clauses. We consider that it should be given a broad commonsense meaning. It cannot be given an exclusive meaning such that it will not overlap with other perils. Most of the war and strike perils do in fact seem to be duplicated by "any person acting from a political motive" as they relate either to actions taken by or on behalf of governmental authorities or to internal disturbances aimed at supplanting those in government or taking place for general purposes. It has been stated that "in its ordinary sense … the word 'political' means 'pertaining to policy or government'". There appears to be no reason to construe the word more narrowly, in the present context.'

553. The AR Camp further contends that, even on a narrower construction, the peril would be made out in the present case because, on any view, the Political Peril is broad enough to encompass acts of governments directed externally, i.e. including against other foreign governments. Here, the acts of the Russian Government, or its agents, qualify as acts done for political purposes.

554. For their part, the WR Camp argue that 'political' needs to be read and understood in its context, alongside 'terrorist'. They contend further that the meaning for which they contend is consistent with the only English judicial consideration of the Political Peril, namely in KAC v KIC, whereas the AR Camp's is not. And they say that their preferred meaning avoids giving to the Political Peril an extraordinary breadth which would consume numerous other WR Perils.

555. The ambit of the words '*any act of one or more persons … for political … purposes*' is not a straightforward issue, and given that it does not, on my findings below, make a difference to the result of the case, I will express my views on it as briefly as I can.

556. I do not consider that the words 'political purposes' can be given the narrow meaning contended for by the WR Camp, namely of purposes aimed at changing a government or its policy. The words themselves are broad. It is not difficult to think of cases in which people can be said to be acting for 'political purposes' on both sides of a debate. By way of example, if there were a demonstration and a counter-demonstration on a topical political issue, both sides might be acting for 'political purposes', even though one might be supporting the stance of the government.

557. I consider, however, that the words '*any act of one or more persons … for political or terrorist purposes*' do contain certain implicit or inherent restrictions. Thus, in my view, it is apparent that it is not concerned with acts of the government itself. That appears to me clear partly from the different terminology between the Political Peril and Government Perils clause. In the former the phrase used to identify the relevant actor(s) is 'one or more persons', in the latter it is 'any government'. I think it is also apparent from the remainder of the wording of the Political Peril clause, and its context within the war risks as a whole. In this regard it is significant that 'political' is juxtaposed with 'terrorist', as to the purposes involved. That seems to me to indicate that what is contemplated as covered by the clause as a whole is acts which are in some sense adverse to the government of the place where they happen. Consistently with what I have already said I do not think that this adversity needs to be confined to where the ultimate aim pursued is the change of the government or its policy, but can embrace a case in which support for a government or government policy is pursued by unauthorised (for example violent) means.

558. I also consider that the WR Camp is correct to say that it is not the natural reading of the WR Perils as a whole, and is unlikely to have been intended, that the Political Peril, by the use of the words 'for political … purposes' rendered effectively if not entirely redundant the carefully expressed Government Perils, and was indeed much wider than the Government Perils. Yet that would be the effect of the AR Camp's construction, whereby acts of the government in pursuit of its own policies can be acts for political purposes within the Political Peril, for there would be no limitation under that clause to government acts of the particular types specified in the Government Perils clause (viz confiscation, nationalization etc.). While I accept that there is overlap both within the various paragraphs of the WR Perils, and between them, I do not accept that the perils should be read as to render a whole paragraph (with a group of perils) redundant and without obvious purpose.

559. For similar reasons, I do not think that it is intended that the Political Peril should embrace acts which are simply those of agents of the government itself, if what one is considering is a situation in which only one government is relevant. If it did, then that would, in effect, mean that the Political Peril clause potentially extended to all or most government acts capable of causing loss or damage, accidentally or intentionally, which, as I have said, I do not regard as the case.

560. The significance of the reference to 'whether or not agents of a sovereign state' is, in my view, that it shows that there may be an 'act … for political or terrorist purposes' even if it is done at the behest or on the instigation of a different state. State-sponsored terrorism of the Lockerbie type, or interference by one state in the politics of another are well known phenomena. Had what was intended been to refer to the agents of the government of the place where the loss or damage takes place, the terms used would surely not have been 'a sovereign state', but have been or have included a reference to 'the government' or to a public or local authority, similar to the language of the Government Perils.

561. But that does not fully answer the issues which arise in relation to situations where two states are involved. A particular question arises here because the AR Camp contends that, even if the Political Peril clause is given a restricted meaning, there were here acts of persons, in Russia, whether or not agents of the Russian State, which were 'for political purposes', namely for the purpose of nullifying, or rendering ineffective the Western sanctions, which would be adverse to the Western governments and/or states which had imposed them. In my view, although I recognise that the boundaries of the distinction are

not easy to define, the Political Peril is not intended to cover the avowed acts of the government, or agents of the government, of the place where the act is done which causes the loss or damage. I say 'avowed' to cover a case such as Lockerbie, where one state may engage in secretive acts aimed at another state or its citizens. I do not think it extends to a case such as the present where the acts of those in Russia which are said to have caused the loss of the Aircraft were either the avowed acts of the Russian Government or its agents or acts of others supporting the known policy of their government and not in any sense adverse to that government.

Government Perils

562. In relation to the ambit of the Government Perils there remained at the end of the case, as I understood it, four points of controversy. Given my findings, below, as to the nature of the operative peril, these issues are not of great significance to my final decisions, but they were fully argued, and I should express my conclusions on them.

563. The first was as to the words 'by or under the order of any government'. The AR Camp contended, in summary, that these words are to be read in the sense which would be made clear by the addition of two commas, thus: 'by, or under the order of, any government'. The WR Camp contended that the words are to be construed such that both 'by' and 'under' apply to 'the order of any government'. The difference therefore is that the WR Camp contends that there must be an order of the government for there to be a Government Peril within the clause.

564. The WR Camp's argument was, in essence, that the syntax favours their construction. Further, numerous statutes use the phrase 'by or under' an order. Insofar as the use of the two words resulted in surplusage, that was not surprising, especially in a clause which contained other overlapping provisions (as with 'restraint' and 'detention').

565. In my judgment the AR Camp's construction is to be preferred. The words in question have to be construed in the context of the Government Perils clause, which I think it is fair to say is a broad provision concerned with deprivation of rights of property and/or possession, and is not concerned with technicalities; hence the different ways in which there may be deprivation of such rights are widely drawn. Furthermore, some of those ways are likely to involve a form of order by the government, but others may not. By way of example, 'seizure' and 'detention' are concerned with the practicalities of what has happened, not with formalities as to whether the dispossession was under an order. The words 'by or under the order of any government' fall to be construed in light of this.

566. Moreover, under the WR Camp's interpretation, the word 'by' would be effectively redundant, because a peril having occurred under the order of a government is not meaningfully different from a peril having occurred by the order of a government. I consider that the better interpretation is that 'by' serves the purpose of capturing cases in which the government brings about deprivation of property, in one of the ways specified in the clause, by direct agency; while 'under the order of' the government refers to what may or may not be a longer chain of causation in which the efficient cause is an order of the government.

567. I do not consider that a reasonable person would understand the meaning of the words used to be such that a deprivation of possession by the government, without something

which qualifies as an order, would not be covered as a war risk (and would thus fall to all risks), while a deprivation of possession by the same government pursuant to an order would be covered as a war risk. The interpretation which I favour is not precluded by the punctuation, or rather the lack of further punctuation, of the clause, though the addition of commas might have made it clearer. Even without commas, I consider that that interpretation is an entirely natural one to put on the words used.

568. The second issue is as to whether any 'order' of any government, as referred to by the clause, needs to be a constitutionally or legally valid order. In my judgment it clearly does not. This I consider to be apparent from the fact that the clause specifies that the government may be 'civil, military or de facto'. It is characteristic of military and de facto governments that they exercise power other than through formal legal or constitutional mechanisms.

569. The third issue is as to the meaning of a 'restraint' or 'detention', and in particular as to the role of a governmental order backed by the force of law in the existence of a restraint, and as to whether there are any circumstances in which there can be a restraint without such an order. This arises because the AR Camp contend that the most relevant perils, which they say were operatively causative, were those of 'restraint' and 'detention'.

570. The words 'restraint' and 'detainment' have a wide commercial meaning. This was confirmed by Hobhouse J in The Wondrous [1991] 1 Lloyd's Rep 400, at 417, whose reasoning was endorsed in the Court of Appeal.

571. The editors of Arnould say ([24-28]) that '*the most obvious cases of restraint are those where the assured is deprived by superior authority of possession of his property or where, although he retains possession the property is forcibly detained, for example by an embargo*'.

572. There is little or no difference between the perils of 'restraint' and 'detention'. In Johnston & Co v Hogg (1883) 10 QBD 432, Cave J referred to the 'impossibility' of giving 'distinct and different meanings' to these perils. The editors of Arnould say ([24-25]) that there does not appear to be any authority that supports drawing a distinction between them. The discussion which now follows in relation to 'restraint' also applies in relation to the 'detention' peril.

573. What is in issue is whether it is inherent in the concept of a restraint that there has to be an order. AerCap's initial position appeared to be that an order is always a prerequisite of a restraint, and reliance was placed on Lord Wright's speech in Rickards v Forestal [1941] AC 51. WR Insurers' position was that there could be a restraint in two, but only two, circumstances. One is where the action of the restrained party is checked or restrained by the direct compulsion of physical force or the threat of immediate physical force. The other is where the compulsion is by the force of the state standing behind laws. In both cases the peril must arise from an executive act, i.e. an act of the state or government in its capacity as such and not, for example, by reason of an ordinary judicial process.

574. WR Insurers rely in support of their case in this regard on Miller v Law Accident Insurance Co [1902] KB 694, British and Foreign Marine Insurance Co v Samuel Sanday & Co [1916] AC 650, Russian Bank for Foreign Trade v Excess Insurance Co [1918] 2 KB 123, Rickards v Forestal [1941] AC 51, and The Bamburi [1982] 1 Lloyd's Rep 312.

575. The AR Camp contends that though the two circumstances in which there can be a restraint identified by WR Insurers are examples of where there can be a restraint, they are not exhaustive of the circumstances in which there can be a restraint and that the authorities relied upon by WR Insurers do not make good the case that the two circumstances are exhaustive. The AR Camp further submits that it is sufficient for there to be a restraint if the matter relied upon constitutes an 'effective' restraint. Geipel v Smith (1871-2) LR 7 QB 404 was cited in support of that proposition.

576. In Miller v Law Accident Insurance Co, a vessel was stopped before berthing in Buenos Aires. Discharge of the cattle on board was prohibited by the Argentine authorities on the grounds that the cattle were suffering from disease. The master was directed to leave Buenos Aires, but he was at liberty if he wished, to tranship the cattle and land them at some other port. He did so, without the vessel having been subject to any actual physical force. The Court of Appeal considered the presence or absence of actual physical force or the immediate threat thereof to be irrelevant in judging whether there had been a 'restraint'. Thus, Stirling LJ said in his judgment, at 720:

> It seems to me that there was an active intervention of the Government of the Argentine Republic, which was none the less an exercise of superior force because no officer of the army or of the police force intervened. The natural inference to be arrived at upon these facts is that, if the captain had not acted as he did, possession would have been taken of the ship by persons acting directly under the authority of the Government, and the cattle would have been slaughtered under art. 5 of the regulations to which I have referred. The captain, therefore, was justified in taking the ship outside the port and transferring the cattle to another ship in order to minimise the loss, and in so doing he acted under compulsion of superior force. It was not the less the act of the Argentine Government because it was done under the laws in force in that country.

577. In British and Foreign Marine Insurance Co v Sanday, the claimant (British merchants) shipped linseed on two British ships to Hamburg. They insured the goods with the defendant under policies which included cover for 'restraint of princes'. While the goods were at sea, war between Britain and Germany broke out, which made trading with the enemy and the further prosecution of the voyage illegal, and the ships diverted to British ports and discharged their cargoes there. The courts at all levels held that there had been a restraint under the terms of the policy. This was so, even though the vessels were not subject to a general 'restraint' but were simply prevented from prosecuting their voyages to Germany by reason of the common law.

578. In the House of Lords, Earl Loreburn said (at 659) that he was not swayed by the '*circumstances that force was neither exerted nor present, for force is in reserve behind every state command*'; and he added '*it would be a strange law which deprived the assured, if otherwise entitled to his indemnity, upon the ground that he had not resisted, till the hand of power was laid upon him.*' Lord Parmoor (at 669) said:

> If the restraint in the present case has been imposed by political or executive acts, it was not the less a restraint, within the terms of the

> policy, because the master submits without opposition and without the presence of either actual or threatened force.

579. The House of Lords further decided that the case was not one of 'anticipated restraint'. Instead it was a case in which the operation of the law, which had been called into action by the declaration of war, was 'present and immediate' (see at 665).

580. In Russian Bank for Foreign Trade v Excess Insurance Co [1918] 2 KB 123, a British vessel in Russia was subject to an order of the British Admiralty requisitioning it for the use of the Russian Government, which was found by Bailhache J to be ultra vires, on the grounds that the Admiralty had power to do so only in respect of ships within British waters. During the course of his judgment Bailhache J said:

> Where restraint takes the form of an order and nothing more, that order must, in my opinion, be one that has behind it the forces of the State, which can, if necessary, be lawfully employed to compel obedience if obedience is refused. Now, an order ultra vires the Admiralty could not lawfully be enforced by seizure, detention or confiscation of the ship….
>
> It seems to me to follow that as disobedience to an ultra vires order is not illegal, obedience to such an order, unless compelled by force, or threats of force, is a voluntary act and not a restraint of princes…

581. The Court of Appeal ([1919] 1 KB 39) affirmed Bailhache J's decision on different grounds. The report records, however (at 40), that in relation to the question of whether an ultra vires requisition by the Admiralty might constitute a restraint of princes, Scrutton LJ '*without expressing a final opinion, inclined to the view that it well might.*'

582. In Rickards v Forestal Land the German government, in anticipation of the outbreak of the Second World War, had instructed the masters of German merchant vessels to take refuge in neutral ports, to return to Germany with their cargoes if possible, or as a last resort, to scuttle their vessels. A claim was brought in respect of the cargoes of two vessels that were scuttled and of one that returned to Germany. The House of Lords held that each of the cargoes had been lost by 'restraint'. Lord Wright said:

> The restraint which was operating on the master was the compelling force of the German State to which he was subject. In one sense it was a moral compulsion, but in another sense it was more because it may be assumed that he was aware that, if he disobeyed the order, his government had means of vindicating its authority if not at the moment, at least subsequently …
>
> … there may be a restraint, though the physical force of the state concerned is not immediately present. It is enough, I think, that there is an order of the state, addressed to a subject of that state, acting with compelling force on him, decisively exacting his obedience and requiring him to do the act which effectively restrains the goods.

583. Insofar as the last sentence quoted from Lord Wright's speech was relied on by AerCap to suggest that there must always be 'an order of the state' for there to be a restraint, I do not accept that it supports that proposition. Lord Wright was not saying that there need always be a legally binding order; but rather that, in that case, it was sufficient to constitute a restraint that the German government had given an order to masters of German vessels, which had compelling force on them even in the absence of an immediate physical threat.

584. In The Bamburi [1982] 1 Lloyd's Rep 312, Staughton J said at 315:

> So far as concerns restraint of princes, it is clear and was not disputed that if there is an order of an executive government, backed by the power of the state, it is unnecessary that actual force be used.

585. As regards the case of Geipel v Smith, relied on by the AR Camp, that was not an insurance case. It was concerned instead with whether a charterparty had been frustrated. The defendant shipowners had chartered a vessel to the plaintiffs to load a cargo of coal and proceed to Hamburg. The charterparty provided '*restraints of princes and rulers … during the voyage always excepted*.' Before the voyage began, the Franco-Prussian war broke out. The defendant shipowners renounced the charterparty. The plaintiffs sued for breach of the charterparty and various defences were asserted by the defendant. One of those was a plea that: a state of war had arisen between France and Germany and that the port of Hamburg had been blockaded by the French; the Queen had published a proclamation enjoining all British subjects to maintain strict neutrality between the belligerents; the owners could and did refuse to allow a ship to receive a cargo for the purpose of running the blockade; and the charterparty had therefore been frustrated. On demurrer, the blockade was taken to have been established and effectual. The Court of Queen's Bench considered that the contract was frustrated.

586. During the course of his judgment, Cockburn CJ said (at 410):

> First, is a blockade a restraint of princes? I think it is. It is an act of a sovereign state or prince; and it is a restraint, provided the blockade is effective; and in the eye of the law a blockade is effective if the enemies' ships are in such numbers and position as to render the running of the blockade a matter of danger, although some vessels may succeed in getting through. In such a case the obstacle arises from an act of state of one of the belligerent sovereigns, and consequently constitutes a restraint of princes.

587. WR Insurers contend that Cockburn CJ was alone in saying this; that it was obiter; and that the result in Geipel could not be applied to a policy of insurance, because the decision not to proceed would, in the insurance context, be regarded as anticipation of restraint rather than the peril of restraint itself.

588. My conclusions, having regard to these authorities, are as follows:

(1) The concept of 'restraint' (or 'detention') has not been the subject of comprehensive and exhaustive definition. I can see no reason, and the authorities cited do not establish, why it should not be given an ordinary broad meaning. Such

a meaning will entail three elements. First, that there must be an action of some sort (which, given the remainder of the clause, must be an action of or emanating from a government or authority). Second that action must give rise to some element of compulsion. Third, the effect of the action must be to restrain or detain the property insured. Whether any particular government action constitutes a restraint is a question of fact.

(2) The two types of case acknowledged by WR Insurers to be 'restraints', namely where there is the use of force or threat of immediate force, and a valid order backed by the force of the law, are likely to constitute 'restraints', and indeed are the paradigm examples of 'restraints', but they need not be the only cases in which there can be a 'restraint'. The AR Camp posited a case in which a belligerent power had, instead of blockading a port with warships, erected a mole, or physical barrier, which effectively blockaded the port, and then had withdrawn its forces, such that there was no immediate threat of force. I agree that that could constitute a restraint, though it does not fall within either of the WR Insurers' two categories.

(3) The cases relied upon by the WR Camp, and in particular Miller, British and Foreign v Sanday, Rickards v Forestal and The Bamburi do not establish that the concept of 'restraint' is limited in the way WR Insurers contend. Those cases refer to the conditions which, on the facts of those cases, constituted a 'restraint', and do not establish that those conditions are necessary for every 'restraint'. In Miller the compulsion arose from a valid local law, but there is no indication in the judgments that the result would have been different if, for example, the local law had been invalid. In British and Foreign v Sanday, there was a compulsion by reason of the common law upon the declaration of war. The case did not need to decide whether, in the absence of force or threat of force, a compulsion of law was always necessary for there to be a restraint, and did not do so. The position is similar in relation to what Lord Wright said in Rickards v Forestal, and what Staughton J said in The Bamburi, which I have quoted above.

(4) What was said by Cockburn CJ in Geipel v Smith is of some usefulness in the context of this debate. It is not an insurance case, and it does not seek to define the limits of what may be a 'restraint', but Cockburn CJ's statement that a blockade, if effective, is a restraint is clearly right; and his further statement that a blockade may be effective even though some ships might be, despite danger, able to get through seems to me to be a statement consistent with common sense.

(5) In relation to technically invalid orders, and whether they can give rise to a restraint, I did not find the case of Russian Bank v Excess persuasive that they cannot. That was a case which related to orders of the British Admiralty, assumedly capable of being exposed as ultra vires by recourse to rational debate and/or the court and not, for example, the orders of contemporary authoritarian regimes. What was said by Bailhache J must be seen in that context. In any event, I consider that Bailhache J's approach is open to doubt, even in relation to orders such as those of the Admiralty in that case, as indeed Scrutton LJ appears to have indicated.

589. The fourth issue is likewise as to the meaning of 'restraint' and 'detention', and is as to whether there can be a restraint or detention if the person allegedly subject to the restraint did not wish to act in the manner prohibited. In the context of the present case, the argument, raised by WR Insurers, is that there can have been no restraint unless the lessee wished to return the aircraft and was actually checked from completing a course of action which they were seeking to undertake. This argument is distinct from, though related to, the question

of whether the restraint is to be regarded as the operative cause of a deprivation of possession on the part of the lessor if the lessee wanted not to return the aircraft anyway.

590. The argument, insofar as put as a matter of construction as to the meaning of 'restraint' and 'detention' is, in my judgment, incorrect. The relevant insurance has property as its subject matter. The important question is whether the aircraft and engines insured have been the subject of a restraint, and that question ought to be assessed by what happens to the aircraft, and not by reference to the wishes of the person who is using the aircraft at the time. Furthermore, 'restraint' and 'detention' within the government perils are, in my view, to be understood as descriptions of forms of governmental conduct. What is necessary for there to be a 'restraint' or 'detention' is whether something describable as that type of conduct has taken place; if it has, the conclusion that there has been a 'restraint' or 'detention' cannot be gainsaid by reference to the mental state of the custodian of the property. The same would apply, for example, to whether there has been a 'confiscation'.

Legal Issues as to Causation

Principles of Causation

591. Most of the principles as to causation which the court should apply were not in dispute. Many were the subject of consideration, in the context of non-marine insurance, in the recent Supreme Court decision of FCA v Arch Insurance (UK) Ltd [2021] AC 649, esp. at [162]-[191] per Lords Hamblen and Leggatt JJSC.

592. The following principles of relevance to the present case can be identified:

(1) First, that the question of whether loss has been caused by an insured peril is a matter of contractual interpretation, but is not a question which depends to any great extent on matters of linguistic meaning of particular words used. (FCA v Arch at [162]).

(2) Second, that, unless otherwise agreed, an insurer is only liable for loss proximately caused by an insured peril. (FCA v Arch at [163]).

(3) Third, what is intended by 'proximate' is, to summarise, 'proximate in efficiency'. While English courts have historically deployed a range of adjectives to describe what is meant by 'proximate', the term 'efficient cause' captures the relevant test (and was, for example, used in [168] of FCA v Arch to do so).

(4) Fourth, a proximate cause is not necessarily the first or the last in time: it could occur at any time before the loss. The position is summarised in *MacGillivray on Insurance Law* (15th ed) at [19-001], that '*A proximate cause is not the first, the last or the sole cause of the loss; it is the dominant effective or operative cause.*' However, once a loss has crystallised, a peril which operates subsequently cannot be a proximate cause of the (earlier) loss. (See for example Hahn v Corbett (1824) 2 Bing. 206). This also follows from the fact that a cause of action under an indemnity insurance policy arises at the point that the covered loss occurs.

(5) In identifying the proximate cause of a loss, the court should approach the exercise from the perspective of an ordinary businessperson possessed of common sense, and not as a scientist or metaphysician. (See FCA v Arch at [167] citing Yorkshire Dale SS Co. Ltd v Minister of War Transport [1942] AC 691 at 706 per Lord Wright). But the principles or standards to be applied in the exercise are capable of some analysis. As the majority of the Supreme Court said in FCA v Arch at [168]:

> It is not a matter of choosing a cause as proximate on the basis of an unguided gut feeling. The starting point of the inquiry is to identify, by interpreting the policy and considering the evidence, whether a peril covered by the policy had any causal involvement in the loss and, if so, whether a peril excluded or excepted from the scope of the cover also had any such involvement. The question whether the occurrence of such a peril was in either case the proximate (or "efficient") cause of the loss involves making a judgment as to whether it made the loss inevitable – if not, which could seldom if ever be said, in all conceivable circumstances – then in the ordinary course of events.

(6) In seeking to identify the proximate cause, the '*first task of the Court is to look to see whether one of the causes is plainly the proximate cause of the loss*' (Handelsbanken Norwegian Branch of Svenska Handelsbanken AB v Dandridge (The 'Aliza Glacial') [2002] 2 Lloyd's Rep 421 at 431 per Potter LJ).

593. In the present case, there is no issue as to what the proper test for causation is, as a matter of interpretation of the policies. The language of all policies is consistent with the usual position, i.e. with the test being of proximate causation.

594. There is also no dispute that where an AR Cover is made subject to an exception of war risks, a loss proximately caused by the operation of a WR Peril will fall for cover under the WR and not under the AR Cover. There was also no issue that the burden of establishing that the exception applies, and thus of establishing that a WR Peril was the proximate cause of the loss, lies on the party/ies asserting the application of the exception.

Concurrent Causes

595. What was the subject of more submissions, and some limited areas of contention, was the position in relation to concurrent causes. Some points relating to this subject were not in contention. Thus:

(1) The fact that there are concurrent causes does not mean that there is more than one proximate cause. It is only in 'rare exceptions' that there will be dual effective causes (see International Energy Group Ltd v Zurich Insurance Plc [2015] UKSC 33 at [73] per Lord Mance).
(2) When there are two concurrent proximate causes, neither of which is excluded but only one of which is insured, the insurers are generally liable (FCA v Arch at [173]).
(3) In a case in which there are two proximate causes of loss, one of which is covered and one of which is within an exclusion, then the exclusion generally applies. (FCA v Arch at [174] by reference to Wayne Tank and Pump Co Ltd v Employers Liability Assurance Corpn Ltd [1974] QB 571).
(4) The position in the cases referred to in (2) and (3) is always subject to the terms of the policy indicating a different result. Further, the position as stated applies at least in cases in which the two proximate causes operate in combination, and where neither would have caused the loss without the other. (FCA v Arch at [175]).

596. There was debate about the position in a case in which there are two proximate causes, each of which operates separately, and each cause would have produced the same loss by itself without any need for the other. These have been described in argument as 'independent causes'. Cases of independent operative causes are likely to be very rare. In WR Insurers' submission, in such a case, if one cause is covered and the other is excluded, then, subject to a contrary indication in the policy, the insured can recover all the loss caused by the covered proximate cause. Where there are arrangements such as the present, that would mean that if there were two independent proximate causes, one an AR Peril and one a WR Peril (which is excepted from the AR Cover), the loss would be recoverable under the AR Cover.

597. WR Insurers contend that this approach is correct as a matter of construction (both of typical policies and of the policies in issue here). As AR Cover is typically unlimited, whereas WR Cover is typically subject to lower limits, a reasonable policyholder would not expect to recover less than their full loss, because of the operation of an exclusion, where the relevant loss was, ex hypothesi, independently caused by a peril covered under the AR Cover. Further, the underwriters of the AR Cover have agreed to cover a loss caused by the unexcluded peril, and there is no basis for them to free themselves from the independent operation of that insured peril. WR Insurers also contend that their approach is supported by persuasive obiter dicta to the effect that the Wayne Tank approach is applicable only to cases of interdependent concurrent causes.

598. The AR Camp contend that the Wayne Tank approach applies in this situation. The intention of the parties was that AR Insurers should not be liable for losses proximately caused by WR Perils; but is instead that losses proximately caused by such perils should be insured only under the WR Cover. No authority suggests the contrary.

599. While, as will appear, the answer to this question is not decisive in the present case, my conclusion is that the AR Camp is correct on this point. My reasons are:

(1) The relevant reasoning in Wayne Tank was not confined to cases of interdependent concurrent causes. The members of the Court of Appeal spoke of '*two causes which were equal or nearly equal in their efficiency in bringing about the damage*' (as it was put by Lord Denning MR at 67C); '*two causes both of which can properly be described as effective causes of the loss*' (Cairns LJ at 68H); or '*two causes effectively operating at the same time*' (Roskill LJ at 75D). They did not suggest that the position would differ if the two causes acted independently.

(2) The rationale for the conclusions on the relevant point in Wayne Tank is that, insurers having stipulated that they will not be answerable for loss proximately caused by the excepted peril, they should not be liable for a loss which is indeed proximately caused by such a peril. That rationale applies to a case of independent as well as to a case of interdependent proximate causes.

(3) The statements in Wayne Tank of what would be the position had there been two proximate causes ultimately depended on the construction of the policy there in issue, including of its exclusion clause, but these were, as far as relevant, in a common form. I consider that there are no particular features of the policies or of the relevant exclusion clauses in the AR Covers in the present case which dictate a result different from that indicated in Wayne Tank.

(4) The typical exclusionary language in the present cases is (as in the AVN 48B Exclusion Clause):

> This Insurance does not cover claims caused by…

In my view, if the AR Insurers were to be liable for a claim which is proximately caused by the operation of a WR Peril, then this clause would not have been given full effect: the insurance would instead have covered a claim 'caused by' an excluded peril. The fact that the claim was, ex hypothesi, also proximately caused by the independent operation of an AR Peril does not alter this.

(5) The decision of the Federal Court of Australia in McCarthy v St Paul International Insurance Co Ltd [2007] FCAFC 28 is not an authority to contrary effect. In that case Allsop J did recognise that there was a potential distinction between cases of independent and interdependent proximate causes. He identified that all the cases considered in Wayne Tank had fallen into the latter category. As to the former category, he said, at [104]:

> More difficulty may be encountered in circumstances where a policy excludes one cause, includes another and the loss is occasioned by the two causes operating concurrently, but independently, in the sense that each would have caused the loss without the other. At the outset, it may be doubted that the solution in any given case is to be found in the application of any principle of insurance law, other than one which states that the rights of the parties to the policy are to be determined by reference to the terms of the contract as found. This was the principle applied by all three Lords Justices in Wayne Tank….

At [114] Allsop J said:

> Once one concludes that, as a matter of construction of the contract, the insurer and insured have agreed that the cover does not extend to any loss caused by a particular cause, and that the loss was caused by that cause, the policy's lack of response can be seen as evident. It is only if one concludes that the parties have agreed that the policy will not respond if the excluded cause must be the sole cause, for the existence of a concurrent and not excluded cause to be relevant. Again this is a question of construction of the policy.

I would respectfully agree with those statements. As I have said, to my mind, the terms of the policies here do indicate that the AR Insurers should not be liable for losses proximately caused by the operation of WR Perils; and the nature of the exclusions is not such that they operate only if the excluded cause is the sole cause.

The 'Ann Stathatos'

600. A further area of debate was as to what was described as the Ann Stathatos line of authority.

601. AR Insurers referred to what was said by Devlin J in Royal Greek Government v Minister of Transport (The 'Ann Stathatos') (1950) Ll. LR 228, at 237, as follows:

> When questions of causation arise in contracts, points of construction are often involved. The contract defines the event which sets in motion

> the train of consequences. If in this respect the contract is misconstrued and the angle of view is, as it were, incorrectly plotted, the view will be wrong…
>
> The terms of the contract may restrict or expand the field of causation which has to be examined. … Sometimes one of the clauses is to be construed as dominant, as in the case of an exceptions clause; then the whole of what one might call the area naturally appurtenant to the excepted event must be granted to it, and the other event is what is left over…
>
> In nearly every case, if ordinary marine risks alone had to be considered, the proximate cause could properly be said to be a peril of the seas; but what had also to be considered was the power of the war risks clause to attract the result into its own field...

602. Devlin J's dicta in The Ann Stathatos were referred to by Lord Mance, with whom the other members of the Supreme Court agreed, in an obiter passage of his judgment in Atlasnavios-Navegação, LDA v Navigators Insurance Co Ltd (The 'B Atlantic') [2019] AC 136 at [41]. He there said:

> In Royal Greek Government v Minister of Transport (The Ann Stathatos) … (as I noted in ENE Kos I Ltd v Petroleo Brasileiro SA (No. 2) (The Kos) [2012] 2 AC 164, para. 43) Devlin J pointed out that the existence of an exceptions clause is itself likely to affect what falls to be regarded as dominant, proximate or relevant; and this is because "the whole of what one might call the area naturally appurtenant to the excepted event must be granted to it."…

603. The AR Camp contends that the approach indicated in these statements is that when the court is faced with multiple candidate causes, one of which is an excluded WR Peril, the excluded peril is likely to merit being characterised as the sole proximate cause, even when it may be possible to identify a non-excluded peril that had some degree of causal impact, in the interests of respecting the overall contractual scheme.

604. The WR Insurers say that what Devlin J was saying is somewhat obscure, and that insofar as Lord Mance's dicta are intended to set out a principle of law or construction that attributes a 'gravitational pull' to exclusion clauses for the purposes of identifying the proximate cause of loss, they are wrong and should not be followed.

605. I think it unnecessary, and it would be unwise, to try to define the scope of the principle involved in Devlin J's and Lord Mance's dicta. I understand them to involve the helpful insight that the nature of the contractual candidates for the cause of the loss may influence which is regarded as the proximate cause. Thus if, for example, there was a broadly expressed cover, and a very precisely defined excepted peril, and in the occurrence of a loss the excepted peril played, at least, a significant causative role, it might well be natural to regard it as the proximate cause. The reason is that the parties clearly regard the specific, and narrow, excepted peril as having a particular significance. I do not regard this as heterodox. It would simply be, in my view, a reflection of the businesslike and common-

sense approach to the identification of the proximate cause, which is the approach supported by the authorities.

The Evidence Adduced

Expert Evidence on Russian Politics, Public Policy and Economics

606. The court gave permission to the parties to call expert evidence in relation to the fields of Russian politics, public policy and economics. The expert topics were, in summary:

(1) The political system and mechanisms of political and economic power in Russia in and from late February 2022 onwards, and the extent and mechanisms of control or influence exercised by President Putin and other senior members of the Russian Government over the administration of power in Russia and on the actions of state bodies, in particular those involved in the aviation sector.

(2) The extent and mechanisms of control or influence exercised by President Putin/the Russian Government/other public authorities over commercial enterprises in Russia, and in particular those involved in the aviation sector, including whether the President/the Russian Government/other public authorities use methods other than formal legislation and decrees as a means of giving governmental orders to, or otherwise controlling or influencing, commercial enterprises in Russia. And if so: what those methods are, the discretion available to commercial enterprises as to whether to follow such orders/directions, what commercial enterprises understand the effect of such orders/directions to be, and the extent to which commercial enterprises can either act independently of the actions and (if they can be identified) the wishes of the President/the Russian Government/other public authorities. As part of this exercise, the experts were also asked to express their opinion on the likely intended effect and/ or actual or potential effect of the various pleaded acts, statements and measures of the President/the Russian Government/other public authorities on the Lessors' retention of the Aircraft and Engines.

(3) Any Russian political and/or international geopolitical factors relevant to the Russian acts, statements and measures pleaded and their likely duration.

607. AerCap served and relied on evidence from Professor Timothy J Colton, who is currently the Morris and Anna Feldberg Professor of Government and Russian Studies at Harvard University, having previously taught at the University of Toronto between 1974 and 1989.

608. WR Insurers served and relied on the evidence of Dr Richard Connolly. Dr Connolly was a Lecturer in Russian political economy at the University of Birmingham between 2011 and 2020, during which time he was director of the Centre for Russian and East European Studies there. Since 2020 he has worked for his own research and analysis consultancy, Eastern Advisory Group.

609. DAE served and relied on evidence of Individual 1. A summary of their background and qualifications appears in paragraph 2 of the Confidential DPSI Schedule.

610. AR Insurers served and relied on the evidence of Professor Samuel Greene, who is a political sociologist focussed on the study of politics and power in contemporary Russia, and who currently holds the position of Professor of Russian Politics at King's College London, having been for 10 years Director of the Russia Institute at the same University.

611. All four were qualified to give expert evidence, and each gave evidence which was of assistance to the court. I found this expert evidence particularly helpful in understanding the background against which to evaluate the evidence as to what had occurred, and its significance, in the period after the full-scale Russian invasion of Ukraine and the imposition of sanctions. In general, I found it distinctly less helpful insofar as it commented on the facts, and considered the terms of the various pronouncements of the Russian Government and officials in that period, or as to how particular pronouncements would have been understood. The court had, by the end of the trial, been placed in a position where it had all the most relevant available evidence of what had occurred before it, and was in a position to form its own views as to what that evidence established.

