A **Pindell Ltd & Anor v AirAsia Bhd.**
[2010] EWHC 2516 (Comm)

Queen's Bench Division (Commercial Court).
Tomlinson J.
B Judgment delivered 12 October 2010.

Aviation – Aircraft lease – Redelivery – Agreement for sale with delivery in six week window following termination date of lease – Aircraft redelivered late and sale lost – Extent of contractual redelivery obligation – Whether lessors estopped from asserting breach of contract – Whether lessors could
C *claim compensation or damages in respect of loss of sale agreement either at common law or under contractual indemnity – Whether prospective purchaser would have terminated sale agreement in any event.*

This was a claim by the lessors of an aircraft for damages in respect of a
D **lost sale where the aircraft was redelivered late at the conclusion of a five-year operating lease.**

The aircraft, a Boeing 737-300, was delivered to the defendant, AirAsia, in June 2003. By 2007 the aircraft was 20 years old. AirAsia had taken the
E **decision to phase out its Boeing 737-300s and to replace them with Airbus A320s. Thereafter its strategy was to return its 28 leased 737-300s and to sell its seven owned 737-300s as soon as possible. To that end AirAsia raised with BBAM the possibility of early redelivery.**

At the end of August 2007 the aircraft went into a scheduled 'C check' at
F **AirAsia's principal maintenance repair and overhaul provider in Singapore. Before the aircraft went into the C check, there were discussions concerning the possibility of early redelivery under the lease. The redelivery condition under the lease was that the aircraft should be fresh from a C check. It was not in the interests of AirAsia to operate the aircraft for only a few months after**
G **the C check before placing it into another C check in order to comply with the redelivery condition requirement.**

In December 2007 the lessors concluded a letter of intent to sell the aircraft to a potential purchaser (NAC). AirAsia kept the C check open on the basis that there would be a sale or lease to a third party. In February 2008, a contract to
H **sell the aircraft to NAC was concluded. The scheduled delivery date was 17 June 2008 with a final delivery date of 1 August 2008.**

Repairs to the aircraft and its engines took longer than expected. The lessors claimed that AirAsia was in breach of the lease having failed to return the aircraft by 17 June 2008. They put AirAsia on notice that they would hold it

responsible for the loss of the sale to NAC in the event that the aircraft was not returned by 1 August 2008 and NAC terminated its purchase agreement. The aircraft was not redelivered until 4 November 2008 and NAC terminated the purchase agreement.

The issues were whether there was a contractual obligation on AirAsia to redeliver the aircraft by 17 June; whether the lessors were estopped from asserting that AirAsia was in that regard in breach of contract; whether the lessors could claim compensation or damages in respect of the loss of the NAC sale agreement either at common law or under a contractual indemnity; whether NAC could and would have terminated the sale agreement in any event.

Held, **ruling accordingly:**

1. The provision of a contractual redelivery date could have been made more explicit. There could be a real debate as to whether contractual compliance had been achieved where the aircraft was delivered for technical acceptance prior to the expiry date but leaving insufficient time for redelivery to the lessor at the return location to be achieved before the expiry date. However, the minimum content of the obligation cast on the lessee was to deliver the aircraft (and the aircraft documents) to the technical acceptance location prior to the termination date for the purpose of an inspection in order to verify that the condition of the aircraft complied with the required redelivery condition. In normal circumstances the lessee would only tender the aircraft for such inspection after completion of all such work as in good faith it believed necessary to achieve that compliance. In the present case there was no doubt that AirAsia did not comply with that obligation, and did not come close to complying with it. In the face of that breach the lessor had the option under the lease either to terminate and recover possession of the aircraft or to extend the term of the lease. In this case the lease and termination date were extended, but that did not relieve the lessee of its accrued liability for the breach which it had committed by failing to deliver the aircraft to the technical acceptance location prior to the original termination date. On the facts therefore AirAsia's failure to present the aircraft for technical acceptance prior to 17 June 2008 amounted to a breach of contract.

2. The estoppel argument failed on the facts. There was no relevant common assumption to the effect that redelivery after 17 June would not be regarded as amounting to a breach of contract by AirAsia or that the lessors would not seek to insist upon their legal rights. The pleaded assumption to the effect that in the circumstances it became clear that the aircraft would not be capable of redelivery by 17 June was not the same as an assumption that the lessors were not insisting on redelivery by that date.

