ADGM COURTS
مـحـاكـم سـوق أبـوظـبـي الـعـالـمـي

In the name of
His Highness Sheikh Khalifa bin Zayed Al Nahyan
President of the United Arab Emirates/ Ruler of the Emirate of Abu Dhabi

COURT OF FIRST INSTANCE
COMMERCIAL AND CIVIL DIVISION
BETWEEN

GLOBAL PRIVATE INVESTMENTS RSC LIMITED
Claimant

and

GLOBAL AEROSPACE UNDERWRITING MANAGERS LIMITED
First Defendant

XL INSURANCE COMPANY SE, DIREKTION FUR DEUTSCHLAND (company number HRB 94266)
Second Defendant

SWISS RE INTERNATIONAL SE NIEDERLASSUNG DEUTSCHLAND (company number HRB 171487)
Third Defendant

STARR INTERNATIONAL (EUROPE) LTD
Fourth Defendant

ALLIANZ GLOBAL CORPORATE & SPECIALITY SE
Fifth Defendant

JUDGMENT OF JUSTICE SIR ANDREW SMITH

Neutral Citation:	[2021] ADGMCFI 0008
Before:	Justice Sir Andrew Smith
Decision Date:	5 December 2021
Decision:	1. Clause 1.3 of the Policy exhaustively defines the indemnity for "*Partial Loss".* 2. The term "*cost of repairs*" in both clause 1.3 and in the definition of "*Constructive Total Loss*" refers to repair of physical damage and does not include diminution in the value of the Aircraft. 3. At the time of the Incident, GPI had a genuine, fixed and settled intention to sell the Aircraft, and there was a reasonable prospect of it doing so. 4. If diminution in the value of the Aircraft after its "*Partial Loss*" were covered by the Policy, GPI's intention as to whether or not to sell it would not have affected the Insurers' liability. 5. If diminution in the value of the Aircraft after its "*Partial Loss"* were covered by the Policy, the indemnity should be measured by reference to the agreed value of the Aircraft. 6. The limit on the Insurers' liability for rental of replacement aircraft is limited to US$600,000 for any one replacement aircraft, and not to US$600,000 for the Aircraft.
Hearing Dates:	22, 23 and 24 November 2021
Date of Order:	Submissions on the terms of order and consequential matters invited.
Catchwords:	Principles for construing insurance contract for property damage; indemnity for partial loss; meaning of "*cost of repairs*"; measure of diminution in value under valued policy; relevance of owner's intention to sell the property at the time of the incident; limit on coverage for loss of use.
Cases Cited:	Arnold v Britton and ors, [2015] UKSC 36, Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1001 para 14 FCA v Arch Insurance (UK) Ltd, [2021] UKSC 1 Firma C-Terra SA v Newcastle P & I Association, [1991] 2AC 1 Sveriges Angfartygs Assurans Forening (The Swedish Club) and Ors) v Connect Shipping Inc & Anor (The "Renos"), [2019] UKSC 29 Kusel v Atkin (The "Catariba"), [1997] 2 Lloyd's Rep 749, 755 The London Corporation, [1935] P 70 Sartex Quilts & Textiles Ltd v Endurance Corporate Capital Ltd, [2020] EWCA Civ 308 Coles v Hetherton, [2013] EWCA Civ 1704 Payton v Brooks, [1974] RTR 169

	Gilbert Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd, [1974] AC 689, 717H Seadrill Management Services Ltd v OAO Gazprom, [2010] EWCA Civ 691 Seadrill Management Services Ltd v OAO Gazprom, [2010] EWCA Civ 691 Cornish v Accident Insurance Co Ltd, (1889) 23 QBD 453 Impact Funding Solutions Ltd v Barrington Services Ltd, [2016] UKSC 57 Gard Marine & Energy Ltd v China National Chartering Co Ltd (The "Ocean Victory"), [2013] EWHC 2199 Lancashire County Council v Municipal Mutual Insurance Ltd., [1997] QB 897 US Fire Ins Co v Welch (1982) 163 Ga App 480, 294 SE 2d 713 State Farm Mutual Automobile Insurance Company v Mabry et al, (2001) 2754 Ga 498, 556 SE 2d 114 Squire (Senko) v Insurance Corp of BC, (1990) 69 DLR (4th) 300 Elcock v Thomson, [1949] 2 KB 755 Western Trading Ltd v Great Lakes Reinsurance(UK) SE, [2016] EWCA Civ 1003 Barnardo's v Buckinghamshire and ors, [2018] UKSC 55 Torvalt Klaveness A/S v Arni Maritime Corp, [1994] 1 WLR 1465
Legislation Cited:	Application of English Law Regulations 2015
Case Number:	ADGMCFI-2020-051
Parties and representation:	Mr Gavin Kealy QC and Mr John Bignall of Counsel, instructed by Al Tamimi & Company for the Claimant Mr Charles Dougherty QC and Mr Lucas Fear-Segal, instructed by Kennedys for the Defendants

JUDGMENT

1. Global Private Investments RSC Limited ("**GPI**"), a company registered in the Abu Dhabi Global Market ("**ADGM**"), makes a claim in these proceedings in respect of damage to a corporate jet, a Gulfstream G650 aircraft (the "**Aircraft**"), against insurers (the "**Insurers**") who issued an Aircraft Hull and Spares all risks and aviation liability policy (the "**Policy**"). The Aircraft was extensively damaged during a hailstorm on 10 July 2019, while it was on the ground at Abruzzo International Airport, Italy (the "**Incident**"). Before it was damaged, GPI had frequently chartered the Aircraft to the Russian Direct Investment Fund ("**RDIF**") for meetings and other commitments in Russia and elsewhere: indeed, this was its sole use.

2. The Insurers accept that GPI is entitled to be paid under the Policy in respect of the damage: they have already paid some US$9.4 million for repairs to the Aircraft and some €540,000 (equivalent to some US$600,000) in respect of hire of replacement aircraft while repairs were being carried out. The dispute is about the amount of the Insurers' liability on the true construction of the Policy. More specifically, there is: (i) a dispute about whether GPI is entitled to an indemnity in respect of any residual diminution in the value of the Aircraft after the physical damage has been repaired, and if so how it is to be calculated; (ii) a related question about whether the Aircraft was a Constructive Total Loss (within the definition in the Policy); and (iii) a discrete issue about a limit set in the Policy upon the indemnity for expenses by way of rental of replacement aircraft necessitated by the damage to the Aircraft.

3. After the Incident, temporary works, taking several months, were carried out to enable the Aircraft to be flown to the headquarters of Gulfstream in Savannah, Georgia, United States of America, where it arrived on 20 December 2020. When the trial date in these proceedings was fixed for November 2021, it was expected that the Aircraft would by then have been repaired and returned to operation. In the event, for whatever reason, it was not, and it is still out of operation. As a result, the hearing starting on 22 November 2021 was, by order dated 8 November 2021, confined to: (i) all issues of construction of the Policy; (ii) an issue on the pleadings about whether GPI owned the Aircraft; and (iii) GPI's claim that, at the time of the Incident, it intended to sell the Aircraft.

4. There is no longer any issue about the ownership of the Aircraft. In their defence, the Insurers did not admit GPI's ownership, but, further information having been provided, they now do so. No specific relief is pursued in respect of the third question about GPI's intentions: it is a question which, it is said, might bear upon the measure of the indemnity under the Policy if, on its proper construction, GPI is entitled to be indemnified for any residual diminution in value after physical repairs.

5. The hearing between 22 and 24 November 2021 was conducted virtually. GPI was represented by Mr Gavin Kealey QC and Mr John Bignall, and the Insurers by Mr Charles Dougherty QC and Mr Lucas Fear-Segal. Evidence of fact about GPI's intentions with regard to selling the Aircraft was given by:

   a. Mr Artem Artemenko, who is a Project Manager with an affiliate company of GPI called LLC RS Investment Management, and who belongs to its Aircraft Liaison Team; and

   b. Mr Anton Khovanskiy, who is a Consultant at Aerobridge SA ("**Aerobridge**"), a Swiss company that acts as a broker for the sale and acquisition of business jet aircraft.