612. As to the evidence of the individual experts:

(1) I considered that Professor Colton's evidence was generally given in a measured fashion. He agreed with a number of the points put to him during cross-examination. His account of the evidence could, however, in some instances, be faulted as somewhat one-sided.

(2) Of the four experts, I found Dr Connolly's evidence on internal Russian politics, as opposed to geopolitical issues, the most inconsistent in cogency. He had expressed views on some matters without an adequate analysis of the evidence available in the case, or on topics, such as the significance or otherwise of GR 311, on which he lacked expert knowledge.

(3) Individual 1's evidence was robustly given, and at times bordered on advocacy. But I concluded that it was based on a very good knowledge of Russian politics. Individual 1's particular thesis as to the personal decision of President Putin to keep aircraft in Russia and his involvement in decisions as to how to implement that detention I treated with caution, considering that, to the extent that this issue was relevant, I had to examine the factual evidence available to the court, including the contemporaneous documents, for myself.

(4) Professor Greene's evidence was well-informed, lucid and careful. I found his evidence as to how to understand practical behaviour within the Russian political system to be persuasive. I accept, on the other hand, that there are significant limitations to the value of his analysis of lessor-lessee correspondence in February/March 2022.

613. There was much which was not in any or any serious dispute between the experts. Many of the issues which there were, including as to methodology, do not need to be resolved. In what follows, I set out features of the expert evidence which I accept and which are, I consider, of some assistance in analysing and understanding the facts of the present case.

614. There was no significant disagreement between the experts on the formal structure of power in Russia. This involves, inter alia, the following aspects:

(1) According to its Constitution, Russia is a federal republic with a semi-presidential system of government. State power is exercised by the President, the Federal Assembly (consisting of the State Duma and the Federation Council), the Government of the Russian Federation and the courts of the Russian Federation.

(2) The President is the head of state, directly elected to six-year terms. The President's formal powers include that the President: guarantees Russia's Constitution and defends its sovereignty, independence and territorial integrity;

coordinates the work of all branches of state power and defines Russia's domestic policy priorities as well as its foreign and security policies; exercises power by issuing Presidential Decrees and orders; submits draft legislation, signs federal draft legislation into law and can veto laws; appoints ministers (including the Minister of Transport) to the Government after they are approved by the Duma; can dismiss any Government minister; directly appoints the Ministers of Defence, Interior Affairs, Foreign Affairs and Justice, and the heads of various Security Services, without the approval of the State Duma; and nominates judges to the Constitutional Court and Supreme Court.

(3) Presidential Decrees (*ukaz*) and orders (*rasporyazhenie*) are binding throughout the Russian Federation. They are usually prepared by the Presidential Administration.

(4) An autonomous division of the Presidential Administration is the Security Council. Its formal powers include conducting analysis and strategic planning of all aspects of security policy relating to individuals, society and the state.

(5) The FSB is a federal agency accountable directly to the President. It has multiple functions, including information collection and analysis on behalf of the President, and wide-ranging operational responsibilities to monitor, investigate and neutralise what are perceived as security risks for Russia.

(6) The Government is the main executive body of the Russian Federation. It is headed by the Chairman of Government (the Prime Minister). The current Prime Minister is Mikhail Mishustin, who was appointed to the role by President Putin in 2020. The Government includes several Deputy Prime Ministers, and Federal Ministers.

(7) The Prime Minister also oversees the activities of many federal agencies. Some agencies are however managed by Ministries (e.g. FATA is subordinated to MinTrans), and some agencies are managed directly by the President (e.g. the Foreign Intelligence Service and the FSB).

(8) The Government has, inter alia, the following responsibilities: to organise the implementation of Russia's domestic and foreign policy; to coordinate activities and cooperation of public state institutions within the unified system of executive power of the Russian Federation; to coordinate and control the activities of executive bodies and resolve their disagreements; and to draft and submit laws to the Parliament for approval.

(9) The Government passes two types of legal instrument. First, Government Resolutions, which are normative acts of Government (*postanovlenia*). Second, Government Orders, which are non-normative instructions and decisions related to operational issues (*pasporyazhenia*). Both Resolutions and Orders of the Government are signed by the Prime Minister and are legally binding throughout the Russian Federation.

(10) As set out above, the Russian Parliament has two chambers. The State Duma, which is the lower chamber, is composed of members (Deputies) who are directly elected. The Federation Council, the upper chamber, is composed of members (Senators) who are either elected by the regional legislatures of the constituent entities of the Russian Federation or appointed by the heads of those entities.

(11) The Russian Parliament approves laws, which can be proposed by the Parliament itself, by the President, by the Government or by legislative bodies of the constituent entities of the Russian Federation.

(12) When a draft law is received by the Parliament, it is registered in the State Duma's online document system, and assigned a special registration number. After that it is sent to the relevant Parliamentary Committee, which has to issue a recommendation on the draft. It could be recommended for approval, or submitted

to other Committees. Once approved, it is debated by the State Duma in three readings. The process can be fast-tracked.

615. The experts agreed that, looking at the realities, Russia is governed by a regime with strong authoritarian characteristics. Dominant power is concentrated in the hands of the country's President, whose power is, on key issues, weakly or not effectively constrained by formal checks and balances. Russia has, moreover, become progressively more authoritarian over time. More specifically, the exercise of power in Russia has become more authoritarian than it was prior to the invasion of Ukraine on 24 February 2022. I would accept the view of Individual 1, Professor Colton and Professor Greene that this has amounted to a 'step change', albeit a continuation of an ongoing process.

616. Informality – by which is meant the exercise of power other than through formal institutions, rules and procedures – is an important part of politics in Russia. Informal mechanisms and norms coexist with formal mechanisms and norms at all levels of state power, and the two sets of norms and mechanisms are mutually influential. Informal instructions and signals form a part of Russian political life. The public dressing down by President Putin of Oleg Deripaska in the famous 'Pikalevo pen' incident is an instance of a signal being sent to society and economic leaders, in an informal fashion. There are a number of ways in which the state may informally communicate decisions to commercial enterprises, including, but not limited to, conversations in closed meetings and phone calls, non-public written communications, public statements not bearing the imprimatur of formal authority or outside a formal procedural setting. Precisely how important and extensive such informal exercise of power is in general is not of any great significance in the present case.

617. The invasion of Ukraine and the Western sanctions which ensued were portrayed by President Putin as part of a vital struggle with the West. In February and March 2022 he referred to the threat, and then the actuality of sanctions, as amounting to blackmail, and like a war; he described Western containment of Russia as a matter of life and death and a threat to the existence and sovereignty of the Russian state. As Professor Colton accepted, President Putin regarded Western sanctions as a belligerent, hostile step against Russia, against which it was necessary to 'counterpunch'. I accept Individual 1's evidence that the Western aviation sanctions were unusual in that, to be effective, they presupposed that Russian entities would cooperate with the West in returning aircraft. They were thus a case in which the Russian regime could swiftly demonstrate that the sanction was ineffective, and instead imposed a cost on Western companies. I also accept Individual 1's evidence that it would have been apparent to everyone within the aviation industry that, unless it was approved by the government, to act in a way which could be construed as implementing the Western sanctions exposed the actor to serious adverse consequences from the regime.

618. Civil aviation is important to the functioning of the Russian economy and the Russian state as a whole, including maintaining connectivity across Russia's territory. It had a particular importance in the aftermath of the invasion of Ukraine and the imposition of Western sanctions. I accept Professor Greene's evidence that the political importance of any particular sector of the economy depends, at least in large part, on the circumstances. While civil aviation might not at other times, and in other circumstances, have been regarded as a 'strategic' sector, it 'received a much more strategic treatment and importance for Russia', to quote Individual 1, in the aftermath of the invasion of Ukraine.

619. The experts agree that the Russian state and its representatives have significant influence over both private and state-owned enterprises; that this influence has increased in recent years; and that this influence is exercised through both formal and informal means. I accept that there are spheres of the Russian economy in which the state intervenes little, at least most of the time. I accept also that in relation to civil aviation, airlines had autonomy to make decisions about day-to-day matters such as routes, services and internal organisation. But I accept Professor Greene's evidence that '*autonomy is always situational … you always have to understand what's expected of you in a given moment … and whether the autonomy that you might have understood yourself to enjoy yesterday no longer exists today.*' It was not atypical for people in Russia to be nervous of going against the state's wishes. The state had a range of weapons which assisted it in creating an atmosphere of fear. As Dr Connolly accepted, these included: threats of prosecution; threats of investigation, including into tax affairs; a pliable legal system in which state interests influenced the outcome of certain cases; and a notorious history of government action against high-profile figures who had demonstrated disloyalty to the regime.

620. In relation to the field of geopolitics, the experts agreed that Western sanctions, and Russian counter-measures, were only likely to be lifted after there is a durable resolution of the war in Ukraine. They also agreed that, while an end to the war was a necessary precondition for the lifting of sanctions, it was not likely to be sufficient. They agreed that, if Ukraine was not made whole – i.e. if it did not achieve the restoration of its territorial integrity, was not provided with robust post-war security guarantees and/or was otherwise left a defeated or partially defeated party – Western governments were likely to maintain large-scale sanctions on Russia.

621. Individual 1 was not challenged on their evidence that as of 8 March 2022 there was no credible prospect of the Western sanctions in general, and aviation sanctions in particular, being lifted in the foreseeable future. During his cross-examination, Dr Connolly accepted that by 8 March 2022: the prospect of a swift military victory by Russia had gone; that even if there had been a swift military victory, there was only a theoretical possibility that sanctions would be lifted or that Russia would not have retained its fleet of aircraft; and a ceasefire (rather than a peace agreement) would not have resulted in the relaxation of sanctions. Dr Connolly's overall assessment was that it was 'highly unlikely' that, as at 8 March 2022, sanctions would be lifted in the foreseeable future. He estimated what he himself said was 'not a scientific number' of a 10-20% chance of this.

622. Dr Connolly also agreed that, though peace talks were proceeding in the period February 2022 to April 2022, the objectives of the two sides were existential and inconsistent; there was never any discussion as to borders and territory; there was no momentum for any form of summit between Presidents Zelensky and Putin; and there had been no consultation with Western countries as to whether security guarantees would be provided, and no agreement from Russia that such guarantees would be acceptable even if available.

Expert Evidence on Russian Civil Aviation

623. The court gave permission for expert evidence to be adduced on the Russian civil aviation sector. Specifically, evidence was permitted on the following issues:

(1) The structure and features of the Russian airline sector, in particular in and from late February 2022 onwards.

(2) The nature of the relationship between Russian airlines and public authorities in Russia in that period.
(3) The extent to which and reasons why Russian airlines may not have returned the aircraft and engines, with particular reference to whether (and why) Russian airlines (i) may have wished to retain or to return leased aircraft in that period (including commercial motivations/economic interests) and (ii) may have been able to (and did) act as they wished and/or to procure state assistance to pursue their wishes, notwithstanding the lessors' termination of the leasing and demands for the return of the Aircraft.
(4) The extent to which and reasons why President Putin/the Russian Government/public authorities may have wished Russian airlines to retain leased aircraft in the period.
(5) To what extent were acts, statements and measures of President Putin/the Russian Government/public authorities likely to have prevented Russian airlines from returning the aircraft and engines.

624. The parties served voluminous expert evidence in relation to these topics. Four witnesses gave expert evidence.

625. AerCap served reports from and called Boris Rybak. Mr Rybak has long experience as a consultant to and commentator on the Russian civil aviation industry. In 1997, with a business partner, he launched Air Transport Observer, the first Russian language airline magazine. From 1992 to 2020 he was a regular commentator on aviation news in Russia and countries of the former Soviet Union and Eastern Bloc. Since October 2022 he has been CEO of Mark Comm LLC, a Seattle-based aviation consultancy start-up. He is a native Russian speaker.

626. WR Insurers relied on the evidence of Andrew Pyne. Mr Pyne is an aviation professional, with experience of managing a number of airlines. Most of this experience was not with Russian airlines or in Russia. His experience of working for a Russian airline was between 2007, when he started working towards the start-up of Avianova, and 2011, when Avianova ceased operations. He remained in Russia until 2014, establishing an aviation consultancy, and a general sales agency for the marketing and sale of (primarily) airline tickets.

627. Merx called and relied on the evidence of Andrei Kozhanov. Mr Kozhanov has long experience in the Russian civil aviation sector. Amongst other roles, he was Chief Financial Officer for VDG between 2003-4; Director of Strategy and Planning and Board Member at I-Fly between 2008 and 2010; Aviation Leasing Department Head at Gaztechleasing between 2013 and 2014; and Fleet Development Director at Smartavia and Red Wings between 2016 and 2022. Since May 2022 he has been an independent consultant.

628. AR Insurers called and relied on the evidence of Ms Anastasia Dagaeva. Since 2007 Ms Dagaeva has worked as a journalist, analyst and expert specialising in the air transport sector. From 2007 to 2011 she worked as a news correspondent for Vedomosti. From 2011 to 2017 she worked for a private equity firm, participating in writing and editing analytical reports. Since 2018 she has been self-employed; continuing her journalistic activities, and being involved in a number of corporate consulting projects. She is a native Russian speaker. Like Mr Rybak, she has been resident in the USA since 2022.

629. Mr Rybak and Ms Dagaeva were both qualified to speak as experts as long standing close observers of and commentators on the Russian civil aviation sector. I considered, however, that Mr Rybak's evidence had to be treated with some caution. His oral evidence involved a number of concessions which were not reflected in his written reports. This suggested that his reports had not been prepared in a way which presented his full views. Mr Kozhanov's evidence was that of someone with long practical involvement in the Russian civil aviation sector. In part his evidence was factual evidence, and I will consider it in that context as well.

630. AR Insurers launched an attack on Mr Pyne, contending that he lacked relevant expertise, and that his evidence could be accorded no weight at all. The criticisms made were, in some respects, overstated, and Mr Pyne did give some evidence which was not given by other experts and which was of assistance to the court. But I agree that he lacked experience of the Russian aviation sector at, or for quite some years before, the relevant events in 2022.

631. As with the evidence of the experts on Russian politics, I considered the evidence of the Russian civil aviation experts to be helpful in providing the background against which to evaluate and understand the evidence, both of documents and factual witnesses, as to what had occurred, and its significance, but markedly less helpful when it was a commentary on the facts of what had occurred and why in the period after the invasion of Ukraine.

632. As in the case of the Russian politics experts, I will set out a number of features which I considered established by the Russian civil aviation expert evidence, and which I regard as of some assistance in assessing the questions of loss, peril and causation which confront the court.

633. The civil aviation sector in Russia has to be considered in the light of geography. Russia is the largest country in the world by area, and more than half its territory is only practically accessible by air transport.

634. Most of the current Russian airlines grew out of the Soviet Aeroflot after the collapse of the USSR. The Russian aviation sector has survived a number of crises, and in 2019 set a record in terms of the number of passengers carried (128 million). Major Russian airlines were severely affected by the COVID-19 pandemic, but survived, usually by refocusing on the domestic market, and receiving some support from the government in the form of emergency one-off subsidies.

635. Russian airlines have a high dependence on Western Leased Aircraft. The Russian aircraft-manufacturing industry is unable to meet Russian airlines' needs for a competitive and fuel-efficient fleet of passenger airliners.

636. For a long time, the Russian passenger air transport market has had Aeroflot as the largest player, and has other participants, many of the most important of which I have described above.

637. Following the invasion of Ukraine and the imposition of Western sanctions, there have been serious changes in the Russian air transport market. In particular there has been a transformation of the route network, with a reduction of international routes, and a sharp increase in domestic routes.

638. Civil aviation in Russia is a sector which is strictly regulated by the relevant public authorities. That regulation is primarily directed to flight safety. FATA is the sector regulator. Its functions include the certification of airlines, airports, aircraft and engines and the licensing of various services and activities, as well as checking flight safety and carrying out inspections. FATA has some 30 subordinate structures, including the State Air Traffic Management Corporation ('**SATMC**'), and is itself subordinate to MinTrans.

639. In addition to the sectoral authorities, the activities of the air transport market are regulated by the relevant resolutions of other authorities, to the extent that those activities fall within the remit of those other authorities. Such other authorities include the Federal Antimonopoly Service, the Federal Tariff Service, the FCS, the Federal Tax Service, the Prosecutor General's Office, the Investigative Committee, the FSB, the Ministry of Defence and the Ministry of Foreign Affairs.

640. FATA, in general, interacts with airlines by orders and recommendations. It transmits them in the form of telegraphic messages (telegrams), which are sent via the Aeronautical Fixed Telecommunications Network. I accept the evidence of Mr Kozhanov who, given his experience, was very well qualified to express a view, that:

> …communications from FATA to airlines concerning the agency's decisions, or changes to regulations, are adhered to without questions. If FATA communicates a requirement to follow law or regulations (such as the Federal Aviation Rules), breaches will result in repercussions (e.g. fines) imposed against the airline and/or its personnel. Furthermore, in my experience, even if FATA simply recommends doing something (or recommends not doing something), then the airline will normally do what is recommended, treating the recommendation as an order, because of FATA's status as a government entity, and because of its powers in general over an airline's operations…

641. The relationship between the Russian Government and the airlines was essentially hierarchical, with the government, to the extent it wished to, exercising dominance over the airlines. Mr Kozhanov said that '*there is a strong sense of hierarchy between Russian airlines and MinTrans/FATA*'. Ms Dagaeva said that '*the dominance of the state is not even up for discussion*', where the '*complex symbiosis between the air transport market and the state*' was characterised '*often with the latter's unconditional dominance*'. Mr Rybak, when asked if he agreed that the government was the dominant party, replied 'Absolutely correct'; and when asked whether, if the government chose, it was a relationship involving subordination to the government, he said 'Correct'.

642. As Mr Rybak said in evidence, the top management of Russian airlines are often, and were in February 2022, strong and seasoned leaders, with experience of surviving crises and difficult market conditions, and who often had no difficulty in making difficult decisions and acting in the interests of their businesses. Equally, however, it appeared to me clear from the expert evidence, including from Mr Rybak's evidence on Day 27, that it was a feature of such leaders that they would be alive to how their decisions would be regarded by the state, and whether those decisions might expose them to civil, commercial or regulatory liability, or prejudice their ability to operate successfully in Russia.

643. After the invasion of Ukraine, and the imposition of Western sanctions, airlines were faced with a number of different considerations to weigh up. Undoubtedly, as was emphasised by Mr Pyne, most airlines would have wished to seek to preserve much if not most and perhaps all of their fleet. That typically provided a motive for them to seek to retain their Western Leased Aircraft because immediately to return all or much of their fleets would have meant immediate operational disruption, and have threatened long term survival. In this regard, the airlines would have been aware that the Western Leased Aircraft could not be replaced, certainly in the short, or indeed medium, term, by Russian-manufactured planes.

644. As Ms Dagaeva said the commercial interests of all the airlines were not identical. Her evidence was also, however, that the most important commercial interest of the airlines was complying with the requirements of the Russian Government. I accept the thrust of that evidence, although it does not of itself answer what any such requirements were and whether the airlines in fact acted in compliance with them.

645. Mr Rybak said that in general, state regulation of civil aviation can be described as 'manual' management and in an almost permanent systemic crisis, since the measures taken are usually aimed at a quick response, and 'doing something' here and now. He agreed that the airlines would have expected the Russian authorities to 'do something here and now' when faced with the prospect of the Western Leased Aircraft being lost. I accepted that evidence, which appeared to me to be realistic.

646. Mr Rybak gave evidence that Russian airlines would have wanted to benefit from subsidies from the government, which started to be announced from late March 2022. A RUB 100 billion subsidy programme was adopted, under which airlines received compensation in the amount of RUB 1.11 per passenger-kilometre provided that from April to October 2022 the airline retained at least 72% of its passenger turnover for the same period in 2021. Airlines were incentivized to keep flying. The RUB 100 billion was distributed among 32 carriers, with half of these funds being received by the Aeroflot group. In addition due to a spike in jet fuel prices in 2022 payments to airlines under the damper mechanism amounted to RUB 98.6 billion; and RUB 19.54 billion was allocated to refund passengers the cost of tickets cancelled due to external restrictions. More than RUB 27 billion was allocated to traditional programmes for subsidising regional transportation. As a result of these large-scale subsidies the total net profit of the 27 leading passenger airlines in Russia at the end of 2022 amounted to a record RUB 87.8 billion, 2.8 times more than in 2021.

647. Mr Pyne produced material as to Available Seat Kilometres (or '**ASK**'s). These indicated that some of the airlines, including S7, Ural, and Smartavia increased the average utilisation of their aircraft in 2022 and also that the 'NEO' aircraft at certain airlines, Aeroflot, Nordwind, S7 and Ural, continued to post 'good utilisation numbers' even in January 2023.

648. Mr Pyne, when asked what would have been the response of airlines if MinTrans had told them on 26 February 2022 that it was not going to take steps to facilitate the operation of the aircraft in Russia, said '*there would have been a big question mark about what was the point of holding on to aircraft.*'

Documentary and Factual Witness Evidence

649. The evidence of some 29 factual witnesses was adduced, of which 23 gave oral evidence. 13 of these were called by AerCap, 2 by DAE, 2 by KDAC, 2 by Merx, 2 by Genesis and 2 by AR Insurers.

650. The bulk of the time taken in examination of the factual witnesses was devoted to the issues of peril and causation. The preponderance of these issues in the time spent on oral evidence was in part due to the fact that the issues in the case had narrowed somewhat since the witness statements were produced. In particular, AerCap had prepared witness evidence to deal with various issues which by the time of the trial were no longer contested.

651. With some exceptions, the factual evidence in relation to the issues of peril and causation was of rather limited assistance. Largely, it was the evidence of employees of lessors, and not representatives of lessees, or of Russian Government officials, or even of people who had been in Russia at the relevant time. Often it represented the relaying of things told to the lessors by lessees and others at the time, or a description of what the witness had understood the position to be from such communications. It was thus, in large part, second or third hand. Moreover, the oral evidence often added little of value to what appeared in the contemporaneous communications or call reports.

652. Because of the lack of centrality of much of the oral factual evidence, it is not necessary to give an appraisal of each of the witnesses' evidence. Some witnesses' evidence does, however, call for specific treatment.

653. Mr Aengus Kelly is the CEO of AerCap and has been since 2011. His oral evidence was mainly directed to issues relating to peril and causation, that is, why the AerCap Aircraft were kept in Russia. There were severe limitations on the value of his evidence on this subject, however, as he was not in Russia at any material time, had limited contact with the lessees, and does not appear to have been in contact with Russian officials.

654. Moreover, I considered that Mr Kelly's evidence was in various respects unsatisfactory and too influenced by a desire to support AerCap's primary case, viz that the relevant peril was an AR Peril. By way of example, he argued unnecessarily, and implausibly, as to whom he had meant by '*the Russians*' in the phrase '*the Russians will not hand them back*' in a WhatsApp message of 26 January 2022 to Mr Hanney, the Irish ambassador to the EU, and what he had meant by '*Russia*' in the sentence '*Russia would never give the aircraft back and won't pay*', in a WhatsApp message to the Irish Minister of Foreign Affairs on the same date. In relation to both he argued that he had meant only the Russian lessees, whereas I regard it as clear, not least from the identity of the recipients, that what he intended to be understood either was, or at least did not exclude, the Russian state. He also expressed views about lessees' (including S7's) lack of honesty which were difficult to reconcile with the sentiments which he was expressing at and about the time of the invasion and with the absence of any contemporary record of his having had such views, and which had not been squarely raised in his witness statement. His refusal to accept that the final two OTI Group AerCap Aircraft were the subject of a government restraint, despite the acceptance of that in AerCap's Opening Submissions, revealed a lack of objectivity.

655. Perhaps most importantly in this connexion, Mr Kelly gave an account of a conversation which he said that he had had with Vladislav Filev on 1 April 2022, while on

the touchline of a football pitch watching one of his children's matches. There was no note of this conversation, and it was not summarised in any contemporaneous email. Mr Kelly's account of it, and in particular the suggestion that it was apparent from it that S7 was keeping its Western Leased Aircraft for commercial reasons, was difficult to reconcile with what Ms Mashkova and probably Mr Filev had said to Mr Leahy and Mr McCray Smith on 30 March 2022, what Mr Filev said to Mr Houlihan on 31 March 2022 and what Ms Mashkova, in Mr Filev's presence, said to SMBC on 2 April 2022, each of which was the subject of a contemporary record. In all of those, S7 had said that it was not permitted to return its Western Leased Aircraft by the government. I concluded that Mr Kelly's account was unreliable in suggesting that there had been a clear message that the aircraft were being kept for commercial reasons, and displayed his tendency to give evidence which favoured AerCap's case.

656. Peter Anderson is Chief Commercial Officer of AerCap. He was able to give some first-hand evidence about the nature of AerCap's leasing business with Russian airlines generally, as to meetings he had attended in Moscow with certain Russian airlines prior to the invasion, and steps he and AerCap had taken in the lead up to and following the invasion to understand AerCap's risk, and the structure and organisation of AerCap's mitigation efforts. He also addressed, at a high level, the steps AerCap took following the invasion to recover the AerCap Aircraft. Much of his evidence was not the subject of challenge. He was not involved in the day-to-day communications with lessees, and to the extent he gave evidence in relation to their stances and motivations in relation to return of the AerCap Aircraft it was not of great assistance.

657. Anton Joiner was the Chief Risk Officer for AerCap at the time of the relevant events. He was responsible for managing distressed situations. His evidence had a particular focus on AerCap's recovery efforts, was generally reliable, and indeed much of it was not challenged. But I think it is fair to say that he was at points evasive and overly reticent about accepting some points which might be contrary to AerCap's primary case. He was loath to make appropriate concessions. By way of example, he declined to say whether there were any differences between the political environment in Russia and that in Ireland; and also was unwilling to identify from whom the 'reprisals' were feared by Red Wings and Smartavia which he had mentioned in his witness statement.

658. Morgan McCray Smith is the head of AerCap's Legal Leasing team, responsible for all legal work in relation to the aircraft leasing process. He gave evidence on a number of aspects of AerCap's legal response to the crisis, and as to the process of negotiating the Russian Insurance Settlements, which was the subject of no significant challenge. He gave his evidence carefully and accurately.

659. Dr Niels van Antwerpen was the AerCap Leasing Executive responsible for managing the relationships with Aeroflot and Rossiya, Alrosa, Aurora and Ural. He was generally an impressively careful and straightforward witness, though sometimes perhaps too fastidious in his refusal to accept the premise of questions, and on occasion gave unrealistic answers.

660. I should also record that there was a particular absence from those giving oral evidence for AerCap. This was of Robert Leahy, who was the Leasing Executive for S7 from 2018-2022. Two witness statements of Mr Leahy were served by AerCap, and put before the court under a Hearsay Notice. Mr Leahy had left AerCap due, as Mr Kelly said, to 'performance issues'. He was at the time of the trial resident in the USA and was not

available to AerCap. Insofar as Leasing Executives were able to give illuminating evidence as to the issues of peril and causation, his role and his statements were amongst the most significant of AerCap's deponents.

661. DAE's principal witness was David Houlihan. Mr Houlihan is the President of DAE Capital. Mr Houlihan is responsible for all customer-facing activities at DAE, including sales, trading, aircraft investor services and the work of the technical teams. One particular significance of Mr Houlihan's evidence was that he had gone to Moscow between 6 and 11 March 2022 to meet DAE's Russian lessees, to seek to get DAE's aircraft returned. During that period he met with Mr Akpinar of Nordwind, Messrs Budnik and Ilmensky of UTair, Mr Burtin of I-Fly, Messrs Klyucharev and Tikhonov of Red Wings, Mr Savostin and others of Smartavia, Ms Mashkova and Ms Saltykova of S7, Mr Isaykin of AirBridgeCargo, and Mr Minaev and Ms Balakina of Aeroflot.

662. Mr Houlihan's evidence was given in an open and frank fashion. I had no doubt that his evidence was entirely honest, and reflected what he recalled and believed to be true. His evidence was, at times, overly influenced by his sympathy for his customers, the Russian airlines. It was however generally reliable.

663. The evidence of David Leggett, DAE's other witness, was given in a straightforward fashion. I also considered that, although the extent to which their evidence could assist on contested issues was limited, KDAC's, Merx's and Genesis's witnesses sought to give honest and helpful evidence.

664. Of the witnesses called by AR Insurers, I considered that it was necessary to approach the evidence of Individual 2 with some caution. I refer to the reasons given at paragraph 3 of the Confidential DPSI Schedule. Furthermore, there had been a number of departures from expected norms of fairness in relation to the preparation of this individual's witness statements. There was a lack of transparency in the deployment of material from third parties, which I did not consider was adequately accounted for by concerns as to the personal security of those involved. These are important caveats. WR Insurers did not, however, invite me to withdraw permission to rely on Individual 2's witness statements. Nor did I consider that the criticisms to be made of the way Individual 2's evidence was prepared and presented meant that it could not be relied on at all. I concluded that it was honestly given, and could be given weight if treated with circumspection.

665. As to Individual 3, I considered that they were an honest witness, and indeed the contrary was not put to the witness by WR Insurers. There were some inconsistencies as between their written and oral evidence, and I had regard to this when assessing their evidence. Generally, however, their evidence was of considerable assistance to the court, being that of someone whose perspective was, amongst the witnesses in the case, almost unique, and who was able to add usefully, from personal and contemporaneous knowledge, to what was apparent from the correspondence.

666. As I have said above, Mr Kozhanov's evidence was in part factual. Insofar as it was, I considered it to be honestly given.

667. There was a very large amount of documentary evidence, much of it emanating from the lessors. There was very little in the way of documentation internal to the lessees or to the Russian Government. What this meant was that some of the documentation which would

have been most germane to deciding on the issues of loss, peril and causation was not available.

668. With that said, the documentation that there is provides much of the most reliable material before the court as to what occurred, and for the purposes of assessing whether there was a loss and if so what was/were its operative cause(s). With the aid of a very comprehensive extended chronology prepared by the parties at my request, I have been able to consider the documentation referred to the court in context and in detail. It is neither practicable nor desirable to seek to refer to all that documentation in what follows.

The Salient Facts

669. I will address the key facts relevant to the issues of loss, peril and causation in six sections. In the first place, I will consider the evidence as to what lessors and lessees thought the future held in the run up to the Russian invasion of Ukraine. Secondly, I will consider the actions of the Russian Government up to 9 March 2022. I will divide this into a consideration of (1) the meeting of 26 February 2022; (2) the meeting of 28 February 2022; (3) FATA telegrams and meetings 1-4 March 2022; (5) the events of 5 March 2022; (6) the period 6-9 March 2022. Thirdly I will consider PD 100, GR 311 and GR 312, particularly GR 311. This will involve a consideration of the issues of Russian law relating to GR 311. Fourth, I will consider government acts after 9/10 March 2022. Fifth, I will look at the position of the various airlines in more detail. Sixth, I will look at recovery attempts made by lessors. This treatment of the facts will involve my reaching and giving conclusions on some of the very many issues and sub-issues of fact which arose between the parties.

Before the Invasion

670. By January 2022 at the latest, Western governments were giving active consideration to the possibility of imposing sanctions on civil aviation, and in particular aircraft leasing, if Russia were to invade Ukraine. AerCap came to know of this, and lobbied the Irish government and the EU Commission. On 26 January 2022, Mr Kelly sent a message to the Irish Foreign Minister, Simon Coveney, saying that sanctions would be '*disastrous*', because '*Russia would never give the aircraft back and won't pay*'. On 2 February 2022, Risteard Sheridan of AerCap supplied lobbyists with a message to be given to the European Commission, which stated, in part, '*in a scenario where sanctions affected aircraft leased to Russian airlines, particularly state-owned airlines, the Russian state would never allow those aircraft to depart its control*'. On 3 February 2022 Mr Kelly sent a further message to Mr Coveney, having had a team in Moscow that week. He said that he could '*say with certainty that the Russian state controlled carriers will not return aircraft to us if aircraft leasing is sanctioned.*'

671. What these communications indicate is that, in anticipation of the invasion, AerCap expected that, if sanctions were imposed, at least the aircraft leased to state-owned airlines would not be returned. It seems clear that AerCap anticipated that this would be procured by the state. Insofar as the likelihood of non-return had been indicated to AerCap by the state-owned airlines themselves, AerCap considered that this would be in conformity with the attitude of the state.

672. Prior to the invasion, at least some of the other airlines operating in Russia were not concerned about the prospects of war or sanctions, and were not planning for them.

Ramazan Akpinar said this to Damhan Finegan of AerCap on a visit the latter paid to Moscow on 2 February 2022. Mr Klyucharev of Red Wings said much the same to Mr Finegan during the same trip.

Actions of the Russian Government to 9 March 2022

The Meeting of 26 February 2022

673. On 24 February 2022 Russia invaded Ukraine. President Putin gave a public address to announce the start of what he called a special military operation. He said, amongst other things, that this was, for Russia, '*a matter of life and death, a matter of our historical future as a nation…*'. Many Russian airlines were taken by surprise by the invasion. S7 said that to Mr Leahy of AerCap on 24 February 2022. Ural on the same day told AerCap it was '*shocked by the developments*'. Other airlines, including Red Wings and Smartavia did not expect that if sanctions were imposed they would have a major impact on their businesses.

674. Wide-ranging Western sanctions, including EU sanctions, were in fact imposed swiftly, as set out in the chronology of main events, above. Word as to the EU sanctions was leaking out on 25 February 2022, and they were formally announced and published at one minute to midnight on that day. By the afternoon of 25 February 2022 word was already circulating that MinTrans had called a meeting of Russian airlines to take place the next morning, which was a Saturday. Ms Mashkova told Mr Leahy of AerCap at 16.50 Dublin time (according to his call report) that '*the Minister of Transportation has demanded that all Russian airlines attend a meeting tomorrow*'.

675. A considerable amount of time was spent at the trial on what had occurred at this meeting. I tend to think that more time was spent on it than its significance deserved. But it was important in some respects. It was unusual, in itself, for MinTrans, as opposed to FATA, to be dealing directly with airlines on operational matters; and it was unusual for its timing (a Saturday). It was attended by the Minister of Transport, Mr Savelyev, and by the head of FATA, Alexander Neradko, and thus indicated high level attention to its subject matter.

676. On the airlines' side, many attended. I have already mentioned that Ms Mashkova had told Mr Leahy that the Minister had demanded the attendance of 'all airlines'. Ms Fileva's recollection in the Forbes magazine article interview which I have quoted above was that 'representatives of all the airlines' were present. That goes too far: Nordwind and Smartavia were not there. But it indicates that many were, and there is sufficient evidence that at least Aeroflot, S7, Ural, Red Wings, and Yakutia were present.

677. There are various sources as to what transpired at the meeting. They are not all entirely consistent, and the original sources of many of these accounts is not clear. I considered it likely that a part of what was said was accurately summarised in a pro-Kremlin social media post, namely a Politjoystic telegram channel post of 26 February 2022, which stated:

> Aeroflot will not give the planes to European leasing companies and will raise the issue of their buyback. All other Russian airlines will decide at their discretion, but the Government will help them if they decide to keep the planes.

…

The decision was made at the very top.