3. The sale price to NAC was a very good price negotiated at the top of the market. The value of the aircraft went down by over 20 per cent between 17

A June and 4 November 2008. It would be surprising if that loss was in principle recoverable under a standard form aircraft operating lease, particularly one in respect of an aircraft which on redelivery was over 20 years old. An aircraft operating lease was significantly different in character from a time charterparty. Furthermore, the sale to NAC was a transaction of which AirAsia had no knowledge when made and over the terms of which it had no influence. Had
B the redelivery window been two or three weeks or less, the claim for simple damages for breach of contract could not possibly have succeeded. That was because the evidence demonstrated that late redelivery of aircraft was common. It was obvious that the older the aircraft the more likely it was that unforeseen problems would delay delivery. Thus any lessor who concluded a sale or follow-
C on lease of a 20-year-old 737-300 which was dependent upon delivery being effected within two or three weeks of the scheduled redelivery from an existing long term lease would be taking an obvious risk. The loss of that contract, if it occurred, was not such as might reasonably be supposed to have been in the contemplation of the parties as the probable result of late redelivery. In the great multitude of aircraft leases, particularly of elderly aircraft, the loss of a sale or
D follow-on lease would not ordinarily occur in consequence of late redelivery from the lease. It would be surprising if a different result ensued where the redelivery window was six weeks.

4. The lease provided for payment of rent at 150% of the basic rent in the
E event of late redelivery, with a possible exception of the first 21 days overrun in the event that the lessee had made commercially reasonable efforts to satisfy its redelivery obligations. The latter exception was recognition that despite the exercise of commercially reasonable efforts late redelivery might occur. That of itself militated against a contractual allocation to the lessee of risk for market
F fluctuation consequent upon late redelivery. Reasonable contracting parties in the shoes of the lessors and lessee would not have had it in mind, when making the contract, that the loss of a follow-on sale or lease was likely to result from a failure by the lessee to effect timely redelivery. Also, on a proper interpretation of the contract against its commercial background, the loss of a follow-on lease or sale in the event of late redelivery was not loss of a type for which the lessee
G assumed responsibility. The lease expressly contemplated that there might be loss suffered by the lessor by reason of the delayed redelivery for which the lessee could be liable and for which holdover rent was not an exclusive remedy. Such loss did not, however, encompass the loss of a follow-on lease or sale. The loss suffered in this case was not the ordinary consequence of late redelivery but was rather caused by the extremely volatile market conditions in 2008. That
H conclusion precluded any recovery under the contractual indemnities in the lease. (The Achilleas [2008] 2 CLC 1 considered.)

5. AirAsia failed to show that NAC would in any event have terminated the sale agreement on account of the condition of the engines. The engines complied with the delivery conditions and that was acknowledged by NAC.

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The following cases were referred to in the judgment:

Amalgamated Investment and Property Co Ltd v Texas Commerce International Bank Ltd [1982] QB 84.
ASM Shipping Ltd of India v TTMI Ltd of England (The Amer Energy) [2009] 1 Ll Rep 293.
Classic Maritime Inc v Lion Diversified Holdings Bhd [2010] 1 CLC 445.
Expert Clothing Service & Sales Ltd v Hillgate House Ltd [1986] Ch 340.
Hadley v Baxendale (1854) 9 Ex 341; 156 ER 145.
Supershield Ltd v Siemens Building Technologies FE Ltd [2010] 1 CLC 241.
Sylvia Shipping Co Ltd v Progress Bulk Carriers Ltd [2010] EWHC 542 (Comm); [2010] 1 CLC 470.
Total Liban SA v Vitol Energy SA [1999] CLC 1301; [2001] QB 643.
Total Transport Corp v Arcadia Petroleum Ltd (The Eurus) [1998] CLC 90.
Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas) [2008] 2 CLC 1; [2009] 1 AC 61.

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John Taylor (instructed by White & Case LLP) for the claimants.

Akhil Shah QC (instructed by Stephenson Harwood) for the defendant.

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JUDGMENT

Tomlinson J:

1. This is a dispute about aircraft leasing. The lessors say that the aircraft, a Boeing 737-300, was re-delivered late at the conclusion of a five year operating lease. The lessors say that in consequence they were unable to complete a sale of the aircraft which they had finally concluded some four and a half months before the (alleged) contractual redelivery date, although the major terms of the deal had been agreed in outline and enshrined in a letter of intent two months earlier. They claim damages in respect of the lost sale. The lessees deny that they were in breach of contract and deny that the lessors can in any event recover damages or compensation by reference to the lost sale. The case raises, or at any rate is said to raise, for consideration again the effect of the decision of the House of Lords in *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] 2 CLC 1; [2009] 1 AC 61.

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2. The claimants 'Pindell' and 'BBAM' are both companies within the Babcock & Brown group, which carries on business acquiring, leasing and selling aircraft. Companies within the group own around 270 commercial aircraft. Babcock & Brown does not operate aircraft.

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A 3. The defendant 'AirAsia' is an airline operator based in Malaysia. Together with its affiliate companies AirAsia Thailand and AirAsia Indonesia it is the largest 'low-cost' carrier in Asia, with a fleet of almost 80 aircraft. The co-founder and a driving force behind AirAsia is Mr Conor McCarthy who between 1996 and 2000 as Director of Group Operations for Ryanair successfully implemented a large expansion of Ryanair's low cost operation in Europe. AirAsia pursues the same business model. B One feature of the business model is typically the lease or purchase of a single type of aircraft, thereby reducing training and servicing costs and eliminating the complexity caused by operating multiple aircraft types. In 2001 AirAsia selected the Boeing 737-300 as its aircraft type. Boeing had ceased production of the 737-300 in 1999.