6. The parties disagreed about whether, as GPI contends and the Insurers dispute, evidence from experts in aviation insurance is admissible with regard to the true construction of the Policy. However, they helpfully agreed before the hearing that I need only consider the admissibility of evidence in a Joint Report dated 11 October 2021 made by the experts, Mr Peter Mills, who had been instructed by GPI, and Mr Martin Stevens, who had been instructed by the Insurers. The only statement in the Joint Report on which Mr Kealey relied was this: "*Expert witnesses agree that the aviation insurance market and therefore the insurers insuring the aircraft knew that high value aircraft (or any aircraft) may suffer a decrease in value when the aircraft suffers substantial damage, notwithstanding that remedial work is carried out which renders the aircraft airworthy and in compliance with all applicable technical requirements and/or remedies the physical damage suffered*". Mr Dougherty accepts that any chattel might suffer a diminution in value following damage and despite its repair, describing this as obvious. The statement of the experts to this effect therefore does not go to anything in dispute. Accordingly, it is not necessary to determine whether or not it is admissible as evidence, but, if it matter, to my mind it is inadmissible since it is, now if not before, not probative of an issue between the parties.

The Terms of the Policy

7. The Policy is an Aircraft Hull and Spares all risks and aviation liability policy, covering aircraft when on the ground, taxiing and in flight. Its terms are contained in a 5-page Schedule and the "*Global Aerospace General Aviation Wording*" (the "**General Aviation Wording**"). Global Aerospace Underwriting Managers Ltd, the First Defendant, is the lead insurer, and the policy was placed in the London market.

8. The Policy was issued to Luxaviation Holding Company SA ("**Luxaviation**") and associated companies, Luxaviation (or an associated company) being the operator of the Aircraft when the Policy incepted. The Policy also covers as additional insureds "*[t]he individual owners of Aircraft detailed in the Schedule of Aircraft as held on file by Besso Limited …*" ("**Besso's Schedule"** and "**Besso**"), who were the brokers who placed the Policy. The Schedule to the Policy stated the "*Business of the Insured*" as "*Operation, management and maintenance of Aircraft*" detailed in Besso's Schedule. Thus, it is a policy directed to operators of aircraft, and, as Mr Dougherty observed, on its face not to persons engaged in business of buying and selling aircraft.

9. It was a valued policy, the agreed value of each Aircraft being stated in Besso's Schedule. The schedule included GPI's Gulfstream Aircraft, which was given an agreed value of US$70 million.

10. The Policy is governed by ADGM law, which applies English common law, so far as is relevant to the issues in dispute: *Application of English Law Regulations 2015*, article 1.

11. Section One of the General Aviation Wording is headed "*Loss of or Damage to Aircraft*": (regard can properly be had to the heading here and elsewhere in the Policy: nothing in the Policy says otherwise). The provisions of this and other Sections are introduced with the words, "*In consideration of the payment of the premium specified in the Schedule and in reliance upon the information provided by the Insured to the Insurers, Insurers agree to provide coverage in accordance with the following*".

12. Clause 1.1 of Section One is headed "*Coverage*", and it provides: "*The Insurers agree to pay for physical loss of or damage to Aircraft, provided that such loss or damage is sustained during the Period of Insurance*", the Period of Insurance being from 1 July 2019 to 30 June 2020.

13. "*Aircraft*" is defined as follows: "'Aircraft *means aircraft and in Sections One and Three means the aircraft specified in the Schedule of Aircraft* ….".

14. Clause 1.2 provides that, in the specified circumstances and subject to the terms of the clause, "[t]*he Insurers will also pay*" costs of dismantling the Aircraft and other costs if it lands in a place from which it cannot take off, reasonable emergency expenses and salvage charges. Thus, as is reflected in the word "*also*", it expands the coverage beyond that in clause 1.1 for physical loss of and damage to aircraft.

15. Clause 1.3 is headed "*Cost of Repairs – Partial Loss*". It is at the heart of the main issues between the parties, and I set it out in full:

> *"In the event of loss of or damage to an Aircraft the Insurers will pay the cost of repairs less*
>
> *1.3.1 the amount of the applicable deductible, and*
>
> *1.3.2 such proportion of the Overhaul Cost of any Unit repaired or replaced as the used time bears to the Overhaul Life of the Unit.*
>
> *The cost of repairs shall include:*
>
> *1.3.3 the cost of transportation of personnel, materials, tools and equipment required to effect the repairs to and from the place where the repairs are carried out and/or the cost of transporting the Aircraft or damaged parts to and from the place where repairs are to be carried out.*
>
> *1.3.4 the cost of necessary test flights and the cost of obtaining reinstatement of the Certificate of Airworthiness.*
>
> *In the event of loss of or damage to the Aircraft being repaired by the Insured, Insurers will pay the actual wages paid for labour plus 150% or, at the Insured's option, labour costs shall be charged on the Insured's average man hour tariff applicable at the time. Materials shall be charged at replacement cost (plus insurance and transportation costs incurred in connection with their delivery to the Insured's base) plus any applicable import taxes and/or duties.*
>
> *In the event of any other firm effecting repairs, the cost of repairs shall be the actual amount of the account increased by the reasonable cost to the Insured for supervising the repairs.*
>
> *Unless the Insurers agree otherwise, repairs and transportation shall be by the most economical means.*
>
> *In no event shall the amount due with respect to a partial loss exceed the agreed value less the amount of the applicable deductible.*

No dismantling or repairs may be commenced without the consent of the Insurers except whatever is necessary in the interests of safety, or to prevent any or further damage, or to comply with orders issued by the appropriate authority*".*

(The last sentence was emphasised in bold print in the Policy.)

16. Although the clause refers to the "*applicable deductible*", the Schedule to the Policy provided that no deductible applied to GPI's Aircraft.

17. Clause 1.4 is headed "*Agreed Value – Total Loss*", and is concerned with what the Insurers are to pay in the event of one of the three types of total loss contemplated by and defined in the Policy. It provides that "*In the event of a claim arising under this Section being settled as a Total Loss, Constructive Total Loss or Arranged Total Loss, the Insurers shall pay the agreed value of the Aircraft concerned, less the amount of the applicable deductible*….".

18. The expression "*Total Loss*" is defined as follows: "'*Total Loss' arises when (a) the cost of repairs exceeds the agreed value of the Aircraft; or (b) the Aircraft is damaged to such extent that it cannot be repaired; or (c) the Aircraft is missing and not reported for a period of 7 days or more*".

19. "*Constructive Total Loss*" is defined: "'*Constructive Total Loss' arises when the cost of repairs to the Aircraft is estimated at 75% or more of the agreed value of the Aircraft*".

20. "*Arranged Total Loss*" is defined: "'*Arranged Total Loss' arises when the cost of repairs to the Aircraft is estimated at less than 75% of the agreed value of the Aircraft but there is a mutual agreement between the Insurers and the Insured for the Insurers to pay the agreed value of the Aircraft*".