678. If, as I consider probable, this was an accurate account of at least part of what had occurred, a number of points arise. In the first place, 'the very top' was probably President Putin. No one else was 'the very top'. But if it was not, it must have been Mr Savelyev. Secondly, it demonstrates, in my view, that Aeroflot was being told that it was not to give back its planes to European leasing companies, and that this was one of the things coming from 'the very top'. In this regard, what Aeroflot was to do ('will not give the planes…') and what the other airlines were to do ('will decide at their discretion…') are expressed in the same way. In other words, both are what the various airlines were told to do. 'The decision' made at the very top is most naturally read as being both parts of what appears in the previous paragraph.

679. I also consider that, while the Politjoystic post refers to Aeroflot being instructed not to give the planes back, the other state-owned airlines were also given to understand that they should not hand back any planes at present. This is supported by statements deriving from Mr Yanbukhtin, a Moscow-based lawyer, who had previously worked in AerCap's legal leasing department, and who had relations with Ural, Red Wings and Alrosa. The information deriving from Mr Yanbukhtin was that while private carriers were fine to do whatever they decide 'Government owned airlines – an absolutely different story'.

680. What also appears to me clear is that, even though the Politjoystic post may represent part of what was said, it does not convey all that was discussed, and, if taken on its own, tends to suggest that the meeting produced a more concluded position than was the case. In this regard, I considered that Mr Kozhanov's evidence was of significance. His account was based on his recollection of a contemporaneous report that he had received from an attendee of the meeting. His evidence was that during that meeting '*everyone, including MinTrans, was shocked and nobody knew exactly what was to be done. This meeting was just a preliminary discussion. MinTrans explained that they needed time to think. They tried to explain the situation, telling the airlines not to worry, not to do anything, and to wait for decisions.*'

681. Similarly, Ms Fileva said in her Forbes interview: '*At that time, no specific decisions had been taken at the first meeting on 26 February. At first, everyone was just confused, to be honest. The decisions followed later.*' Izvestia, in an article published on 27 February 2022 said: '*As Izvestia's sources at a number of airlines reported, no decisions were made at the* [26 February] *meeting.*'

682. Mr Finegan recorded Mr Kozhanov as having conveyed, on 26 February 2022, '*Per Red Wings, the meeting was light and there is likely more to come.*'

683. Kommersant reported, based on what it had been told by '*one of the participants of the meeting*', that '*the state would only save Aeroflot*'; and that '*the others were asked, if possible, not to give up the planes preventively, to wait for clarity and try to find a compromise with the lessors.*'

684. In the immediate aftermath of the meeting it was already known that there would be another meeting with MinTrans on Monday (as is apparent from Mr McCray Smith's 'Russia Update' of 11.02 on 26 February 2022). It seems likely that this had been announced at the meeting itself.

685. My findings of what had occurred at the meeting can be summarised as follows. In the first place, the Aeroflot group was told not to hand over any aircraft, and other state-owned airlines were given to understand that they should await the government's decisions about leased aircraft. Secondly, private airlines were not given any express instruction as to what to do, and were told to deal with the situation in their own way. Thirdly, it was made apparent that there would be further communications from and decisions of MinTrans, and that it would be prudent for airlines to await those communications/decisions before giving up planes. Fourth, it was made known that there would be another meeting with MinTrans on Monday 28 February 2022. And fifth, there was some talk as to the state helping private airlines, by which most likely it was being mooted that there might be assistance with purchasing aircraft, and possibly subsidies, but this was at a high level of generality, and it was unclear what might be on offer, as reflected in Kommersant's source's understanding that the state would only save Aeroflot.

The meeting on 28 February 2022

686. A further meeting at MinTrans occurred on 28 February 2022. It was not attended by Minister Savelyev but was attended by the Deputy Minister of Transport, Igor Chalik, who has been described as having been Minister Savelyev's right hand man when he was CEO of Aeroflot, before they had moved together to MinTrans.

687. It is not entirely clear which airlines were at the meeting. The RBC article, to which I will come, said that 'the largest Russian airlines' participated, and mentioned the presence of Aeroflot, S7, Ural and UTair. Ural's presence is open to doubt. Three Ural representatives told AerCap on 28 February 2022 that Ural was not at the meeting and could not provide an update. Whether Ural was at the meeting or not, I consider it likely that it was told about what was discussed at the meeting very shortly after it had happened. Other airlines than those mentioned by RBC were also present at the meeting.

688. There are two main sources for what happened at the meeting. In the first place, there is an RBC article of 2 March 2022. RBC is a business news outlet increasingly subject to control by the Kremlin. This was based on what had been told to RBC journalists by 'two sources familiar with the meeting'. The article says, in part:

> … the option of nationalization of such [viz leased] aircraft was raised as one of the options for solving the problem.
>
> The Ministry of Transport is inclined to this idea (about the nationalization of aircraft), added a source in a large leasing company. But the authorities have not yet made a final decision on what to do with Airbus and Boeing aircraft … They expect that a specific scenario may appear before the end of the week.

> "The question is at the evaluation stage", a representative of [FATA] told RBC, answering questions about options for maintaining foreign aircraft in Russia and the possibility of their nationalisation.
>
> …
>
> "The nationalisation of the fleet is the most realistic scenario, there are no other options {for maintaining operability} [in parentheses in original] right now", says one of the sources of RBC. According to him, this should be a decision of the state, because the companies themselves do not have legal grounds to detain aircraft, if there is a requirement of leasing companies to return them. If a decision is made to buy the aircraft, the state will have to discuss this possibility with the United States and the EU…
>
> The state will primarily help the Aeroflot group…

689. The other principal source is the evidence of Mr Kozhanov. He was not at the meeting, but was told at the time what had happened by two people who were there. Mr Kozhanov's evidence was that he was told that this meeting was 'stronger' than that on 26 February 2022, and that:

> It was explained that the issue of repossession of aircraft was in the final stage of being resolved and a decision would be made very soon. It was not a final decision, but the airlines were told to be ready for the final decision of the government. Airlines were told not to return aircraft until a final decision was made as Russia could not be in a situation where it had airlines without aircraft. The expectation was clear that the aircraft should be retained pending a formal legal solution.

690. Mr Kozhanov supplemented this evidence, in a correction to his first report, by adding that what he had meant was that '*while there was no final decision at that stage as to what the legal mechanism would be, there was nonetheless a decision that the government policy would be to retain the aircraft in Russia.*'

691. Some further light is shed on what happened by a Telegram message from Aviatorshina of 2 March 2022, which stated:

> At meetings with Russian airlines at the Ministry of Transport and [FATA] at the beginning of the week, it was decided that the leased aircraft would not be handed over, says a source acquainted with the details.

692. My conclusions in relation to this meeting are that it was attended by a significant number of the major Russian airlines. I consider that it was indeed made apparent at the meeting that the government's expectation was that the aircraft should be retained pending the formulation of a legal solution. I do not regard this as having been an order. Nor do I find that it was couched in terms of a decision having been made by the government that the

aircraft should be retained. Rather, the message was that the government was working on a legal solution, and its expectation was that the aircraft should not be returned before that was devised. It was further conveyed that one possible legal solution was nationalisation, but that this was still under review.

693. I accept that Mr Kozhanov, especially in the correction which he added to his report, probably went too far in characterising the meeting as having conveyed a decision that the government policy would be to retain the aircraft in Russia. I think that the position was somewhat more indefinite than that, and the government was indicating that it was still reaching its decisions, did not want the aircraft to be handed over in the meantime, and was looking at legal solutions which would keep the aircraft permanently in Russia.

The FATA telegrams and meetings 1-4 March 2022

694. I have referred above to the nature of the FATA telegrams. In summary: (1) on 2 March 2022, FATA asked to be given details of airlines' leased fleets and any requests for the return of leased aircraft; (2) on 3 March 2022, FATA stated that even if certificates of airworthiness were suspended, airlines should not suspend flights without confirmation from FATA; (3) on 4 March 2022 certain regional administrations within FATA proposed that airlines react to lease terminations by re-registering aircraft in Russia and obtaining Russian certificates of airworthiness, and the Tyumen Administration directed airlines to re-register aircraft; and (4) also on 4 March 2022 FATA placed special control measures on the preservation of technical records for leased aircraft.

695. It is not in dispute that these telegrams from FATA were not legally binding. MinTrans' legal department indeed sent a letter on 5 March 2022, reported by Aviatorshina, stating that it was not permitted for regulatory legal acts to be issued in the form of letters and telegrams. Some of these messages were also expressed as recommendations, which doubtless provides additional support for their not being binding; though, as I have said above, I accept Mr Kozhanov's evidence that FATA's recommendations are generally observed without question.

696. These FATA telegrams were also, as it seems to me, clearly and of their nature, only temporary messages, inviting an immediate response to a situation on which there would be a more definitive position established in due course.

697. The significance of the telegrams appears to me to be that the Russian authorities had a clear, and urgent, concern about what was happening to the leased aircraft, wanted to know how many were the subject of termination of leases or requests for return, and wanted to keep them flying in Russia.

698. As to other meetings which were being held at MinTrans during this period, there was evidence that Dr van Antwerpen spoke to a representative of Rossiya on 1 March 2022, and was told that there had been a meeting at MinTrans on that day. The call report states: '*The feed-back from the meeting … is that the government is trying to understand how it can keep its aviation infrastructure in place across the Russian Federation given the sanctions imposed*'; and further that the Rossiya CEO had returned from the meeting with a 'tracker' put together by the Ministry, which required Rossiya to specify how many foreign lessors had demanded the return of their aircraft, and information as to how long aircraft could fly before anticipated maintenance was required.

699. The call report also records that Dr van Antwerpen asked his contact whether he anticipated that leased aircraft would be held in Russia and whether this would apply to both government-owned and private airlines. His contact said he was speculating and could not provide a firm answer: '*there is no instruction or messaging at this moment that suggests that leased aircraft should be held in Russia. But there is no instruction for the aircraft to depart outside Russia either.*'

700. This report indicates that MinTrans was, by 1 March 2022 actively collecting information in relation to leased aircraft. The answer given to the question as to whether aircraft would be kept in Russia reflected some uncertainty on the part of the contact which itself, as I understood Dr van Antwerpen's evidence, was probably due to the contact, Mr Ostrovsky, being in St Petersburg, that is to say not in Moscow at the centre of decision-making.

701. On 2 March 2022 representatives of Ural said to Dr van Antwerpen that there was no formal guidance from the government, and 'airlines are left to deal with their lessors'; but that there had been an informal direction given by the government that aircraft should not be returned at present, and no confirmation permitting their return; and that clarity was expected to be provided by MinTrans in the middle of the following week. The words which I have quoted within inverted commas were in inverted commas in the original. I regard it as clear from the note that this was to indicate that this was a reiteration of a formal position, and it was to be taken in conjunction with the informal direction, and the fact that there was no government confirmation that aircraft might depart.

702. On 3 March 2022 there was a further meeting at MinTrans. When Mr Leahy of AerCap spoke to Ms Mashkova of S7 on 3 March 2022, she referred to daily meetings at MinTrans, and reported that they were largely centred around operations and how to keep passengers moving; and that she thought MinTrans would provide more clarity as to its position early in the following week.

703. An email was sent by Mr Turtsev of Clifford Chance, a lawyer who worked with lessors, to CDB Aviation on 4 March 2022, which contained an account of the meeting on 3 March 2022. Mr Turtsev did not work for airlines, and it is unlikely that he was at the meeting himself, and so it is unclear what his source of information was. Two of the points he noted were that the Russian Federation would not assist lessors in repossessions; and that '*there is no guidance or rules for privately owned airlines. They are free to make their own decisions*'. As to the latter point, it seems to me very likely that this was a reflection of the same message from MinTrans as Ural had reported on to Dr van Antwerpen on 2 March 2022, and which he had put in inverted commas (and which I have quoted above), namely that formally airlines were left to deal with their lessors. But that does not mean that there was not an informal direction that aircraft should not be returned, as Ural had said there was.

5 March 2022

704. I have quoted above part of what President Putin said in his appearance at the Aeroflot training centre on this day. It was a high profile appearance, occurring at an early stage after the start of the full scale invasion of Ukraine and the imposition of Western sanctions. What he said can be over-interpreted. What is apparent, however, is that President Putin publicly associated himself with the continued operation of civil aircraft in Russia; and that he

indicated that he regarded Western sanctions as like a war on Russia. It is also significant that President Putin revealed that he was talking to Minister Savelyev on a very regular basis, and, given the context of the remarks, it is plain that these discussions were, wholly or largely, about aviation. President Putin's remark that Minister Savelyev should be given the opportunity to negotiate with his 'partners' is not clear as to who the 'partners' were that he was referring to. Minister Savelyev would not be conducting negotiations with Western lessors himself, and these do not appear the obvious group President Putin had in mind. I tend to think that President Putin was referring to negotiations with all interested parties, including airlines, and possibly other ministries. Whatever the position in relation to that, the reference to the Minister having the opportunity to negotiate further but President Putin being certain that 'we will fly' is a clear indication that, while there had been no final decisions as to the way in which it was to be achieved, there would continue to be a functioning civil aviation system in Russia.

705. Also on 5 March 2022 FATA issued the message of that date which I have quoted above. I consider that this was an instruction, albeit a temporary one, to airlines to keep leased aircraft in Russia, subject to the identified exceptions. I do not regard it as plausible that this message was intended, or understood by airlines, merely to be advice that if flown abroad planes might be arrested. That is a matter of which airlines would have already been aware. In any event, and as I have already said, 'recommendations' of FATA were generally expected to be complied with; and that must have been particularly the case with this one, which was expressed in emphatic terms, and employed marked and unusual political language. FATA also took care to communicate this message to airlines, publishing it on its website, emailing it to airlines, and, as Mr Kozhanov and Mr Rybak agreed, telephoning the CEOs of airlines to ensure that it had been received.

706. I also consider that this message was not intended, and would not have been understood to prohibit only laden flights carrying passengers and cargo, while saying nothing about empty ferry flights. As the message said, FATA was concerned about the possibility of aircraft being arrested. It would not have been concerned only about the arrest of laden aircraft, and not about ferry flights to return aircraft to lessors. The message would have been understood, as Mr Kozhanov says it was understood, as a ban on any flights abroad for any purpose.

The period 6-9 March 2022

707. During this period, most airlines did not fly abroad. There were returns to lessors of 22 planes by Russian-Turkish airlines, i.e. Azur, Pegasfly/Nordwind and Royal Flight. Of those, 12 flew to Turkey, 6 to Egypt, and 2 each to Mexico and UAE. In several of these cases, the airlines used subterfuge to return the aircraft. By way of example, AerCap's MSN 32729, which had been leased to Azur, was flown to Egypt and grounded, and Azur made sure that the aircraft could not depart by immobilizing it. In most if not all these cases the airline acquiesced or cooperated in the repossession. It seems that these airlines were able to obtain permission to fly the aircraft to Turkey, Egypt and Mexico because they were carrying out repatriation flights or because they were able to fly under the guise of carrying out maintenance at an operational base outside Russia.

708. These returns were not viewed with equanimity by FATA. A telegram post by Aviatorshina of 11 March 2022, referring to a 'recent' meeting at FATA, included the following:

> The meeting also discussed a "small demarche" by charter airlines with Turkish origins (Pegas Fly, Nordwind, Royal Flight, Azur Air). The source said that "by a fortuitous coincidence, most of their fleet landed in Turkey at the same time where they were conveniently detained." According to Flightradar data, more than 20 aircraft of the listed airlines have already been in Turkish airports for several days.
>
> In response, Maxim Kostylev [FATA's head of flight operations] threatened the carriers that "the appropriate conclusions will be drawn" regarding this sabotage.

709. Mr Kozhanov's evidence was that SATMC was instructed, on 10 March 2022, not to issue permits for flights abroad by Russo-Turkish airlines. It seems likely that this instruction was given at much the same time as the meeting at FATA described above.

710. A draft Government resolution, '*On Guaranteeing the Uninterrupted Operation of Civil Aircraft Flights Against the Backdrop of Sanctions Against the Russian Federation*' was reported to have been prepared by 2 March 2022. Its text was published unofficially on the Russian website Frequent Flyers on 3 March 2022. It did not include any prohibition on leased aircraft being moved out of Russia. Instead it provided for the extension of the validity of airworthiness certificates, reducing the period for the issue of Russian airworthiness certificates, extending the validity of documents confirming the passage of inspections, and the like. On 5 March 2022 an expanded version of this draft resolution was officially published for public consultation, due to be completed by 21 March 2022.

711. On 9 March 2022 a draft regulation in relation to the performance of aircraft leases, including the terms and conditions and procedure for the return of foreign aircraft was published by MinTrans. It provided that sums due under such leases should be paid in accordance with procedures established by the Central Bank of the Russian Federation, and provided that the lessee should ensure insurance and reinsurance of the aircraft with Russian insurers and reinsurers. It further provided that in the event of the termination of a lease by the lessor and a demand by the lessor for the early return of the aircraft, the lessee '*shall return the foreign aircraft … on the basis of a decision of the Government Commission for Import Substitution, indicating the procedure and the terms and conditions of such a return*'; and that in the absence of such a decision, the lessee should continue to use the aircraft during the term of the lease.

712. This draft resolution was published on the same day as GR 311, which I will come to consider in detail below, was passed. The draft resolution was aircraft-specific, whereas GR 311 covered a wide range of goods. They dealt with restricting the export of aircraft in rather different ways, with the draft resolution envisaging a permission procedure involving the Government Commission for Import Substitution, and not referring to GR 311. It seems to me likely that the difference was due to the governmental left hand (MinTrans) not knowing exactly what the right hand (the Russian Government acting by the Prime Minister's Office) was doing, in circumstances of emergency and crisis. The draft resolution came to be amended and turned into GR 412, which was enacted on 19 March 2022. In its enacted form, instead of referring to the Government Commission for Import Substitution,

it provided that the export of foreign leased aircraft was to be '*carried out in accordance with the bans and restrictions established on the basis of* [PD 100]', that is to say GR 311.

PD 100, GR 311 and GR 312

713. These measures are central to the AR Camp's case that any loss of the Aircraft was caused by a WR Peril. They contend that, if there had been no prior loss of the Aircraft, these measures, and in particular GR 311, were a restraint or detention which was the proximate cause of the loss of the Aircraft. The WR Camp accepted that GR 311 was capable of amounting to a restraint, subject to three issues, which are in whole or in part issues of Russian law, that determine its scope and effect. Russian law expert evidence was adduced in relation to those issues.

714. In what follows, I will consider the terms of the measures, and then the three issues. In the course of my review of those issues, I will resolve the issues of Russian law, insofar as it is necessary to do so.

The Measures

715. President Putin's decree PD 100, issued on 8 March 2022, was issued pursuant to pre-existing counter-sanctions legislation. It provided, in part, that there should, until 31 December 2022, be a ban on the export from Russia of certain goods pursuant to lists to be determined by the government. PD 100 was implemented by means of the Prime Minister signing GR 311 and GR 312 on behalf of the government on 9 March 2022. They came into force from 10 March 2022, the date of their official publication.

716. GR 311 banned the export from Russia of certain goods, which were listed in an Annex to the resolution. This Annex contained a large number of items, including aircraft and aircraft engines. GR 311 provided that the FCS should ensure control over the performance of the ban; and that the Ministry of the Interior, the Border Service of the FSB, and the Federal Service of the Troops of the National Guard should assist the FCS. There was an exception for exports to other countries in the EEU. There was an exception for TVIC.

717. GR 312 introduced a permit-based procedure for the export of certain goods from Russia to the EEU member states. Those goods were listed in annexes to the resolution. Annex 2 included aircraft and engines. MinTrans was given responsibility for issuing export permits for these goods. TVIC were exempt from the permit-based procedure.

718. Both GR 311 and GR 312 were stated to impose their restrictions until 31 December 2022. In the event they were first extended by GR 1959 of 2 November 2022 until 31 December 2023, and then re-extended by GR 2285 of 23 December 2023 until 31 December 2025.

719. On 17 March 2022 GR 311 was amended to introduce a new paragraph 2(1) which provided that temporary export permits could be granted '*by decision of the Government of the Russian Federation, on the basis of proposals of federal executive bodies agreed with the Ministry of Industry and Trade … and the Ministry of Economic Development*'.

720. GR 311 was amended by GR 850, which came into force on 12 May 2022. Following the amendment, the exception for TVIC was not to apply to aircraft exported for the purpose of return to lessors of states unfriendly to Russia.

721. The three issues raised by the WR Camp as to whether GR 311 had a relevant restraining effect, and if so as to whether any restraint was effective, are as follows. First, the WR Camp contended that the aircraft could have been moved outside Russia pursuant to the TVIC exception. Second, it was said that the aircraft could have been returned by exporting them as 'goods' if the Government granted permission. There is a significant issue as to the reality of this possibility. Third, it was argued that if an aircraft was refused permission to leave Russia on the grounds that it was to be returned to a lessor, that refusal could have been challenged on the basis that GR 311 conflicted with Russia's obligations under the Cape Town Convention and Protocol.

The TVIC exception issue

722. GR 311 as initially enacted provided that the ban on exporting the goods listed in the Annex to the Resolution 'shall not apply to: … transport vehicles of international carriage'.

723. The WR Camp contends that, up to 12 May 2022, aircraft could have been moved outside Russia pursuant to this exception, by the airline undertaking a journey of international carriage (i.e. a journey involving a flight carrying passengers, baggage and/or cargo to another state) and, once outside Russia, returning the aircraft to the lessors. This was supported by expert evidence from Dr Gerbutov and Mr Kozienko.

724. The AR Camp contends that the TVIC exception did not allow aircraft to be exported permanently from Russia to be returned to lessors. Further, even if leased aircraft could have left Russia as TVICs for the purpose of the permanent return to lessors, it would still have been necessary to submit them for export or re-export processing in order to effect their export on a lawful basis, and that would have been prohibited by the ban on 'export' in GR 311. The AR Camp relied on the expert evidence of Mr Saveliev and Dr Khodykin.

725. In more detail, the issues are these. First, would an aircraft which left Russia to start or complete a journey of international carriage **but also** with the purpose of being permanently returned to a lessor outside Russia have qualified as a TVIC within the meaning of the TVIC exception? Second, once an aircraft had been flown out of Russia in such circumstances, would the FCS have been bound to agree to the airline's application permanently to export it?

726. The legal background to these arguments, aside from GR 311 itself, includes that TVIC is a concept drawn from EEU Customs law, and has the same meaning as it does there. Article 2.1(51) of the EEU Customs Code defines a TVIC as:

> transport vehicles used for the international carriage of goods, passengers and/or luggage.

727. A number of matters were common ground between the experts as to the TVIC concept. It covers vehicles making journeys for the purpose of international carriage of goods, passengers and/or luggage; and the relevant purpose is that of the particular journey.

The TVIC concept does not apply to vehicles which are being exported as goods themselves. Its rationale is to simplify and facilitate international carriage, travel and trade, as it would be inconvenient for full customs procedures and the payment of duty to be required for a vehicle which is being used for regular flights to and from Russia each time the vehicle crossed the border. I also understood it not to be in dispute between the experts that a movement out of the EEU as a TVIC is a temporary export, and does not change the vehicle's customs status.

728. The first main matter at issue was whether the movement of an aircraft out of Russia would fall within the TVIC exception if, at the point of departure, the airline had had the intention of completing a carriage of goods, passengers and/or luggage, but had also intended that, at the end of that carriage, the aircraft would be returned to the lessors outside Russia.

729. The WR Camp contends that the only relevant purpose is as to the use of the aircraft for the particular journey, not its subsequent use. This produces a simple test, while any assessment of whether a movement falls within the TVIC exception which depends on the relative weight of the purposes of the airline would be uncertain, and illogical.

730. The AR Camp contends that the WR Camp's case is inconsistent with the intention and purpose of GR 311, which was to ban the export of aircraft; and that a Russian court would consider the purpose and objective of GR 311 when considering its meaning and effect. Further, if there was an intention that the aircraft should be delivered to lessors at the end of the flight, that would be a current intention at the outset of the flight, and one which could not be dissociated from the purpose of the journey. If there were an intention at the outset of the flight that the aircraft should be returned to a lessor at the end, then the export would not be temporary, and that would be inconsistent with the aircraft being a TVIC. Moreover, an airline could not have properly and honestly filled in the TDTS form (the short form declaration that has to be filled in when a TVIC leaves the EEU), if the intention was to return an aircraft to the lessor at the end of the flight.

731. I have concluded that the AR Camp is clearly right about this. My reasons are essentially six-fold.

732. In the first place, I considered that, where they differed, the evidence of Mr Saveliev and Dr Khodykin was generally more cogent than that of Mr Kozienko and Dr Gerbutov. The evidence of Mr Saveliev was, I found, generally persuasive and realistic, as was that of Dr Khodykin. Mr Kozienko's evidence, though informed by considerable knowledge of Russian and EEU customs law, on occasions lacked realism; and Dr Gerbutov on occasions failed to make realistic concessions and came close to arguing the case for the WR Camp.

733. Second, it is apparent that the objective of GR 311 was to be an effective ban on the export of aircraft and engines. GR 311 (and GR 312) was passed pursuant to PD 100, which was a decree, as its title stated, for the purpose of furthering the security of the Russian Federation. PD 100 was issued pursuant to Federal Laws 281-FZ of 30 December 2006 on Special Economic Measures, 390-FZ of 28 December 2010 on Security and 127-FZ of 4 June 2018, on Counter-Sanctions. As Mr Saveliev put it, the purpose of GR 311 can be seen to be to further the objectives of (i) ensuring the uninterrupted functioning of key areas of the Russian economy, (ii) protecting Russia's security and sovereignty and (iii) protecting the rights and interests of Russian citizens against the actions of unfriendly states; and was

intended to protect (inter alia) the aviation sector against economic sanctions. These objectives would be defeated if any number of aircraft could be returned to lessors provided only that there was any amount of cargo/passengers on board.

734. Third, the meaning and purpose of GR 311 are illuminated by the facts, which were agreed between the experts, that: (1) the TVIC exception does not apply to a case where the aircraft was exported outside the EEU for the sole purpose of return to the lessor; and (2) the TVIC exception does not apply to the export of engines outside Russia separately from aircraft. To say that these cases were not within the TVIC exception, but the export of an aircraft where there was an outward flight which did carry some passengers or cargo was, appeared to me to produce an absurd result.

735. Fourth, the points about the purpose of GR 311 and the relevance of the absurdity of one interpretation of it, are matters which could be taken into consideration by a Russian court in interpreting GR 311. I accepted the evidence of Dr Khodykin and of Mr Saveliev that a teleological interpretation was a mode of construction available to a Russian court in construing GR 311. This seemed to me to be borne out by the decision of the Appeal Chamber of the Russian Supreme Court in *LLC Vita-Ora*, where the court did have regard to the objective of GR 311 itself.

736. Fifth, the interpretation which WR Insurers put on GR 311, and the way in which it is contended that aircraft could have been exported, would fall foul of the Russian law doctrine against circumvention of law. This principle was explained by Mr Saveliev as applicable where a person seeks, using formally permissible and lawful actions, to circumvent a result that the law is intended to prohibit. That this principle is applicable in public law cases is the evidence of Mr Saveliev, and this is supported by part of the reasoning in the Russian Supreme Court decision in *Moloko v Chelyabinsk Customs*, and also by part of the reasoning in the decision of the Arbitrazh Court of the North West Circuit in *Barrus Project Logistics v Murmansk Customs*. I recognise, especially in relation to the latter authority, which is not a decision of the Russian Supreme Court, that it is necessary not to treat Russian authorities as precedents in the way in which a common law system would; nevertheless those cases do appear to contradict the idea that the principle is only applicable in private law cases.

737. Sixth, I accepted the evidence of Dr Khodykin and Mr Saveliev that an intention to return the aircraft after the flight was inconsistent with a temporary export, which is an integral part of the TVIC regime; and their further evidence that if that was the intention, then to fill out the TDTS form indicating one of the four standard purposes of export would involve a misrepresentation which would have exposed the airline to sanctions.

738. The second main issue is whether, if an aircraft had been flown out of Russia as a TVIC, the lessee would have been entitled to make a declaration for export or re-export which the FCS would be bound to approve.

739. It was, as I understood it, common ground between the experts that, in order for an aircraft to be permanently exported, it was not enough that the aircraft should have physically left Russia, but there needed to be the performance of a customs procedure, namely to submit a declaration for export or re-export, and the customs authorities needed to agree to place the aircraft under the relevant procedure. What was in issue was that the WR Camp contended that, the aircraft having been flown out as a TVIC, the authorities would have had no option but to agree; but even if that was wrong, non-compliance with

the relevant procedure would have no significant implications, and a refusal of the authorities to agree to the placing of the aircraft under the relevant procedure would not be a restraint of the aircraft.

740. This point does not matter given my conclusions in relation to the first main point as to the TVIC exception. I will nevertheless briefly express my conclusions in relation to it.

741. The situation which is being considered is where an aircraft has been flown out of Russia as a TVIC, and on the assumption that it was not inconsistent with the aircraft's TVIC status that there should have been an intention to return it to the lessors at the end of the flight. I accept AR Insurers' case that, in such circumstances, the aircraft would still be subject to the ban on export in GR 311. GR 311 bans the permanent export of goods (including aircraft). That ban does not cease to apply to a TVIC once it has left Russia, because, as provided for in Article 7 of the EEU Customs Code, the aircraft crossed the EEU customs border and/or have been placed under customs procedures 'subject to prohibitions and restrictions'. I accept Dr Khodykin's evidence that if an aircraft left the EEU as a TVIC, namely a temporary export, permanent export would still be prohibited.

742. I consider as entirely unrealistic the suggestion that, if an aircraft had left the EEU as a TVIC, but was still subject to the ban on export, the Russian authorities would have given permission for its permanent export by return to lessors.

743. More generally, if one assumes, contrary to the facts, that what had happened was that airlines had moved aircraft out of Russia as TVICs and had then applied to export or re-export aircraft in order to return them to lessors, the purpose would have become known to the Russian authorities, even if it had not been known before. I do not consider that the Russian authorities would have accepted such applications, and they would have been made aware that the TVIC route was being used as a means of returning aircraft to lessors. I regard it as clear that the authorities would have reacted by not permitting any further aircraft to fly out as TVICs. There were numerous ways in which unauthorised flights could have been prevented: including refusal of an airspace permit, and refusal of dispatch permission. In other words, after the first few planes, this route to returning aircraft would have been stopped, even if it had succeeded in the first few cases.

744. WR Insurers make the point that, if aircraft were outside Russia, and if there was then a refusal by the Russian customs authorities to grant a permit for permanent export, this would not be a restraint for the purposes of the policies. Even if a customs duty could, in such circumstances, be levied, the aircraft would not be restrained, or prevented from being returned. I am prepared to accept that is so. But it does not seem to me to be the relevant question, as that situation never occurred. The relevant question is whether GR 311 was a restraint, and the degree of realism of the suggested ways of getting around it is relevant to whether it was. The way suggested by WR Insurers as to how the ban could have been avoided, or was potentially inapplicable, is, in my view, unrealistic and would not have worked, and that is of relevance to whether GR 311 was a restraint.

745. For completeness, I should refer to the position under GR 312, which had introduced a permit procedure for exports of enumerated goods to EEU countries. Mr Kozienko's evidence was that it would have been possible for aircraft to be returned to lessors pursuant to GR 312 by a series of steps involving first that the aircraft should be admitted for domestic consumption in Russia; second that it should be flown to another EEU country as a TVIC;

third, that the aircraft be returned to the lessor in that other EEU country; and fourth that the lessor then apply to the local customs authority in the other EEU country in order to export the aircraft.

746. As the TVIC exception in GR 312 is in the same terms as that in GR 311, and for the same reasons as in relation to GR 311, I do not consider that an aircraft could have been flown out of Russia to another EEU country as a TVIC, if it was intended to return the aircraft to the lessor; and an attempt to do so would have fallen foul of the doctrine as to circumvention of the law.

747. It is also apparent that there would have been further difficulties with this proposed route of return. Dr Khodykin explained that it would be necessary, as a first step, for the lessee to change the customs status of the aircraft, while in Russia, from temporarily admitted to released for domestic consumption, because it would not be possible to transfer possession of the aircraft to another in an EEU country while under the temporary admission regime. That change of status would, however, attract VAT at 20% and customs duties of up to 12.5%. I did not consider persuasive the suggestion, put to Dr Khodykin in cross examination, that no VAT would have been payable, because the relevant exception relates, as I understood it, to goods conditionally released for domestic consumption, but goods in that category would retain the status of foreign goods and could not have been transferred to a lessor. In addition, I concluded that, at stage 4, the foreign lessor would not have been able successfully to apply for export from the EEU country, because it would not have met the relevant criteria. In particular it could not have used any of the available codes, for the reasons Dr Khodykin gave.

748. One final issue in relation to the TVIC exception should be referred to. This is as to what inferences can and should be drawn from the passage of GR 850 which came into force on 11 May 2022. As set out above, this provided expressly that the export restriction should not apply to TVICs except for aircraft being exported for the purpose of return to lessors in unfriendly countries. This was relied on by the WR Camp as support for their case that, prior to this, there had been no ban on the export of aircraft for the purpose of their return to lessors. On the other hand, the AR Camp, and Messrs Khodykin and Saveliev, contended that it was merely clarificatory.

749. I found the evidence of Mr Saveliev and Dr Khodykin on this point persuasive. On their evidence, GR 850 did not alter the position that the TVIC exception had never allowed permanent return to any lessor, but emphasised it in relation to Western lessors. I considered the contrary position, and Mr Kozienko and Dr Gerbutov's evidence on it, to be unconvincing. It would suggest that, when GR 311 was introduced in March 2022, the government was content that aircraft should be returned to lessors from unfriendly countries, but that that changed in May 2022. There was no evidence of, or apparent reason for, such a change. The WR Camp's interpretation also involves that there would have been a difference between the government's approach to aircraft and detached engines. Detached engines could never have been a TVIC. It is difficult to see why the government should have been intending to permit the return of aircraft in March 2022, but not of detached aircraft engines, or why that policy changed in May 2022. Further, if the intention had actually been to effect a substantive change to the TVIC exception, it is difficult to see why the TVIC exception in GR 312 was not similarly altered, notwithstanding that other amendments to GR 312 were made by GR 850.

750. Clarificatory amendments were made to GR 311 by GR 1775. This confirmed, in essence, that the ban did not apply in relation to goods exported from the Russian Federation prior to GR 311 coming into force. I conclude that GR 850 was likewise introduced for the avoidance of any doubt, probably because some airlines were asking about the position.

751. I therefore find that the TVIC exception was not available as a route by which airlines could return aircraft to lessees. The fact that no airline in fact tried to use it to return aircraft to lessors appears to me to support the conclusion that it was not, and was not thought to be.

Permits to export

752. There is no dispute that, in its original form, GR 311 did not contain any procedure for seeking permission to export goods subject to the ban; or that, on 17 March 2022, GR 390 amended GR 311 to introduce a new provision dealing with permission. That provision was, in the event, further altered on 6 October 2022 by GR 1775 which introduced a more involved procedure.

753. There was no specific format stipulated for an application for permission under GR 311; nor were any criteria or conditions set out for the grant of permission. A procedure for applications under GR 312 was established by Order 99 passed on 24 March 2022, and might have been applied by analogy. The procedure under Order 99 required the submission of an application to MinTrans, including the grounds for export of the relevant product and details of the applicable contract; and if the application conformed to relevant requirements, MinTrans would provide it to the FSB and the Ministry of Defence for them to evaluate whether the export posed a threat to the defence and security of the country. Grounds for refusal of the application expressly included a threat to national defence or security.