C 4. On 16 June 2003 BBAM leased one 1987-built Boeing 737-300 aircraft having manufacturer's serial number ('MSN') 23808 from Intec Leasing Inc, a Japanese company, for a term of five years ('the Head Lease').

5. On the same day AirAsia sub-leased the aircraft from BBAM pursuant to a D sub-lease which is in all material respects identical to and thus back-to-back with the Head Lease.

6. The aircraft was delivered to AirAsia on 17 June 2003.

7. By 2007 the aircraft was 20 years old. Twenty years is a watershed in the E life of a commercial jet aircraft. Some civil aviation authorities, notably those in India, China and Indonesia, do not allow the import into their jurisdiction of aircraft over 20 years old. Aircraft over 20 years old are also inevitably overtaken by technological advances, the launch of new models, improvements in fuel efficiency and improvements in quiet operation enabling compliance with increasingly stringent noise restrictions.

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8. In 2005/6 AirAsia took the decision to phase out the Boeing 737-300 and to replace it with the Airbus A320 aircraft. Thereafter their strategy was to return their 28 leased 737-300s and to sell their seven owned 737-300s as soon as possible. To that end AirAsia raised with BBAM the possibility of early redelivery.

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9. At the end of August/beginning of September 2007 the aircraft went into a scheduled 'C check' at AirAsia's principal maintenance repair and overhaul provider, ST Aerospace Engineering, 'ST Aero', at its facility in Singapore. C checks are of different magnitude, scope and expense depending on the stage reached in the maintenance cycle of the airframe and engines. This C check took longer than H expected because of spares-related delays.

10. On 21 November 2007 Intec sold the aircraft to Pindell for US$5.76m pursuant to a larger agreement whereby Intec sold five aircraft to companies in the Babcock & Brown group. Intec, BBAM and Pindell entered into a deed of novation whereby Pindell became lessor under the Head Lease. AirAsia was served with

notice of assignment and duly acknowledged that Pindell had become the 'owner' to which reference is made in the sub-lease and to whom various rights and benefits are accorded therein.

11. Before the aircraft went into C check discussions began between BBAM and AirAsia concerning the possibility of early redelivery under the sub-lease. The discussions were conducted on the basis that it might be to the mutual benefit of both BBAM and AirAsia for the aircraft to be re-delivered early so as to enable BBAM either to sell the aircraft or to enter into a new lease and AirAsia to pursue its policy of replacing the 737-300 fleet with A320s. The required redelivery condition under the sub-lease was that the aircraft should be fresh from a C check. Once the aircraft was undergoing the C check, it would have made little sense for the aircraft to be taken out of C check and/or returned to service if there remained a realistic prospect of an early redelivery. Once the aircraft came out of C check it would be impossible to comply with the standard 'fresh out of C check' redelivery condition. It was not in the interests of AirAsia to operate the aircraft for only four months before placing it into another C check in order to comply with the redelivery condition requirement.

12. On 14 December 2007 BBAM on behalf of Pindell concluded with NAC Nordic Aviation Contractor A/S, a Norwegian aircraft leasing company to which I will refer as 'NAC', a Letter of Intent pursuant to which NAC would purchase the aircraft from Pindell for US$12m. No contractual commitment to purchase was made at this stage but a deposit of US$500,000 was paid by NAC to BBAM. The price of US$12m is not directly comparable with that paid by Pindell to Intec because it presupposed the aircraft and particularly the engines being on delivery in a superior condition. Furthermore the sale by Intec to Pindell was part of a larger transaction. However on any showing this represented a very significant potential profit for Pindell.

13. The Letter of Intent provided:

> 'Seller will use commercially reasonable efforts to deliver the Aircraft to Purchaser on or about February 28, 2008 (if the current lessee, AirAsia SDN BHD (the "Prior Lessee"), elects to re-deliver the Aircraft prior to June 17, 2008) or on or about June 17, 2008, it being understood and agreed that the Aircraft will be delivered to Purchaser as soon as practicable following its return by the Prior Lessee.'

14. On 19 December 2007 AirAsia informed BBAM that the C check would be completed by Saturday 22 December 2007. They asked for an update on the proposed early return, pointing out that they would obviously hold the aircraft in C check if the proposed early redelivery was to go ahead as tentatively planned but that otherwise the aircraft would be returned to service that weekend. As Mr McCarthy explained in evidence it would probably have been put into reserve.

A 15. On the same day, 19 December 2007, BBAM indicated to AirAsia that they remained willing to consider an early return but that they would need the aircraft to be re-delivered fresh from a C check. They told AirAsia that it seemed that 'the interested party' would request an inspection just after 15 January 2008 and they asked for how long AirAsia could hold open the C check. They continued:

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> 'Once we have agreed the commercial terms, and assuming a satisfactory inspection, we expect a quick closing.'