21. Clause 1.5 is headed "*Exclusions applicable to this Section only*". It provides that "*This Section does not cover*" four types of loss or damage, including at clause 1.5.3 "*loss of use of an Aircraft*". However, there was attached to the Policy an Extra Expenses Clause, and it is not disputed that this overrides the exclusion in clause 1.5.3. It provides that:

> *"The coverage provided under Section One of this Policy is extended to include:*
>
> *(a) Expenses for rental of a replacement aircraft necessitated by physical loss of or damage to an Aircraft provided that such loss or damage is covered under Section One of this Policy.*
>
> *The coverage afforded by this clause shall not apply to:*
>
> *(i) expenses incurred following Total Loss, Constructive Total Loss or Arranged Total Loss of the Aircraft; …*
>
> *"Expenses" shall mean the actual costs of renting a replacement aircraft …*
>
> *However, should the Insured have an appropriate replacement aircraft available to them, the liability of insurers shall be limited to the additional costs incurred by the Insured in order to use the replacement aircraft compared to the cost of using the Aircraft which was lost or damaged.*
>
> *…*
>
> *The limit of Insurers' liability is stated in the Schedule…".*

22. The Schedule states the limit as "*USD 60,000 per day subject to a maximum of USD 600,000 any one aircraft and USD 2,000,000 in the aggregate*".

23. Other general policy exclusions are set out in Section Ten.

24. I also refer briefly to Section Two of the Policy, which deals with "*Loss of or Damage to Spares and/ or Equipment*". Its structure and much of its wording are broadly similar to Section One. Thus, clause 2.1 is about coverage, clause 2.2 is about "*Emergency Expenses and Salvage Charges*" and clause 2.3 is about "*Cost of Repairs – Partial Loss*". Clause 2.6 sets out eleven categories of "*Exclusions applicable to this Section only*". There is, of course, no clause about total loss in this Section dealing with the insurance of spares and equipment, but clause 2.4 deals with the position if there is "*Loss or Damage beyond Economic Repair*". Essentially, it provides that, in these circumstances, the sum recoverable is the lesser of the replacement costs (and costs incidental to replacement) and the insured value.

The Issues of Construction

25. GPI contends that, after the Aircraft has been repaired, its value will still be reduced because the history of damage will be known to any buyer and the Aircraft will carry with it what has been termed "*a negative stigma effect*". Indeed, although it is not strictly a matter before me at this hearing, from expert reports that have been served in the proceedings it seems unlikely to be disputed that the Aircraft will suffer some residual diminution in value, although its amount is much in issue. Against this background, the main issues of construction are:

    a. the interplay between clause 1.1 and clause 1.3. The Insurers contend that clause 1.3 exhaustively defines what is recoverable in the event of partial loss of or damage to the Aircraft, and limits it to the cost of repairs. GPI argues that clause 1.1 provides coverage against loss of or damage to the Aircraft, which can, and in this case does, include any residual diminution in the value of the Aircraft despite the physical damage being repaired, and that this is not affected by clause 1.3, which is not an exhaustive definition of what is recoverable in the event of partial loss but is directed to how the cost of repairs is measured if that cost is recoverable; and

    b. what is the meaning of "*cost of repairs*" in clause 1.3 and in the definition of "*Constructive Total Loss*"? Does it mean only the cost of repairing physical damage, as the Insurers contend, or does it include the cost of making good any residual diminution in the value of the Aircraft despite the physical damage being repaired, as GPI submits?

26. If, in light of the answer to these two questions of interpretation, the Insurers are liable to pay in respect of diminution in value, then further questions arise about: (i) whether the measure of diminution in value is affected by whether, at the time of the Incident, GPI intended to sell the Aircraft, and (ii) whether diminution in value is calculated or assessed by reference to the agreed value of the Aircraft.

27. As I have said, there is also a discrete question about the Policy's applicable limit to the cover for loss of use of the Aircraft.

28. The parties cited a number of authorities about the proper approach to interpreting contracts of insurance and contracts generally. The principles are pretty clearly established, at least as far as matters for present purposes, and I shall confine myself to referring to two authorities. In his judgment in *Arnold v Britton and ors, [2015] UKSC 36,* Lord Neuberger said at para 15: "*When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean', to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, … para 14. And it does so by focussing on the meaning of the relevant words … in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the [contract], (iii) the overall purpose of the clause and the [contract], (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions*".

29. The general approach to construction of insurance contracts is summarised by Lords Hamblen and Leggatt in their judgment in *FCA v Arch Insurance (UK) Ltd, [2021] UKSC 1* at para 47 as follows: "*There is no doubt or dispute about the principles of English law that apply in interpreting the policies.... 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*."

The interplay between clause 1.1 and clause 1.3

The common law principles

30. The starting point of Mr Kealey's argument about the limited impact of clause 1.3 on the coverage provided by clause 1.1 was to examine the nature of insurance contracts for property damage and the principles governing the measure of the indemnity for partial loss under such policies. In *Firma C-Terra SA v Newcastle P & I Association, [1991] 2 AC 1* at p.35G, Lord Goff said this: "… *at common law, a contract of indemnity gives rise to an action for unliquidated damages, arising from the failure of the indemnifier to prevent the indemnified person from suffering damage …I also accept that, at common law, the cause of action does not (unless the contract provides otherwise) arise until the indemnified person can show actual loss… This is, as I understand it, because a promise of indemnity is simply a promise to hold the indemnified person harmless against the specified loss or expense. On this basis no debt can arise before the loss is suffered or the expense incurred; however, once the loss is suffered or the expense incurred, the indemnifier is in breach of contract for having failed to hold the indemnified person harmless against the relevant loss or expense*".

31. Accordingly, when an insured peril causes loss to the insured, the insurer is in breach of the contract of insurance and liable to pay unliquidated damages. This is not because the insurer has warranted that the peril will not occur, but because he has, subject to the terms of the contract, undertaken to hold the insured harmless against damage from the peril and has failed to do so: see *MacGillivray on Insurance Law* (14th Ed, 2012) para 107. In these circumstances, the insurer is *ipso facto* in breach of the insurance contract, and, accordingly, the insured has a claim for unliquidated damages. The measure of damages is, prima facie, the sum which will put the insured in the same position as he would have been had the damage not occurred. Therefore, "*[t]he ordinary measure of indemnity under an insurance against damage to property is the depreciation in the value of the property attributable to the operation of the insured peril*": *Sveriges Angfartygs Assurans Forening (The Swedish Club) and Ors) v Connect Shipping Inc & Anor (The "Renos"), [2019] UKSC 29* at para 11 per Lord Sumption.

32. If further authority is needed, Mr Kealey also referred to the judgment of Colman J in *Kusel v Atkin (The "Catariba"), [1997] 2 Lloyd's Rep 749, 755*, who said that the indemnity principle works in this way: "*If the partial loss has diminished the sound value of the vessel the assured has sustained a loss measured by the reduction in value unless he could have mitigated that loss by restoring the value of the vessel by means of repairs costing less than the reduction in value. In that case, the true loss is obviously the cost of repairs that he would carry out and not the reduction in value*". Mr Kealey emphasised that Colman J properly refers to the value of the vessel being restored, not its physical condition. Similarly, in *The London Corporation, [1935] P 70*, which concerned minor damage to a vessel which was sold to be broken up, so no repairs were done, Greer LJ said this (at p. 77): "*Prima facie, the damage occasioned to a vessel is the cost of repairs – the cost of putting the vessel in the same condition as she was in before the collision, and to restore her in the hands of the owners to the same value as she would have had if the damage had never been done; and prima facie, the value of a damaged vessel is less by the cost of repairs than the value it would have if undamaged…".*

33. All these principles are, of course, subject to the terms of the insurance contract. Thus, as Mr Dougherty observed, if the contract provides for a deductible and loss of an amount below the amount of the deductible is suffered, the insurer is not in breach of his obligation to hold the insured harmless against loss from the insured peril.