754. The main focus of argument between the AR and WR Insurers on the issue of permits was as to whether there was any realistic prospect of the grant of permissions to return aircraft to lessors. I will return to the applications which were made in the context of the position of the airlines below. But my conclusions on this issue are as follows:

(1) There was not a realistic prospect of permission being granted to airlines to return aircraft to lessors from unfriendly countries, save in relation to exceptional circumstances.

(2) The attitude of the authorities was, and I consider would always have been understood as likely to be, encapsulated in what Minister Savelyev said to the Transport Committee of the Duma on 15 March 2023, quoted in full above, and in particular his comment that the airlines '*understand that they cannot take the aircraft out of the country without approval, and it goes without saying that we will not give such approval*'. I see no good reason to doubt that statement, coming from the person in the best position to know. Minister Savelyev's comment that 'it goes without saying' implies not only that it would have been the policy of the Ministry to decline permissions, but also that he thought that this would have been obvious to all.

(3) This is borne out by the fact that four applications are known to have been made, which were not granted: by Red Wings, ABC and Atran and UTair. The only case in which the government did permit the return of leased aircraft to Western lessors, Air Lease Corporation and Aviation Capital Group, was of two S7 Boeing 737 MAX 8 aircraft, and it appears to have been an exceptional one, based on the fact that these aircraft had been grounded for years, and were not allowed to fly in

Russia. That was how Ms Fileva explained the matter in her Forbes interview. As she there implied by saying that '*Airlines can make an effort with paperwork if they are told to do it*', that was an application which had the approval of the authorities. The only other return of leased aircraft has been to a lessor in a Chinese group of companies, and it appears likely that the fact that the group was not from an 'unfriendly' state was essential to the grant of the exception.

(4) In the case of at least some other airlines, they will not have applied for permission because they saw no point. This is suggested by what Nordwind told Mr Houlihan in about May 2022, namely that they did not see the point in applying; and this in circumstances in which DAE considered Nordwind an airline which wanted to hand back at least some aircraft due to international passenger demand. Others will have been deterred by the absence of any clear procedure for applying. As Individual 3 said, '*no one made it clear as to how potential exemptions could be made … it's like going through a wall: it's open to you to try and go through a wall, but you can't do that, you need a door.*'

(5) WR Insurers developed an argument that the draft resolution published by MinTrans on 9 March 2022, referred to above, indicated the real policy of MinTrans, and that it was open to returns of aircraft, even before the end of lease periods, and even to lessors in unfriendly countries, to the extent that that facilitated the operation of airlines. I do not accept that this is so. There is no good reason for thinking that the decisions of the body which would, under that draft resolution, have been responsible for granting permissions to return aircraft, namely the Import Substitution Committee, would have adopted a different approach from that which was said by Minister Savelyev to 'go without saying' in relation to the permission procedure under GR 311. On the contrary, Individual 1's evidence was that the Import Substitution Committee would 'of course' have declined permissions.

755. Accordingly, I accept that the position is accurately stated in AerCap's Opening Submissions, namely that the ability to obtain export permits for return of aircraft to Western lessors was at all material times illusory. The only exception appears to have been in relation to the special case of Boeing 737 MAX 8 aircraft. There would not have been the grant of permits for any significant number of aircraft because it would have undermined the government's anti-sanctions strategy.

The Cape Town Convention

756. The third main issue in relation to GR 311 is as to whether GR 311 could have been challenged on the basis that it was inconsistent with Russia's obligations under the Cape Town Convention. WR Insurers contend that GR 311 did not constitute a restraint or detention because any refusal of permission of an aircraft to leave pursuant to GR 311 could have been challenged in court on this ground. The AR Camp disagrees, and contends that the point is hopeless.

757. WR Insurers' argument is that, under the Cape Town Convention, Article 10 entitles a lessor to terminate the leasing agreement, take possession or control of the aircraft and apply for a court order authorising or directing these acts. The Protocol confers additional rights to '*procure the export and physical transfer of the aircraft object from the territory in which it is situated.*' Accordingly, upon a default, the lessor had a right to remove the aircraft from Russia and to export it. Insofar as GR 311 restricted that right, it was incompatible with the

Cape Town Convention, and could have been challenged accordingly, because Russia's international obligations take precedence over Government Resolutions pursuant to the Russian Constitution.

758. This argument is another which strikes me as unrealistic. This is because I find that this is not a point which would or could have been advanced successfully in a Russian court. It is a point which it is unlikely that any airline would take to court, and none has; and if it was taken, it would not be successful. Russian courts would either have 'self-censored', to use the expression which has been used during the trial, or there would, if it had been necessary, have been direct political interference.

759. On these points, I found the evidence of Professor Greene to be of the greatest assistance. He gave evidence that: 'The barriers to judicial independence in Russia are multiple'. He quoted from a Freedom House 2023 Report to the effect that the Russian judiciary 'lacks independence from the executive branch'; and from the World Justice Project which in 2023 ranked Russia 113th out of 142 countries on rule of law, 130th out of 142 on the degree of government interference in the conduct of civil justice, and 137th out of 142 on the degree of government interference in the conduct of criminal justice.

760. Professor Greene gave the following evidence which I considered persuasive:

> … it is my opinion that a challenge to Resolution 311 – whether that be a challenge to the law as such, or to aspects or instances of its implementation and enforcement (including in particular whether the purported exception for … TVIC might be used to return aircraft to lessors) – would have implicated a clear political interest. In such circumstances, Russian airlines would likely have concluded that it would be reckless to bring suit, given the government's apparent interest in the policy and the national-security context in which the policy was framed. This is in part because they would likely have perceived no chance of success, and in part because they would likely have perceived at least some chance of adverse reaction, including reprisal, by the authorities.

761. There was largely agreement by the other experts who dealt with the area that, at least in areas of political importance, the Russian courts are weak and pliable and likely to be swayed by state interests. There was some disagreement as to whether the issue in the present case fell within the category of a case of political importance where the interests of the state were substantially engaged; or at least as to whether that would have been the case if the matter had arisen in a dispute between airlines and customs authorities, rather than as a head on challenge to the validity of GR 311. Dr Gerbutov gave evidence in his first report (paragraph 230) that '*in case of a direct dispute between a Russian lessee or a foreign lessor with the President or the Government seeking to invalidate Decree No. 100 or Resolution No 311, the likelihood that the risk* [of unlawful influence over the judges] *could materialize seems to be very high*'; but considered that a reliance by a lessee on incompatibility of GR 311 with the Cape Town Convention in the context of a dispute between the lessee and Russian customs authorities was less likely.

762. Given that, as I consider clear, the validity of GR 311, including in relation to aircraft, engaged an important state interest, I find that the fact that the challenge to its validity might have arisen in the context of a dispute with Russian customs authorities would not have made any material difference to the (un)likelihood of the point being taken, or of its being successful. If the putative challenge, namely that GR 311 was incompatible with the Cape Town Convention, was identical, then there seemed no good reason to think that the result (both as to whether the point would be taken and its fate if taken) would be different.

763. As Mr Saveliev and Dr Khodykin gave evidence, a Russian court would have been able to decide, had the point been taken, that the termination of the leasings was contrary to public policy, as having been caused by Western sanctions. This would have been consistent with an approach which was applied in *GPM RTV LLC v Google*, which was based on reasoning in *Ruling No. 8-P*. That would mean that the issue of inconsistency between GR 311 and the Cape Town Convention did not arise, because the lessor's rights which would be protected by the Cape Town Convention would not have come into existence. There were other possible arguments to the effect that there was no inconsistency between GR 311 and the Cape Town Convention, in particular because GR 311 provides for the possibility of an authorisation procedure to export aircraft, and that GR 311 is expressed to be temporary in nature. I accepted the evidence of Mr Saveliev that it was likely that a Russian court would, had the point been taken, have concluded, by one of these routes, that the issue of non-compatibility of GR 311 and the Cape Town Convention should be resolved in a way which avoided any conclusion that there was incompatibility.

764. The above conclusions are consistent with Henshaw J's finding in Zephyrus v Fidelis that a fair trial in Russia on the Cape Town Convention point would be unlikely. He considered that the validity of the Russian Counter-Measures, including GR 311, was '*bound to be a topic of the most obvious and acute interest to the Russian state*', and that it is '*clear that a Russian court would be unlikely to be able to adjudicate fairly on this issue.*' ([347], [353]). He further found it unlikely that a Russian court would recognise a termination ground which was based on Western sanctions ([368]). Those findings were based on the evidence before Henshaw J, but, as appears above, I have reached similar conclusions based on the evidence before me.

After GR 311

765. From 10-29 March 2022, the only international flights which took place for the aircraft which are the subject of this dispute were to Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan. On 30 March 2022 flights involving such aircraft recommenced to Belarus. Thereafter flights recommenced on 14 May 2022 to Sri Lanka, 5 August 2022 to Venezuela, 3 September 2022 to Iran, 4 September 2022 to Armenia, 4 October 2022 to Cuba, 24 October 2022 to Turkmenistan, 24 January 2023 to Turkey and 20 March 2023 to Azerbaijan. AerCap was able to effect an arrest of MSN 1301 in Sri Lanka on 2 June 2022, but after intense diplomatic pressure from the Russian state, and despite diplomatic efforts procured by AerCap from the EU and USA, the aircraft was allowed to depart back to Russia on 6 June 2022.

766. Since 9 March 2022 the only returns of aircraft have been of two pairs of aircraft, which were authorised by the Russian Government. The first pair was the pair of Boeing 737 MAX 8 aircraft, which, as I have already mentioned, S7 obtained permission to return. The second was two aircraft which ABC was permitted to return in March 2024 to lessors within

the Bank of China Aviation group. It seems likely that this permission was based on the fact that the return was to lessors within a group based in a 'friendly' country.

The position of the Airlines

767. Both WR and AR Insurers made very detailed submissions about the position of the various airlines. The WR Insurers' case was that the AR Camp had failed to establish that airlines wished to return Western Leased Aircraft and were prevented from doing so by an operative WR Peril. Further that it was the airlines' decisions not to return the Aircraft which was the proximate cause of any loss which may have occurred. The AR Camp, by contrast, contended that an analysis of the position of the airlines showed that the proximate cause of the loss of the Aircraft was a WR Peril, and in particular a restraint or detention.

768. Before considering the position of the airlines in turn, it is helpful at this point to summarise a number of general points arising from the evidence. In the first place, the relations between the airlines on one side and the federal, and local, government on the other differed from case to case. Secondly, the extent to which airlines had commercial interests was, equally, not uniform. And thirdly, the nature and relative importance of the commercial considerations applicable to the airlines again differed. It is clearly the case that most of the airlines had interests in retaining some or all of the aircraft leased to them. Without those aircraft, their businesses would be disrupted, severely harmed or even destroyed. Furthermore, the immediate return of all the Aircraft would have created a scheduling crisis. Different airlines would, however, have been affected by the return of leased aircraft to differing extents. Those airlines whose fleets consisted largely or entirely of leased aircraft faced the prospect of bankruptcy and failure if all their leased aircraft were immediately returned.

769. There were, however, clearly also factors which, to greater or lesser extents, motivated airlines to return the Aircraft. The principal such factor was that a failure to do so would be a breach of contract with the lessors which would be likely to destroy or undermine relationships with lessors. This would have meant the real prospect that, even if relations between Russia and the West were restored, lessors would not wish to contract with Russian airlines. Airlines would also have an incentive to return Western Leased Aircraft if they could not be profitably utilised if retained, and whether they could be profitably utilised depended, in part, on what would be the regulatory and subsidy framework in which they might be operating.

770. It is also necessary at this juncture to reiterate and emphasise certain features of the evidence. In the very voluminous submissions on the position of the airlines, there is much examination of documents which were not produced by the airlines themselves. Even where the documents, or statements, come from the airlines, they were generally produced for purposes very different from that of illuminating whether any operative peril was a WR or an AR Peril: a distinction which was in none, or almost none, of the participants' minds at the time of the communications. Further, the nature of many of the communications – the relaying of the latest news as to what was happening, often informally – made them inappropriate subjects for much of the detailed parsing to which they were subjected in this trial.

771. In what follows, I will endeavour to express my findings in relation to the various airlines as succinctly as possible, concentrating on the main material which indicates the

position of each airline insofar as it may be relevant to the questions of loss, peril and causation.

The Aeroflot Group

772. In advance of the invasion of Ukraine, in early February 2022, in meetings with AerCap, Aeroflot representatives had indicated that, if sanctions were imposed on Russia, this would lead to Aeroflot retaining its AerCap Aircraft, and probably to its stripping parts off some aircraft to service others. It is not possible to know whether these comments were prompted or approved by MinTrans. What is clear is that they were only a forecast as to what would happen: they were not a response to a concrete situation or the sanctions which were, in the event, imposed.

773. Immediately after the invasion, on 25 February 2022 at a point before the EU sanctions had been announced, Dr van Antwerpen had a discussion with Mr Minaev and Ms Balakina of Aeroflot. At that stage AerCap was exploring many different ideas with Aeroflot, including the possibility of novating AerCap's leases to GTLK, the Russian State Transport Leasing Company, or selling the relevant AerCap Aircraft to Aeroflot. Ms Balakina said that, based on its cash position, she did not see Aeroflot buying the relevant AerCap Aircraft itself, but said that this might change depending on developments. Aeroflot was 'holding its breath for the upcoming European sanctions'.

774. I find that at some point soon after the announcement of Western sanctions, Aeroflot was directed by MinTrans that its Western Leased Aircraft should not be returned. I have already set out my findings as to the basic facts. There is no evidence of any board meeting of Aeroflot before the meeting with MinTrans on 26 February 2022. Instead, what I consider happened is that by the time of, and/or at, that meeting, MinTrans directed the Aeroflot Group to retain its Western Leased Aircraft. This directive came 'from the very top', which as I have said, was probably President Putin, and if that is not right, Mr Savelyev. Whether or not that message had been communicated to Aeroflot before the meeting, I regard it as clear that it was said at the meeting. I also regard it as clear that this was not said at the meeting by MinTrans as a representative of the majority shareholder of Aeroflot, but as the government acting in an executive capacity. The meeting of 26 February 2022 had been called by Minister Savelyev; it involved other airlines; and there is no reason to believe that it involved the other shareholders of Aeroflot. Minister Savelyev was clearly acting towards Aeroflot as he was towards the other airlines present, namely as Minister and part of the executive government, not as the Chairman of Aeroflot's Board of Directors.

775. It is inherently plausible that the government should have given an early direction to the Aeroflot group to keep its leased aircraft in Russia, as the Aeroflot Group fleet was essential to maintaining connectivity within Russia; and also because the return of the Aeroflot fleet would have amounted to an important symbolic victory for Western sanctions. There is no evidence that the government's stance towards the return of the Aeroflot Group's fleet changed over the weeks after 26 February 2022, and ultimately the government passed GR 311, which applied to Aeroflot's aircraft as to others.

776. It is difficult to distinguish the state's political interests from Aeroflot's commercial interests. To the extent that it is possible to distinguish between them, it may well be that the retention of the aircraft served Aeroflot's commercial interests. Nevertheless, in the case of this airline, that does not appear to me to be of any great significance. As Individual 1

said, and I accept, 'at the end of the day there is no such thing as Aeroflot making decisions outside the state.' As from 26 February 2022, the issue of whether the Aeroflot Group's fleet should be returned was off the table: the matter had been decided by the government. There is no evidence to suggest that, at some point after 26 February 2022, the Board of Aeroflot made a decision that Aeroflot should retain its Western Leased Aircraft for commercial reasons independent of the directive of the government, and it is hard to imagine how there could have been. What did happen is that within an overall approach that the Western Leased Aircraft should be kept, Aeroflot worked towards a buyout of at least some of those aircraft, backed by government money.

777. One specific issue which should be addressed is the return by Rossiya of MSN 1630 (an Airbus A319) on 5 March 2022. That is, as I think, clearly to be explained by the fact that the lease for MSN 1630 had expired and the aircraft had been approved for return to AerCap before the invasion of Ukraine. The plane was, moreover, over 20 years old and was due to be 'parted out' by AerCap on its return. This appears therefore to be a return in the ordinary course, and does not, in my view, provide any cogent reason to consider that there had been no order that the Aeroflot Group airlines should retain its Western Leased Aircraft.

S7

778. The position of S7 was the subject of particularly intense and lengthy debate. My findings follow.

779. After the invasion of Ukraine and the imposition of sanctions, as Ms Fileva said in her Forbes interview, S7, in common with other airlines was faced with an unexpected situation and was 'confused'. Although, after the invasion, S7's immediate reaction to requests from AerCap to relocate the AerCap Aircraft had been a willingness to help, on 25 February 2022 Mr Leahy was told that it would not be possible to relocate the AerCap Aircraft before the MinTrans meeting of the following day. By the time of the MinTrans meeting on 26 February 2022, the Filevs had made no firm decision as to how to respond to the unexpected crisis.

780. There is no basis for thinking that at the 'family council' meeting after the MinTrans meeting of 26 February 2022, there were any decisions made as to whether the Western Leased Aircraft should be returned or retained. The exchange between Mr Filev and Ms Fileva which she describes in her Forbes interview, amounted to no more than the father asking whether his daughter had the courage to battle through the crisis, and the daughter responding that she was determined to do so. Doubtless neither envisaged that the whole S7 fleet would be parted with, and still less immediately, but there is no evidence that they were making any firm decisions about what should be done. Instead, it appears that one matter which must have been discussed was the need to obtain legal clarity as to the effect of the sanctions, including by getting advice from outside counsel. S7 did proceed to take legal advice from Norton Rose Fulbright.

781. By 1 March 2022 S7 had still made no firm decisions. It expected legal advice the following day, and '*had not yet discussed a proposal for lessors at a senior level*'. It proposed to one lessor to provide its thoughts and proposals for next steps over the following 7 days.

782. It appears that Ms Berezina of S7 had a call with Mr Hogan of SMBC on 2 March 2022. She said that '*discussions continue at the highest level in S7 and with authorities*'; that S7 believed it was not in breach of any terms of its lease and wanted to continue to operate until the end of the 'wind down' period in the sanctions regime; that a return of the SMBC-owned aircraft in the next few days was 'far too early'; and that S7 had a meeting with the Minister of Transport on the following day. This stance appears to be a reflection of the facts that S7 wished to find a way of retaining the SMBC-owned aircraft at present, that it had or was waiting for legal advice saying that it was entitled to do so, and that S7 was being influenced by the government as to what it should do.

783. In the days which followed, S7 was nevertheless indicating to lessors that it was seeking to cooperate in relation to the return of at least some Western Leased Aircraft, but that it was constrained as to what it could do by the government. I am not able to conclude that this was simply pretence or dissimulation on S7's part. I consider that Mr Leahy's contemporary understanding that S7 was trying to return at least some aircraft, which was based on his frequent interactions with S7 representatives, is likely to be accurate. A note of particular importance is his call report sent by email at 7.35 pm on 3 March 2022. This stated, in part:

> I had a long and frank conversation with Olesia [Mashkova of S7]. They have been actively trying to relocate some aircraft for us since Saturday. All requests so far have been denied.
>
> Daily meetings with the MoT that Olesia and Vlad [Filev] have both been going to personally have yielded little result. …
>
> S7 have been strongly requesting to at least move the neos first as these are of little use since they cannot continue to operate them without PW [Pratt & Whitney] support. S7 seem to sincerely want to try to help the lessors as these are important relationships that they have cultivated over a long period.
>
> … She also was of the opinion that terminating leases when aircraft are outside the country would likely have negative repercussions, though this is basically a moot point now as they are no longer allowed to fly internationally (including to Uzbekistan).
>
> … Olesia is of the opinion that early next week (perhaps Tuesday) the MoT will provide more clarity on their position. In the meantime, there is another of the daily meetings tomorrow. She promises to keep us informed of any developments and will keep pushing to get the neos out asap.

784. I regard it as significant that Mr Leahy saw this conversation, at the time, as having been 'frank', and that his assessment was that S7 'sincerely' wanted to help. It is of course possible that Ms Mashkova was being disingenuous but with a convincing appearance of candour which took Mr Leahy in, but that is not the most obvious nor, in my view, a necessary conclusion. What Ms Mashkova was indicating was that S7 was seeking permission to relocate at least the 'NEO' aircraft amongst the AerCap Aircraft, but was not being permitted to do so. I see no adequate reason for doubting the substance of what she

was telling Mr Leahy. Specifically, I see no reason to doubt that S7's view, as of 3 March 2022, was that NEOs would be difficult to maintain; or that it was seeking to return some of them; or that requests to do so had been refused; or that more definitive guidance was expected from MinTrans the following week.

785. With effect from 5 March 2022 S7 stopped flying its aircraft internationally. A spokeswoman for S7 was reported as saying that the decision to stop flying internationally was 'forced'. Mr Houlihan's evidence was that this decision was unlikely to have been to protect S7's aircraft from arrest, given that S7's international presence was very limited; and that it was more likely to have been done in compliance with the regulator's expectations. I considered this to be probably the case.

786. An SMBC aircraft leased to S7, MSN 10160, had been grounded by SMBC on 3 March 2022 while it was in Armenia. By 8 March 2022 it was apparent that efforts to recover the aircraft in Armenia were being pursued at the highest political levels in Russia, who had contacted their counterparts in Armenia. Ms Mashkova told Mr Hogan of SMBC that S7 was under pressure to get the aircraft returned. Mr Filev was later to tell representatives of SMBC that this pressure from the Russian Government had 'included direct physical threats to his personal safety'.

787. On 9 March 2022 Ms Mashkova told Mr Leahy by WhatsApp that she did not have good news from her latest meeting at MinTrans. She wrote:

> Not good news, all our requests were rejected, even for the aircraft which should be redelivered….

It is unclear how many aircraft the requests related to. But this is evidence that S7 were continuing to seek permission to return at least some Western Leased Aircraft.

788. Mr Houlihan met S7 in Moscow on 9 March 2022. He sent colleagues a summary of the meeting later that afternoon. That note included the following matters of significance.

> S7 have been listed as a strategic entity by the Ministry of Transport along with Aeroflot.
>
> They expect government decrees in the next couple of days regarding confiscation of aircraft.
>
> The SMBC aircraft is stuck in Armenia. The Russian Ministry of Transport is demanding its return via Armenian authorities.
>
> … Even if aircraft are confiscated they intend proposing to the Ministry that they do not require all 116 of their leased aircraft due to reduced demand and that they will propose to the Ministry handing back some aircraft, something along the lines of 1 aircraft per lessor. They said they are being transparent with all lessors but the situation is out of their hands. All ferry permit applications they have submitted to date have been rejected by the Russian authorities.

> They also would like to see if they can swap out the existing aircraft for other aircraft with Chinese and other lessors or via other structures.
>
> They want to hand back NEOs and take in CEOs…

789. Again, I see no sufficient reason to doubt that what Mr Houlihan was told was true. That S7 had been listed as a strategic entity had, as Mr Houlihan recognised in his oral evidence, both positive and negative aspects for the airline. On the positive side it meant that S7 would be eligible for state funding as regards the purchase of aircraft. On the negative side, it might mean state interference in S7's affairs; and for that reason S7 were somewhat nervous about it, and of being 'taken over by the state'.

790. The reference to the expectation of government decrees in the next couple of days was explained by Mr Houlihan in his oral evidence. He said that on 9 March 2022 everyone in Moscow '*knew that something was coming that would turn what was a somewhat covert attempt to retain aircraft into a very overt way to retain the aircraft.*' That eventuated in that GR 311 and GR 312 were published on the following day. The paragraph as to what Western Leased Aircraft S7 might seek permission to return, indicates that the requested return might be modest, but also that the situation was, as S7 saw it, 'out of their hands.'

791. The reference to the SMBC-owned aircraft stuck in Armenia is also of significance. What that incident does demonstrate is that MinTrans was interested in the Western Leased Aircraft being retained in Russia, to the extent that the Russian Government intervened with the Armenian government to seek to procure the return of this S7 aircraft.

792. On 14 March 2022 S7 wrote to AerCap referring to the terms of GR 311 and GR 312, as a prohibition on the export of aircraft and of all their parts and components in the absence of approval from MinTrans.

793. S7 met AerCap in Dubai on 30 March 2022. The possibility of pursuing an insurance settlement structured buy-out was first identified as a possible option at this meeting. S7 said that they had been instructed by the government not to return any aircraft to lessors. S7 met DAE in Dubai on the following day. S7 repeated to DAE that they had been instructed by the government not to return any aircraft, and told that they must not cooperate with unfriendly lessors. S7 also met Merx on 31 March 2022, and again S7 raised the possibility of an insurance settlement buy-out.

794. S7 continued flying Western Leased Aircraft within Russia and re-registered them on the Russian registry. S7 made a request to MinTrans before the end of June 2022 for clarification as to whether it could redeliver aircraft to lessors, but were told not to expect an immediate reply. S7 did, however, obtain permission to return the two Boeing 737 MAX 8 aircraft, to which reference has been made above.

795. In relation to several of the airlines, but particularly in the case of S7, WR Insurers placed weight on a May 2022 email sent by David Houlihan to Firoz Tarapore, the CEO of DAE, in which David Houlihan placed each lessee into one of three categories. These were '*Category 1 – airlines that have no requirement for the aircraft and want to hand back the aircraft and records*', '*Category 2 – airlines that want to hand back some aircraft due to lack of international passenger demand*', and '*Category 3 – airlines that do not want to*

hand back the aircraft and are operating in domestic Russia and Eurasian Economic Union'. He considered that ABC, UTair and Red Wings fell into '*Category 1*', Nordwind into '*Category 2*', and Aeroflot, S7, Smartavia and I-Fly into '*Category 3*'.

796. The question of whether an airline wanted to hand back its Western Leased Aircraft is not the same as the question of whether it retained them due to a government restraint or business need. An airline's very proximity to the government, or the pressure it experienced from the government, might well account for why it did not want to return its leased aircraft. Moreover, while David Houlihan was a valuable witness, a record of his opinion as to the intentions of the airlines in May 2022, which he himself described in his oral evidence as written '*in a hurry*', is of limited use in determining why those airlines retained their Western Leased Aircraft in the relevant period.

797. The findings I make in relation to S7, in summary, are these. Initially after the invasion and imposition of sanctions, S7 was in a state of uncertainty as to what to do, and was doubtless awaiting developments. It did not, in the first days following the imposition of sanctions, make any firm decisions as to whether to retain or return most of its Western Leased Aircraft. However, in the period from about 1 March to about 8 March 2022 S7 was seeking permission from the Russian authorities to return at least some leased aircraft, but permission was refused. From 10 March 2022 the export ban was in place. S7 thereafter raised with lessors the possibility of an insurance based buy-out.

Ural

798. Representatives of Ural indicated to lessors, on a number of occasions, in the immediate aftermath of the invasion, that Ural would cooperate. On 28 February 2022 Ms Nortseva of Ural told Mr Carr of Merx that Ural planned to redeliver its Merx Aircraft; and Mr Carr's assessment was that Ural were '*effectively willing to terminate ops today in the hopes of future business with Lessors and Ural 2.0*'. I consider that there was a degree of temporising in these and other communications from Ural representatives, as the airline was seeking to understand the position and what it should and could do.

799. As I have set out above, on 2 March 2022 representatives of Ural told Dr van Antwerpen that, though there was no formal guidance from the Russian Government, there had been an informal direction to Ural not to return its Western Leased Aircraft at that juncture. In addition, Mr Skuratov, the decision-maker at Ural, had said that aircraft were not to depart until clarity was provided by MinTrans. It thus appears that Ural were, by this stage, subject to informal directions by MinTrans, and would not act to return aircraft without permission.

800. Nevertheless it also appears that Ural were seeking permission from the authorities to return at least some Western Leased Aircraft. Thus on 3 March 2022 Dr van Antwerpen reported that '*Ural is making a plea to the MoT to get at least all their NEOs out (all Leap) and returned to Lessors outside Russia.*' On 5 March 2022, Mr Melnikov of Ural told BOCA that the decision on redelivering aircraft was '*with the Russian state authorities…*'; and that '*Ural is advocating in front of the government to return Airbus NEO planes to lessors as Ural will not be able to service these planes for more than 2 months.*' Mr Melnikov also said that he thought '*the chances to get the Russian government to agree to return NEOs to lessors are quite slim.*' There is no adequate basis for concluding that these statements were not true.

801. On 9 March 2022 Mr Melnikov told SMBC that Ural was '*fighting*' to be able to return aircraft '*but the ball is on government side now*'. He said much the same to Goshawk on the same day, referring to Ural being '*prepared to create a plan for extraction of the aircraft but they are awaiting the Government to approve anything*'.

802. On 21 March 2022 Mr Skuratov wrote to various lessors saying that Ural was temporarily prevented from returning aircraft to lessors by GR 311, and that Ural intended to apply for permission to export aircraft once the procedure for doing so was established. It is not apparent that Ural did make such an application; and Ural did re-register its Western Leased Aircraft on the Russian register.

803. My conclusions in relation to Ural are that it was, in the period up to 10 March 2022 open to returning at least some Western Leased Aircraft, but considered that it was under an informal direction from the government not to do so; and although it had sought to argue that it ought to be permitted to return at least the NEOs, no such permission had been forthcoming. After 10 March 2022 Ural took the position that it was not permitted to return aircraft by reason of GR 311.

UTair

804. WR Insurers accept that, after the invasion, UTair took concrete steps towards returning its DAE Aircraft; and further that, after GR 311 and 312 were introduced, UTair sought proactively to export the DAE Aircraft under GR 312. That application has not been successful.

805. In relation to the concrete steps which UTair took towards returning the DAE Aircraft, on 5 March 2022, UTair was envisaging a ferry flight to Joramco in Jordan. UTair was, however, clearly concerned about whether this would be permitted. By 8 March 2022 it was suggesting Kazakhstan as the place where the aircraft might be returned; and it sought approval for a ferry flight plan. This was refused.

806. UTair summarised the position as of 11 March 2022 in a letter which it wrote to DAE of that date:

> The operation of the aircraft has been stopped and they are ready to take off since March 10, 2022. As it stands today, we have not been able to obtain permission from FATA to fly to Kazakhstan, although we have all needed permissions from Kazakhstan. Also our request for a flight to Jordan for March 13, 2022 is still pending and we did not yet received (sic) neither approvals nor rejections from FATA. Moreover, we became known today that the export of aircraft outside the Russian Federation is now prohibited as per the government order #311. We continue to seek solutions…

807. On 22 March 2022, the Governor of the Khanty-Mansiysk Autonomous Okrug-Yugra, the region in which UTair had its head office, issued Order No. 69-rg enacting various measures to ensure social and economic development of the region. Paragraph 7 of the order required UTair to '*ensure uninterrupted operation of its aircraft, regardless of any requests*

from third parties for suspension of operations and return of aircraft.' Notwithstanding this, during the remainder of 2022, UTair sought permission to return its DAE Aircraft. This appears to have involved a number of approaches. On 5 May 2022 UTair confirmed to DAE that it had submitted an application for export permission under GR 312. No approval was forthcoming. On 13 March 2023 UTair proposed a buy-out of the aircraft '*since we see no other options due to restrictions on both sides.*'

808. The instance of UTair is thus a relatively straightforward one in which UTair undoubtedly wished, and tried, to return its Western Leased Aircraft, but was prevented from doing so by the Russian authorities refusing permission for a ferry flight prior to 10 March 2022; and then by the prohibition on export contained in GR 311, from which UTair was unable to obtain an exception.

Aurora

809. Aurora's basic function is to provide accessible transportation between the isolated communities of Russia's Far Eastern Federal District. Its activities are, as Ms Dagaeva put it, dominated by a 'predominantly social function'. Its purpose is not to make money for shareholders. Instead, even before the invasion of Ukraine, it required subsidies to continue operating. It is not possible, in the case of Aurora, sensibly to distinguish its commercial from its public and social interests.

810. In the aftermath of the meeting at MinTrans on 26 February 2022 Aurora was not certain as to what was the position as to the return of the Western Leased Aircraft of the relevant authorities, including of its main owners, the regional governments. On 27 February 2022 Mr Tyschchuk of Aurora told Dr van Antwerpen that '*we do not understand the position of our government and aviation authorities on this issue at the moment*'. On 2 March 2022 Mr Emets of Aurora, in an email which expressed a hope that a 'workaround' could be found to the current problem, asked in relation to the possibility of return of the aircraft how this was based on the lease agreement, and also stated that '*we have still not received an official decision from our government*'.

811. WR Insurers' case is that 'our government' in these communications meant the local government, as Aurora's shareholder. It seems to me most likely that it was either a reference to the federal government or a reference to the government of the Sakhalin Region. But, and to the extent it matters, I do not consider that it was intended to be referring to a government only in its capacity as a shareholder. There were eleven regional governments (and the federal government) which were shareholders, and the reference does not seem to have been to them all. I therefore think that it was not intended to be a reference to the owners of the company qua owners. Be that as it may, the local government(s) would have been guided by the federal government, as was Ms Dagaeva's evidence. It may well have been the case that the local government(s) would have been the, or a, vehicle for communication from the central government. There is evidence that this happened in the case of Yakutia which told KDAC on 7 March 2022 that the '*federal government, via local government, instructed not to stop operations…*'.

812. As of 10 March 2022 Mr Voronin of Aurora informed AerCap that '*the main issue is the permission for the ferry-flight from Russian aviation authorities.*'

813. The position is accordingly that until 10 March 2022 Aurora was saying that it did not have clear instructions as to what it would do, and would only be able to return aircraft in the event of permission from the Russian aviation authorities.

814. On 11 March 2022 Ms Eliseeva of Aurora wrote to AerCap saying that no airline was allowed to make a ferry flight from Russia without a special permit. She referred to GR 311 and GR 312, and said that Aurora was trying to understand the process of obtaining approvals. On 25 March 2022 Ms Eliseeva wrote again to AerCap, referring to GR 311, as a temporary prohibition on the export of aircraft from Russia, and to GR 411 as requiring Aurora to re-register its Western Leased Aircraft on the Russian register and to operate the aircraft. She said: '*Being incorporated in Russia Aurora Airlines must comply with all regulations issued by the RF Government.*'

Yakutia

815. Yakutia, like Aurora, operates subsidised socially valuable routes in the far east of Russia. It is not a profit-making commercial enterprise, and it is difficult to separate its 'commercial' from its social and political interests.

816. Immediately after the MinTrans meeting of 26 February 2022, Yakutia did not understand there to have been any direct instructions given to operators as to what they should do as to returning or retaining Western Leased Aircraft. By 1 March 2022, Mr Shtenko of Deucalion understood that the '*word is*' that '*any airline with any gov connections (i.e. like the Yaks) have been ordered not to respond…*'. On the other hand, in a conversation between Mr Skirrow of Deucalion and Mr Ermolaev of Yakutia, Mr Ermolaev did not mention that Yakutia was precluded from returning the aircraft by anyone. On 6 March 2022 in a WhatsApp message to Mr O'Reilly of AerCap Mr Ermolaev said that Yakutia were 'getting contradictory instructions from the Russian authorities'.

817. On 7 March 2022 Mr Batenburg of Deucalion spoke to Mr Ermolaev. His internal email report included:

> Sergei [Ermolaev] explained that Federal Government, via local government, instructed not to stop operations as this would create "social unrest". Creating social unrest is a criminal offence (prosecution risk).
>
> Sergei/Yak want to apologize but can't apologize for something they can't control.
>
> The situation is changing on a daily basis and they would like to cooperate as soon as possible, but currently "hands are cuffed". It is all driven by the Federal Government.