16. AirAsia kept the C check open. On 8 January 2008 Mr McCarthy expressed his concern to his opposite numbers at BBAM that whilst AirAsia had kept the aircraft
C 'in check' and was ready to re-deliver it to BBAM, there was as yet no agreement to an early redelivery.

17. On 15 January 2008 NAC's technical representative Mr De Lessio inspected the aircraft at the ST Aero facility. He was accompanied by BBAM's Mr Keith Addison.
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18. On 25 January 2008 BBAM's Mr Howard Dugger told Mr McCarthy of AirAsia that the opportunity which BBAM had been pursuing which would have 'included the early redelivery' of the aircraft had evaporated. It was therefore necessary to plan for a redelivery as scheduled in the Lease Agreement, by which he
E meant and Mr McCarthy understood a date in June 2008. This was disappointing for AirAsia who had by now kept the aircraft in C check and idle for over a month. Since the inspection the aircraft had been kept in 'preservation', which as I understand it involves the aircraft being parked outside the hangar but still technically undergoing C check.

F 19. On 29 January 2008 NAC informed BBAM of the outcome of their inspection. They were not satisfied with 22 items, which included the number of cycles remaining before certain life limited parts ('LLP') on the two engines would require to be replaced. Significantly, they also pointed out that 'the Dent and Buckle report is not up-to-date and is incomplete'.

G 20. 'Dent and Buckle' mapping of the airframe is perhaps self-explanatory. As I understood the evidence it is to some extent a continuous process, although it acquires special significance on delivery into and redelivery from a lease. During the normal C check there would be a zonal inspection of different parts of the airframe which would or should throw up anything which is outside permitted tolerances. It was
H the evidence of Mr O'Gorman of BBAM that the damage mapping report is usually revised and updated during routine maintenance inputs. Indeed it was his evidence that it is a mandatory requirement for all operators to maintain a damage report that details the structural repairs and allowable damage to the aircraft. However that may be, the evidence also demonstrated that the detailed inspection of the fuselage and updating of the Dent and Buckle map or report in the manner typically required on

delivery into and redelivery from a lease can lead to the discovery of dents which have not, for whatever reason, been picked up by the routine checks. Furthermore, this detailed inspection and mapping exercise can lead to the re-evaluation of known dents by reason of their proximity to other repairs on the fuselage skin. The significance of a dent in the fuselage is that it compromises the fatigue strength of the skin. That strength is equally compromised by repairs which introduce into the skin a lack of continuity, and the significance of a dent has to be assessed by reference to any other compromising features in the immediate location.

21. It was no doubt in the light of these considerations that on 3 January 2008 Mr Addison of BBAM asked AirAsia by e-mail to be provided with a soft copy of the complete or integrated dent and damage mapping. Mr Tang of AirAsia, who was the Projects Manager responsible for aircraft redelivery, responded immediately. He told Mr Addison that AirAsia would update the repair mapping and pass a copy to him soonest. He asked one of his colleagues to get 'one of his guys' to work with ST Aero to update the repair mapping quickly.

22. On 5 January 2008 Mr Addison told Mr Tang that the dent and damage mapping was a priority, as BBAM would require this to assist with the physical inspection. However the required work was not done at this stage. The resources of both ST Aero and AirAsia were severely stretched by the circumstance that AirAsia were attempting simultaneously to prepare several aircraft for redelivery. On 26 January 2008, i.e. three days before NAC advised AirAsia of the outcome of their inspection, ST Aero told AirAsia, by whom they had been chased, that they planned to proceed with the dent and buckle mapping on this aircraft, 'AAH', after they had completed the mapping tasks on aircraft 'AAY', another B-737-300 which AirAsia had on lease from Mitsubishi. Almost immediately thereafter however on 31 January 2008 AirAsia agreed with Mitsubishi that aircraft 'AAY' would be redelivered on 3 March 2008, just over a year in advance of the scheduled redelivery. In consequence, aircraft AAY stayed in the hangar to be put into redelivery condition. It was not in fact redelivered until 16 May 2008. The evidence clearly established that, in the event, the treatment of the Mitsubishi aircraft delayed the induction of aircraft AAH into the hangar to prepare it for redelivery in June. The inference is irresistible that the inspection and dent and buckle mapping which AirAsia intended should be accomplished for aircraft AAH in January 2008 was for the same reason not commenced until 26 May 2008.