34. In *Sartex Quilts & Textiles Ltd v Endurance Corporate Capital Ltd, [2020] EWCA Civ 308*, Leggatt LJ explained how English law goes about applying the principle that the insured is entitled to be put in the same position as it would have been if the breach had not occurred in claims under property insurance. He said:

> *"Where the breach of contract arises from loss or destruction of or damage to property (as it does where the contract is a property insurance policy), there are two distinct ways of seeking to give effect to this principle. One is to award the cost of replacing or repairing the property. The other is to award the market value of the property in its condition immediately before the damage occurred (less any residual value). Which measure is appropriate depends, at least in the first place, on the use to which the claimant was intending to put the property.*
>
> *Where the property is a building insured against damage or destruction which the owner (or other person with an insured interest in the building) was intending to use, or continue to use, as premises in which to live or from which to carry on a business, the sum of money required to put the insured in a materially equivalent position to its position immediately before the insured peril occurred will generally be the cost of repair, if the building is damaged, or the cost of replacement, if the building is destroyed. Replacement may take the form of constructing a new building on the site of the old one or acquiring substitute premises. ….*
>
> *Where, on the other hand, at the time when the damage occurred the insured was intending to sell the building (and the land on which it was built), the loss to the insured is appropriately measured as the amount by which the market value of the property has been reduced as a result of the damage: …". (loc cit at paras 36-38).*

35. Thus, in the absence of some applicable provision in the policy, the cost of repairs is not itself the measure of the indemnity for damage to property under an insurance contract. The cost of repairs is often used as a practical way of calculating the diminution in value but it is only evidence of the amount of the loss that is recoverable: see *Coles v Hetherton, [2013] EWCA Civ 1704* at para 31. If the damaged property can be replaced but cannot be repaired at a reasonably economical cost, prima facie the cost of repairs is not the measure of the indemnity: it would be too generous to the insured. On the other hand, if repairs will not restore the property to its full value before it was damaged, the cost of repairs will not sufficiently compensate the insured. This is exemplified by the decision of the Court of Appeal in *Payton v Brooks, [1974] RTR 169*, in which the owner of a car, which had been damaged in a collision and been "*excellently*" repaired, also claimed damages for diminution in value on the grounds that nevertheless the vehicle would be worth less in the market because of the damage history. The claim failed because the owner did not prove that the repaired car's value was diminished because of its history, but the Court of Appeal accepted that, if this were proved, damages for loss of residual diminution in value would be recoverable.

GPI's submissions

36. Against this background, therefore, GPI contends that it is entitled under clause 1.1 of the Policy to recover not only the costs of carrying out repairs to the Aircraft, which is not disputed, but also any residual reduction in the value of the Aircraft after repairs are completed. That clause, it argues, provides the "*coverage*" under Section One of the Policy, and clause 1.3 should not be read as reducing it. Clause 1.3 does not on its face purport to state an exclusive or exhaustive remedy for partial loss, and Mr Kealey therefore submits that it cannot have been intended that clause 1.3 should exhaustively define the scope of the indemnity in a case of partial loss. It simply does not deal with all such cases: for example, it does not apply when damage incurred by way of a partial loss cannot be repaired so as to restore the aircraft to its former condition; where parts cannot be replaced by a manufacturer; where it is impossible to effect a complete repair. The parties cannot, it is said, have intended the insured to be without an indemnity in such circumstances.

37. Further, Mr Kealey argued that, if clause 1.3 is designed to restrict the coverage under clause 1.1, it would be by way of an exclusion clause, and in accordance with well-established principles it should be given a narrow application. His argument had three limbs: firstly, that the Court will not conclude that contracting parties have given up valuable rights without making clear their intention

to do so (see *Gilbert Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd, [1974] AC 689, 717H* per Lord Diplock, *Seadrill Management Services Ltd v OAO Gazprom, [2010] EWCA Civ 691* per Moore-Bick LJ at para 29); secondly, that clear words must be used to exclude or limit liability under a contractual term, and any clause said to have that effect is to be construed narrowly (see *Impact Funding Solutions Ltd v AIG Europe Insurance Ltd, [2016] UKSC 57* at para 345 per Lord Toulson); and thirdly that, if there is genuine ambiguity in the meaning of clause 1.3, it is to be construed contra proferentem against the Insurers (see *Cornish v Accident Insurance Co Ltd, (1889) 23 QBD 453*, 456 per Lindley LJ). Accordingly, GPI argues that the Insurers are not entitled to rely on clause 1.3 to exclude or reduce the cover provided by clause 1 because it lacks the clear language that would be required to restrict the liability of the Insurers for breach of the contractual commitment in clause 1.1.

38. As GPI's argument continued, in fact the exclusions from the coverage provided in clause 1.1 are set out in clause 1.5, where they are clearly so identified. Clause 1.3, on the other hand, does not exclude, or limit the scope of, coverage, but has a more modest role: to set out what is recoverable where, as would be typical in a case of partial damage, repair costs reflect or represent all or part of the indemnity for diminution in value to which the insured is entitled, or, as Mr Kealey put it in oral submissions, a regime or code that provides for what the Insurers are to pay, in the event that repairs are carried out to the Aircraft, in relation to those repairs. Mr Kealey agreed that clause 1.3 might also, consistently with GPI's interpretation, afford the insured the option to carry out repairs, and be indemnified doing so, even if they cost more than the diminution in value caused by the insured peril. But it cannot have been intended, he contended, to be exhaustive of the indemnity that the Insurers are to pay, except where repairs fully restore the aircraft to its former condition and value.

The Insurers' submissions

39. The Insurers, on the other hand, while accepting that an insured is entitled to be held harmless against the happening of an insured peril, say that the proper measure of the indemnity is always subject to the terms and scope of the particular policy wording. Clause 1.1 is not a self-standing measure of indemnity: it is to be understood in the context of Section One read as a whole. It provides a description of the coverage under Section One, but says nothing about the scope or measure of the indemnity. That is dealt with in clauses 1.2, 1.3 and 1.4.

40. Clause 1.2 expands the cover to losses or expenses that would not otherwise be covered by the Section. It is to be noted that clause 1.2.1 provides that the amount payable in respect of dismantling the aircraft and associated costs shall not "*together with the cost of repair, exceed the agreed value of the aircraft*", no reference being made to diminution in value. (It was not suggested by either party that it is significant that this clause refers to "*the cost of repair*", not "*the cost of repairs*", the phrase used elsewhere in the Policy).

41. Clauses 1.3 and 1.4 define the indemnity to which the insured is entitled in respect of the two possible kinds of loss, partial loss and total loss. Neither clause 1.3 nor, for that matter, clause 1.4 expresses the Insurers' liability in conditional or discretionary terms: "*the Insurers will pay*…" or "*the Insurers shall pay*". (Again, it was not suggested that the difference between "*will pay*" and "*shall pay*" in clauses 1.3 and 1.4 respectively is significant).

42. Thus, the Insurers say, the Policy protects the insured in the event of partial loss by paying the costs of repairs to the Aircraft. It does not protect against diminution in value: that is why it makes no mention of this and does not give any guidance as to how it should be calculated. This does not mean that clause 1.3 necessarily, or typically, reduces or limits the rights of the insured: on the contrary, the clause entitles it to recover the costs of repairing its aircraft even if that cost is more than the diminution in value resulting from the insured peril.

43. Moreover, the Insurers submit, GPI's interpretation of the Policy would have results which make no commercial sense. In particular, questions of bringing into account any deductible and applying limits on the indemnities are dealt with in clauses 1.3 and 1.4. If an insured who suffered a partial loss were entitled under clause 1.1 to an indemnity for diminution in value, by-passing clause 1.3, it could claim an indemnity assessed without bringing into account any deductible or any limit.