818. I see no good reason to doubt the substantial truth of this. Had Yakutia been simply making up an excuse, it is not obvious why it should have blamed the Federal Government as opposed to the local government which owned it. Mr Batenburg's oral evidence was to the effect that he had believed what he had been told by Mr Ermolaev. I accept that what the Federal Government was telling Yakutia to do was in accordance with what Yakutia,

and the government of the Republic of Sakha, would have wished, namely to continue flying and fulfilling its social functions. That does not, however, mean that the Federal Government was not directing it to do so. Mr Ermolaev's statements are evidence that it was.

Yamal

819. Yamal shares characteristics with Aurora and Yakutia. As Mr Rybak said, one of its main goals is not to make a profit but to perform a social function by providing residents of YaNAO with flights to other parts of Russia and, to a more limited extent, abroad.

820. On 28 February 2022 Damhan Finegan of AerCap reported that '*Yamal informed Castlelake that they will cooperate but will take instruction from the Govt and won't move aircraft until they get a green light there.*' That meant either the federal government or the Sakha government. I do not consider it matters greatly which was being referred to, because the regional government would have deferred to the federal government. What I do not consider plausible is that what was being referred to was 'the owner' and that the type of instruction which would be taken were only corporate decisions made by the shareholder.

821. After GR 311, on 16 March 2022 Yamal wrote to AerCap stating that the transfer of aircraft to other countries was now prohibited, but that it might be possible for there to be a transfer to EEU countries subject to a special permission from MinTrans, which it would investigate. On 8 April 2022 however, Yamal wrote to say that, due to the unfriendly actions of the Bermuda authorities in cancelling airworthiness certificates, it had decided to re-register its AerCap Aircraft on the Russian register, and would continue to fly in order to fulfil its social and contractual obligations.

822. Thus in Yamal's case, the airline did not consider that it could return its Western Leased Aircraft, even had it wanted to, without a green light from the government. There can be no doubt that that green light never came. I accept that the net effect of that was that Yamal did what it and the government of Sakha might in any event have wished to do, which was to keep the aircraft and to continue flying. But Yamal regarded the position of the government as an essential matter to be given effect to.

Red Wings

823. Since before the invasion of Ukraine, Red Wings had a business strategy to cease operating its Western Leased Airbus aircraft and return them to Western lessors, replacing them with Russian-built SSJ-100s.

824. Consistently with this, Red Wings was willing to return its leased aircraft. On 26 February 2022 Red Wings told Mr Finegan of AerCap that it would facilitate AerCap's ferry requests. In a WhatsApp message on 27 February 2022 Ms Palevska of Aviator Capital told Mr Ranta-Aho of AerCap that, at the MinTrans meeting on the previous day, Red Wings had been told that they should keep their Western Leased Aircraft, but had said to her that they would cooperate. In a further WhatsApp message on 28 February 2022 she said that Red Wings had told her that they were not allowed to cooperate, and so would not try to get aircraft out of Russia.

825. By 7 March 2022 all of Red Wings' AerCap and DAE Aircraft had been grounded. All those aircraft have remained registered in Bermuda and none has been registered in Russia. Only in June 2024 did Red Wings indicate that it might bring two of its Western Leased Aircraft back into service.

826. On 9 March 2022 Mr Houlihan of DAE met Mr Klyucharev of Red Wings in Moscow. Mr Houlihan's note of the meeting records that Red Wings intended to comply with the Grounding Notice in relation to the A321 leased from DAE, and had grounded it since 3 March 2022; that Red Wings wanted to cooperate and return the DAE Aircraft and requested a draft redelivery agreement; that Red Wings said that it was restricted by MinTrans and 'Russian aviation authorities', but intended to make an application for a ferry flight. There is, in my view, no good reason to doubt the truth of these statements made by Red Wings.

827. On 10 March 2022, Mr Klyucharev confirmed to AerCap, via Mr Finegan, that he was now seeking shareholder (i.e. Rostec/UAC) support to fly out. On 28 March 2022 Mr Tikhonov emailed AerCap to confirm that Red Wings could not ferry MSNs 2793 and 2730 out of Russia because it still had not received permission for returning aircraft to the lessor. It thus appears that an application had been made by this stage. This is also implied by an email from Mr Adanov of DAE to Laura Ivaskaite at the Latvian airline Smartlynx on 30 March 2022, which said that '*apparently the Governmental commission does no*[t] *give them* [Red Wings] *a ferry flight permit.*'

828. Whether that is correct or not, there was clearly an application by Red Wings to return aircraft in November 2022, but it was rejected. I do not accept that this rejection is likely to have been because General Chemezov did not put his weight behind the application. That is, in my view, implausible speculation. General Chemezov would be very unlikely to be dealing with this matter; and Mr Kozhanov's evidence was that Rostec had told Red Wings on 5 or 6 March 2022 that he would not be dealing with the issue and that Red Wings 'should strictly follow the government policy'.

829. I accept Mr Houlihan's evidence, as follows, at least as it applies to Red Wings:

> … [Red Wings] wanted to hand back the aircraft ever since and again, bearing in mind who their shareholder are, they haven't put this aircraft on the Russian registration, and it's been parked up since 3 March 2022, and despite their best efforts, they still can't get it out. So it doesn't really matter whether airlines do or do not want to hand back aircraft; the state does not want to hand back aircraft, hence the decision is taken out of everybody's hands, including Red Wings.

Alrosa

830. Alrosa is wholly owned by the Alrosa diamond-mining company, which is majority owned by a combination of federal, regional and local government. The diamond company accounts, apparently, for 95% of all diamonds mined in Russia, and a third of all diamonds mined in the world. It is a 'backbone' company, that is to say it is on the list of enterprises whose products or services are vital for the functioning of a particular territory or the socio-economic system of a region. The airline's main business is to shuttle miners working at the mines between Mirny in Eastern Siberia and Moscow. The airline has a social function,

in addition to, and which it is not easy to separate from, the commercial interests of the mining company.

831. After the invasion, on 26/27 February 2022 Mr Carr of Merx spoke to Messrs Gulov and Khoroshikh of Alrosa. His note indicates that Alrosa's representatives raised options of purchasing aircraft or leasing through an alternative jurisdiction, but '*would not elaborate (likely hasn't yet formed) shareholder/airline's plan assuming neither of these options is a possibility*'. Merx was told that Alrosa's management was travelling to Moscow for the FATA meeting on 28 February 2022, '*followed by another shareholder meeting with the diamond co.*'

832. On 3 March 2022, Mr Gulov sent Dr van Antwerpen a letter raising an argument that there was an exception to Western sanctions for lease agreements concluded before 26 February 2022 and saying '*Currently, we are in communication with the aviation authority of the Russian Federation about the situation, waiting for its position. We will inform you immediately about the clarifications received.*' On the same day, Mr Gladkikh of Alrosa emailed Merx saying '*We are currently awaiting a decision of the Government, the aviation authorities and the shareholder.*'

833. A consultant to Alrosa, Mr Koltovich, who was contacted by AerCap, considered that the stance put forward in Alrosa's letter of 3 March 2022 must have been as a result of '*some kind of order/position from the Russian Ministry of Transportation/Government*' and that '*it is definitely not simply Alrosa Air Company position*', but was '*coming either from the Shareholder or from the Ministry of Transportation*', as he told Dr van Antwerpen by WhatsApp on 3 March 2022.

834. After GR 311, on 22 March 2022 Alrosa sent a letter to AerCap denying that any Events of Default under its leases had occurred. It referred to GR 311 saying that this '*prohibits return of aircraft according to the Lessor's instructions*', and said '*the Lessee at present does not have any opportunity to take aircraft abroad for objective reasons due to the effect of the Decree of the Government of the Russian Federation.*'

835. It is not clear as to whether Alrosa made an application for special permission to export aircraft after the permission possibility was introduced on 17 March 2022. From the exiguous evidence, it appears that it probably did. This is suggested by a letter from AerCap to Alrosa dated 27 September 2022 which refers to a letter from Alrosa dated 21 July 2022 which refers to such an application. That it had done so would be consistent with what Mr Koltovich had told Dr van Antwerpen on 7 April 2022, namely that Alrosa was looking to return one of the AerCap Aircraft. If an application was made, there is no evidence that it was successful.

836. The case of Alrosa appears to me to be one where, in the period before 10 March 2022, the airline was awaiting direction from the government, aviation authorities and shareholder. There is no indication that it was anticipated that those three would contradict each other, and it was to be expected that they would align with the government's position. After GR 311 Alrosa took the point that it was not obliged to return aircraft under the leases, but also clearly took the point that export was not permitted by reason of GR 311.

Nordwind

837. Nordwind is essentially the same entity as IKAR, and they are both owned by Ramazan Akpinar. Mr Akpinar is a Turkish businessman who owns hotels around the world, in particular in Turkey. Nordwind enabled him to sell package holidays to tourists. The majority of Nordwind's and roughly half of IKAR's business was international.

838. The evidence indicates that, after the invasion and the imposition of sanctions, Mr Akpinar was seeking to establish Air Operator Certificates ('**AOC**'s) in Turkey and Armenia with the aim of setting up a Turkish airline, and in the interim had in mind transferring Nordwind's aircraft to an existing AOC in Turkey. On 28 February 2022 he told Mr Finegan of AerCap that he would ferry his fleet to Turkey by 20 March 2022. On 2 March 2022 Mr Akpinar was telling CDB that he was in the process of re-evaluating his business model so that the aircraft he leased from CDB might operate in Turkey, and was negotiating with CDB to enter into new lease agreements with the relevant Turkish company on the same terms and conditions as the terminated leases.

839. Nordwind in fact made significant efforts to return Western Leased Aircraft to Western lessors from Russia. 21 aircraft were returned to lessors, including nine to AerCap and one to DAE. Nordwind cooperated with CDB with the result that all aircraft it had leased to Nordwind, except MSN 1370, were secured.

840. There is, in my view, insufficient evidence to conclude that Mr Akpinar's statements, namely that he wanted to return his entire fleet, were untrue or insincere. He had a business case for wanting to do so. Mr Akpinar indeed established a new airline in mid-2022, Southwind, which is based in Turkey. As AR Insurers put it, '*instead of operating a Russian airline flying between Russia and Turkey, Mr Akpinar now operates a Turkish airline flying between Turkey and Russia*'. I also find unconvincing WR Insurers' case that what he had wished to do was to return some of his Western Leased Aircraft while keeping some in Russia. Deliberately to retain aircraft in Russia and not hand them back to lessors would not be conducive to the good relations with the lessors which were necessary for his ongoing, Turkey-based, operations. Furthermore, if aircraft were retained in Russia, it was, at least in the early period and before it was known what the Russian state would do by way of subsidies, doubtful that they could be profitably employed. Mr Akpinar said to NAC on 22 March 2022 that the operation of the aircraft leased from NAC 'domestically in Russia only generates "negative results" financially'.

841. Accordingly, I conclude that the reason why Nordwind did not return more of its Western Leased Aircraft than it did was the one which Mr Houlihan believed it to be at the time and since, namely that it became impossible for Mr Akpinar to do so, given the constraints imposed by the Russian authorities. In this regard, it appears from a note of Mr Houlihan's that Nordwind considered from 5 March 2022 that there was a direction from FATA to ensure that their aircraft were not arrested anywhere in the world. Nordwind did make a return of two aircraft to AerCap and DAE respectively on 5 March 2022 and 8 March 2022, each of which involved an element of subterfuge.

842. As Mr Akpinar told Mr Houlihan on 7 March 2022, and which appears entirely plausible, he was under enormous pressure because of the seizures which had been made of aircraft, while he was also under enormous pressure from the authorities to repatriate Russian tourists.

843. When Mr Houlihan met Mr Akpinar in Moscow on 7 March 2022, they discussed the return of all five of the DAE Aircraft. Mr Akpinar showed Mr Houlihan the flight schedule for the next few days on his phone. I refer to the evidence in paragraph 4 of the Confidential DPSI Schedule. In the event the flight schedule which Mr Akpinar had shown to Mr Houlihan was not adhered to. MSN 32639 flew to Hong Kong and MSN 37136 flew to Mexico later than in the schedule. MSN 32640 did not fly to China, or thereafter to Turkey, as had been scheduled. I accepted Mr Houlihan's assessment that this was not because Mr Akpinar was giving him the run around. In circumstances where on the one hand the Russian aviation authorities were applying strong pressure to avoid repossession of Western Leased Aircraft by lessors while completing repatriation flights, and on the other hand the lessors themselves were demanding the return of their Western Leased Aircraft, it is of course plausible that Mr Akpinar may at points have been economical with the truth. However Mr Houlihan, who communicated closely with Mr Akpinar at the time, evidently believed that he was truthful, and there is no evidence before the court which demonstrates that Mr Akpinar had lied.

844. Instead, it appeared to me that Mr Akpinar's good faith towards DAE was shown by the fact that he told Mr Houlihan on 9 March 2022 that MSN 37136 was in Mexico and suggested that DAE should detain it there, as was in fact done. It was also demonstrated by Nordwind's continued cooperation in getting records for MSN 37136 to DAE, as indicated in an email from Mr Lopes of 12 March 2022. I also accepted Mr Houlihan's view that the fact that MSN 32639 had departed Hong Kong before DAE could arrest it there was not on Mr Akpinar's instruction.

845. After GR 311 was introduced, Nordwind appears to have sought to persuade the Russian authorities that some Western Leased Aircraft should be permitted to be returned. On 22 March 2022 Mr Akpinar told NAC that he was trying to set up a meeting with MinTrans to try to explain that IKAR did not need its NAC aircraft and to seek approval to redeliver them. On 22 May 2022, Mr Akpinar told Mr Houlihan that he had had a meeting with MinTrans and that the Minister was refusing even to talk about re-export. On 16 June 2022, Mr Hayrettin Yagiz, a third-party consultant, told Mr Finegan of AerCap that Mr Akpinar had asked for an appointment with MinTrans for the week of 20 June 2022 'to discuss the application for export of aircraft'. It appears that Nordwind made no formal application because it did not see the point of doing so. I consider that that was because of what Nordwind had learned as to the likely attitude of MinTrans to any application.

846. Nordwind held certain settlement discussions with AerCap in May 2022. One matter of significance is what Mr Morozov, Nordwind's Chief Legal Officer, wrote on 18 May 2022, as follows:

> If AerCap do not agree, why then 113 AerCap's aircraft are still in Russia. It is widely acknowledged that the only reason why the aircraft of foreign lessors are still in Russia and cannot be removed from Russia is the actions of the Russian Government and not lessees' unwillingness or reluctance to return the aircraft. AerCap's approach towards treatments of the recent enactments of the Russian Government as not preventing the exportation of the aircraft outside Russian (sic) seems to be unreasonable and unjustified. If AerCap knows how to return the aircraft from Russia when there is a statutory ban for exportation of the aircraft and engines outside Russia please show us a good example…

847. This communication indicates that Nordwind regarded itself as constrained by GR 311 and considered that there were no available routes round the 'statutory ban'.

Royal Flight

848. There is no dispute that Royal Flight cooperated with lessors to return most of its Western Leased Aircraft. Of the 15 aircraft leased to Royal Flight by Western lessors, 13 were recovered. Eight of the ten AerCap Aircraft were recovered. There is evidence that this was in the face of menaces from at least some Russian authorities. A contractor who assisted in the extraction of Royal Flight aircraft later said: '*the managers of Royal Flight were threatened by Russian FSB, that they will have jail punishment in Russia if these aircrafts go back to Lessors.*'

849. As to the two which were not returned, one had been the subject of a repossession attempt by AerCap in Egypt on 6 March 2022, which Royal Flight had evaded. It appears, nevertheless, that Royal Flight planned to ferry the two remaining aircraft out of Russia on 11 March 2022, but were declined a flight permit. Mr Kozhanov gives evidence that, with effect from 10 March 2022, SATMC ordered that international flights were not to be permitted by aircraft with foreign registrations operated by, amongst others, Royal Flight. Since then, they have not been used for commercial operations. MSN 38820 had a technical event which meant that it could not operate between 27 February 2022 and 27 June 2022. Thereafter it performed non-commercial flights on 27 June and 18 August 2022, but has otherwise been grounded. MSN 28171 has been grounded since returning to Russia on 7 March 2022. Royal Flight's AOC was suspended by FATA on 1 April 2023 at the carrier's request. It has not been reinstated.

850. In my judgment the reason why the two Royal Flight aircraft remained in Russia was because they were not permitted to leave by the Russian authorities. I do not accept that it was because Royal Flight decided to keep these two aircraft in order to retain the possibility of restarting operations. I also do not accept Mr Kelly's evidence that at a meeting with Coskun Yurt of OTI on 16 March 2022 Mr Yurt told him that OTI would not be returning more of the AerCap Aircraft for 'commercial reasons' on the basis that an airline with western aircraft would be in a strong position. That would have been inconsistent with the fact that Royal Flight had returned so many of its Western Leased Aircraft, and the fact that the two which remained in Russia were not flown. The best evidence of what was said at the meeting is in the note kept by Alexander Wilson, an AerCap leasing executive who also attended the meeting. In that note Mr Wilson recorded that Mr Yurt '*can't say when a/c can leave Russia* [...] *private airlines being forced to fly* [...] *Russian govt wants to keep Russian aviation alive*'. I do not accept Mr Kelly's evidence on the subject save insofar as it accords with the note kept by Mr Wilson.

851. Royal Flight set out its position to AerCap in a letter of 15 April 2022. It referred to GR 311 and 312 as a prohibition on taking aircraft out of Russia; it said that it was seeking legal ways to return its AerCap Aircraft, '*however as of today there is no way that is applicable for our Company*'; and that '*we do not have intention for commercial use of the Aircraft grounded.*' I see no good reason not to credit those statements.

I-Fly

852. On 28 February 2022 I-Fly had a call with DAE. An internal DAE message records the gist of what was said. One point recorded, under '*Traffic*', was that '*China/Asia/ME/South America traffic remain open*' and that '*iFly plan to continue to operate in these markets and will avoid EU.*' In this and other parts of the message, what is indicated is that, at this early stage, I-Fly was considering ways in which it could continue to retain its Western Leased Aircraft, but operate legally, perhaps by changing the location of the lessor company.

853. In the first few days of March 2022 I-Fly indicated a willingness to cooperate with DAE in relation to the return of the ESN 733666 engine. On 4 March 2022 DAE recorded that I-Fly was 'cooperating', and also that MSN 283 was grounded in Moscow. The aircraft and engine were not returned, however.

854. On 8 March 2022 Mr Houlihan met Mr Ivan Burtin, CEO of I-Fly, and Evgeny Filatov, its General Director, in Moscow. Mr Houlihan's evidence was that they had met at the Ritz hotel, as I-Fly did not want him to visit them at their offices. This, as I understood Mr Houlihan's evidence, was because I-Fly had a fear of punishment for being seen to cooperate with a foreign lessor. At the meeting, Mr Burtin said that I-Fly was unable to return the aircraft since its employees might face jail time. Mr Filatov had had real world Moscow prison experience, and was thus particularly anxious. Mr Houlihan's evidence was that I-Fly were '*very nervous of … upsetting the authorities in advance of what they believed were to be resolutions coming down, being issued, in the next day or two.*'

855. After GR 311, I-Fly referred to it as making the airline 'unable' to return the engine or aircraft, by communications to DAE of 14 and 22 March 2022 respectively. As far as is known, I-Fly has not made an application for permission to export the aircraft or engine. This is probably because I-Fly considered that an application would not be successful, as indeed it suggested in a communication of 27 June 2022. MSN 283 remains parked up in Moscow, with I-Fly unable to carry out appropriate maintenance. As Mr Houlihan put it, 'It's a paperweight sitting in Vnukovo airport.'

NordStar

856. On 28 February 2022, NordStar conveyed to Genesis that its '*legal team* [was] *still seeking any alternatives to retain aircraft in operation including aircraft purchase'*. Genesis had raised the possibility of ferrying the Genesis Aircraft outside Russia in advance of a resolution on lease termination or otherwise; and NordStar had said that '*they will cooperate, but nothing can happen in advance of discussion with Russian Transport Ministry*', the timeline for which was by the following day.

857. On 1 March 2022, NordStar told another lessor, Avolon, that it would not decide on next steps until all options had been considered. By 3 March 2022 Genesis regarded NordStar as '*deflecting on aircraft return, ferry and records on shareholder and Russian Minister of Transport approval*'. I understand this, in line with Mr Croucher's evidence, to mean that NordStar had stopped providing clear answers. Mr Croucher also said that NordStar was putting the blame on the shareholder or MinTrans for not progressing the discussion of return.

858. In the period between 3 and 10 March 2022 NordStar gave at least one indication that it was still contemplating cooperating with Genesis to return the Genesis Aircraft, namely

that on 9 March 2022 it returned a marked-up draft of a proposed termination agreement which had been sent by Genesis on 3 March 2022.

859. By 12 March 2022 the Genesis Aircraft had been re-registered on the Russian registry, along with 8 other foreign-owned NordStar Boeing aircraft.

860. On 15 March 2022 Ms Kochetkova of NordStar emailed Genesis, informing them of '*some new piece of legislation*' which had been adopted in Russia, and said that '*our discussion on redelivery conditions seems to be futile now*'. This attached a formal letter which referred to PD 100, and to GR 311. The letter stated that: '*As a result of the Regulations, the Lessee is currently prohibited to export the Aircraft from the territory of the Russian Federation. As such, if the Lessee were required to redeliver the Aircraft while these restrictions remain in place, it would be unable to do so. We suggest that we hold a meeting to discuss the impact of these developments…*'.

861. In NordStar's case, the position is, in my judgment, that after the invasion and advent of sanctions, it was looking for ways in which it could continue to operate its leased aircraft legally. There is no good evidence that it had come to any clear decision as to what to do if that was not possible by the time that GR 311 was introduced. Once GR 311 had been introduced NordStar referred to it as prohibiting redelivery.

Smartavia

862. Smartavia's ultimate owner and decision maker is Sergei Kuznetsov. He is a close friend of Denis Manturov, the Minister of Industry and Trade of the Russian Federation, and an important political figure in Russia. Mr Kuznetsov is also a friend of General Chemezov, the director general of Rostec. The CEO of Smartavia at the relevant time was Sergey Savostin. Mr Kozhanov was Smartavia's, as well as Red Wings', Fleet Development Director. He stopped working for Smartavia on about 14 March 2022.

863. As he clarified in his oral evidence, on the evening of 26 February 2022, Mr Kozhanov had a conversation with Mr Savostin, in which Mr Kozhanov expressed the view that Smartavia should return its planes. Mr Savostin '*categorically refused* [the] *suggestion; in his words, if the planes were returned, it would "kill his business", deprive the company of its income and put more than a thousand people out of work. Nevertheless, he told me he would wait for a decision from the government.*' Mr Kozhanov also gave evidence that Mr Savostin told him to tell AerCap that Smartavia would facilitate their ferry requests. Mr Kozhanov described all this as a '*very strong emotional reaction on the part of Mr Savostin.*'

864. Mr Kozhanov's evidence, which I accept, is that after the 28 February 2022 MinTrans meeting, it was obvious that returning the planes to lessors would have been problematic. Nevertheless, Mr Kozhanov still encouraged Mr Savostin to find a way of returning Smartavia's Western Leased Aircraft, up until 8 March 2022. Mr Savostin, Mr Kozhanov said, was not in a position to make important decisions in the company; '*the important decisions were always made only by Mr Kuznetsov, the owner of the company.*' Mr Kozhanov added:

> So after the 28 February meeting I know that Savostin and Kuznetsov had a long discussion where Mr Kuznetsov spoke with members of the government and representatives of the government in order to

> understand what was going on and to get direct instructions directly from the government, and those instructions were received on 3, maybe 4 March. I received a clear-cut instruction that we had to act in full compliance with the instructions that we were receiving from the government.

865. Smartavia's representatives appear to have been seeking to buy time, by temporising answers to lessors' questions on 1 and 2 March 2022 from Mr Kozhanov and Mr Loksts. This correspondence certainly did not reveal the level of animosity which Mr Savostin felt to the idea of returning the planes. On the other hand, I consider that Mr Kozhanov's evidence that management were awaiting the clarification of MinTrans' position is borne out by a voice note sent by Mr Kozhanov to Mr Finegan on 2 March 2022 in relation to the termination of the leasing of an A320 NEO which was in Turkey. Mr Kozhanov said that he had just got a message from top management '*that tomorrow Minister of Transport will send a kind of instructions or whatever. So before that, before that information or email from Minister of Transport, let's say, my guys, don't know, will do nothing. So they will wait for that, ok?*'.

866. While Mr Kozhanov's message was in the specific context of the two aircraft which were not in Russia, I consider that it reflected what would have been Smartavia's position in relation to aircraft within Russia: namely that they were awaiting direction from MinTrans. If Smartavia would not make a decision on aircraft outside Russia without knowing the position of MinTrans, it would have been most unlikely to make decisions on aircraft within Russia without doing so. Further, Mr Kozhanov's evidence was that Smartavia received 'an answer' from MinTrans on 8 March 2022 in the form of PD 100 and 9 March 2022 in the form of GR 311, which clearly were not directed solely, or principally, to aircraft outside Russia.

867. On 9 March 2022 Mr Houlihan had a meeting with Mr Savostin and Ms Lavitskaya of Smartavia in Moscow. Mr Houlihan's record of the meeting contains the following:

> … They will not hand back aircraft as they say they will lose the airline. They also will not stop flying as they need the revenue. All of their operations are domestic.
>
> They discussed various solutions, buying the aircraft via Chinese banks, setting up an AOC in Kazakhstan, etc.
>
> It appears they haven't fully read the sanctions or correctly interpreted them.
>
> They expect a Ministry decision on aircraft soon and are waiting for that.
>
> I spend a while discussing with them, the meeting was cordial, but we should consider them non-cooperative in even negotiating to hand back aircraft.

868. In his oral evidence Mr Houlihan confirmed that the Smartavia representatives' conduct at the meeting was consistent with a commercial decision by the shareholder or

management to keep its Western Leased Aircraft. As to the reference to awaiting a MinTrans decision, he said that, although there was no legislation yet '*on 9 March, 2022 everybody knew this was coming, and not to do anything until the government's position on this was in law, not just were aware of what the government wants to do, it's in law…*'. He further described the meeting as follows:

> Their conduct at the meeting was they had a number of presentations and a number of pieces of paper, they were quite nervous, they went through them in great detail, they took great care to explain how they could set up AOCs, how they could try to set up bank accounts, how it could try to move title. … They were nervous, they were coming up with ways that they felt maybe they could continue leasing through these structures, but they were nervous, and it was not a normal meeting.

869. On 15 March 2022, a representative of Smartavia told Mr Korn of Carlyle that they '*have clear instructions from the aviation authority and the Ministry of Transport not to return any aircraft. They are being instructed to move the fleet to the Russian registry and keep operating domestically. They mentioned there have been indications that any airline that redelivers aircraft would be shut down.*' While what was said may have been convenient to Smartavia as justifying its retention of aircraft, it was true that there were by then clear directions not to return aircraft, and I consider it likely to have been true to say that there were indications that any airline that redelivered aircraft would be shut down; and that Smartavia had been encouraged to continue operating domestically.

870. On 18 May 2022 Mr Adanov of DAE recorded a conversation with a representative of Smartavia, who had told him that the airline had no intention to apply for permission to export its Western Leased Aircraft as it needed them.

871. Smartavia is undoubtedly an instance with some unusual features. Its attitude was noted as unusual by Mr Finegan in an exchange of WhatsApp messages with Mr Kozhanov on 25 March 2022, when Mr Finegan wrote: '*please tell Sergey* [Savostin] *that Smartavia is the airline in all of Russia to provide the least amount of dialogue and cooperation to AerCap.*'

872. WR Insurers contend that Smartavia is a clear case in which the airline made the decision to retain its Western Leased Aircraft for commercial reasons, independently of the attitude of the Russian Government. It is the case that the airline saw no commercial reason to, and strong reasons not to, hand back its aircraft. Its stance cannot, however, be considered in isolation from the government's position. There is no basis for considering that the ultimate decision-maker, Mr Kuznetsov, had taken any decision before the MinTrans meeting on 28 February 2022. The evidence is that after that meeting Mr Kuznetsov took the line that the airline should act on the instructions of the government. I have had regard to the material which appears in paragraph 5 of the Confidential DPSI Schedule.

873. WR Insurers suggest that this line really amounted to no more than that Smartavia had decided to retain its Western Leased Aircraft, save in the unlikely event that the government took the view that they should be returned, and so was, in effect, window dressing. I do not consider that that is an accurate characterisation of the position. I consider that the decision

to await the government's direction was, formally as well as politically, significant. It meant that the airline was accepting the government's position as governing. And the details of that position might not be clear or might change. Thus, while it was doubtless inconceivable that the government would order the return of aircraft to Western lessors, whether there was a ban on doing so would likely be related to the support which the government was contemplating providing if aircraft were retained in Russia, including in relation to subsidies.

VDG: ABC and Atran

874. ABC specialised in transcontinental cargo transportation between the USA and South-East Asia and the Northern EU and South-East Asia. Atran specialised in intra-Asian cargo transportation between Russia and China, and sometimes between Russia and the EU, and supplementary pure domestic distribution of cargo delivered from China. It was not practical for these airlines to refocus away from international to domestic routes post invasion, as Mr Pyne said.

875. Very shortly after the imposition of sanctions, on 26 February 2022, AerCap sent a letter to VDG requesting that the two Boeing 747s leased by it to ABC, which were then in Amsterdam, should be relocated to locations in Spain, France or Ireland. It is somewhat unclear as to whether that letter will have been received by ABC before the aircraft were flown back to Russia, but if it was, ABC did not comply with it. One aircraft flew back to Russia at about midday, and the second departed about an hour later.

876. On 1 March 2022, two of the Boeing 737s leased to Atran were in Kagoshima, Japan, and Hangzhou, China respectively. Mr Trottier of AerCap spoke with Mr Nikitin of VDG, requesting that VDG should ground the aircraft in Japan and China. Mr Trottier understood Mr Nikitin to have agreed to do so, which may in fact have been the case. The aircraft were, however, flown back to Russia.

877. Two BOCA-owned 747-800s were flown back to Russia on about 5/6 March 2022. Evidence in the Irish proceedings indicates that ABC said that this was because they had been expressly required by the Russian Government to return the aircraft to Moscow.

878. The last flight undertaken by either of ABC's AerCap Aircraft was on 3 March 2022. Save for some non-commercial repositioning flights within Russia on about 12 March 2022, the Atran aircraft have been grounded since 5 March 2022. The last ABC-operated flight by a DAE Aircraft was on 1 March 2022. The aircraft remain in Russia up to the present. They have not been re-registered in Russia.

879. With those aircraft are three more aircraft which were leased to ABC by Irish leasing companies ultimately owned by Mr Isaykin himself, and which have remained in Russia since March 2022.

880. On 8 March 2022 AerCap received a letter from ABC dated 6 March 2022, and a materially similar letter from Atran. The letters stated that the aircraft must comply with customs formalities before they could depart Russia; and further that '*Russian Aviation Authorities issued the document requiring prior authorization for any movement of any aircraft operated by any Russian carrier outside Russia*'. I also have regard to the evidence referred to at paragraph 6 of the Confidential DPSI Schedule.

881. On 10 March 2022 Mr Houlihan met Mr Isaykin and his deputy in Moscow. Mr Houlihan's evidence was that at that meeting he had been told that ABC '*wanted to hand back MSN 66625 but would be unable to do so because of government action*'. In oral evidence he added that they had discussed 'both aircraft'. That is a reference to both MSN 66625 and to MSN 35613. In relation to the former, ABC had paid a commitment fee by the time that the aircraft had been delivered to it under the lease. The other was an aircraft which DAE had leased to Emirates, which was being returned to DAE, and which DAE was intending to sell to Avers Avia, an Irish company controlled by Mr Isaykin, to be subleased to ABC. ABC had paid a deposit in respect of that aircraft. That aircraft was not in Russia. Mr Houlihan said that at the meeting:

> At this stage, the game was up. The draft resolution was in circulation. Everyone knew about it. Everyone knew it was a temporary ban…. at this stage I knew I wasn't going to get 66625 out, and nor was I going to get any money…we both knew we couldn't do anything.

I accepted that this was reliable evidence.

882. After GR 311 and GR 312 were enacted, on 18 March 2022 ABC wrote to AerCap stating that they were willing to comply with AerCap's Termination Notice, but that '*we are required to have a permission from the Russian governmental authorities to actually fly the Aircraft outside of Russia as requested in the Termination Notice.*' On 30 March 2022 in the context of negotiations between AerCap and ABC of an early termination agreement, Mr Nikitin referred to the fact that because of GR 312, '*any aircraft operated by Russian airline could not be redelivered to lessor without a permission from the Russian authorities for such redelivery.*'

883. From late March 2022 until at least early 2023, VDG were seeking to find a non-Russian partner, which would allow them to operate their business outside Russia, while, if possible, continuing to use at least some of their Western Leased Aircraft. From sometime in April 2022 a potential joint venture with Etihad became a serious option. Any deal negotiated would have been for both ABC and Atran.

884. In parallel with the exploration of such options, ABC and Atran made efforts to obtain permission to export their aircraft from Russia. An application to export the 737-800s leased from AerCap was submitted on or about 27 April 2022. This, Individual 3 said, was an application to permit return of these aircraft to the lessor. ABC submitted a formal application to MinTrans on 17 May 2022 in respect of its entire fleet of 18 aircraft, including the three that were leased to ABC by leasing companies ultimately owned by Mr Isaykin. The basis was said in the letter of application to be that '*the sanctions regime means that there is no prospect of ensuring the continued airworthiness of these types of aircraft, so the Airline is planning to return them to the lessor.*'

885. Although ABC had been optimistic that the necessary permissions would be obtained, they were not. On 13 September 2022 Mr Nikitin informed DAE that '*the Russian government want something in return for allowing aircraft to leave.*' I take into account the evidence referred to at paragraph 7 of the Confidential DPSI Schedule.

886. ABC obtained permission to return two Boeing 747 aircraft to BOCA in March 2024. I am unable to conclude that, because ABC was successful in that application, it shows that it could have been successful in relation to its AerCap/DAE Aircraft had it been 'sufficiently motivated'. As Ms Dagaeva said in her evidence, it is reasonable to consider that the return to BOCA proved possible in part because of the fact that the ultimate origin of the leasing company was a 'friendly country', China.

887. The position in relation to VDG in overview can, in my judgment, be summarised as follows. In the immediate aftermath of the invasion and imposition of sanctions, ABC and Atran did not comply with requests to ground or reposition certain aircraft, which flew back to Russia. I do not consider that this was as a result of any settled or strategic decision that VDG's Western Leased Aircraft should be kept in Russia or not returned to lessors. Instead, I consider it likely that it was a result of a desire to fulfil existing commitments, and not to have the aircraft arrested or detained in a way which would have interfered with them. However, from about 5 March 2022 it appears to me clear that the reason why the ABC/Atran aircraft remained in Russia was because they were not permitted to depart by the Russian authorities. I do not consider that VDG wanted to retain them in Russia. For one thing, keeping them unused in Russia entailed considerable storage costs. For another, to keep them would have jeopardised good will with lessors, which would have been necessary in the long term, as Individual 3 said. There is no plausible explanation as to why VDG should have wished to keep the aircraft owned by leasing companies controlled by Mr Isaykin himself in Russia and idle. Further a desire on the part of VDG to keep its Western Leased Aircraft in Russia appears to me to be negatived by ABC/Atran's applications to export aircraft.