23. Reverting to the chronology, Mr McCarthy on 6 February 2008 confirmed by e-mail both to BBAM and to his own staff that redelivery would after all be in June and he suggested that BBAM should move fast before the bottom fell out of the market. He pointed out that AirAsia was about to put seven of its owned 737-300s on the market and that Southwest Airlines, an airline in the US operating 193 737-300s, had 'a load coming out this year'. Mr Dugger responded that BBAM were planning to take the aircraft back in June. He said that they 'now had a home for it' and so would 'go back to the original return schedule'. Mr McCarthy chased BBAM for feedback concerning the aircraft and records inspection which had taken place. He enquired

whether the next lessee might take the aircraft early, thereby indicating that he was wholly unaware that BBAM were negotiating a sale.

24. BBAM did indeed move fast for on the next day, 7 February 2008, on Pindell's behalf they entered into a firm contract to sell the aircraft to NAC. The price remained US$12m, however this presupposed that the aircraft would be fresh out of 'D' check and that the engines would comply with certain conditions. The aircraft was to be delivered by the 'Scheduled Delivery Date' 17 June 2008 with a 'Final Delivery Date' of 1 August 2008. In the event that delivery had not occurred by 1 August 2008 as a result of the seller's failure to perform its obligations under the agreement, the buyer had the option to terminate the agreement. The agreement also recited that it was then currently contemplated that AirAsia would redeliver the aircraft on 28 February 2008 and made provision for bringing forward the Delivery and Final Delivery Dates.

25. Notwithstanding Mr McCarthy's confirmation both to BBAM and to his own staff that redelivery would be in June, it is clear that discussions continued on the basis that an early redelivery might still be achieved. On 7 February 2008 Mr Addison told Mr McCarthy and others at AirAsia that the records and aircraft inspection about which Mr McCarthy had been chasing for information were fairly high level and cursory but that no significant findings had 'popped out'. He said that there was a short list of issues that would need to be addressed before redelivery. He asked when AirAsia could redeliver. In response Mr Tang, having spoken to Mr Addison on 12 February, asked for a list of the items that BBAM would want dealt with before an early return and indicated that he was contemplating closing the C check at ST Aero and undertaking a ferry flight to another MRO (maintenance and repair organisation) with a view to carrying out the redelivery check items there. This was as a result of 'slot congestion' at ST Aero, itself exacerbated by the number of aircraft that AirAsia was preparing for redelivery.

26. On 13 February 2008 Mr Addison, under the rubric 'Early redelivery', passed on to Mr Tang a list of items which needed 'to be addressed prior to redelivery'. This was in fact NAC's list of items with the condition of which they were dissatisfied less one item which was omitted. The list included item 15: 'Dent and buckle report is not up-to-date and incomplete'. Mr Addison asked to be updated on Mr Tang's discussions with ST Aero concerning induction slots. Meanwhile the aircraft remained 'in preservation' at the ST Aero facility, i.e. still technically in C check but standing outside the hangar. The humid conditions in Singapore are not ideal conditions in which an aircraft should stand outside for an extended period.

27. The engine delivery conditions under the sale to NAC were not the same as the redelivery conditions under the sub-lease. Under the former, both engines would require to be put in for a shop visit, whereas under the latter only one engine would require such treatment. It was agreed between BBAM and AirAsia that AirAsia would put both engines in for a shop visit, with BBAM paying for the additional work over and above that required to put the engines into the required sub-lease redelivery

condition. When agreeing to this AirAsia were unaware of the sale contract between Pindell and NAC. The agreement had been made on the basis that BBAM wanted to take the opportunity to carry out a performance restoration shop visit on both engines. On 15 February 2008 Mr Tang sent to Mr Addison proposed workscopes for the two engines, indicating that ST Engines had slots for both engines in early March 2008. ST Engines is an associated company of ST Aero. Turnaround time was expected to be 55-60 days.

28. The engines were in fact inducted into the ST Engines workshop in Singapore on 12 and 13 March respectively. The workscope was agreed between BBAM, AirAsia and ST Engines. It was also agreed between those three parties that the work to be carried out under the workscope should properly be described in the documents issued on completion of the work as a 'performance restoration in accordance with the Customer Workscope'. BBAM employed Royal Aero Technical Services to oversee the work to the engines and to ensure that the costs of the work were kept within reasonable bounds.

29. In June 2008 NAC appointed Mr Tom Underhill to be its on-site representative managing the delivery of the aircraft on its behalf. He is a freelance aviation engineer who NAC retained to monitor and review the technical status of the aircraft. At the ST Engines facility he shared an office with the BBAM personnel. He was fully conversant with the scope of the work undertaken to the engines.

30. On 21 May 2008 Mr Cotter of BBAM sent to Mr Tang a draft 'timeline' in fact dated the previous day. This was for the redelivery of the aircraft. It was prepared on the assumption that the aircraft would enter the ST Aero facility on that day, i.e. 21 May, a piece of information which BBAM can only have derived from AirAsia who were responsible for making the relevant arrangements with ST Aero. This timeline identified the 'Next Lessee/Buyer' as NAC. AirAsia did not at this stage know that NAC was a buyer. The timeline also identified the 'AirAsia Redelivery' as 17 June 2008, the 'Delivery to NAC' as 17 June 2008 ('Target Delivery Date') and the Cut-Off Date as 1 August 2008 ('Final Delivery Date'). Since AirAsia did not at this stage know that NAC was a purchaser, the significance of the cut-off date would not have been entirely clear to Mr Tang even had he studied this document with care.