44. The Insurers also contend that the principles restricting the interpretation and application of exclusion and exemption clauses have no application here. First, they submit that there is no genuine ambiguity in the meaning of the Policy, and so there is no scope for the principle of construction contra proferentem, either in the sense of interpretation against the contracting party which put forward the relevant contractual wording (*contra proferentem in contrahendo*) or in the sense of interpretation against the party seeking to rely on it in litigation (*contra proferentem coram iudice*). However, they have another argument: clause 1.3 is not properly to be seen as excluding liability or exempting the Insurers from liability; rather, it defines the indemnity which they are obliged to pay. A provision of this kind is not to be approached with a predisposition to construe it narrowly: see *Impact Funding Solutions Ltd v Barrington Services Ltd, [2016] UKSC 57,* esp. per Lord Hodge at para 7 and per Lord Toulson at para 35, who distinguished between, on the one hand, clauses which "*seek to prevent a liability from arising by removing, through a subsidiary provision, part of the benefit which it appears to have been the purpose of the contract to provide",* the vice of which is that *"it can have a propensity to mislead, unless its language is sufficiently plain"* and, on the other hand, words of exception which are *"simply a way of delineating the scope of the primary obligation*".

Conclusions

45. I prefer the Insurers' case about the role of clause 1.3. I can explain my reasons by reference to the considerations identified by Lord Neuberger in the *Arnold* case, cit sup, as relevant to assessing the meaning of a written contract. First, with regard to the ordinary and natural meaning of the clause, in my judgment the Insurers' interpretation better reflects the wording of clause 1.3 itself. On its face, the clause sets out an unqualified obligation on the Insurers to pay the cost of repairs, not an obligation that is conditional in that it depends on the cost of repairs being less than any diminution in value. The provisions in clause 1.3 in respect of other matters, such as the cost of transportation to the repair site and the cost of test flights, though not the cost of repairs themselves, are clearly incidental to physical repair and not to diminution in value. Similarly, the provisions about how the indemnity is measured, where repairs are carried out by the Insured or by "*any other firm*", such as the Insured's "*average man hour tariff*" or the actual cost of repairs being increased by "*the reasonable cost to the Insured for supervising the repairs*", are all directed to an indemnity for physical repairs and not one for diminution in value.

46. Secondly, with regard to other provisions of the Policy, the Insurers' interpretation better reflects the context of clause 1.3 in Section One as a whole, providing a formula to define the indemnity in the event of partial loss as a counterpoint to the formula in clause 1.4 dealing with total loss (of the different kinds).

47. Thirdly, the more natural view of the overall purpose of clause 1.3 is to enable the parties to ascertain what indemnity is payable in the event of partial loss: it provides guidance such as would be expected about the Insurers' liability for cost of repairs, but would provide no help in assessing its amount if the insured were entitled to an indemnity for diminution in value (either alone or together with the cost of repairs that did not wholly restore the Aircraft's value).

48. With regard to the facts and circumstances known or assumed by the parties at the time of making the contract, Mr Kealey emphasised that it was known to the parties when the Policy was taken out that an aircraft may have a reduced market value when it suffers substantial damage, despite remedial work making it operational and technically compliant with regulatory requirements. I do not consider that that assists his argument: it does not indicate whether the parties intended to cover that reduction in value. Indeed, it might be said that the fact that the parties, knowing of the possibility of diminution in value, nevertheless chose not to mention it in the Policy indicates that they did not consider it covered or intend it to be covered.

49. I should mention briefly that the Insurers too sought to support their case by reference to normal practices in the aviation insurance market with regard to whether policies include cover for diminution in value. I was not persuaded to give weight to this consideration, even if the factual basis for the Insurers argument were made out.

50. The other consideration identified by Lord Neuberger as relevant, or potentially relevant, when assessing contractual meaning is commercial common sense. Here, I see great force in Mr Dougherty's argument that the Policy does not provide for any deductible (or policy limit) to be applied to a claim for diminution in value. That would not make commercial sense, and cannot have been the parties' intention: it indicates that the Policy did not contemplate a claim for diminution in value in the event of partial loss. Mr Kealey recognised this, and pointed out that the deductible is set out in the Schedule, suggesting that it should therefore be brought into account when assessing a claim for diminution in value after partial loss. I do not consider that meets the point: the Schedule sets out the level of the deductible, but not when it is to be applied. Provisions about that are in clause 1.3 and clause 1.4. It would, to my mind, be strange if it were necessary to imply a term into the contract that the deductible set out in the Schedule is to be brought into account in assessing a claim for diminution in value when elsewhere the Policy deals with the application of the deductible in clear and express terms.

51. At one stage before and during the hearing, I thought that it would be odd for the Policy to require the insured to carry out repairs before it could claim for partial loss. After all, as Mr Kealey observed, it might not want to carry out repairs because, for example, it was about to dispose of the aircraft. Further, generally an insurer's liability arises immediately harm is suffered as a result of an insured peril, and the Courts are not concerned about how a successful claimant uses its damages. I asked Mr Dougherty during the hearing whether the Insurers did indeed argue that this is the meaning and effect of clause 1.3, or whether on its true interpretation an insured might make a claim measured by the (estimated) cost of repairs without carrying them out, but Mr Dougherty pointed out that the detailed provisions of clause 1.3, whereby the measure of the indemnity depends on whether the repairs are carried out by the insured himself or by a third party, appear to contemplate that the indemnity is to be paid only once the repairs have actually being carried out.

52. However that might be, on reflection I consider it a less surprising commercial arrangement than I first thought that, in the event of partial loss, an indemnity should be payable only in respect of repairs that are carried out. After all, as Mr Dougherty emphasised, the insureds under the Policy were aircraft operators, not persons in the business of dealing in planes. Their concern is likely to have been to return their aircraft to operation in the event of a partial loss, rather than to recover a financial indemnity for diminution in value. It is understandable that they would arrange cover to ensure that they could carry out repairs, even though it might mean that, in such circumstances as Mr Kealey described, they would forego compensation for any loss in respect of the aircraft's market value.

53. What of the argument that clause 1.3 is to be given a narrow interpretation because it is in the nature of an exclusion clause? I accept Mr Dougherty's submission that the nature and purpose of the clause is to delineate the scope of the Insurers' primary obligation to hold the insured harmless against insured perils, but that does not dispose of the point completely. It might still be said that by clause 1.3 the insured would, on the Insurers' interpretation of it, be giving up valuable rights that the Policy would otherwise confer, namely an indemnity for diminution in value. Admittedly, in the *Gilbert-Ash* case, when saying that clear language is required if the Court is to conclude that a party is giving up valuable rights, Lord Diplock referred to common law rights, but his approach has been applied where the rights would otherwise be conferred by the contract itself. In *Gard Marine & Energy Ltd v China National Chartering Co Ltd (The "Ocean Victory"), [2013] EWHC 2199*, a case concerning the total loss of a vessel on demise charter, Teare J had to consider whether a safe port warranty in the charterparty was qualified by another clause that placed insurance obligations on the charterers and was said by them to provide a complete code setting out their liabilities in the events which happened. Teare J rejected the charterers' argument, saying that "*In circumstances where the demise charterparty contains a clear safe port warranty by the demise charterers … one would expect that any exemption of the demise charterers from liability in damages for breach of the safe port warranty would be clearly expressed*" (at para 185) and referring to the *Gilbert-Ash* case, he continued (at para 194): "*This rule of construction is usually expressed with regard to rights which a party would have at common law but it must also apply to valuable rights given by other parts of a contract*" (at para 194). I respectfully agree: the vice identified by Lord Toulson in the *Impact Funding* case (cit sup), namely that a contracting party should lose through a subsidiary provision of the contract part of the benefit which it was apparently the purpose of the contract to provide, can arise from allowing the subsidiary provision to restrict either common law rights or rights apparently conferred by another provision of the contract.

54. How does this apply to the Policy? Mr Kealey submits that, if this is the test, on the Insurers' interpretation clause 1.3 would be just such a provision, restricting the benefit of the property damage insurance that it was the nature and purpose of the Policy to provide, and as clause 1.1 spells out, by removing cover for diminution in value. Mr Dougherty disputes this, arguing that nothing either in the wording of the Policy, which does not mention diminution in value in any relevant context, or in the surrounding circumstances, suggests that the purpose of the Policy was to provide an indemnity for diminution in value in the event of partial loss; and that in any event clause 1.3 cannot properly be regarded as a subsidiary clause.