Efforts at recovery

888. Many of the steps taken by lessors to seek to recover aircraft, in the wake of the Ukraine invasion, have already been referred to. I will summarise them briefly at this juncture.

889. All lessors in this action took steps to attempt to recover the Aircraft. At a minimum, those steps included the issuing of grounding notices and notices of termination of the leases to the Russian airlines and communicating with lessees to persuade the lessees to return the Aircraft. All the lessors reasonably concluded that recovery within Russia itself of their assets was impossible.

890. There have been no opportunities to take further steps towards repossession in the case of the Merx Aircraft, which have not left the CIS subsequent to the Russian invasion.

891. Russian airlines did continue to use AerCap and DAE Aircraft for international flights, generally for repatriation purposes, subsequent to the imposition of the EU Sanctions. Both lessors made efforts to repossess their aircraft whilst they were outside Russia. Some of those efforts were successful, and others not.

892. AerCap's initial recovery efforts were diplomatic and aimed at a consensual return. Its leasing executives frequently contacted their lessees both to clarify what their intentions were and to urge them to return the AerCap Aircraft. On occasion there was contact between very senior figures, as on 7 March 2022 when Mr Kelly emailed Mr Filev of S7. On 8 March 2022, AerCap wrote to its lessees to reiterate that they were in breach of the aircraft leases

and to repeat its request for flight plans for the return of the AerCap Aircraft. By 10 March 2022 the leases of all AerCap Aircraft had been terminated.

893. Where possible AerCap also undertook further active steps to repossess the AerCap Aircraft as follows. It identified where an aircraft was flying, whether by tracking or by the co-operation of the airline. Once the aircraft had exited Russian airspace, or once it had landed at its destination, AerCap issued a termination notice in respect of that aircraft if it had not already done so and as a result obtained an official letter from the registering authority which confirmed that the aircraft's certificate of airworthiness was suspended. AerCap sent the termination notice and the registering authority's letter to the aviation authority of the country in which the aircraft was situated or to which it was flying, requesting that the authority ground the aircraft.

894. AerCap's successful repossessions were all of aircraft leased to the 'Russian Turk' airlines. AerCap recovered its sole aircraft on lease to Azur Air, 8 out of 10 aircraft from Royal Flight/Blue Connect, and 9 out of 17 aircraft from Nordwind. The majority of aircraft recovered from the Russian Turk airlines were already outside Russia at the time of the invasion. However there were some exceptions. The Azur Air aircraft was flown to Egypt, two Royal Flight/Blue Connect aircraft to Egypt and four to Turkey, and three Nordwind aircraft to Turkey subsequent to the invasion. AerCap made all of these recoveries consensually, with the exception of the Nordwind aircraft MSN 28247, which was prevented from leaving Turkey on 2 March 2022 without Nordwind's co-operation.

895. The difficulties involved in the recovery of aircraft may be illustrated by the case of the Azur Air aircraft. On 6 March 2022, after failing to obtain a flight permit for Turkey due to the large number of leased aircraft which had been repossessed there, Azur obtained a flight permit for Egypt, and informed AerCap that once the aircraft had landed it would 'pull some of the circuit plugs' and declare a technical problem. AerCap could then apply to arrest the aircraft. The scheme was successful, but even after the aircraft was grounded AerCap could not obtain its return. The Irish ambassador to Egypt reported that Egypt was under pressure from Russia not to permit the return of Western Leased Aircraft to lessors. Following a meeting between AerCap representatives and the Egyptian Minister of Aviation in October 2022, the aircraft was returned to AerCap.

896. AerCap also successfully recovered several assets which were outside Russia for maintenance purposes, or to be redelivered, at the time of the invasion. These included the aircraft MSN 2243 leased to Aurora, which was undergoing maintenance in Taiwan, MSN 30038 leased to Smartavia, which was undergoing maintenance in Sharjah, and MSN 28825 leased to Yakutia, which was in the US for redelivery, in addition to a variety of engines.

897. However, with the exception of the single Nordwind aircraft MSN 28247, AerCap did not recover any aircraft where the lessee did not co-operate. The Dominican Republic's aviation authority allowed the Royal Flight/Blue Connect aircraft MSN 32714 to depart on 2 March 2022. The same was true of the Azur Air aircraft MSN 32729 on 3 March, later repossessed in Egypt. The Egyptian civil aviation authority allowed the Ural aircraft MSN 9073 to depart on 5 March 2022, and likewise the Royal Flight/Blue Connect aircraft MSN 27617 (later recovered). It allowed the Royal Flight/Blue Connect aircraft MSN 28171, which was never recovered, to depart on 6 March 2022. All these departures were in spite of AerCap's requests to the aviation authorities to ground the aircraft.

898. The most recent attempt made by AerCap to ground an aircraft leased by a Russian airline was in respect of the Aeroflot aircraft MSN 1301. The aircraft landed in Sri Lanka on 2 June 2022, and AerCap obtained an interim order for its arrest on the same day. However, due to intense diplomatic pressure, including a threat by Russia that it would revoke a facility for the export of oil and gas to Sri Lanka, and an announcement by Aeroflot that it would cease all flights to Sri Lanka, the aircraft was released by the Sri Lankan authorities on 6 June 2022.

899. DAE, like AerCap, sought consensual returns and to that end communicated frequently with its lessees both by WhatsApp messages and calls. Its discussions with UTair, for instance, focussed on a possible plan for repossession in Kazakhstan, which was ultimately unsuccessful. Most strikingly, Mr Houlihan also travelled to Moscow and met with each lessee between 6 March and 11 March 2022, in an act of significant personal courage. Mr Houlihan repeated DAE's requests for the return of the DAE Aircraft, requested information on aircraft movements, and clarified the airlines' positions in respect of the return of their Western Leased Aircraft. Some of that information was of material assistance in recovering aircraft.

900. Where possible, DAE also took further steps to repossess certain individual aircraft. As in AerCap's case, its only successful repossessions were either where the lessee co-operated or where the aircraft was already outside Russia at the time of the invasion.

901. DAE recovered one aircraft from the 'Russian-Turk' airlines. As set out above, on 9 March 2022 Ramazan Akpinar (Nordwind) called Mr Houlihan, pursuant to their meeting in Moscow on 7 March 2022, and informed him that Nordwind could not obtain flight permits for Turkey, and therefore DAE should attempt to repossess the aircraft MSNs 37136 and 32639 in Mexico City, to which they were flying. DAE successfully repossessed MSN 37136 there on the same day.

902. DAE also recovered two I-Fly aircraft, MSNs 293 and 946, which were undergoing maintenance outside Russia at the time of the invasion.

903. Genesis successfully arrested an aircraft on lease to Ural on 4 March 2022 in Dubai and flew it back to the UK by 25 July 2022. As a result of its successful repossession, it is not the subject of a claim in this action. There has been no opportunity to take further steps to repossess the Genesis Aircraft leased to NordStar.

904. By the end of the trial, all Defendants either conceded that the Claimants had taken reasonable steps to recover the Aircraft, or advanced no case that they had not. I find that they had.

Analysis and Conclusions

Were the Aircraft lost and if so when?

905. The issue is whether the Aircraft were lost by reason of a permanent deprivation of possession. I have set out above what I have concluded is the correct 'test' to be applied in deciding this: namely to say whether, as of any given date, deprivation of possession was, on the balance of probabilities, permanent; that in carrying out this assessment the court will

look at the true facts at that time; but that the court may have regard to what happened after that date in the two ways I have previously identified.

906. This exercise is in principle distinct from an identification of whether any particular peril may have caused the loss. It is inevitable, however, that a consideration of whether and if so when any loss occurred will be related to what perils were operating and how, as at any given date.

907. In making the assessment which follows as to whether there was a loss, and when, I have had regard to all the various circumstances and developments which applied and took place from 24 February 2022 onwards, and which I have referred to above. In particular I have taken into account the general political situation in Russia, the governmental reaction and measures taken in response to Western sanctions, the positions of the various lessee airlines, and the geopolitical situation.

908. The last of these is significant in two particular respects. First, in the early days after the invasion of Ukraine, there appeared the possibility that the 'special military operation' launched by President Putin might be brought to a swift conclusion by the seizure of Kyiv and the capture or forced exile of the Ukrainian government. This has been called the attempted *coup de main*. What might have been the effect of this succeeding on the potential for return of the Aircraft is difficult to say, given that Western sanctions would probably have remained in place. Nevertheless the uncertainty, during the period in which it remained a possibility, seems to me to weigh against a conclusion that, during that period, it was more likely than not that the lessors had been permanently deprived of the Aircraft. As I have set out above, however, the evidence before me was to the effect that, by 8 March 2022, the prospect of a swift end to the war was over, and Western sanctions were in place for the foreseeable future. Second, although peace talks were still proceeding in March 2022, the positions of the two sides were existential and inconsistent. Those talks were, in my judgment, never remotely likely to result in any peace agreement which would have led to the lifting of sanctions, as proved to be the case. There was no realistic prospect of those talks ending the lessors' deprivation of the Aircraft.

909. In relation to the position of the government, this was characterised by a resolve not to see Western sanctions be successful, and to maintain transport connectivity within Russia. How the government sought to meet these objectives developed over time. Initially it relied on measures which were, in various ways, informal. But the position of the government, to the effect that Western Leased Aircraft should not be returned to lessors, became progressively clearer and more emphatic. It came to be expected by Russian airlines that there would be formal legislative steps taken in relation to the matter. Those steps were taken by the introduction of GR 311 and GR 312 on 10 March 2022.

910. In relation to the airlines, their positions were not identical, as I have set out. I do not consider that the evidence establishes, in the case of any airline, that, prior to 10 March 2022 such a fixed decision permanently to keep the Aircraft had been taken that that decision itself made it likely that the lessor's deprivation of the Aircraft would be permanent. Meanwhile, those airlines which were most committed to returning Western Leased Aircraft to lessors clearly came under increased constraints, and pressure not to do so, especially from 5 March 2022 when the FATA Message was published and President Putin made his appearance at the Aeroflot training centre. Some room for manoeuvre remained, at least for some airlines, as demonstrated by the return of aircraft leased to Russo-Turkish airlines in

the period 6-9 March 2022. After 10 March 2022 the room for manoeuvre disappeared. The only flights abroad of the Aircraft in this action which occurred after that date until May 2022 were to Kazakhstan, Kyrgystan, Tajikistan, Uzbekistan and Belarus. The only returns of aircraft to lessors which have taken place have been the very exceptional cases to which I have referred. The restriction on flights may have been achieved by the restrictions on the approval of flight plans, but it appears to me clear that this was in keeping with the formal export ban introduced by GR 311.

911. Before 10 March 2022, on my assessment, it could, and I think would, have been properly said that recovery of the Aircraft at some point was uncertain. I am not persuaded that it would have been said to be, on the balance of probability, unlikely. On and after 10 March 2022 I consider that it could and would properly have been said to be unlikely. By that stage, there was a formal ban on exports, and effective practical restraints on flying to locations where there might be return to lessors. Western sanctions were in place for the foreseeable future. While GR 311 was, as enacted, time-limited, it was likely that it would be continued as long as necessary to counter Western sanctions (and it has indeed been extended). The probability that, upon any hypothesised end to sanctions, which might be years down the line, and having been flown or kept unused in Russia in the meantime, the aircraft would be returned to lessors would in my view have been considered to be low.

912. I do not consider that there is the need to invoke an 'evidential wait and see' period to make this assessment as of 10 March 2022. But insofar as regard is had to such a period, it confirms the conclusion that the aircraft were lost on 10 March 2022. A reasonable 'wait and see' period cannot last indefinitely without emasculating the commercial product which the insurances represent. Any 'wait and see' period must have ended long before now. Equally, the conclusion that there was a loss on 10 March 2022 is not contradicted, but if anything supported, if regard is had, as a 'cross-check' in the manner described above, to what has happened since that date up to the present. The Aircraft have not been returned. The fact that in some cases the lessors have entered into settlements which transfer title to aircraft does not show that there has been no loss. I have already given my reasons for rejecting WR Insurers' case that there is only a deprivation of possession if the insured is unable to exercise any of the benefits of ownership. That the lessors agreed to part with title in circumstances where they were deprived of possession does not indicate that they had not lost the Aircraft.

913. My above conclusions are I consider consistent with the evidence of Mr Houlihan of DAE. His evidence was that, by 9 March 2022, the situation (from his point of view) was deteriorating, it was known that a formal decree was imminent, and he '*was aware at this stage that I wasn't going to get any aircraft back*'; and further that what GR 311 and GR 312 did was to convert a covert into a '*very overt way to retain the aircraft.*' To my mind that supports my conclusion that it was with the implementation of GR 311 that the Aircraft could be regarded as lost.

914. For the purposes of completeness, I should make it clear that I regard the position as at 10 March 2022 as being not only that, on the balance of probability, the deprivation of the aircraft was permanent; but also that there was only a 'mere chance' of their recovery; and that recovery was uncertain, the insured having taken reasonable steps to seek to recover them by that stage. I have explained my preferred analysis of these various formulations of the test, but, in case there is said to be any difference between them, my view is that each is satisfied.

Which Peril(s) was or were Operating?

915. I have set out above what, as a matter of law and the proper construction of the policies may count as AR or relevant WR Perils.

916. As I have said, I did not understand it to be in dispute that, assuming that the Contingent or Possessed Cover was engaged, if there was a loss of the Aircraft within the policy periods involved, and if it was not caused by the operation of a WR Peril, then it was caused by the operation of an AR Peril. Specifically, it was not in dispute that decisions on the part of airlines, or deliberate conduct on their part not to return aircraft, constituted AR Perils.

917. As to the WR Perils, I consider that the direction which I have found was given by the Russian Government to the Aeroflot group, either shortly before, or at, the Meeting of 26 February 2022 was a 'restraint' or 'detention' on the aircraft of the Aeroflot Group by or under the order of the government.

918. I am also satisfied that the FATA information message of 5 March 2022 was a restraint or detention by or under the order of the Russian Government. This message was expressed in unusually emphatic, and political, terms and was communicated by particularly numerous and direct methods. As Mr Kozhanov said, it would have been understood as a ban on flights abroad for any purposes; and it was largely complied with. It has the three features of a 'restraint' or 'detention' which I have identified above.

919. I have found more difficult whether there was any other 'restraint' or 'detention' in the period prior to 10 March 2022. There are arguments to the effect that what was said at the meeting on 28 February 2022, and/or the 'informal direction' which the representatives of Ural spoke of to Dr van Antwerpen on 2 March 2022, and/or the FATA telegrams of 2-4 March 2022 were 'restraints' or 'detentions'. They all had a role in communicating to airlines that the Russian state wished aircraft not to be returned to lessors for the present and pending further official action.

920. I have been left unpersuaded that any of these matters should be characterised as a 'restraint' or 'detention'. Even allowing for the role of informality in the communication of the wishes of the Russian state, the fact that these communications took the forms they did, coupled with the lack of an unequivocal prohibition on the return of aircraft to lessors or flights abroad indicates to me that they are not, themselves, properly described as 'restraints' or 'detentions'.

921. In relation to GR 311, as I have already said, subject only to arguments about it that I have rejected, there was no dispute that GR 311 constituted a restraint or detention within the Government Perils in the war risks.

What was the Operative Cause of the Loss?

922. The issue which has to be resolved here is as to what must be regarded as the cause of the loss of the Aircraft. Specifically, the question is whether the proximate, or efficient cause, of their loss was, or was not, the operation of a WR Peril. What that involves considering, in the present case, is what was the proximate cause of the lessors' deprivation

of the Aircraft becoming, on the balance of probabilities, permanent. The burden rests on the AR Camp of establishing that it was the operation of a WR Peril.

923. As I have already indicated, the answer to this question cannot be easily divorced from the question of when the loss occurred. My finding is that the loss occurred on 10 March 2022, and that was in part based on the fact that it was on 10 March 2022 that GR 311 was published. That does not itself dictate that it is GR 311 that is to be regarded as the proximate cause of the loss of the Aircraft, but it is consistent with such a conclusion.

924. In my judgment GR 311 should indeed be regarded as the proximate cause of the loss of the Aircraft. I say this for the following reasons:

(1) First, GR 311 was enacted at a time when a quick end to the war had ceased to be a possibility. It was, therefore, an enactment at a time when sanctions, and counter-sanction measures, would be in place for the foreseeable future.
(2) Second, GR 311 of itself, and without reference to prior government measures, was a ban on the export, and thus the return of the Aircraft. It was intended to be a prohibition on returns, and it was effective in the sense that no returns occurred after its publication save in those few cases in which permission was given.
(3) Third, GR 311 was the culmination of a series of steps taken by the Russian Government which indicated the importance the government attached to Western Leased Aircraft being retained by Russian airlines. GR 311 added to the existing restraints on Aeroflot, and to the FATA Message of 5 March 2022, which I have referred to above. Those measures, however, were clearly interim, in the sense that it was always anticipated that the government would formulate and pronounce an official policy. GR 311 represented that official, and legally binding, policy.
(4) Fourth, under most regimes, but especially under an authoritarian regime such as Russia's, obedience to an enactment such as GR 311 can be expected. It was to be expected that, from its enactment, airlines would comply with it, whether or not it represented what they would otherwise have wished to do. Compliance with the law will have displaced or replaced, as of prime importance, any other reasons which the airlines, or some of them, may have had to retain aircraft.

925. I do not regard the airlines' wishes or decisions to retain the Aircraft in their own interests to have been a cause of the loss of the aircraft of equal efficiency with the government measures culminating in GR 311. Again, this is for a number of reasons.

(1) First, as I have said, I do not consider that the evidence establishes that there was, prior to GR 311, any clear decision by any airline to keep its Western Leased Aircraft permanently such as of itself meant that the relevant lessor's deprivation of the Aircraft and Engines was permanent. No case that there had been a loss of aircraft as a result of any such decision was made out, and thus it was not established that the aircraft had been lost as a result of an AR Peril before GR 311. It may be noted, in this connexion, that WR Insurers did not contend that aircraft had been so lost, as they denied that any of the Aircraft and Engines were lost by 10 March 2022, or at all.
(2) Second, as I have set out above, each airline had a range of interests, and there were differences in the positions of the airlines as to the desirability of return of aircraft. It is not the case that all airlines uniformly considered it in their commercial interests to retain all the Aircraft and Engines. S7, Ural, UTair, Red Wings, Nordwind, Royal Flight, ABC and Atran all considered that there might be

advantages in returning at least some aircraft, and this probably also applies to I-Fly.

(3) Third, for all airlines, their most important commercial interest was to comply with the requirements of the Russian Government, as Ms Dagaeva said. Various airlines stated expressly to lessors that their position was dependent on that of the government, including Aurora, Yakutia, Yamal and Alrosa. Even in the case of Smartavia, as I have found, the position of Mr Kuznetsov was that the airline should act in accordance with the instructions of the government, which involved an acceptance that the government's position governed.

(4) Fourth, in the case of all airlines it appears clear that their attitudes up to GR 311 were provisional, in the sense that they wished to see how matters would develop, including what the government would do not only by way of compulsion but also by way of support and subsidy.

(5) Fifth, I did not accept that the stance of the government was strongly influenced by the desires of the airlines, or that, in effect, reliance on the government's position was a reliance on a stance which was moulded by their own interests in retaining and using Western Leased Aircraft. This view does not take sufficiently into account the state's own political and social interest in defeating Western sanctions and maintaining connectivity in Russia. Furthermore such a view is not in accordance with the relationship of hierarchy and subordination which prevails between the government and airlines in Russia. Ms Dagaeva's evidence was convincing:

> … it is far more likely that the decision was taken by the government on its own initiative and simply imposed on the airlines. That is not to say that there was not a coincidence of interests between at least some of the airlines and the government. [But] … the state … would not have been interested in protecting the private commercial positions of the airlines.

(6) Sixth, as I have said, once GR 311 was published, then it must have become the prime reason why the Aircraft remained in Russia. Obedience to that law will have been the primary concern of airlines. It did not matter whether the airline wished to keep or return its Western Leased Aircraft; it was not permitted to do so without permission.

926. My conclusion as to the proximate cause of the loss is, to my mind, consistent with what was said contemporaneously by two men who were very well placed to know what was the real cause of Western Leased Aircraft remaining in Russia, and how decisions are taken in Russia: President Putin and Minister Savelyev. In his remarks at the Novgorod Technical School on 21 September 2022, and at the meeting with the aviation industry on 9 February 2023, President Putin was clear that it was governmental action which had ensured that the planes remained in Russia, and were not returned to lessors or able to be 'seized' by them. Minister Savelyev's comments on 15 March 2023 to the Duma's Committee on Transport were to the effect that GR 311 was what put an end to the 'bewilderment' of some airlines, leading them to understand that aircraft could not be taken out of the country without approval, which approval would not be forthcoming.

927. I do not regard this case as one in which it is necessary, in order to reach the conclusion that the proximate cause of the loss was a restraint or detention by or under the order of the government, to have regard to the principle established in The Ann Stathatos. If the

approach suggested in that case is adopted, however, and regard is had to the '*power of the war risks clause to attract the result into its own field*', it would strengthen my conclusion.

928. Equally, I do not consider that the present is a case of there being two concurrent causes of equal efficacy or efficiency. If I were wrong in this conclusion, and it could be said that the WR Peril and an AR Peril were of equal efficacy, I would still regard the exception for War Risks in the AR Covers as being applicable. This is because, in the first place, I do not consider that the two causes can sensibly be said to be 'independent'. Any decisions, or desires, or interests on the part of airlines to retain the Aircraft were at least influenced by the measures taken by the government. But even if that is wrong, and the two causes can properly be said to be independent, my conclusion would still be, for the reasons I have given above, that the exception in the AR Covers would apply to the loss.

Notices to review and 'grip of the peril'

929. My findings above as to the date on which the Aircraft can be said to have been lost make relevant and provide the framework for the arguments which were advanced by reference to the notices to review/cancellation which were served by WR Insurers on DAE, Falcon, Merx and Genesis (the '**Notices of Review**').

930. To recap, the WR Covers for each of the Claimants, except AerCap, contained provisions allowing WR Insurers to review, inter alia, the geographical limits of the policies. The effect of the Notices of Review was, in most cases, that from midnight 7 days after the notice was issued, either cover would be cancelled entirely, if the notice were not accepted by the insured, or if they were accepted cover would be amended to exclude the countries specified in the notices from that date.

931. The Notices of Review which were served are summarised in the table at Annexe 4 to this judgment. DAE, Falcon and Merx do not dispute that Notices of Review could be issued by the Slip Leader on behalf of all WR Insurers and/or by individual WR Insurers. There is a dispute as to the authority of the Slip Leader in relation to Genesis, to which I will return below.

932. Given my findings as to the date on which the aircraft were lost, what is significant is as follows. For DAE, all the 7 day notices expired after 10 March 2022, except for the IQUW notice issued on 1 March 2022, which expired at 23.59 on 8 March 2022; and for Falcon, all the notices expired after 10 March 2022, except for the Atrium and IQUW notices issued on 1 March 2022 which expired at 23.59 on 8 March 2022. In relation to Merx, all the notices expired after 10 March 2022, except for the Hive and IQUW notices issued on 1 March 2022 which those underwriters say were effective at midnight on 8/9 March 2022. The position in relation to Genesis is more complex, and will be considered below, but WR Insurers' contention is that the Notice of Review issued by TMK as Slip Leader was effective from midnight on 2/3 March 2022.

933. It is convenient to address at this juncture a preliminary point taken by Merx. Merx refers to the fact that the WR Endorsement, at Section 5 clause (a), provides that cancellation '*shall only apply to the Aircraft the subject of the notice.*' Merx further contends that as none of the notices given by WR Insurers actually identified the Aircraft to which they applied, the notices were invalid.

934. I do not consider that this argument is correct. The terms of the policy did not make the enumeration of the aircraft to which the notice was to apply a condition of a valid Notice of Review. The words relied on by Merx were meant to clarify the extent of any cancellation, namely to make clear that insofar as aircraft were identified by WR Insurers as not the subject of the notice, those aircraft would remain on cover; they were not seeking to impose a requirement of individual enumeration, and the clause would have been differently expressed had that been the intention. Furthermore, the notices which were given would have been understood by a reasonable recipient as applicable to all the aircraft underwritten by the relevant policy.

935. There are thus, on my findings, a number of WR Insurers whose policies had been temporally or geographically restricted from a point prior to that at which there was a loss of the Aircraft.

936. WR Insurers contend that, in those cases, there is no cover. The relevant policies each covered losses occurring during the relevant policy period, and given that the loss, on this basis, occurred after the end of the (truncated) period, it was not covered.

937. In response the relevant Claimants contended that this was not so. They relied, in various ways, on an argument that the loss flowed from a peril which was operative prior to the end of the period of insurance; and they invoked the concepts of 'death blow' and 'grip of the peril' to say that there was cover notwithstanding that the total loss of the Aircraft and Engines occurred outside the relevant policy period.

938. The terminology of 'grip of the peril', and its distinction from the related concept of a 'death blow' was first used, or at least first made common currency, by Rix LJ in Scott v Copenhagen Re Co (UK) Ltd [2003] EWCA Civ 688 at [47]-[48]. As Rix LJ there said, there was in the field of marine insurance a long recognised doctrine, known loosely as that of the 'death's blow', under which, if a vessel has suffered some grievous damage which cannot be said to amount at once to a total loss, or even a constructive total loss, and which only develops into a total loss after the risk expires, nevertheless the total loss is covered under the insurance. This is a doctrine which is associated with the case of Knight v Faith (1850) 15 QB 649, though it was not applied in that case. Rix LJ went on to say that the same or an analogous doctrine, which might be better labelled 'grip of the peril', applied in cases of deprivation of possession. He referred to the exposition of this in the then current edition of *Arnould* by reference to Bailhache J's judgment in Fooks v Smith [1924] 2 KB 508 at 514. Bailhache J had there said that if a peril insured against occurred, and if in the ordinary course of an unbroken sequence of events following on the peril a constructive total loss became an actual total loss, the underwriters were liable in respect of the total loss. Rix LJ said (at [48]) that it was not clear why, absent express contractual provision, such a doctrine or doctrines were not applicable outside marine insurance.

939. These principles are stated in *Arnould,* in the marine insurance context, at [28-05] as follows:

> If the subject matter of the insurance has already received its death blow when the risk expires, the fact that the damage has not yet reached such proportions as to make the ship or goods already an actual total loss cannot prevent the assured from claiming for an actual total loss when the work of destruction has been completed.

> Similarly, if the assured is deprived of possession or control of the insured property prior to the expiry of the risk by an insured peril, the fact that at the date when the policy expired it could not be said that the assured was irretrievably deprived of his ship or goods, or that their recovery is unlikely, will not prevent him from afterwards claiming for an actual total loss if as a result of a sequence of events following in the ordinary course upon the peril insured against the loss develops into an actual total loss.

940. In *Bennett*, the principle is stated thus (at [21.22-21.23]):

> The confinement of the insurer's liability to loss sustained during the currency of the risk is subject to the "grip of the peril" doctrine. According to this doctrine, where the insured property falls into the grip of an insured peril during the currency of the risk, the insurer is liable for any total loss proximately caused by that peril after the expiry of the risk.
>
> The doctrine operates most readily in the context of perils of deprivation of possession. The policy may expire between the insured property falling into the grip of a peril of deprivation of possession and that deprivation maturing into a total loss. However, provided the peril of deprivation of possession that grips the property while the insurer is on risk qualifies as the proximate cause of a total loss that ultimately matures, the insurer will and should be liable for that total loss. Otherwise, the apparent extent of cover against perils of deprivation of possession would be misleading and there would be a significant gap in the ship-owner's cover, since renewal or alternative cover is unlikely to be available except at prohibitive rates once the vessel is known to have been seized.

941. It is now clear that the doctrine or doctrines or their analogues are applicable in non-marine insurance. In KAC v KIC [1996] 1 Lloyd's Rep 664 at 690, Rix J applied what he there called the 'death blow' principle, in holding, as an alternative ground, that the loss of the aircraft and spares taken from Kuwait airport was proximately caused by a peril occurring within the policy period. In Wasa International v Lexington Insurance [2010] 1 AC 180, Lord Mance stated, at [39] that '*damage materialising or developing from* [the peril insured against] *after the policy period would still be covered.*'

942. Recently, in Sky UK Limited v Riverstone Managing Agency Ltd [2024] EWCA Civ 1567, the Court of Appeal held that deterioration and development of damage to roof timbers occurring after the period of insurance, but as a result of wetting which had occurred during the period of insurance was covered by the policy. This was said to be the correct result as a matter of principle and authority, reinforced by consideration of the commercial consequences. As to principle, a contract of indemnity insurance is one in which the insurer promises that the assured will not suffer the insured damage. If and when the insurer fails to perform that primary obligation, it comes under a secondary obligation to pay damages. The consequence is that the measure of recovery is that provided for by the common law

principles governing damages for breach of contract, subject to any express policy terms to the contrary. Such limitation is not achieved merely by the insuring clause identifying the temporal limit of the insured damage. As to authority, Popplewell LJ referred, amongst others, to Lord Campbell's dictum in Knight v Faith '*that the insurer is liable for a loss actually sustained from a peril insured against during the continuance of the risk*'; to Andersen v Martin [1908] AC 334; to Municipal Mutual v Sea Insurance [1998] Lloyd's Rep IR 421; to Wasa v Lexington; and to The Renos [2019] 4 All ER 885.

943. As to the last of these, Popplewell LJ quoted what Lord Sumption had said at [10], as follows:

> The first point to be made is that as a general rule, the loss under a hull and machinery policy occurs at the time of the casualty and not when the measure of indemnity is ascertained. A claim on an insurance policy is a claim for unliquidated damages. The obligation of the insurer is to hold the assured harmless against an insured loss, from which it follows that where the insurance is against physical damage to property the insurer is in breach of that obligation as soon as the damage occurs: *Chandris v Argo Insurance Co Ltd* [1963] 2 Lloyd's Rep 65, 73-74, *Firma C-Trade SA v Newcastle Protection and Indemnity Association* (*The 'Fanti'*) [1991] 2 AC 1, para 35 (Lord Goff of Chieveley). As Megaw J pointed out in the former case, at p. 74, the result is that "it is not a condition precedent – it is not a fact which must exist and be pleaded – that the plaintiff has quantified the amount of his claim; or even that all the facts exist at the date of the writ which will enable the proper amount of the claim to be determined." These are "matters of evidence, not prerequisites of a cause of action". The rule that the loss is suffered at the time of the casualty applies notwithstanding that the loss developed thereafter, unless it developed as a result of something that can be regarded as a second casualty, breaking the chain of causation between the first one and the loss. For that reason, it has been held that the fact that the policy expires before the loss has fully developed will not affect the assured's right to recover under it in full: *Knight v Faith* (1850) 15 AB 649, 667 (Lord Campbell CJ); *Wasa International Insurance Co Ltd v Lexington Insurance Co* [2010] 1 AC 180, para 39 (Lord Mance). For the same reason, as the editors of Arnould, 19th ed (2018) point out at para. 29.07, if a casualty occurs within the policy period, and the loss develops after its expiry into one which is constructively total, there is still a constructive total loss under the policy.

944. As to commercial consequences, Popplewell LJ said that the conclusion he had reached accorded with commercial common sense. Business people, he said, would expect an insurance to yield the result that there was cover for deterioration and development damage; and it would have serious and unacceptable adverse consequences if this were not so, '*because it would make deterioration and development damage occurring after the expiry of the period of insurance uninsurable under any separate and subsequent property insurance cover.*'

945. By the end of the trial, it was not in dispute that there would be cover under non-marine policies such as those at issue here in respect of a development, after the end of the policy period, of physical damage proximately caused by a peril operating during the policy period. But WR Insurers argued that the present facts were not of that sort, and that the 'death's blow'/'grip of the peril' doctrine as it has been developed did not apply so as to mean that the losses in this case occurring after the expiry of the periods specified in the Notices of Review were covered under the policy.

946. Two particular arguments or groups of arguments arose in this connexion.

947. In the first place, WR Insurers contended that there was no room for the application of the 'death's blow'/'grip of the peril' doctrine where the policies were written on 'loss occurring during' terms: i.e. on terms which insured against losses occurring during a specified period, and that the present policies were written on that basis. This was so either because of the terms of the insurances themselves, or because the nature of the Notices of Review ousted any application of the 'grip of the peril' doctrine.

948. The first answer which was given to this by Genesis was that its policy was not, or was not simply, written on a 'loss occurring during' basis. It contended that its Contingent WR Cover was '*against all risks of physical loss or damage howsoever occasioned, sustained during the insurance period*' and that this was against risks which had been sustained during that period. Genesis thus argued that if a peril had started to operate or occur during the policy period, which caused loss and damage developing or manifesting then or later, it was covered. Merx adopted this argument insofar as its wording was similar.

949. I was not persuaded that this wording was materially different in effect from the words of, for example, the DAE Policies, which insured against 'loss or damage to aircraft and/or spares' within the policy period. Specifically, I consider that the natural meaning of the Genesis clause is that the 'physical loss or damage' must be 'sustained' during the policy period; and the insurance is against the risk of such loss or damage being sustained. As to when loss is 'sustained' for the purposes of these words, I consider that this is when loss or damage occurs. I would, however, agree, that a connotation of the word 'sustained' is that the adversity undergone may develop: as with the common usage, 'sustained a wound, of which he later died'. To that extent, the Genesis wording may be said to provide some textual support for the applicability of that aspect of the 'death's blow' or 'grip of the peril' doctrine or doctrines.

950. For their part, DAE/Falcon accepted that their relevant covers were on a 'loss occurring during' or 'LOD' basis. I agree with their submission, however, that coverage wording such as found in their policies, or in typical LOD covers, does not prevent or oust the application of 'death's blow'/'grip of the peril' principles. While those principles were originally developed in cases involving the differently worded Lloyd's SG Form, they have been recognised in marine insurance cases involving the New Marine Policy Form and ITC Hulls (1/10/83) clauses. Municipal Mutual involved a series of annual marine liability insurances on the MAR form. Hobhouse LJ described them as '*time contracts whereby the cover provided was defined inescapably by reference to a period of time*' (at 426 rhc), and further said that '*the cover is defined … in the present case by reference to when the physical loss or damage occurred*' (at 436lhc). Nevertheless, Hobhouse LJ acknowledged the applicability of 'grip of the peril' principles at 432 rhc, when he said that '*the problem of dates in relation to time policies is not a new one and is covered by authority*', cited Knight

v Faith and Anderson v Marten, and stated that '[t]*he loss is attributable to the policy year in which the loss was caused not that in which it was capable of quantification*'.

951. In Sky (UK) Ltd in the passage I have already quoted, Popplewell LJ said that the ousting of the principle that cover will be provided for the loss caused by the casualty, including the deterioration or development of damage sustained in the casualty, will not be '*achieved merely by the insuring clause identifying the temporal limit of the insured damage*'. The insuring clause in the construction all risks policy there at issue provided cover for 'physical loss or damage to Property Insured, occurring during the Period of Insurance'; and it is thus clear that the type of clause which Popplewell LJ was referring to as insufficient to oust the principle he identified included an express LOD clause.