31. Although I am not sure that it is ultimately relevant to anything which I have to decide, it seems to me that it was not until some time in June that AirAsia became aware that NAC was a purchaser of the aircraft, and thus of the significance of the cut-off date. On 24 June 2008 Mr Tang reported to Mr McCarthy and others that 'Declan (Cotter) and Brian O'Gorman ha[d] been holding telecons virtually daily for the past couple of weeks to indicate their need to get the airplane accepted by NAC… before the end of July or NAC can walk away from their purchase of the airplane.' That certainly demonstrates that Mr Tang by then knew that NAC were purchasers, not lessees. It also indicates that Mr Tang had been told that if the aircraft was not delivered by the end of July, NAC could walk away. Mr Tang was not however a

commercial man. He was a technical man. In sending this message, of which I have only reproduced a small part, he was concerned to get across to his management that AirAsia would face problems if, by the end of July, BBAM had no purchaser or lessee to which to deliver the aircraft. Lessors in such a position in his experience become difficult over accepting that the aircraft is in the required redelivery condition. No-one at AirAsia had been told in terms that the contract with NAC contained a Final Delivery Date of 1 August 2008 after which if not met NAC had an option to terminate the contract. However by 26 June 2008 AirAsia was clearly aware that the final date for delivery of the aircraft by Pindell to NAC was 1 August 2008. On 16 July 2008 AirAsia was told by BBAM that it had been advised by NAC that it would terminate its purchase agreement with Pindell if delivery did not occur by 1 August 2008. This was I think the first occasion on which BBAM spelled out in terms to AirAsia that NAC had a right to terminate the contract if delivery had not been effected by 1 August.

32. A projected induction of the aircraft into the ST Aero facility on 21 May in order to perform a redelivery check for a 17 June 2008 redelivery was a very tight and less than ideal timescale. Ordinarily AirAsia would have wished to have a period of the order of one to two months for this task since it is acknowledged that unexpected problems can appear, especially on an older aircraft. Indeed, whilst the B 737-300 has a reputation for reliability in service it is, I was told by Mr McCarthy, known as a 'Hangar Queen' on account of its less enviable reputation for throwing up unexpected problems during routine maintenance. AirAsia would undoubtedly have scheduled an earlier induction had they not preferred the interests of other aircraft which they proposed to re-deliver at about the same time. As it is, the timeline of 20 May envisaged redelivery being achieved only on 26 June 2008, nine days beyond the Target Delivery Date. However in the event pressure of space at ST Aero meant that the aircraft was not in fact inducted into the hangar until 26 May, a mere three weeks before the Target Delivery Date. Thereafter ST Aero were reluctant to issue a definitive timeline for the completion of the maintenance activities, painting, demonstration flight and such other tasks as were required until the extent of component replacements was known.

33. Detailed inspection for the purposes of Dent and Buckle mapping began on 26 May 2008. On that day and the next 73 dents were noted. One of them, hereinafter called as it was at trial the 'big dent', proved to be a serious problem. Described initially but possibly erroneously as an 'oil-canning' dent it was on the right hand side of the fuselage at Stations 747-767, Stringers 22R-23R. Because of its proximity to an area of the fuselage which already bore a heavy density of repairs, the assistance of Boeing was required in order to establish an engineering solution.

34. It is accepted by AirAsia that discovery of this dent close to multiple existing repairs rendered it impossible for them to redeliver the aircraft in its required redelivery condition by 17 June 2008. The question whether the dent had occurred recently or had simply been missed on the C check is of only very marginal relevance

to one narrow issue, viz the question whether holdover rent at 150% is payable for the first 21 days after 17 June 2008. There was evidence that new dents can occur even whilst an aircraft is out of service on the ground. However the weight of the evidence was to the effect that such dents would be largely mechanical in nature rather than caused by simple static loading. A new dent was indeed identified even after completion of the dent and buckle map. It was accepted to be highly unlikely that all 73 of the newly identified dents had occurred between January and May 2008. The witnesses were agreed that many of the dents would inevitably have been present on the earlier occasion but simply not inspected or evaluated at the time. The only reliable conclusion to which I can come is that the big dent must have been present in January 2008 but that its significance was not then appreciated, either because it was not properly inspected or because it was not then properly evaluated in the light of the volume and concentration of repairs in the adjacent area.