55. To my mind, the law does not demand a hard choice between sternly applying the *Gilbert-Ash* rule of construction or disregarding it as having no relevance. I see it as a matter of degree: the more improbable that a contracting party would give up, or agree to restrict, the right in question, the plainer the contractual words needed to evince that intention. In this case, I accept that, on the Insurers' interpretation of clause 1.3, it removes the right to an indemnity for diminution in value the benefit of which GPI would *prima facie* enjoy under product liability insurance providing the coverage described in clause 1.1, but it does not seem to me very surprising or truly improbable that the contracting parties intended this, not least because, on the Insurers' interpretation, clause 1.3 at the same time confers on the insureds the benefit of an indemnity for the cost of repairs even if they are uneconomical in the sense of exceeding the diminution in value. An aircraft operating company such as the insured under this Policy might well consider that overall this benefit outweighs the fact that the Policy does not provide an indemnity for diminution in value. The Insurers would, no doubt, calculate the premium accordingly.

56. Accordingly, I reject GPI's argument that clause 1.3 should be given a narrow interpretation because of its exclusionary nature and effect, and prefer to give it what I consider to be its natural meaning for which the Insurers contend.

The cost of repairs

GPI's submissions

57. GPI has an alternative argument that it is entitled to be indemnified for the residual diminution in the value of the Aircraft after it has been repaired: that, if (contrary to its primary contention) clause 1.3 exhaustively defines the scope of the indemnity in the event of partial loss, then the term "*repairs*" in the clause must be given a wide meaning, and include not only the cost of works to carry out repairs but also a sum of money that will repair, or make good, any residual loss of value. As GPI puts it in its pleading (at para 15 of its Re-Amended Particulars of Claim: "*Only a payment to indemnify [GPI] for [the] diminution in value will truly repair the damage caused by the incident*". Unless the term "*repair*" is so interpreted in clause 1.3, the Insurers' interpretation disregards the fundamental principle that an insured's entitlement under insurance for property damage is to be compensated for diminution in value, the cost of repairs being simply evidential or a mechanism for assessing the diminution in value. It would be wrong, GPI submits, to give the term "*cost of repairs*" a narrower meaning: that fails to give proper weight to the context of the words and the fundamental indemnity principle in insurance law and also in clause 1.1 of the Policy: it is a proxy for diminution in value.

58. English law is familiar, it is said, with the use of the term "*repair"* to mean make good, without confining it to physical repair. Mr Kealey cited the judgment of Staughton LJ in *Lancashire County Council v Municipal Mutual Insurance Ltd., [1997] QB 897*, 909H-910A:

> *"The word 'compensation,' when used by lawyers in connection with the recovery of damages from a wrongdoer, usually means a sum of money designed to repair or make good the loss that the victim has suffered. Of course there is always the proviso, so far as money can do that. Where the wrong is loss of reputation, or pain and suffering and loss of amenity, it cannot in reality be repaired or made good by money. But the law has a fiction that it can".*

59. Mr Kealey also cited American authorities in which the term "*repair*" was given this wide meaning in the context of insurance for property damage, two cases from the State of Georgia. In *US Fire Ins Co v Welch (1982) 163 Ga App 480, 294 SE 2d 713*, a case arising from a motor accident, there

was a dispute about an insurance policy with a limit of the lesser of the actual cash value or the amount necessary to repair or replace the vehicle. Before the Georgia Court of Appeal the appellant insurer argued that, if the vehicle was repaired, the insured was entitled only to the cost of repairs even if it was less than the cash value. That submission was rejected: Quillian CJ, with whom the other members of the Court concurred, said this: "*Appellant misconstrues the meaning of repair in the limits of liability provision as meaning any repair. We construe repair to mean restoration of the vehicle to substantially the same condition as existed before the damage occurred*". That view was endorsed by the Supreme Court of Georgia in *State Farm Mutual Automobile Insurance Company v Mabry et al, (2001) 2754 Ga 498, 556 SE 2d 114*. Having identified the question whether the insurers were required to pay for diminution in value as part of its physical damage coverage as one of law, being one of contractual construction, the Court reviewed the authorities, including the *Welch* case, and concluded "*The foregoing review of Georgia case law establishes clearly that value, not condition, is the baseline for the measure of damages in a claim under an automobile insurance policy in which the insurer undertakes to pay for the insured's loss from a covered event, and that a limitation on liability provision affording the insurer an option to repair serves only to abate, not eliminate, the insurer's liability for the difference between pre-loss value and post-loss value*".

60. The meaning of the term "*cost of repairs*" is pivotal also to a second issue between the parties in this case, the meaning of the definition of "*Constructive Total Loss*". The Policy's definition of "*Constructive Total Loss*" is by reference to the "*cost of repairs*" and whether it is estimated at 75% or more of the agreed value of the Aircraft, US$70,000,000. There is no dispute that the Aircraft would be a "*Constructive Total Loss*" if the estimated cost of repairs is US$52,500,000 or more. GPI submits that, in deciding whether there has been a "*Constructive Total Loss*" (as defined in the Policy), account is to be taken of diminution in value of the Aircraft as a result of the damage, including any residual diminution in value despite repairs and remedial work. It advanced the same arguments in support of this contention as it did with regards to the meaning of "*cost of repairs*" in clause 1.3.

The Insurers' submissions

61. The Insurers submit that the ordinary and natural meaning of the word "*repairs*" simply does not include diminution in value, and words "*cost of*" preceding "*repairs*" puts it beyond doubt that the phrase as a whole refers to what will need to be paid and spend on physical repairs.

62. In answer to GPI's citation of the authorities from Georgia, Mr Dougherty referred me to this extract from Georgia Property and Liability Law of J Stephen Berry, August 2021 Update, at para 3.21: "*Since 1926, Georgian Courts, (unlike the nationwide majority of other jurisdictions) have ruled that standard automobile policies require an insurer to pay both repair costs and post-repair diminution in value*". That is not in dispute: Mr Kealey explained that did not suggest that the approach in Georgia had been followed elsewhere in the United States of America (or anywhere), but commended the reasoning found in the Georgian judgments.

63. Mr Dougherty cited authority from British Columbia in support of the Insurers' case on this issue, the judgment of the Court of Appeal in *Squire (Senko) v Insurance Corp of BC, (1990) 69 DLR (4th) 300*, a case arising from accidental damage to an insured's vehicle, in which the Court was concerned with the expression "*cost of repairing*" in a regulatory provision (referred to as "*section 117*") setting a limit to the liability of the Insurance Corporation "*for payment of indemnity for loss or damage*". The insurers paid the cost of repairs but the insured claimed a further amount for diminution in the value of her vehicle after repairs. Wood JA, delivering the judgment of the Court, referred to the insured's argument, upheld by the Judge, that the words "*damage*" and "*repair*" should both be given a broad construction so as to include accelerated depreciation within the word "*damage*" and compensation for economic loss within the word "*repair*". Wood JA rejected that argument, saying that it required "*that the word 'repairing' be given a meaning which is both unusual and inconsistent with the context in which it is found. The ordinary meaning of the verb "repair" does not invoke any concept of compensation for economic loss. In the case of section 117, it is used in conjunction with a verb 'replace' in a context which clearly suggests physical repairs or replacement with material of a similar kind or quality. In short, it is impossible to read compensation into the words 'cost of repairing or replacing' … without doing violence to the plan meaning of those words"* (at p.304h/305a).