952. Sky (UK) Ltd involved physical damage, but 'death's blow'/'grip of the peril' principles are also applicable in cases where there is a deprivation of possession within the policy period, and it remains to be seen whether that will develop into a total loss after the policy period, notwithstanding that the cover is written on LOD terms. That this is so is supported by the decision of Rix J in KAC v KIC. In that case, the insurance covered 'loss of or damage to the [aircraft and spares]' and specified the policy period as one year from 1 July 1990. On 2 August 1990 Iraqi forces had captured Kuwait airport, and with it 15 KAC aircraft which were on the ground there, together with a large amount of spares. All but one of the aircraft had been flown out by the end of 8 August 1990; that plane and some of the spares were taken away after 9 August 1990. A cancellation of the war risks cover had taken effect from midnight on 9 August 1990. Rix J found that all 15 of the aircraft had either been lost by a peril insured against by midnight on 9 August 1990 '*or to have been lost after that time by reason of the operation of a peril insured against before that time*' (see at 693 rhc). As Rix J said at 690:

> Secondly, even if I had not found that KAC's loss was complete already on Aug. 2, because of the "wait and see" principle espoused by Mr Webb, I would have found that the ultimate loss of all the aircraft and spares taken out of Kuwait airport was proximately caused by a peril insured against taking effect within the period of the policy…. I do not regard the actual flying out of the aircraft, followed by the spares … as new and separate proximate causes, but merely the working out of something which had already occurred.

953. WR Insurers drew attention to what was said by Rix LJ in Scott v Copenhagen Re. That was a case in which the reinsurance was expressly on 'losses occurring during [specified one year period] terms'. Rix LJ, in what were expressly obiter remarks said that '*it is to be noted that the period clause in the policy under consideration appears to be emphatic that the loss must occur precisely within the contract for it to be covered*' (at 215). On this basis, and on the basis that 'Moore v Evans would seem to be against [the] submission', Rix LJ doubted that the loss of the BA aircraft dated back to the initial date of deprivation. With respect, I am not able to agree with this reasoning (which, I reiterate, was not necessary to the decision in the case). I do not understand how Moore v Evans was contrary to the submission being considered. More importantly, I do not consider that 'losses occurring during' language has the effect that, to be covered, all loss must occur precisely within the policy period. The language used was not different in effect from that considered in Municipal Mutual or more emphatic than that examined in Sky UK Ltd. The

rationale for the recognition of 'grip of the peril' principles, to which I will revert, applies just as, if not more strongly in the case of LOD wording than, in cases where other language is used in the insuring clause.

954. For essentially the same reasons which I have set out above, I do not consider that the terms of the Notices of Review in the present case are sufficient to prevent or oust the application of 'death's blow' or 'grip of the peril' principles. The effect of the Notices of Review was to accelerate the date at which the WR Cover expired for Russia from the date originally agreed as the end of the period of insurance to the date and time when the Notices of Review took effect. They did not alter the scope of any cover provided for losses eventuating post expiry. In other words, if the insuring clause admitted of 'death's blow' or 'grip of the peril' principles at the end of the policy term, the early expiry of cover in respect of Russia would have admitted of the application of the same principles, and simply brought forward the relevant date for the application of those principles.

955. The second group of arguments raised refined questions as to the ambit of the 'grip of the peril' doctrine, and as to whether there was cover for partial loss by way of deprivation of property under the relevant insurances.

956. WR Insurers' argument was that the basis of any 'grip of the peril' principle was that there had to be a breach of contract by the insurer, in the sense described by Popplewell LJ in Sky UK Ltd by reference to Chandris v Argo and The 'Fanti' within the policy period; and if there is not, there can be no recovery in respect of loss or damage arising after the policy period. Further, as I understood it, WR Insurers argued that a temporary deprivation of the Aircraft, under the policies at issue here, is not a loss of the Aircraft, and is not insured against; and there is no breach of contract in its occurrence. Accordingly a temporary deprivation of the Aircraft within the policy period cannot be relied on as giving rise to the secondary obligation to pay damages spoken of by Popplewell LJ in Sky UK v Riverstone.

957. DAE's answer to this was, in the first place, to contend that a temporary deprivation of the Aircraft was a partial loss and, though it did not give rise to an obligation on the part of the insurers to pay, nevertheless constituted an insured loss, and thus a breach of the primary obligation. Insurers were liable to pay the damages flowing from that loss, and in particular for a total loss if it was proximately caused by the peril which had caused the partial loss by way of temporary deprivation. As a secondary argument, DAE contended that the position would actually be no different if there could not be said to be a partial loss by reason of a temporary deprivation within the policy period, because the 'grip of the peril' principle should apply in any event, whatever its precise legal basis.

958. In its submissions on the subject, AerCap's emphasis was rather different. AerCap, in Mr Howard KC's reply submissions, contended that the answer given by the courts to issues of whether there was cover for loss which was in some sense in train at the expiry of a period of insurance had to be one which made sense in the 'real world'; and that in that world, neither insureds nor insurers would have intended that a loss would fall into a 'black hole' which was neither covered under the expiring policy, nor insurable, save perhaps at a prohibitive premium, under any replacement policy. Mr Howard KC's submission was that, in the case of temporary deprivation within the policy period followed by permanent deprivation after it, it is awkward and confusing to seek to analyse that as a partial loss within the policy period followed by total loss thereafter; and preferable simply to recognise that provided the insured is in the grip of the peril during the policy period, loss suffered

later is treated as occurring during the policy period; and that if that is not right, then in the alternative, the court should say that a temporary deprivation does constitute a partial loss.

959. The idea that a temporary deprivation of the aircraft amounted to an insured partial loss was one which was only raised, by any of the parties, in the present context. I do not consider it to be correct. As was stated by Bankes LJ in Moore v Evans, and has been assumed in many non-marine cases, '*Mere temporary deprivation would not under ordinary circumstances constitute a loss.*' That is to say, when property policies such as those at issue here refer to 'a loss' of the property, that is to be understood, in the absence of express terms to a contrary effect, to mean, in relation to deprivation of possession, only permanent deprivation. The present policies do not, in my view, provide differently. The DAE policies contain no provision in relation to partial loss. In the relevant AerCap (clause 8), Merx (clause 1.5) and Genesis (clause 1.13.2) policies, there is reference to partial loss but only in relation to physical damage and the cost of repairs.

960. DAE relied on two cases as authority for the proposition that temporary deprivation would amount to a partial loss. The first of these was Empresa Cubana de Fletes v Kissavos Shipping Co SA (The Agathon) (No. 2) [1984] 1 Lloyd's Rep 183. That was not an insurance claim; the issue in the case was whether insurance against detention constituted insurance of an 'interest' in the vessel for the purposes of a clause in a time charter under which the expense of such insurances would be reimbursable by charterers. In holding that it did, Hobhouse J's conclusion that a detention of the vessel can be a partial loss for the purposes of marine insurance was only one of the reasons for his decision. Furthermore, his reasoning on the point is heavily dependent on the terms of s. 56 Marine Insurance Act, which provides that 'Any loss other than a total loss … is a partial loss.' Hobhouse J himself recognised that in non-marine policies the word '*loss*' may be used '*in a sense which is confined to actual total loss only…*' and referred to Moore v Evans (at 190 rhc).

961. The other case relied upon by DAE is Integrated Container Service Inc v British Traders Insurance Co Ltd [1984] 2 Lloyd's Rep 154. That was also a case of a marine insurance policy. It was, furthermore, a case in which there was an entitlement on the part of the insured to be indemnified within the policy period for sue and labour expenses.

962. Neither case, in my judgment, establishes that, for the purposes of non-marine policies worded as those at issue here are, there is a partial loss in the case of temporary deprivation of possession of the Aircraft. However, with that said, I do not consider that the question of whether there can be recovery under an expiring policy for a permanent loss of possession occurring after expiry but arising from a temporary loss of possession occurring prior to expiry should depend on the technicality of whether the temporary loss of possession can be regarded as a partial loss. To put this point another way, I do not think that the application of the 'grip of the peril' principles does or should rest solely on whether it can be said that there has been technically a breach of contract (even if it is one in respect of which no indemnity is payable) of the type identified by Popplewell LJ in Sky UK in the passage quoted above within the policy period.

963. Instead, I consider that the relevant 'grip of the peril' principle is that, if an insured is, within the policy period, deprived of possession of the relevant property by the operation of a peril insured against and, in circumstances which the insured cannot reasonably prevent, that deprivation of possession develops after the end of the policy period into a permanent deprivation by way of a sequence of events following in the ordinary course from the peril

insured against which has operated during the policy period, then the insured is entitled to an indemnity under the policy. To my mind, and as suggested by Rix LJ in Scott at [47], that has now evolved as a principle distinct from the 'death's blow' principle deriving from Knight v Faith, and which was referred to in The Renos and applied in Sky (UK) Ltd. That principle applies most readily to cases of physical damage, where the loss which occurs after the policy period is proximately caused by a casualty suffered during that period. It is an application of principles of proximate causation. The insurer is in breach from the moment when the casualty is suffered, though the quantification of the consequences of that breach may only be completed after the end of the policy period.

964. By contrast, on the approach I have indicated in the previous paragraph as to the 'grip of the 'peril' principle', it is not necessary to establish that the insurer was technically in breach of contract during the policy period. The legal basis of the principle, in my view, is that it is implicit in the terms of the policies. Specifically, on the proper construction of the policies, there can be no justification for considering that there should be a difference between the treatment of pre-expiry physical damage developing into a subsequent total loss, and pre-expiry deprivation/detention developing into a subsequent total loss. I would further say, however, that if this approach is not available, then, as AerCap submitted, it would be appropriate to recognise that the temporary deprivation within the policy period did constitute a partial loss, and that there was a technical breach of contract at that point. One or the other route is, in my view, correct, and necessary to avoid the 'black hole' identified in AerCap's submissions which, I also consider, would be inconsistent with the intentions of the parties to the contracts.

965. If I am right in my preferred approach identified in the previous paragraph, how does it apply in the present case? In this regard, it is necessary at the outset to record that it was DAE/Falcon's clearly stated position that they were not contending that it was sufficient if an AR Peril was operating before the expiry of the policy, and there was then a loss by reason of a WR Peril after its expiry. While I can see arguments to the contrary, I consider that this concession was correctly made. I do not consider that it can be said to be implicit in the WR Cover that it should respond, after expiry, to a loss arising out of a matter which, during the policy period, had only involved the operation of an AR Peril. The relevant questions therefore are (a) whether there was a WR Peril, which in concrete terms means an operative restraint or detention, operating on the Aircraft prior to the point(s) at which the Notices of Review took effect in such a way as to deprive the insured of possession of the Aircraft, and (b) whether that deprivation of possession developed in a sequence of events following in the ordinary course into the loss of the Aircraft, which as I have held, occurred on 10 March 2022.

966. In my assessment, and as I have already set out, there were operative restraints or detentions prior to 10 March 2022, namely of the Aeroflot Group's aircraft and engines from 26 February 2022, and of all relevant aircraft and engines from 5 March 2022 by reason of the FATA Message. I would also hold that the loss of the Aircraft on 10 March 2022 arose in a sequence of events which followed in the ordinary course from those restraints or detentions. This is because those earlier restraints/detentions represented the Russian Government exercising measures of control over Western Leased Aircraft, which it was always envisaged would be developed and formalised by subsequent official steps, and which were actually developed and embodied in GR 311.

967. The facts of the present case can, in my view, be distinguished from those in Stonegate v MS Amlin and others [2022] EWHC 2548 (Comm). In that case, losses sustained as a result of government closures of hospitality venues in response to a second wave of COVID-19 cases could not be regarded as following in the ordinary course from previous closures in response to the first wave of cases. In that case the successive government actions related to different underlying situations (different waves of cases). In the present case, the successive government actions of the 5 March FATA Message and GR 311 were in response to the same underlying situation, i.e. the Western sanctions and lessors' attempts to recover their aircraft from Russia in consequence. GR 311 reflected the full working-out of a process of which the FATA Message was an earlier stage.

968. There remain two further issues which still require to be considered. The first is WR Insurers' argument that aircraft cannot be regarded as having been 'in the grip' of the earlier restraints or detentions if, after their implementation, those aircraft flew out of Russia; and that this is so even where an aircraft subsequently returned to Russia. The argument is that, upon the return of that aircraft, it would have been subject to a new peril operating on it from when it arrived back in Russia, and if, by that point, the policies excluded Russia there would have been no operative WR Cover that could grip because there was then no cover for Russia.

969. Insofar as this argument was directed to aircraft which may have flown out of Russia after 10 March 2022, it is, in my judgment, wrong because, on my findings, the aircraft had been lost on that date. Any subsequent flights out of Russia did not alter that fact. And, in practical terms, subsequent flights only took place to destinations where Western Leased Aircraft could not be arrested or repossessed by lessors. Insofar as the argument was directed to aircraft which flew out of Russia prior to 10 March 2022, it has a limited significance. Given that, putting Genesis to one side for the moment, all Notices to Review were effective after 10 March 2022 except some which were effective as at the end of 8 March 2022, it would seem to apply only to the DAE/Falcon or Merx Aircraft which flew out of or arrived back in Russia on 9 March 2022. If they were in Russia as at the end of 8 March 2022 and stayed there they were caught by the restraint or detention constituted by the 5 March FATA Message until they were, on my findings, lost on 10 March 2022.

970. As I understand it, this point therefore only potentially applies to three aircraft: Merx's MSNs 2187 and 2175, leased to Ural, which flew to Tajikistan and Uzbekistan respectively; and DAE's MSN 32639, leased to Nordwind, which flew to Hong Kong. I do not consider that the argument has any force in relation to the Merx aircraft. The restraint or detention imposed on 5 March 2022 by the FATA Message of 5 March 2022 was expressly directed at ensuring that aircraft were not arrested abroad, and appears to have been understood as permitting flights to countries, such as Tajikistan and Uzbekistan, where there was no risk of that. Accordingly, the fact that aircraft flew to Tajikistan and Uzbekistan does not show, in my view, that they were not in the grip of the detention/restraint imposed by the FATA Message.

971. MSN 32639 requires separate consideration, since this aircraft flew to Hong Kong, a jurisdiction in which the arrest of Western Leased Aircraft might at least have been a possibility, on 9 March 2022. This raises two issues. The first is whether the journey to Hong Kong should be taken to have broken the chain of causation between the operation of the 5 March FATA Message and GR 311, such that the latter did not follow 'in the ordinary course' from the former. The second issue is whether, during the period in which MSN

32639 was in Hong Kong, DAE could reasonably have prevented being permanently deprived of the aircraft by procuring its arrest.

972. As to the first, the circumstances surrounding the Nordwind flight to Hong Kong are, in some respects, obscure. Mr Akpinar had informed Mr Houlihan on 9 March 2022 that MSN 32639 was flying to Mexico City, but instead it landed in Hong Kong on the same day. Moreover, Mr Houlihan's evidence (supported by that of Antonio Lopes, DAE's Chief Technical Officer) was that the aircraft departed from Hong Kong earlier than had been scheduled. I cannot make firm findings as to the reasons for these facts. In my view they must be taken alongside the fact that Nordwind was at this time and continues to be a business domiciled in Russia, and that MSN 32639 has flown only in Russia, or to Cuba or Venezuela. Taken as a whole, I conclude that the FATA Message, in respect of its stated aim to prevent the arrest of aircraft abroad, continued to operate on MSN 32639 while it was in Hong Kong. There was no break in the chain of causation.

973. As to the second, I am of the view that DAE could not reasonably have effected the arrest of the aircraft. The available time to prevent the departure of the aircraft was very short, partly due to DAE's lack of notice of the aircraft's destination and the aircraft's early departure from Hong Kong. Within that time DAE took several steps, including hiring local lawyers, requesting the assistance of the airport and Hong Kong aviation authorities, and procuring the sending of a notice from the Bermuda Civil Aviation Authority to the Hong Kong aviation authorities. I therefore conclude that, notwithstanding its flight to Hong Kong on 9 March, MSN 32639 was in the grip of the peril by virtue of the FATA Message when it was lost on 10 March.

Genesis

974. I turn to address an issue which is specific to Genesis's claim. This relates to whether Genesis's WR Cover was validly amended to exclude Russia from midnight on 2/3 March 2022. The WR Insurers who insured Genesis, who did not include Fidelis, contend that it was. Genesis contends that it was not. If it was, then not only was there no subsisting cover as at the date when I have found that the Genesis aircraft was lost, but there would have been no cover as at the date, 5 March 2022, when I have found that there was an operative restraint or detention for the purposes of 'grip of the peril' principles.

975. The background to this dispute is as follows. On 1 February 2022, TMK Syndicate 510 sent a Notice of Review giving 7 days' notice. Genesis, through its brokers Ed Broking LLP, agreed to amend the notice period from 7 days to 48 hours. The brokers prepared an Endorsement (No. 3), which embodied this change. It was prepared on a 'Box 2' basis, that is to say it was to be agreed by the leaders, and advised to all underwriters within 7 days. This endorsement was signed and stamped on behalf of TMK Syndicate 510 on 4 February 2022. On 16 February 2022, another Notice of Review was given, and, using the same process as before, the notice period was again amended, this time to 24 hours, by endorsement No. 4 signed and stamped on 4 March 2022. On 1 March 2022, TMK tendered 24 hours' notice of amendment of terms, removing Russia and Belarus from the territorial limits of coverage with effect from 00.01 GMT on 3 March 2022.

976. After the service of that notice, Genesis's brokers prepared Endorsement No. 6. This read:

> RISK DETAILS
>
> (Unaltered Except)
>
> SITUATION: Amended to read:
>
> Worldwide but excluding Ukraine, Crimea, Russia and Belarus.
>
> All other terms, conditions, limitations and exclusions remain unchanged.
>
> Information: Following issue of 24 hours' notice of amendment of terms issued by the Leading Underwriter hereunder at 00.01 GMT 2nd March 2022 and with respect to Russia and Belarus, the exclusion of these territories was invoked.

977. This Endorsement No. 6 was again prepared on a 'Box 2' basis, and was signed and stamped by TMK Syndicate 510 on 4 March 2022. The brokers then distributed it to the following market.

978. Genesis denies that TMK Syndicate 510 had authority to issue this Endorsement, either on behalf of the rest of the market, or for itself. WR Insurers' principal argument to the effect that TMK Syndicate 510 did have that authority and that the Endorsement is valid and binding in relation to all subscriptions to the risk, is that the Subscription Agreement in the Genesis WR Slip conferred such authority.

979. Insofar as material, that Subscription Agreement was in the following terms:

> **Slip Leader** Slip Leader shall mean Tokio Marine Kiln 510 only, regardless of the market security structure attaching to this slip.
>
> …
>
> **Basis of Agreement to Contract Changes**: LEADING UNDERWRITERS' CLAUSE (AVIATION BUSINESS) – AVS 100B, except as amended in this Subscription Agreement or in the submission to Insurers.
>
> All Insurers to follow the Slip Leader in the application of any notices under AVN52E and reinstatement and/or amendments to the condition, rates, geographic limits in relation thereto shall be automatically binding on all Insurers without notice, upon agreement by the Slip Leader only.
>
> …

980. In order to understand the debate as to the meaning and effect of this Subscription Agreement it is necessary to refer to two further matters. The first is the terms of AVS 100B. These were, in part, as follows:

> All alterations and amendments (hereinafter called "alterations") shall be dealt with by leading underwriters on the following basis:
>
> Alterations will be submitted to the first two Lloyd's and the first two Company underwriters (or the first two underwriters if the risk is placed on one market only).
>
> The first leading underwriter will affix the following stamp to the endorsement concerned should this not be incorporated in the printed endorsement:

	AVS 100 B	
Agreed by Ldrs. Only (1)	Agreed by Ldrs. But Advise All Uwrs. Within 7 Days from Date ……. (2)	To be Agreed by All Uwrs. (3)

> Each of the leading underwriters will initial in the appropriate place in the above stamp and in section (2) the date of the agreement of the last of the leaders must be inserted.
>
> …

Thus AVS 100B provides for the submission of alterations to two leaders (or two Lloyd's and two company underwriters).

981. The other matter is the terms of AVN 52E, referred to in the Subscription Agreement in the Genesis WR Slip. AVN 52E is entitled 'Extended Coverage Endorsement (Aviation Liabilities)'. It provides for the deletion of various parts of the War, Hi-Jacking and Other Perils Exclusion Clause (Clause AVN 48B), and provides, amongst other things, that insurers may give 7 days' notice to review premium and/or geographical limits. AVN 52E was not part of the Genesis WR Policy. It was part of the Genesis AR Policy, as Endorsement Three thereto. The effect of that Endorsement was that the AVN 48B exclusions (except for sub-paragraph (b)) were not to apply, and thus that even if liabilities were incurred as a result of a WR Peril (other than a sub-paragraph (b) peril) they would be covered under the AR Cover.

982. The Subscription Agreement in Genesis's AR Policy was in the same terms as the Subscription Agreement of the Genesis WR Policy as to the 'Basis of Agreement to Contract Changes'. It made reference to notices under AVN 52E. The relevant Notices of Review given by WR Insurers, which I have referred to above, could not have been given under AVN 52E, as that formed no part of the WR Cover.

983. The points which WR Insurers wished to make in relation to Endorsement 6, in their closing submissions, were three-fold. They wished to argue:

(1) that the reference in the Subscription Agreement in the Genesis WR Policy to AVN 52E was an obvious mistake, in that there could never have been notices under AVN 52E in respect of the WR Cover, as AVN 52E formed no part of it, and that

the Subscription Agreement should be construed as if 'any notices under AVN 52E' read 'any notices of review';

(2) alternatively, that the relevant paragraph in the Subscription Agreement should be read as bifurcated, thus '*All Insurers to follow the Slip Leader in the **(a)** application of any notices under AVN 52E and **(b)** reinstatement and/or amendments to the condition, rates, geographic limits in relation thereto shall be automatically binding on all Insurers without notice, upon agreement by the Slip Leader only*' (proposed additions in bold); and/or

(3) that AVS 100B had been amended by the Subscription Agreement, which had identified the Slip Leader as Tokio Marine Kiln 510 only, regardless of the market security structure, and thus the requirement of AVS 100B in its unamended form for two Lloyd's syndicate and two company underwriters' agreement, was displaced such that TMK Syndicate 510 alone could issue Notices of Review and stamp notices on behalf of the entire following market.

984. Genesis strongly opposed WR Insurers raising these arguments. It contended that these points were not open to WR Insurers: they were inconsistent with WR Insurers' pleadings, were raised too late and could not be fairly considered, and in some respects were the same as a case which WR Insurers had sought to raise by way of an application to amend their Statements of Case early in the trial, but which had been refused. In any event, Genesis contended that each of the arguments could be seen, even on the material which was available to the court, to be wrong.

985. I have reached the conclusion that Genesis is right, on both counts.

986. As to the first, the starting point is WR Insurers' Statements of Case. In their Rejoinder (paragraph 6) it is pleaded that '[u]*nder AVS 100B, unless otherwise agreed, the default position is that two underwriters must agree any alteration or amendment to the policy. This default position does not apply to the issue of AVN 52E notices under the Genesis WR Policy or amendments to the "condition*[s]*" relating to such notices…*'. Further in a response to a Part 18 Request served by Genesis, WR Insurers stated, in relation to how authority was conferred on Syndicate 510: '*For the avoidance of any doubt, the War Risks Defendants conferred authority on Syndicate 510 to issue AVN 52E notices under the War Risks Policy and amendments to the "condition[s]" relating to such notices by the Subscription Agreement contained in the War Risks Policy.*' Those pleas were to the effect that AVS 100B did require multiple signatures, but that the Subscription Agreement made an exception in relation to notices under AVN 52E. They raised no case that the reference to AVN 52E was a mistake.

987. At the outset of the trial, WR Insurers sought to amend their Rejoinder. The proposed amendments included: (1) that the reference to "notices under AVN 52E" in the Subscription Agreement was an obvious error (paragraph 6); and (2) further or alternatively, that if Syndicate 510 had had no actual authority to enter into Endorsement 6 on behalf of other WR Insurers, those other WR Insurers had ratified Endorsement 6 (paragraph 6A). Genesis objected to those amendments, both those summarised in (1) and (2), on the basis that they would require factual and perhaps expert investigation, which it was too late to conduct. On 9 October 2024 I refused to permit the amendments, on the basis that they were very late, and involved new factual allegations which required at least consideration of whether there needed to be further disclosure, further witness evidence, and conceivably expert evidence.

988. As I have already said, in their closing submissions, WR Insurers put forward the three arguments I have summarised above. They are not arguments which are on WR Insurers' pleadings, and are inconsistent with them, as is clear from the passages in the Rejoinder and the response to the Part 18 Request which I have set out above. Further, and significantly, I think that Genesis is correct in saying that each, to be dealt with fairly, would have required a factual investigation, and that it is prejudicial for WR Insurers to raise them without that having been conducted. Specifically, I consider that Mr Reeve KC, for Genesis, was correct to say that Genesis would have needed to be able to investigate whether there was material relevant to whether there had been a mistake in the reference to AVN 52E; and to consult the broker or an expert broker as to practice in relation to AVS 100B. It was too late, and not fair, for these points to be raised in closing submissions.

989. As to the merits of the three arguments, insofar as they can be gauged without an investigation of the context, my views are as follows. In relation to the first, it is not established, and cannot be assumed, that there was a mistake in the reference to AVN 52E. It is quite possible, as Mr Reeve KC submitted, that the Subscription Agreement provisions were part of a standard set of terms and conditions appended by the brokers to aviation insurance slips which were designed to accommodate a range of aviation coverage terms, including AVN 52E if incorporated into the policy. There is no evidence that the Subscription Agreement was individually negotiated for each slip. Furthermore, the Subscription Agreement can operate even if there can be no notices under AVN 52E, because of the provision that AVS 100B is to apply except as amended by the Subscription Agreement or the submission to insurers. In addition, even if the reference to AVN 52E was a mistake, it is not clear what the appropriate correction is. As Mr Reeve KC again submitted, one clear possibility, no less plausible on the available material than amendment to 'any notices of review', is deletion of the clause which refers to AVN 52E.

990. In relation to the second argument, this does not, in my judgment, work linguistically. This is because the words 'in relation thereto' must refer to notices under AVN 52E and it is therefore impossible to divide the clause into the two parts suggested by WR Insurers on this argument.

991. As to the third argument, this amounts to a contention that AVS 100B, as made applicable, is itself amended such that only the one leader's agreement is necessary. Presumably, the same would apply to the identically worded Subscription Agreement in the AR Slip, and this would render the second paragraph of the 'Basis of Agreement to Contract Changes' clause redundant, even though AVN 52E was incorporated into that policy. 'Slip Leader' is not a term used in AVS 100B. Had it been intended by the Subscription Agreement to produce a result which altered the operation of AVS 100B in relation to all contract changes, language would surely have been used which engaged directly with that of AVS 100B. Instead, the Subscription Agreement is intelligible reading the provisions as to 'Slip Leader' as being significant only in relation to a particular class of changes, namely notices under AVN52E if relevant.

992. Accordingly I conclude that WR Insurers have not succeeded in the case open to them as to why TMK 510 had authority to enter Endorsement No. 6 on behalf of the other subscribing WR Insurers. On that basis, as far as those underwriters were concerned, the Genesis WR Policy did not exclude Russia or Belarus up to its expiry on 15 March 2022. On the other hand, I can see no sound basis for saying that the Notice of Review tendered on 1 March 2022 and Endorsement No. 6 were not effective in relation to TMK 510's

proportion of the risk. On that basis, as far as that underwriter was concerned, relevant cover had ceased before, on my findings, there was either a restraint/detention of the Genesis Aircraft by the FATA Message of 5 March 2022 or the loss of the aircraft on 10 March 2022.

993. This is also the appropriate point at which to consider an argument raised by WR Insurers which was said to be relevant to Genesis, but was also relevant in part to Merx's claim, and possibly to AerCap's. This argument is that there could not be a loss of the Aircraft and Engines for the purposes of the policy/ies, and possibly the Aircraft and Engines could not have been in the grip of a relevant peril, if, as at the date of the alleged loss or operation of the peril the leasing had not been terminated. WR Insurers' argument was, in essence, that there could not be a loss of the Aircraft by the lessor unless it had a right of possession of the Aircraft at the relevant date. It was said to be relevant to Genesis, in that the notice of termination of leasing was given on 16 March 2022, and accordingly there could have been no loss (or operative peril) before that date and by that date the policy period had expired, irrespective of issues of Notices of Review and Endorsement No. 6.

994. Insofar as Genesis was concerned, it appeared to me that Mr Reeve KC was correct to say that, under the terms of the relevant lease, the lessor had an immediate right to take possession of the aircraft from the date of default, and that the first event of default occurred on 1 March 2022, when Genesis served a grounding notice on the basis of the invalidation of reinsurances required under the lease.

995. More fundamentally, however, I consider that WR Insurers' argument is wrong in that it elides the question of whether there is a loss under the policy/ies (or operative peril) with the different question of rights of possession under the leases. That the submission can be seen to be wrong is in my view demonstrated by positing a case of nationalisation. Suppose that, on 26 February 2022, without any or much advance warning, and before lessors had served any notices of default or termination of leasing, the Russian Government had nationalised the airlines and with them all their aircraft. That would surely have constituted the loss of the aircraft. The same applies if the cause of the loss is assumed to be an AR Peril. If an airline had said to a lessor that it did not need to serve a notice of default, because the airline had decided, for good, not to give the aircraft back in any circumstances, that would surely constitute a loss of the aircraft.

996. Clearly, whether there is a loss depends on all the relevant circumstances, and whether the lessor will be permanently deprived of the aircraft. It does not, in my view, depend on the question of whether, as at the point of time when it is said that there is a loss, the leasing had been terminated.

Sanctions

997. By the end of the trial, the position as to a defence based on sanctions was as follows. All WR Insurers, including Fidelis, relied on US Sanctions as a defence, in part, to the claims against them. Fidelis relied in addition on EU Sanctions. No Defendant relied on UK Sanctions.

998. The basis of such sanctions-based defences as are pursued lies in the market standard 'Sanctions and Embargo Clause', AVN 111, which is incorporated into all relevant policies. It provides in part:

> 1. If by virtue of any law or regulation which is applicable to an Insurer at the inception of this Policy or becomes applicable at any time thereafter, providing coverage to the Insured is or would be unlawful because it breaches an embargo or sanction, that Insurer shall provide no coverage and have no liability whatsoever nor provide any defence to the Insured or make any payment of defence costs or provide any form of security on behalf of the Insured, to the extent that it would be in breach of such law or regulation.
>
> In circumstances where it is lawful for an Insurer to provide coverage under the Policy, but payment of a valid and otherwise collectable claim may breach an embargo or sanction, then the Insurer will take all reasonable measures to obtain the necessary authorisation to make such payment.
>
> …

US Sanctions

999. In relation to US Sanctions, WR Insurers' case is that BIS controls contained in the US Export Administration Regulations ('**EAR**') apply to some of the Aircraft and that insurers' cover or payment of an indemnity in respect of such aircraft would be prohibited by General Prohibition 10.

1000. General Prohibition 10 ('**GP 10**') provides as follows:

> General Prohibition Ten – Proceeding with transactions with knowledge that a violation has occurred or is about to occur (Knowledge Violation to Occur).
>
> You may not sell, transfer, export, re-export, finance, order, buy, remove, conceal, store, use, loan, dispose of, transport, forward, or otherwise service, in whole or in part, any item subject to the EAR and exported, re-exported, or transferred (in-country) or to be exported, re-exported, or transferred (in-country) with knowledge that a violation of the [EAR], the Export Control Reform Act of 2018, or any order, license, license exception, or other authorization issued thereunder has occurred, is about to occur, or is intended to occur in connection with the item.

1001. The EAR only apply to an aircraft or engine which was manufactured in the USA or was manufactured elsewhere but includes more than 25% controlled components of US origin. Accordingly, the EAR only applied to certain of the Aircraft in these proceedings.

1002. In addition, GP 10 only applies to items which are '… exported, re-exported, or transferred (in country)' with the relevant knowledge. It does not apply to all aircraft.

1003. There is a dispute, however, as to whether GP 10 applies at all, even to those of the Aircraft with a sufficient US connexion and which meet the test referred to in the previous

paragraph. This is a question of interpretation of GP 10. There are apparently no US judicial decisions interpreting or applying GP 10. BIS has not articulated its own interpretation of GP 10 in any policy statements, FAQs on its website, or settlements or charging letters. In the circumstances, I did not understand it to be in dispute between the experts, Mr Mortlock and Mr Wall, that the approach which should be adopted is to '*… consider the scope and application of GP 10 as a matter of construction taking into account the plain meaning of the words of the regulation as well as its regulatory and legislative context and its purpose.*'

1004. In my view, applying this approach to GP 10, it does not apply to the provision of insurance. Looking at the plain meaning of the words:

(1) GP 10 does not specifically mention insurance.

(2) The activities which GP 10 enumerates are largely concerned with export or re-export of items subject to EAR. That is unsurprising as GP 10 is part of an export control measure.

(3) Only two of the activities mentioned could arguably cover the provision of insurance. The first is 'financing … any item'. Insurances such as those at issue here do not, however, in my view 'finance' the aircraft or their export, re-export or transfer. GP 10 is concerned with financing activities which would assist with the supply or export of goods.

(4) The other activity which could arguably cover insurance is 'otherwise service … any item.' Again, however, I consider that the provision of insurance of the type involved here does not 'service' the aircraft or engines: it is an insurance product taken out by the lessors to protect themselves from loss.

1005. The legislative purpose of the statute under which the EAR were made, namely the Export Administration Act of 1979, as amended (50 USC app. 2401-2420), was, as Mr Wall sets forth in his report, to allow the control of exports in furtherance of the national security and foreign policy of the United States. Those objectives would not be furthered by preventing an insurer from providing cover to Western lessors in respect of aircraft or engines kept in Russia against the lessors' wishes.

1006. Accordingly I conclude that GP 10 does not prohibit either the insurances at issue here, or the payment of any indemnity under them. In any event, the US Sanctions experts agree that '*… it is possible for parties to apply to BIS for authorization to engage in conduct that would otherwise violate* [GP 10] *pursuant to EAR § 764.5(f)…*'. There is no good reason to believe that BIS would not grant any authorisations necessary, and it is to be noted that BIS has granted authorisations to DAE when DAE has sought them, including authorisations to engage in activities such as moving aircraft and engines and entering into settlements.

EU Sanctions

1007. The EU's sanctions against Russia are primarily contained in EU Regulation No. 833/2014. Fidelis contends that Articles 3c(2) and 3c(4)(b) of that Regulation prevent it from providing cover. Those Articles provide:

> (2) It shall be prohibited to provide insurance and reinsurance, directly or indirectly, in relation to goods and technology listed in Annex XI to any person, entity or body in Russia or for use in Russia.

> …
>
> (4) It shall be prohibited to:
>
> …
>
> (b) provide financing or financial assistance related to the goods and technology referred to in paragraph 1 [viz goods and technology suited for use in aviation or the space industry, as listed in Annex XI] for any sale, supply, transfer or export of those goods and technology, or for the provision of related technical assistance, brokering services or other services, directly or indirectly to any natural or legal person, entity or body in Russia or for use in Russia.

1008. Articles 3c(2) and (4) were added to Regulation No. 833/2014 by Regulation No. 328/2022 dated 25 February 2022. The recitals to Regulation 238/2022 provide, in part:

> (3) On 24 January 2022, recalling the December 2021 European Council conclusions, the Council reiterated that any further military aggression by Russia against Ukraine would have massive consequences and severe costs.
>
> (4) In view of the gravity of the situation, on 25 February 2022 the Council adopted Decision (CFSP)2022/327, amending Decision 2014/512/CFSP and imposing further restrictive measures in various sectors, particularly defence, energy, aviation and finance.
>
> …
>
> (7) Furthermore, Decision (CFSP) 2022/327 introduces an export ban covering goods and technology suited for use in aviation and space industry and prohibits the provision of insurance and reinsurance and maintenance services in relation to those goods and technology. It also prohibits the provision of technical assistance and other related services as well as financing and financial assistance in relation to the goods and technology subject to this prohibition.