35. Boeing's initial response to being asked about the big dent was that they needed more time to respond. On 7 June they advised that because of the amount of damage and the presence of existing repairs, the solution would be to trim out the damaged skin and replace it with a partial solid skin repair. Boeing suggested that they would need three weeks to develop an engineering drawing. However on 20 June Boeing also advised that on review they could authorise a temporary time limited repair. If this course were adopted a permanent repair would be necessary within 24 months. On 26 June AirAsia instructed ST Aerospace to undertake the temporary repair. BBAM agreed to reimburse AirAsia up to US$60,000 of the cost in the event that the sale to NAC completed successfully.

36. Meanwhile on 26 June 2008 Boeing recommended wholesale replacement of the skin panel rather than the previously suggested partial solid skin repair. This was a substantial structural repair albeit mitigated by the availability from Boeing of the necessary skin panel assembly free of charge.

37. BBAM put the options to NAC. They were two. First, NAC was invited to accept the temporary repair together with a seven digit figure by way of compensation for the permanent repair which would be required later. This it was expected would enable delivery of the aircraft to be made to NAC by the Final Cut-Off Date 1 August. The alternative was to agree an extended delivery date to enable the permanent repair to be carried out. The sale contract between Pindell and NAC clearly required the aircraft to be delivered in a permanently repaired condition.

38. On 3 July 2008 NAC responded to these proposals. It came as no surprise to BBAM that the temporary repair option was rejected, because of the potential for cost escalation due to additional findings once the old skin was removed. As BBAM's Mr Lynch put it, agreeing to accept an aircraft with a temporary patch repair is a hostage to fortune as you simply do not know what you will find when you open it up 12 months down the line. However NAC rejected the second option also. They declined to extend the delivery date under the sale contract. In explaining NAC's decision, Mr

A Abeledo told BBAM that NAC's potential lessee for the aircraft seemed unlikely, at this point, to be able to meet its commitments. As Mr Abeledo put it, NAC had come to the conclusion that they would rather not become owners of this aircraft. They would of course honour their commitment in the event that the aircraft was delivered in accordance with the agreed delivery conditions, including the permanent repair of the fuselage skin, by 1 August 2008.

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39. It was virtually inevitable that this would not occur. By 4 July ST Aero had completed the temporary repair but said that they had no slot available to carry out the permanent repair. By 7 July the temporary skin repair had been certified fit for service. On 9 July AirAsia told BBAM that it had secured a slot for the permanent C skin repair at the Malaysian Airline System facility in Kuala Lumpur, and on 10 July BBAM agreed to the aircraft going there to undergo the permanent repair. MAS was at this stage advising that the work would take nine days to complete.

40. As at 11 July it was envisaged that the work outstanding at ST Aerospace might be completed by 21 July with the aircraft transferring to Kuala Lumpur on 22 D or 23 July. This would not have enabled the 1 August deadline to be met – as at this stage, redelivery was envisaged on 4/5 August. However the timeline prepared on 11 July was not met.

41. By 23 July the aircraft remained at ST Aero and MAS increased its time E estimate to carry out the permanent repair to 17 days. In response to being advised of this by AirAsia BBAM sent an e-mail of 28 July in which they recorded that AirAsia was in breach of the sub-lease having failed to return the aircraft prior to the Termination Date, 17 June 2008. BBAM put AirAsia on notice that they would hold them responsible for the loss of the sale to NAC in the event that the aircraft should not be returned by 1 August 2008 and should NAC terminate its purchase agreement F with Pindell.

42. On 1 August the aircraft was ferried to Kuala Lumpur and on 5 August MAS started work on the skin replacement. However on the same day NAC terminated the purchase agreement with Pindell. In the event the repair to the big dent occupied G from 5 August to 12 September 2008. By now all urgency to redeliver the aircraft had evaporated. A persistent problem remained over what is described in the industry as the robbing of parts, a practice whereby an aircraft undergoing maintenance is plundered for parts required for installation on aircraft in service. AirAsia suggest that the fact that the redelivery date was extended beyond even September was in part due to the conduct of BBAM in adopting a 'literal approach' to the redelivery H conditions. It is unnecessary to enter into this debate. The fact is that the aircraft was not redelivered until 4 November 2008.

43. After this extensive although necessarily much truncated recital of the facts I can turn to the issues, supplementing my findings where necessary. The following issues arise for determination:

(1) Was there a contractual obligation on AirAsia to redeliver the aircraft by 17 June?

(2) If so, are BBAM estopped from asserting that AirAsia were in that regard in breach of contract?

(3) Can BBAM claim either under one of the contractual indemnities or at common law compensation or damages in respect of the loss of the NAC sale agreement?

(4) Could and would NAC in any event have terminated the sale agreement on account of the condition of the engines following their shop visits to ST Engines?

(5) Which remaining items of BBAM's various claims arising out of the delayed redelivery of the aircraft are recoverable?

(6) The final balance of account as between BBAM's claims and AirAsia's admitted counter-claim of US$2,780,934.25 (US$1,620,934.25 in respect of work done to the engines and US$1,160,000 in respect of unreturned security furnished by AirAsia).

Issue (i) – Was there a contractual obligation to redeliver by 17 June 2008?