Conclusions

64. Neither party argued that the phrase "*cost of repairs*" has a different meaning in clause 1.3 of Section One from that which it has in the definition of "*Constructive Total Loss*". It seems to me clear that in both contexts the expression refers to physical repairs to the Aircraft and not to compensation for diminution in value. That interpretation is required both by the ordinary and natural meaning of the term and the contexts in which they are used.

65. As for the natural meaning of the words, I agree with Wood JA. I also consider that Staughton LJ's observations about the general use of the word "*repair"* cannot be applied to the composite phrase that I am to construe, "*cost of repairs*".

66. The context of the term in clause 1.3 is that it is used in a clause with a series of provisions that are directed to what is included in the indemnity for the cost of physical repairs and how that is to be assessed. Moreover, clause 1.3.2 refers to units being "*repaired or replaced*", and the use of the term "*repaired*" in company with "*replaced*" puts beyond argument, if it be disputed, that the reference there is to physical repair.

67. As for the context of the definition of "*Constructive Total Loss*", it is to be noted that Clause 1.4 of Section One of the Policy provides that the Insurers shall pay the agreed value of the Aircraft in the event of a claim settled as a Total Loss, Constructive Loss or Arranged Total Loss, and the definition of "*Constructive Total Loss*" is not to be read in isolation from definitions of these related terms, all of which include the words "*cost of repairs*". The definition of "*Total Loss*" also includes reference at (b) to "*the Aircraft* [being] *damaged to such an extent that it cannot be repaired*", which clearly connotes physical damage the Aircraft being repaired. This being so, it seems to me that, in (a) of the definition, the term "*cost of repairs*" must similarly refer to physical repairs to the Aircraft: the natural inference is that "*cost of repairs*" has the same meaning in the definition of "*Constructive Total Loss*", and indeed in the definition of "*Arranged Total Loss*".

The impact of GPI's intentions with regard to the Aircraft on the assessment of diminution in value

68. There were two questions before me at the hearing said to be relevant, or potentially relevant, to how the indemnity for diminution in value should be calculated if GPI is entitled to it. If I am right in my other conclusions, they do not arise, but, having heard submissions, I shall deal with them.

69. The first arises because GPI pleads that, at the time of the Incident, it "*was considering selling the Aircraft and/or had the intention to sell the Aircraft (even if, in the meanwhile, the Aircraft would or might continue to be used in flight) at its pre-Damage market value*": see para 11A.6 of the Re-Amended Particulars of Claim.

70. Mr Artemenko gave evidence that RDIF had expressed dissatisfaction with some aspects of the Aircraft, in particular the comfort and standard of its interior. He was informed by Mr Richard Ogdon, GPI's Chief Executive Officer, that GPI therefore wanted to sell and replace the Aircraft. Mr Artemenko's Aircraft Liaison Team was responsible for implementing the decision. Accordingly, in about March 2019 he contacted Mr Khovanskiy of the brokers, Aerobridge, with a view to arranging a sale. It was decided that Aerobridge should go about selling the Aircraft on a low-key "off-market" basis, that is to say without advertising it for sale at a particular price, but by approaching potential buyers to invite offers. Mr Artemenko and Mr Khovanskiy discussed the potential sale price, and Mr Khovanskiy recommended that GPI aim for US$ 40 million. Mr Artemenko conveyed this recommendation to Mr Ogdon, who instructed him to work with Aerobridge to achieve a sale at that price.

71. On 27 March 2019, GPI and Aerobridge entered into a written Mandate Agreement, signed by Mr Ogdon on behalf of GPI, which recited that GPI "*desires to sell the Aircraft*" and provided that Aerobridge would (inter alia) undertake a "*global marketing campaign in order to allocate Buyer for the Aircraft*" and "*[a]ssist in successful Closing of the deal*". GPI could withdraw the mandate at any time, but if a sale resulted, Aerobridge was entitled to a fee of US$ 150,000.

72. On 21 May 2019, Mr Khovanskiy provided details of the Aircraft to a Mr Brett Forrester of Jet Sense Aviation, whom he met at the European Business Aviation Convention and Exhibition ("**EBACE**"), and on 29 May 2019, Mr Forrester indicated interest in the Aircraft and said that he would prepare a letter of intent. Mr Khovanskiy reported this to Mr Artemenko. Before matters could progress, the Aircraft was damaged in the Incident.

73. Mr Dougherty criticised the evidence of Mr Artemenko, in particular because he often replied to questions in cross-examination that he did not know about matters that were clearly relevant to his evidence. Certainly, my impression is that he was unnecessarily reticent, and if his knowledge was limited as he claimed, GPI could and should have adduced more satisfactory evidence from another witness. However, I would attribute Mr Artemenko's reticence to anxiety about being drawn into unfamiliar matters beyond his immediate responsibilities, rather than to dishonesty. Nothing significant in his witness statement was discredited.

74. Mr Dougherty had other points. First, he established in cross-examination that before the Incident GPI had taken no steps to find another aircraft to replace the Gulfstream G650 if it was sold. Secondly, he showed that, before the Incident, GPI was investigating making improvements to the Aircraft by way, for example, of installing privacy curtains and a better entertainment system, and it appears from emails that the plans were shared with RDIF, which indicates, it was suggested, that GPI was still entertaining the idea that it might keep the Aircraft and continue to deploy it for RDIF.

75. Despite these arguments, I conclude that, at the time of the Incident, GPI had firm plans to sell the Aircraft for about US$ 40 million and had set about doing so: that can be inferred from the evidence of Mr Khovanskiy and the documents. But for the Incident, the Aircraft probably would have been sold for such a price: Mr Khovanskiy's evidence, which I accept, was that in 90% of cases owners who sign a mandate with Aerobridge achieve a sale. As for Mr Dougherty's other points, the plan, Mr Artemenko said, was to find a replacement aircraft once a purchaser for the Gulfstream G650 had been found, and there is no reason to doubt that part of his evidence. The explanation for the planned works was that they were essentially cosmetic and relatively inexpensive improvements of a kind that might be expected to attract a purchaser. It is a little curious on the face of it that, in these circumstances, emails about the plans were copied to RDIF, but I am not persuaded that this is so significant that I should conclude that GPI was not seriously planning to sell the Aircraft or reject the evidence that the instructions to Mr Khovanskiy reflected its genuine and serious intention to do so.

76. The question of GPI's intention to sell the aircraft has been raised because, as is apparent from the judgment of Leggatt LJ in the *Sartex* case (cit sup), where property is damaged, the Courts look to the owner's (or other relevant person's) intentions with regard to the property to determine how to measure the diminution in value resulting from the damage. If the intention was to sell the property, the Courts will measure the diminution in value by reference to the market value of the property before and after the damage, rather than by reference to the cost of repairs, which would be appropriate if the owner had intended to keep it. In *Western Trading Ltd v Great Lakes Reinsurance (UK) SE, [2016] EWCA Civ 1003,* Christopher Clarke LJ suggested, albeit tentatively, that in order for an intention to sell to determine the appropriate measure of damage, it must be not only genuine, but also "*fixed and settled*", and there must be a "*reasonable prospect of [the owner] bringing [it] about*": at para 75. Certainly, it is difficult to see why an intention should matter unless there was a reasonable prospect of it being realised: it would only then be that diminution in value to the particular insured in the actual circumstances would truly be reflected in the price that would be paid on a sale. However that might be, if it matter, I find that GPI's intention at the time of the Incident to sell the Aircraft was genuine, fixed and settled, and that there was more than a reasonable prospect of bringing it about.