1009. On 25 February 2022 the Council of the EU issued a press release, explaining the new measures introduced by Regulation No. 238/2022. It said, in part:

> Swiftly implementing the European Council conclusions of 24 February, the package of sanctions adopted today includes:
>
> …
>
> Transport Sector
>
> The EU introduced an export ban covering goods and technology in the aviation and space industry, as well as a prohibition on the provision of

> insurance and reinsurance and maintenance services related to those goods and technology. The EU will also prohibit the provision of related technical and financial assistance.
>
> This ban on the sale of all aircrafts, spare parts and equipment to Russian airlines will degrade one of the key sectors of Russia's economy and the country's connectivity, as three quarters of Russia's current commercial air fleet were built in the EU, the US and Canada.

1010. The European Commission has published '*Consolidated FAQs on the implementation of Council Regulation No. 833/2024 and Council Regulation No. 269/2014*', which was apparently last updated on 5 September 2024. In Part C (Finance and Banking), Section 12 (Insurance and Reinsurance) Question 4 states:

> 4. When items listed under Annex XI of Council Regulation 833/2014 are being retained in Russia against the will of their non-Russian owner, is it prohibited to provide insurance and reinsurance for them, or to execute an insurance settlement with Russian insurers?
>
> Last update: 21 December 2022
>
> Insurance and reinsurance of the goods and technology in Annex XI are not "for a person in Russia or for use in Russia", where it is provided for the benefit of the non-Russian owner of those goods and not for the benefit of the actual user or operator of the goods. This applies also when the items remain in Russia against the will of their non-Russian owner and despite the latter's demand for their return (including "lost aircraft").

In Part G (Sector Specific Questions), Section 2 (Aviation), Question 23 states:

> 23. What is meant by "for use in Russia" in the context of Article 3c of Regulation No. 833/2014?
>
> Last update: 2 June 2022
>
> The term "for use in Russia" should be understood as covering the sale/supply/transfer/export of goods/services which would be used in Russia, including operations between two points in Russia.

1011. I did not understand there to be any significant dispute as to the principles of construction which should be adopted in interpreting the relevant EU Regulation. The court should give effect to the words used, but having regard to the objectives and purposes of the legislation, taking into account its recitals and other principles referred to in the body of the regulation and the recitals.

1012. Applying this approach, it appeared to me clear from the terms of Regulation No. 2022/238, including its recitals, that it was intended to impose or contribute to 'massive consequences and severe costs' for Russia as a result of its invasion of Ukraine. The 25

February 2022 press release confirms, what would in any event be apparent both from the general purpose which I have referred to, and the fact that a specific ban was imposed in relation to goods and technology suited for use in aviation, that a particular purpose was to '*degrade one of the key sectors of Russia's economy and the country's connectivity.*'

1013. Having regard to the purpose of the legislation, as well as its wording, I consider that, for the purposes of Article 3c(2) and 3c(4)(b), insurance of the type with which this case is concerned and which is provided to non-Russian lessors is not insurance (or other financing or financial assistance) provided '*to any person, entity or body in Russia or for use in Russia*'.

1014. This conclusion is confirmed by the terms of the FAQs which I have quoted above. There was some debate about the legal relevance of those answers. The FAQs themselves state:

> This document is a working document drafted by the Commission services to give guidance to national authorities, EU operators and citizens for the implementation and the interpretation of Council Regulation (EU) No. 833/2014. … Only the Court of Justice of the EU is competent to interpret EU law. National authorities and economic operators may make use of this guidance based on the text, context and purpose of the aforementioned regulations, to achieve the uniform application of sanctions across the EU.

This guidance is thus clearly not binding, even within the EU; but regard can be had to it, including by courts, for the purpose of implementing and interpreting the relevant Regulation. As I say, if regard is had to it, it confirms the interpretation which I have put on Article 3c, given above.

1015. Fidelis raised essentially two arguments against the construction of the Regulation which I have given. The first was to say that it was conducive to the purpose of the Regulation, even if that was taken to be the infliction of adverse consequences and costs on Russia and the degradation of a key sector of Russia's economy, for Article 3c to be read as extending to the provision of insurance of the type with which these cases are concerned to non-Russian lessors. The argument was that, if such insurance was enforceable, lessors would have another source of recourse and might be less determined to pursue the lessees for the aircraft. I found that argument unconvincing. There is no indication that that was regarded as being a purpose of the Regulation. In any event, if insurers were obliged to indemnify lessors, they would doubtless be subrogated to rights against the lessees, and in relation to the aircraft. I do not think they would be significantly less motivated to pursue such lessees than the lessors themselves would have been; and certainly there is no evidence that they would be.

1016. Fidelis's other main argument was that the interpretation of the Regulation should be consistent with that put on the UK Sanctions regulations by the Court of Appeal in Celestial Aviation Services Ltd v Unicredit Bank GmbH [2024] EWCA Civ 628. In that case, the Court of Appeal considered Regulation 28(3)(c) of the Russia (Sanctions) (EU Exit) Regulations 2019 (SI 2019/855), as amended by the Russia (Sanctions) (EU Exit) (Amendment) (No. 3) Regulations 2022 (SI 2022/195) and held that payment under letters of credit provided as part of the leasing arrangements of certain aircraft would have been 'in

connection with' an arrangement the object or effect of which was the supply of aircraft to or for use in Russia or to a Russian person.

1017. I have to say that this submission struck me as back-to-front. The issue with which I am concerned is what is the effect of the relevant EU Regulation, which came into force, as regards aircraft, before the UK Regulation, and is not in the same terms. One particular difference is that, under the EU Regulation, there is no procedure for licences or authorisations to be given in relation to Article 3c matters. Accordingly, the EU Regulation is unlike the UK Regulations, which the Court of Appeal in Celestial considered to be '*a relatively blunt instrument*' which '*risks catching arrangements that may not be seen to be within the overall mischief*'. The solution adopted by the UK government is a licensing regime and legislative exceptions in Part 7 of the UK Regulations (paragraph [66]). In the case of the EU Regulation, where there is no licensing 'solution', a purposive construction tends to narrow the meaning to be attached Article 3c, rather than accepting that it is a 'blunt instrument'.

1018. With these features is to be taken the fact that Celestial dealt with letters of credit, not with insurances taken out by lessors. Further, there is the express statement in the FAQs quoted above that the Commission does not consider insurances of the type at issue here to fall foul of the EU Regulation. In all these circumstances, I do not consider that Celestial is persuasive as to the correct construction of the EU Regulation insofar as insurances of the present type are concerned, and am of the view that the CJEU would not do so either.

1019. For these reasons I reject Fidelis's defence based on EU Sanctions.

Chubb's Russian Insurance Settlement Defences

1020. Chubb raised a number of defences based on the RISs made by AerCap. At least to some extent, at the end of the case, Chubb took the stance that these could not be resolved at this trial, and needed to be considered at a Phase II trial. I saw no reason why those points should not be decided now, and will consider each of those which I understood to be maintained below.

1021. The first is that Chubb contended that entry of the RISs breached AerCap's duty in General Condition 1(d) of the Policy not to act 'to the detriment or prejudice' of Chubb; and/or of an implied term to the effect that AerCap should not deal with its rights against third parties in a manner prejudicial to Chubb's interests as its insurer. Chubb contended that those obligations were breached because of terms which the RISs contained.

1022. As to the allegation of breach of General Condition 1(d), I accept the statement of the law in Hemsworth, *Law of Insurance Contracts* (March 2024 update) that:

> … bona fide (bilateral) settlement by the insured of his claim against the third party is not a breach of the contract of insurance, even though the settlement prevents subrogation against the third party. Settlement does not prejudice the insurer, provided that the settlement is indeed bona fide: the court will be alert to the possibility of collusion between victim and tortfeasor.

1023. In the present case, I am satisfied on the evidence which has been adduced, and especially that of Mr McCray Smith, that the RISs concluded by AerCap were not only bona fide and reasonable, but the only option for AerCap to recover promptly any value for the Aircraft from parties in Russia. They were the product of extensive negotiations and were carefully evaluated to ensure compliance with applicable sanctions. The terms of which Chubb complains were themselves the subject of negotiation and were part of the overall deal represented by the RISs. They cannot be considered in isolation.

1024. I do not accept that the term Chubb contends should be implied is to be implied if and insofar as it is said to have any effect wider or different from General Condition 1(d). In any event, I find that AerCap did not deal with its rights against OP Insurers/reinsurers in a manner prejudicial to Chubb, for the reasons I have given.

1025. The second point is that AerCap has been indemnified 'in part' under the OPs and cannot therefore claim under their Contingent Cover. This point I have considered and rejected above.

1026. The third point is Chubb's contention that the Contingent Cover required AerCap to take reasonable steps to make and pursue a claim to be indemnified under the OPs, and that, by entering into the RISs, it has not done so, and that Chubb is therefore entitled to damages or an indemnity as a result. I do not accept that AerCap was under the obligation alleged. It is not express and cannot, in my view, be implied. Where the policy intended to place an obligation on the assured to pursue a third party, this is expressly stated. In any event, I do not consider that AerCap has failed to take reasonable steps. Its RISs, which were entered into in circumstances where the Russian interests had a strong bargaining position, have reduced its claim in the present proceedings by some US$1.3 billion.

Quantum

1027. There was no dispute that, in principle, if there was a loss of the Aircraft the Claimants should recover the agreed value of each. There was also no dispute that the Claimants which had entered into RISs, namely AerCap and DAE, should give credit for the amounts of those settlements.

'Recoveries'

1028. What remained were certain issues as to whether the Defendants had a right to be subrogated to certain amounts which the Claimants had received. These were called by the WR Insurers, in their submissions, 'recoveries', but it was not accepted by the Claimants that all were properly so described.

1029. The essential legal principles are clear. The following is taken from *MacGillivray on Insurance Law* (15th ed.), [22-001] - [22-005]:

> Subrogation is the name given to the right of an insurer who has paid a loss to be put in the place of the insured so that he can take advantage of any means available to the insured to extinguish or diminish the loss for which the insurer has indemnified the insured. [22-001]

> The doctrine confers two distinct rights on the insurer after payment of a loss. [22-002]
>
> The first is to receive the benefit of all rights and remedies of the insured against third parties which, if satisfied, will extinguish or diminish the ultimate loss sustained. (Ibid.)
>
> The second right vested in the insurer by the doctrine of subrogation is to claim from the insured any benefit conferred on the insured by third parties with the aim of compensating the insured for the loss in respect of which the insurer has indemnified him. The right is usually exercised by an insurer claiming from the insured a sum equivalent to any sum of damages paid to the insured by a third party legally liable for the loss. The right is wider in scope than that, however, and the insurer is entitled to moneys paid to the insured ex gratia to diminish the loss unless intended by the donor to benefit the insured to the exclusion of the insurers. [22-005]

1030. As explained by Brett LJ in Castellain v Preston (1883) 11 QBD 380 at 388:

> … as between the underwriter and the assured the underwriter is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be, or has been exercised or has accrued, and whether such right could or could not be enforced by the insurer in the name of the assured by the exercise or acquiring of which right or condition the loss against which the assured is insured, can be, or has been diminished.

1031. Cotton LJ, in the same case, at 395 said:

> … if there is a money or other benefit received which ought to be taken into account in diminishing the loss or in ascertaining what the real loss is against which the contract of indemnity is given, the indemnifier ought to be allowed to take advantage of it in order to calculate what the real loss is, even though the benefit is not a contract or right of suit which arises or has its birth from the accident insured against.

1032. An insurer may be subrogated to a receipt by an assured following a loss, even though that receipt is under a contract or arrangement which preceded the loss and which is payable independently of the occurrence of the loss. That was the case in Castellain v Preston itself, where the insurer was subrogated to the purchase money paid by the buyer in respect of the purchase of the house, which had been damaged by fire after the exchange of contracts but before completion.

1033. It was also not in dispute that where an assured recovers money from a third party which reduces the loss against which the insurance gives an indemnity but where the assured

has losses in excess of the policy limit, the recoveries are to be applied 'top-down' to the loss in excess of the limit first, and only when the assured is compensated for the loss above the limit do insurers begin to take the credit below the limit: Napier and Ettrick (Lord) v Kershaw [1993] 1 All ER 385; Royal & Sun Alliance Insurance PLC v Textainer Group Holdings Ltd [2024] EWCA Civ 547.

1034. What was in issue was the application of those principles to three categories of 'recovery'. It is necessary to consider the points which arise in relation to each Claimant separately.

1035. I will take AerCap first. AerCap contended that, if the loss was held to have been caused by a WR Peril, as I have held it to be, the points raised by WR Insurers were not of any significance. This was because AerCap's losses, net of settlement amounts received, was US$2.051 billion, whereas the aggregate limit on its War Risks cover was US$1.2 billion, and the points at issue did not, it contended, exceed the difference. Nevertheless, WR Insurers made submissions that AerCap had to give credit for (a) amounts of 'maintenance reserves'; (b) security deposits; (c) amounts received under maintenance letters of credit; and (d) amounts for which credit was given in the Russian Insurance Settlements. I will consider each in turn.

1036. 'Maintenance reserves' are periodic payments made by lessees pursuant to the lease of an aircraft in addition to their rent payments. They are sometimes referred to as 'supplemental rent'. They are paid partly based on usage of the aircraft or engine, and partly on a purely periodic basis. Once paid maintenance reserves are the property of the lessor, which can do with it what it wishes. However, during the term of the leases, where maintenance reserves are being paid, and provided no Event of Default is continuing, AerCap must reimburse the lessee for the costs of qualifying maintenance work, by way of 'maintenance contributions'. It is not a requirement of the leases that AerCap use the actual maintenance reserve payments it has received to make the maintenance contributions.

1037. At the end of the lease period, with the exception I will come to, the lessee has no entitlement to the return of any maintenance reserves if it has paid more in maintenance reserves to AerCap than AerCap has reimbursed it by way of maintenance contributions. The exception is that, in certain leases, it was specified that, where there has been a total loss of the aircraft, and there is no unremedied payment default or Event of Default, the lessee should receive 50% of the amount by which the aggregate maintenance reserves paid during the lease exceed the aggregate amount of maintenance contributions paid by AerCap.

1038. How do the principles of subrogation apply to such amounts? I put on one side for a moment amounts falling into the exceptional category referred to in the last paragraph. In relation to the others, in my view, insurers are not subrogated to such amounts. There is no right or remedy which could be exercised or which was acquired upon or after the occurrence of the loss by which that loss could be diminished. What has happened is that the assured has, prior to the loss, received payments, which it has been entitled to treat as its own, and to which the lessee has no claim. Payments which an assured has received before and independently of any loss, and which have become its own property might, in some types of insurance claim, be relevant to assessing what loss the assured sustains at the time of the occurrence of the peril and can claim for under the policy. I do not consider that to be the case here, not least because this is property insurance and there is an agreed value

fixed in the policy. But, I would suggest, there would not, at least ordinarily, be any question of the insurer being *subrogated* to payments of that sort.

1039. True it is that, by the loss, the lessor will have been saved the amount which it would have had to have paid by way of future maintenance contributions, but that is not, in my view, a right or remedy to which the insurer can be subrogated. Moreover, the agreed value fixed in the policy will itself have been affected by the estimated future costs of keeping the aircraft in serviceable condition: other things being equal, higher maintenance costs will generally lead to lower market and thus lower agreed values. For insurers to get the benefit of a lower agreed value and also a further credit representing saved maintenance expenses would be likely to give rise to a double credit, or allowance, in respect of future maintenance costs.

1040. What of the exceptional category I have referred to above, in which the leases provided that the lessee should receive, in the event of a total loss, and if there is no unremedied payment default or Event of Default, 50% of the amount by which the maintenance reserves paid exceeded the amount of maintenance contributions? This was the subject of only very limited argument. However, I consider that this category is different. As I understand it, in this category of case, as a result of the circumstances giving rise to the loss of the aircraft, which themselves gave rise to Events of Default, AerCap will have received the benefit of being able to retain 50% of the balance of the maintenance reserves, which in other circumstances it would have had to pay to the lessee. That does appear to me to be a matter where the doctrine of subrogation can, in principle, apply.

1041. The second category of 'recovery' in question is security deposits. These are sums which the lessees were required to pay to AerCap as security in respect of their obligations under the leases. If an Event of Default occurred and was not remedied, the security deposit could be applied by AerCap towards the payment or discharge of any obligation of the lessee under the lease. There is no dispute between the parties that security deposits, once retained by AerCap, are capable of constituting payments which might offset the loss in respect of which indemnity is sought: i.e., there is no dispute that they are payments to which insurers might be subrogated.

1042. The issue is as to whether AerCap was entitled to set those sums off against other losses. But it is also not in dispute that AerCap is entitled to apply sums held by way of security deposits against unfulfilled obligations of the lessees under the leases. Thus, it is not in dispute that AerCap was entitled to do so in relation to arrears of rent as at the date of termination of leasing. Equally, in relation to cases where AerCap has applied security deposits against future rent in relation to aircraft where there was no settlement with lessees/Russian insurers, the Defendants do not contend that AerCap should give credit for those amounts, although they say that that should have an impact on whether AerCap should be awarded interest on the value of those aircraft. I am not going to deal with issues of entitlement to interest at this stage.

1043. WR Insurers do say, however, that AerCap was not entitled to apply security deposits against future rent amounts in relation to those aircraft in respect of which there were RISs. The basis for that argument is that, under the RISs, the leases were terminated, and accordingly the lessees no longer owed obligations in relation to future rents; and thus by the time that AerCap purported to apply security deposits against such future rents, those future rents were not due.

1044. I considered that the answer given by Mr Howard KC to this was correct. While the RISs put an end to the obligations of the lessee vis a vis the lessor, they did not mean that AerCap had not suffered the loss of future rent. The RISs in fact state that they are not intended to be construed as a release of any claims that AerCap may have under insurances or reinsurances. Accordingly, I consider that there were uninsured losses which AerCap has suffered to which it was entitled to apply the relevant amounts of the security deposits.

1045. The third category is as to maintenance letters of credit. In some cases, AerCap agreed, as an alternative to the lessee making monthly maintenance payments, that the lessee could provide a letter of credit to secure its maintenance obligations. Shortly before the service of written closing submissions, AerCap accepted that amounts it had received under maintenance letters of credit were in principle amounts which might be offset against the loss in respect of which indemnity was sought, in the same way as security deposits. This acceptance was on the basis that the sums could be drawn down under the letters of credit on the occurrence of an Event of Default. But, AerCap contended that it had set off those amounts against accrued but unpaid rent, and future rent, and that the result of this exercise was that in the case of all except two aircraft (MSN 35420 and MSN 28245), no credit to the Defendants was required. The points arising here are the same as those in relation to security deposits, and my conclusions are the same.

1046. The fourth category is amounts for which credit was given in settlements with Russian lessees/insurers. WR Insurers point to credits which were given by AerCap in those settlements for various matters, namely security deposits. These overlap with but are not identical to the three categories of 'recovery' to which I have already referred. WR Insurers contend that AerCap should not be permitted to take an inconsistent position in relation to credits as between its insurance settlements and its present claim. The amounts credited were part of the consideration which AerCap received under the RISs, and have already been allocated by AerCap, in the RISs, to the value of the aircraft.

1047. I considered that AerCap was correct to say that the credits given in the RISs do not determine that the relevant recoveries cannot be attributed, for the purposes of the claim on insurers, against unpaid hire. The evidence is that the amounts which were paid under the settlements were the maximum amounts which the Russian airlines and insurers, who were in a very strong position in the negotiations, were willing to pay. The way in which those amounts were said to be structured does not, in my view, bind AerCap in relation to the separate question of the credits which it must give to insurers in relation to its claim under the policies.

1048. In the case of DAE/Falcon, three categories of 'recovery' are in issue: (a) maintenance reserves; (b) security deposits; and (c) maintenance letters of credit. There is also an issue as to the commitment fee paid to DAE with respect to MSN 66625.

1049. In relation to maintenance reserves, DAE submitted that some were not recoveries because they had been received by it as its unencumbered property. This applied to what were called the 'S7 maintenance reserves'. That, as I understood it, raised the same issue of principle as raised by AerCap in relation to maintenance reserves, and which I have answered above in AerCap's favour.

1050. That point apart, DAE/Falcon accepted that the amounts of maintenance reserves and security deposits, and which had been paid under maintenance letters of credit were, in principle, sums which were capable of reducing the indemnity payable under the policies. What DAE/Falcon submitted was that they had suffered other losses, in the form of unpaid future rent, to which those recoveries could be, and had been, allocated. WR Insurers submitted that, at least in respect of maintenance reserves, they could not be allocated to unpaid rent, but could only be applied to maintenance obligations. That, however, was not borne out by the example lease to which I was directed, namely that in respect of MSN 32639, where there were provisions that the lessee would not be entitled to recover maintenance reserves if there was a default continuing under the agreement; and, in the case of a total loss, for the lessee to pay the 'agreed value', which was set at a sum considerably greater than the agreed value of the aircraft under the insurance, and for the lessee not to be entitled to the repayment of any maintenance reserves until the 'Total Loss Amount', which includes the 'agreed value', should have been paid. Accordingly, even under the contractual scheme, DAE would have been entitled to apply maintenance reserves against the lessee's responsibility for a sum much larger than the amount of unpaid rents. In any event, it appeared to me that DAE would have been entitled to set off the amount of those maintenance reserves against any amount due from the lessee under the lease.

1051. I concluded that there was no material difference between maintenance reserves on the one hand and security deposits, which WR Insurers accepted could be applied against unpaid future rents, on the other.

1052. WR Insurers raised a similar point about maintenance reserves in the case of DAE's RIS in relation to Aeroflot aircraft as they had raised in relation to AerCap's RISs. I do not accept it in relation to DAE's RIS, for the same reasons.

1053. There are four DAE Aircraft in relation to which, even after setting the maintenance reserves against unpaid rents, there remains a surplus amount. DAE argued that that was not necessarily to be credited to WR Insurers, because the calculations did not take account of interest payable in respect of sums due under the leases. To the extent that this matters, this issue will have to be resolved at a later date.

1054. As to the commitment fee paid in respect of MSN 66625, it was not established that this was a relevant recovery. This was a sum which was paid over to DAE, outright, in equal tranches upon signing and delivery under the lease of this aircraft. It was not a right or remedy which could be exercised, nor a benefit received, after the loss which could diminish the insured loss.

1055. In relation to Merx, questions again arise in relation to the treatment of maintenance reserves, security deposits and maintenance letters of credit. Merx takes the same stance as to credit for maintenance reserves as does AerCap. For the reasons I have given in relation to AerCap's arguments, I conclude that Merx does not have to give credit in respect of the maintenance reserves it received. As to security deposits, Merx takes the position that it need not apply the security deposits to any loss at all; but that if necessary it would set them off against unpaid rent. I doubt that it is correct that Merx need not give credit for the security deposits, once retained, if they are not applied to other losses, and that is not the stance of AerCap or DAE. The point as to whether Merx needs to apply the deposits to any loss was barely argued by either side. WR Insurers contended, moreover, that if security deposits were allocated to unpaid rents, then that might need to be reflected in any award of

interest in relation to any amount WR Insurers have to pay in respect of the value of the Aircraft. Both these points should be resolved, if they still arise and cannot be agreed, at a later stage.

1056. As to Genesis, the issues relate to a sum paid under a maintenance letter of credit, and in relation to a security deposit. In relation to the security deposit amount (US$855,000), there was, by the end of the trial, no issue that credit did not need to be given for it, but it might be relevant in relation to the award/calculation of interest. As to the sum of US$1,060,746, drawn under a maintenance letter of credit, I doubted that the position should, as a matter of principle, be different from that applying to the other Claimants. In any event, as I understood it, Genesis contended that it could apply the amount involved against uninsured losses, which greatly exceed it: see paragraph 90(1) of Genesis's Closing Submissions. On that basis, the only issue would be as to whether there is any effect on interest which might be awarded to Genesis. I will not finally decide the questions of whether the sum received under the maintenance letter of credit should, in principle, be credited to underwriters, or as to whether, if it is not to be credited because it can be attributed to uninsured losses, that has an effect on interest. Those will require to be resolved, if they still arise and are not agreed, subsequently.

VIM Airlines Thrust Reverser

1057. There is a claim by DAE/Falcon in respect of a thrust reverser (MSN 9254001) leased to VIM Airlines. The claim is for US$165,000.

1058. VIM Airlines went into bankruptcy in 2017. On 16 November 2017 DAE terminated the lease due to non-payment by VIM, and for failing to return the Thrust Reverser pursuant to a demand made on 25 October 2017. On 8 December 2020 a decision of the Arbitrazh Court of the Republic of Tatarstan established DAE's right to possession of the Thrust Reverser.

1059. There was no evidence directed to this Thrust Reverser. A disclosed document indicates that the bankruptcy manager of VIM Airlines indicated in July 2022 that she was ready to transfer the Thrust Reverser to DAE, and also that DAE was given the details of a logistics company which DAE could contact to make arrangements for the transfer of the Thrust Reverser away from Domodedovo Airport. There was no evidence that DAE had sought to recover the Thrust Reverser.

1060. While the evidence is very thin, I concluded that the position in relation to the Thrust Reverser is the same as that for the other aircraft and engines in dispute. I did not understand it to be in issue that GR 311 applied to the Thrust Reverser; and I conclude that it will have been GR 311 which was the operative cause of the Thrust Reverser remaining in Russia; and that this was notwithstanding that the bankruptcy manager of VIM Airlines might have been prepared to transfer it back to DAE.

DAE/Falcon claim for costs and expenses

1061. DAE/Falcon pursue a claim for costs and expenses. These are in the amounts of US$4,272,353.56 for DAE and US$7,000 for Falcon.

1062. Mr Lopes gave unchallenged evidence as to the amounts involved. The relevant question is therefore whether there is cover for those amounts.

1063. DAE recovered aircraft MSNs 293, 946 and 37136, and incurred costs in doing so. Specifically

(1) MSN 946 (leased to I-Fly) was, at the time of the invasion in a maintenance facility in Belgium, where it had been since 10 February 2022. DAE terminated the leasing and demanded the return of the aircraft on 3 March 2022. DAE incurred expenses in connexion with obtaining the repossession of this aircraft, which was ferried from the maintenance provider to Teruel, Spain, for storage. There were expenses for storage (both at the maintenance facility and in Teruel), for completion of the C-Check which the aircraft was undergoing, for components, and for the ferry flight to Teruel. The total expenses claimed amount to US$1,175,232.04.

(2) MSN 37136 (leased to Nordwind), was repossessed in Mexico City from 9 March 2022. The aircraft could not leave Mexico City for a lengthy period. Expenses were incurred for a ferry flight to Arizona in August 2022, for inspectors and consultants engaged to assist in the recovery of the aircraft in Mexico City and other maintenance and modification expenses. The total expenses claimed amount to US$ 1,966,758.84.

(3) MSN 293 (leased to I-Fly), was at the time of the invasion at a maintenance facility, called Starco, in China undergoing a C-Check. DAE terminated the leasing for the aircraft and demanded its return on 3 March 2022. Starco was initially unwilling to allow access; and to release the aircraft DAE had to make an agreement with Starco on financial matters. An agreement was reached and the aircraft was ferried out in December 2022. Expenses were incurred for consultants, components and the ferry flight. The total expenses claimed amount to US$999,644.33.

1064. The basis of the claim in respect of the recovered aircraft is as Salvage Charges and Expenses; and/or the costs of ferry flights are recoverable under the Repossession Expenses Endorsements to DAE's AR and WR Policies.

1065. The Salvage Charges and Expenses Cover at clause 7.2.2 of the AR Cover provides:

> The Insurers will pay for:
>
> …
>
> 7.2.2 salvage charges and expenses incurred by or on behalf of the Insured for the safety, preservation or recovery of an Aircraft and/or, as applicable, Spares.

1066. Under the same policy, by clause 11.8 the Insured was to '*use due diligence and concur in doing everything reasonably practicable to avoid or diminish any loss hereon…*'.

1067. Those clauses were also incorporated into the DAE WR Policy.

1068. There is a Repossession Expenses Endorsement to both the DAE AR and WR Policies. That in the AR Policy provides:

> 1 In consideration of the premium charged for this Insurance, the Insurers agree to indemnify the Insured up to a limit of USD1,000,000 in respect of any one Aircraft or Engine and USD2,000,000 in the aggregate in respect of expenses incurred in connection with the repossession or attempted repossession of an Aircraft or Engines in exercise of rights vested in the Insured under the terms of a lease agreement.
>
> 2 Expenses shall mean:
>
> a. The cost of engaging and positioning the statutory minimum flight crew and technical engineers for the purposes of the flight.
>
> b. The cost of fuel, lubricants and hydraulics necessarily incurred for the purposes of the flight.
>
> c. All airport dues and air navigation charges incurred during the course of the flight but excluding any fees incurred subsequent to landing at the destination airport.
>
> d. With respect to Engines, all transportation costs incurred in connection with Engine delivery to the Insured's base and any applicable import taxes.
>
> 3 For the purposes of this Endorsement flight shall mean all flying (including test flying), taxiing, hangarage or parking necessary for the return of the Aircraft from the airport at which repossession takes place, to the airport stipulated in the lease agreement for return of the Aircraft on expiry of the lease (destination airport).
>
> 4 This Endorsement only applies to Aircraft or Engines on which a right to repossession is established during the period of this Insurance and which is advised to the Insurers within 30 days of being established.
>
> 5 In the event of any payment under this Endorsement, the Insured shall diligently pursue any rights of recovery against the Operator, and any proceeds received will be due to the Insurers, provided always that the Insurers shall not be entitled to benefit in any general recoveries obtained by the Insured unless and until the Insured's own losses have been made good.

1069. The Endorsement in the DAE WR Policy was in the same terms, save that the limit specified was of US$ 1 million any one aircraft and in the aggregate.

1070. In my judgment the position in relation to the Nordwind aircraft, repossessed in Mexico City, is relatively straightforward. I have no difficulty in accepting that the expenses of this operation were for the purposes of avoiding or diminishing a loss under the WR Cover, and were for the 'preservation' of the aircraft from a WR Peril. Had the aircraft been flown back to Russia, as it was scheduled to do, it would have been caught by the Russian measures, including in particular GR 311. Accordingly, and subject to the point I make

below as to post-ferry flight expenses, the expenses referable to it are payable as Salvage Charges and Expenses under the WR Cover.

1071. I have reached the same conclusion, albeit with more hesitation, in relation to the two I-Fly aircraft. They were not subject to, or in the grip of a WR Peril, being outside Russia. However, that does not appear to me to be the relevant test: the question is whether the expenditure was to avoid the aircraft being lost by a WR Peril. While there is no direct evidence that I-Fly was intending to fly the aircraft back to Russia, or that the repossession efforts were undertaken to prevent its doing so, Mr Lopes does give evidence that his impression is that '*I-Fly would not respond to any proposition that might go against the position in Russia that they were not allowed to return airplanes to lessors.*' Accordingly, I consider that it can be inferred that I-Fly would have returned the aircraft to Russia, and complied with the ban on export, had it been able to do so. The expenses of repossession avoided that loss. Thus, again, and subject to the post-ferry flight point below, I consider that the relevant expenses were payable as Salvage Charges and Expenses under the WR Cover.

1072. Had I not found that all the claimed expenses were payable as Salvage Charges and Expenses, I would have found that at least the costs of the ferry flights were recoverable as Repossession Expenses under the WR Cover, up to an amount of US$ 1 million.

1073. In relation to all the recovered aircraft, I considered that WR Insurers made a fair point that expenses incurred after the completion of the ferry flight in each case were not covered. It has not been established that those expenses were for the purposes of avoiding or diminishing a loss under the WR Cover. There is, in relation to such amounts a dearth of relevant evidence. Accordingly I conclude that DAE has not established its entitlement to claim those amounts. If any issue arises as to their quantification, it will need to be resolved with the other, limited, issues as to quantum which I am not going to decide now.

1074. DAE also make a claim for expenses in relation to unrecovered aircraft. These were expenses for inspectors and consultants, including for technical representatives in Russia who attempted to access and scan aircraft records and to carry out physical inspection of the aircraft. The amounts claimed are US$130,718.35 for DAE and US$7000 for Falcon.

1075. These are claimed primarily as Salvage Charges and Expenses. WR Insurers accepted that liability for these expenses would follow my findings in relation to whether the relevant aircraft were lost by a WR or an AR Peril. As I have found that they were lost by a WR Peril, it follows that WR Insurers are responsible for these costs.

Does the US$ 300 million aggregate limit apply to AerCap's claim under the War and Allied Perils cover?

1076. I have already set out Item 4 of the Schedule to AerCap's policy. LIC and Fidelis contend that any claim of AerCap under Section Three is limited to US$ 300 million because, if aircraft were lost by a 'restraint' or 'detention', it was one '*by or under the order of the Government of country of registry…*'. They point out that the Bermudian and Irish authorities concluded agreements permitted by Article 83bis of the Chicago Convention by which, in certain circumstances they transferred to Russia some of their regulatory obligations under that Convention. The Bermuda-Russia agreement, dated 27 September 1999 transferred to Russia functions and duties in relation to personnel licensing, rules of

the air and operation of aircraft. The Ireland-Russia agreement, dated 26 April 2002, transferred similar functions. Those transfers are said to make Russia '*effectively … the state of registry under the Chicago Convention for the purposes of those functions and duties*', and the 'country of registry' for the purposes of the Schedule to the Policy.

1077. I found that a surprising argument. In my judgment, the Policy envisages that there is one 'country of registry' for each aircraft. There is no doubt that the AerCap Aircraft at issue were, before the invasion of Ukraine, registered either in Bermuda or Ireland. Article 18 of the Chicago Convention makes clear that there cannot be dual registration: there can only be one country of registry. The 'country of registry' for the purposes of the Schedule is, in my view, the country of registration, namely Bermuda or Ireland. The Schedule does not refer to what is 'effectively' the state of registry for some purposes, and cannot, in my view, be read as doing so.

1078. WR Insurers relied on the same point as a defence to the Merx claim. In that case the 'government of registry' clause was a full exclusion to the WR Cover, rather than a limit, but otherwise the clauses were materially similar. My reasoning above applies equally to the Merx clause. I do not find WR Insurers' point persuasive.

Overall Conclusions

1079. For the reasons I have endeavoured to express, I conclude:

(1) The Aircraft were lost on 10 March 2022.

(2) The proximate cause of their loss was the coming into force of GR 311. GR 311 was a 'restraint' or 'detention' within the Government Perils of the WR cover of each of the Claimants. The loss of the Aircraft was not proximately caused by an AR Peril.

(3) Each Claimant may, subject to (4) and (5) below, recover in respect of its lost Aircraft and engines under the Contingent Cover of its Policy(ies). No Claimant has a valid claim under the Possessed Cover of its Policy(ies).

(4) Genesis's claim in relation to the proportion of its WR Cover underwritten by TMK Syndicate 510 fails.

(5) Most issues of quantum have been capable of resolution at this stage, as set out above; but in respect of some limited issues, it will be necessary for these to be resolved, if they remain in issue, at a further hearing.

1080. I hope that the parties will be able to agree an order embodying the conclusions in this judgment.

1081. I wish to thank the representatives of all parties for the degree of cooperation and expertise shown in the preparation and presentation of what, by any standards, was an unusually demanding piece of litigation.