77. All that said and even if, under the terms of the Policy, GPI were entitled to an indemnity in respect of residual diminution in value despite the Aircraft being repaired, I do not consider that its plans and intention to sell it would be relevant in this case. The owner's intention is relevant when the Courts have to decide between measuring the indemnity for a particular owner of property in respect of diminution in value of its damaged property by reference to the cost of repairs or by reference to the market value. Here, there is no question about choosing between the two measures. If the insured is entitled to an indemnity for the residual diminution in value after repairs, that would, as I see it, necessarily be assessed by reference to the market value of the damaged property before

the incident, whether or not there was an intention to sell. Nothing in the judgments in *Payton v Brooks* (cit sup), or for that matter in the cases from Georgia on which Mr Kealey relies, suggests that intention at the time of the Incident affects either whether the insured can recover in respect of residual diminution in value or the question of how such residual diminution in value is to be measured.

The relevance of the agreed value to assessment of diminution in value

78. GPI submits that the indemnity for damage for which causes diminution in value is measured by applying a percentage diminution in value to the agreed value of the Aircraft, that is to say US$ 70 million. GPI pleads that "*The Aircraft has decreased in value by 75%. As a 'valued' policy … the true measure of the diminution in value …. Is $52,500,000 – being 75% of the $70,000,000 agreed value*": see para 19 of the Re-Amended Particulars of Claim.

79. Mr Dougherty did not dispute GPI's contention in this regard if the Insurers are liable for diminution in value on the basis of GPI's first argument: that clause 1.3 does not exhaustively define the limits of the indemnity in the event of partial loss, and that therefore GPI can recover for diminution in value on the basis that the coverage is that broadly stated in clause 1.1. He submitted, however, that the position is different if GPI's claim for diminution in value is upheld on the basis that the expression "*cost of repairs*" in clause 1.3 is to be given a broad meaning that includes it. His argument was that here the question is one of the proper interpretation and effect of clause 1.3, and that, since otherwise clause 1.3 is concerned with actual loss and actual costs, consistently any claim in respect of diminution in value under clause 1.3 should be assessed by reference to the actual diminution in value.

80. I cannot accept Mr Dougherty's distinction. There can be no doubt that, when considering a valued policy, the law generally adopts the approach to assessing diminution in value for which GPI contends. *MacGillivray on Insurance Law* (14th Ed) puts it thus (at para 21-012): "*If the insurance policy is a valued policy, the amount recoverable by the insured is the agreed value; this will benefit the insurer in cases where the loss is greater than the sum stated in the policy, but will benefit the insured if his actual loss is less than the agreed value. The same principle applies to partial loss, in which case it is necessary to calculate the amount of actual depreciation and express it as a fraction of the actual value. The insurer will then be liable to pay that fraction of the agreed value, although it is arguable he can limit his liability to the cost of reinstatement*". This statement of the position is well established in a line of cases, in particular the decision of Morris J in *Elcock v Thomson, [1949] 2 KB 755*. In my judgment, it justifies GPI's contention that diminution in value should be calculated by reference to the applicable fraction of the agreed value, whatever the basis for its entitlement to recover diminution in value. The Policy would need specific wording to displace the well-established rule for assessing loss of value under a valued policy.

The Limit to the Cover for Loss of Use of the Aircraft

81. After the Incident**,** GPI hired replacement aircraft to meet RDIF's requirements. The Insurers have reimbursed GPI some €540,000 (the equivalent of US$600,000) in respect of the hiring charges, but the charges incurred by GPI far exceed that amount.

82. It is not in dispute that the "*Extra Expenses Clause*" in the Policy provides coverage for expenses for rental of a replacement aircraft if that was necessitated by damage to the insured Aircraft. The issue between the parties turns on the true effect of this provision in the Schedule to the Policy: "*USD 60,000 per day subject to a maximum of USD 600,000 any one aircraft and USD 2,000,000 in the aggregate*". GPI submits that this means the indemnity for the cost of hiring replacement aircraft is limited to US$600,000 per replacement aircraft (and US$2 million in aggregate). The Insurers interpret the provision as limiting the sum recoverable in respect of any damaged aircraft to US$600,000.

83. The uncertainty might arise because the Extra Expenses Clause contemplates that an operator will rent a (singular) replacement aircraft, and the parties did not focus on the possibility that an insured might hire different aircraft from time to time. However that might be, the Insurers have raised no objection to GPI using a number of different aircraft, and do not criticise them for doing so.

84. The issue between the parties is a narrow one, and their arguments can be stated shortly. GPI says that the draftsman of the Policy and the Schedule was careful to use "*Aircraft*" (with a capital 'A') when referring to an insured aircraft as so defined in the definitions section of the Policy and otherwise to use "*aircraft*" (with a small 'a'). The Extra Expenses Clause itself observes the distinction, extending coverage to "*Expenses for rental of a replacement aircraft necessitated by physical loss or damage to an Aircraft*". Thus, in the limit provision found to the Schedule, the reference to "aircraft" is to be understood to be a limit in respect of a replacement aircraft. Mr Kealey also submitted that, if there were any ambiguity about this, GPI can invoke the principle of construction contra proferentem.

85. The Insurers point out that, unlike the Extra Expenses Clause, the Schedule does not use the term "*replacement aircraft*", and submit that, in the context of a fleet policy, the limit is to be understood to apply to each insured Aircraft. They say that GPI's interpretation would lead to the commercially absurd result that the limit could be circumvented by an insured deliberately swapping replacement planes. Accordingly, they submit that the failure to spell "*aircraft*" with a capital 'A' in the Schedule must be a mistake.

86. Of course, any draughtsman can make a mistake, and when the mistake and the nature of the required correction are clear, the Courts will construe the contract to give it the intended meaning: *Barnardo's v Buckinghamshire and ors, [*2018] UKSC 55 at para 28 per Lord Hodge. But if there was a mistake in this provision in the Schedule, it was a singular one in a matter where otherwise the Policy is exact. The Insurers' argument about commercial sense would, to my mind, have considerable force if their alternative interpretation did not also have commercially strange results, but it seems to me that it does. If two aircraft in the insured fleet (of over 70 planes) suffered damage from an insured peril during the insured period and the owners chose, or happened perchance, to rent the same replacement aircraft, it would be odd that one or other (or both) of the owners might find itself caught by the limit of US$600,000 although its own rental charges were more modest, the amount available for the particular replacement aircraft having been already used by another insured. When two alternative interpretations of a contract have results that seem strange or surprising, but neither makes the contract unworkable or utterly absurd, the Courts will not depart from a literal reading of the contract in order to accommodate its own ideas of what would make more commercial sense or would be less odd: see *Torvalt Klaveness A/S v Arni Maritime Corp.*, [1994] 1 WLR 1465, 1473 per Lord Mustill.

87. I prefer GPI's construction of the limit, and I do so without resorting to the contra proferentem principle of construction.

Overall Conclusions

88. I therefore conclude that:

    a. clause 1.3 exhaustively defines the indemnity for "*Partial Loss*";

    b. the term "*cost of repairs*" in both clause 1.3 and in the definition of "*Constructive Total Loss*" refers to repair of physical damage and does not include diminution in the value of the Aircraft;

    c. at the time of the Incident, GPI had a genuine, fixed and settled intention to sell the Aircraft, and there was a reasonable prosect of it doing so;

    d. if diminution in the value of the Aircraft after its "*Partial Loss"* were covered by the Policy, GPI's intention as to whether or not to sell it would not have affected the Insurers' liability;

    e. if diminution in the value of the Aircraft after its "*Partial Loss"* were covered by the Policy, the indemnity should be measured by reference to the agreed value of the Aircraft; and

    f. the limit on the Insurers' liability for rental of replacement aircraft is limited to US$600,000 for any one replacement aircraft, and not to US$600,000 for the Aircraft.

89. I am grateful to counsel for their submissions, and to those who carefully prepared the documentation for this trial. I should be grateful for Counsel's assistance in drafting an order to give effect to my conclusions in this judgment, and I invite written submissions, to be served and filed by 5.00 pm GST on 12 December 2021 on any consequential matters.

Issued by:

Linda Fitz-Alan
Registrar, ADGM Courts
5 December 2021