44. This is a surprisingly elusive issue. The relevant provisions of the lease are:

> 'CLAUSE 18. REDELIVERY
>
> 18.1. *Redelivery*. Prior to the Termination Date (other than following a Total Loss) Lessee shall, at its own expense, deliver the Aircraft and the Aircraft Documents to a FAA licensed maintenance facility in the State of Registration or another FAA licensed maintenance facility in southeast Asia acceptable to the Lessor (the "Technical Acceptance Location") so that Lessor may inspect the Aircraft in accordance with Clause 18.3. Upon confirmation from Lessor in writing that the Aircraft satisfies the redelivery conditions in Clause 18.2 (the "Technical Acceptance"), Lessee will fly the Aircraft from the Technical Acceptance Location to Dublin International Airport or such other international airport in the European Union as may be mutually agreed to between Lessor and Lessee (such location, the "Return Location") for redelivery to Lessor hereunder. Upon the request of Lessor, the Return Location may instead be an international airport in the United States provided Lessor reimburse Lessee for the incremental costs incurred as a result of flying the Aircraft to such United States airport instead of to Dublin International Airport.'

'Termination Date' is defined in Clause 1, Definitions and Interpretations, as:

> 'Termination Date means the earlier of (i) Expiry Date and (ii) the date when Lessor terminates the leasing of the Aircraft to Lessee pursuant to the terms

A hereof, or (iii) the date when Lessor receives the Agreed Value together with any other amounts then due and unpaid under the Lessee's Documents, following a Total Loss of the Aircraft; provided that if the Term is extended pursuant to Clause 18.4, the Termination Date shall be extended to the date when the Aircraft has been re-delivered to Lessor in full compliance with this Agreement.'

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Expiry Date is likewise defined as being 60 calendar months after the Delivery Date. Clause 18.4, a key provision in this dispute, also provides:

'18.4. *Compliance After Term*. If the time required by Lessee to complete C compliance with any of the provisions of this Clause 18 (including Schedule 4 hereto) shall extend beyond the last day of the Term, the provisions of this Agreement shall, at the option of the Lessor, continue on a daily basis until full compliance by Lessee with all of such provisions. In such case, Lessee shall (without relieving Lessee of any liability for damages of any kind suffered by Lessor by reason of such delay) pay to Lessor upon demand for each day D after and including the Expiry Date until such time as Lessee satisfies all of its obligations under this Clause 18 an amount equal to 150% of the monthly Basic Rent set forth under Clause B(2) of Schedule 14 pro-rated on a daily basis for the period from and including the Expiry Date to but excluding the Return Date; provided, however, if Lessee has made commercially reasonable E efforts to satisfy its redelivery obligations set forth in Clause 18 on or before the Expiry Date, the daily rental owed by Lessee under this Clause 18.4 shall be calculated based on 100% of the monthly Basic Rent set forth under Clause B(2) of Schedule 14 for the first twenty-one days from and including the Expiry Date. Lessee shall not be obligated to pay Basic Rent for any day after the Expiry Date to the extent that Lessee's failure to redeliver the Aircraft in F accordance with Clause 18 was caused solely by the performance of additional work requested by Lessor pursuant to the last sentence of Clause 18.3 or the painting of the Aircraft in any colour other than white. Notwithstanding any continuation of Lessee's obligations under this Agreement, Lessee shall only be entitled to possession of the Aircraft (a) if Lessor so elects and (b) for the G sole purpose of promptly carrying out the works necessary to ensure redelivery in accordance with the provisions hereof. Upon compliance by Lessee with the obligations under this Agreement, Lessor shall deliver to Lessee a redelivery acceptance certificate substantially in the form of Schedule 12 to this Agreement.'

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45. BBAM's case is that under Clause 18.1, prior to 17 June 2008 AirAsia ought to have delivered the aircraft to the Technical Acceptance Location for an inspection to ascertain that the aircraft complied with the Redelivery Conditions. The Technical Acceptance Location could have been in Singapore if BBAM had agreed, which they would have done, Malaysia being the State of Registration.

46. AirAsia points out that technical inspection does not amount to redelivery, and that after technical acceptance the aircraft must be flown to a 'Return Location' which by default is Dublin but which at the option of the Lessor can be in the United States. Here technical acceptance took place on 26 October 2008 and Redelivery occurred on 4 November 2008 at Lasham in England. AirAsia point also to the manner in which Termination Date is defined as being one of three options which include the Expiry Date but with a proviso that if the term is extended pursuant to Clause 18.4, the Termination Date shall be extended to the date when the aircraft has been redelivered to Lessor in full compliance with the Agreement.

47. AirAsia contends that BBAM did extend the lease under Clause 18.4 by rendering to them an invoice dated that day, which claimed Holdover Rent at 150% of the monthly basic rental for the period 17 June to 30 June 2008. Further such invoices were raised subsequently.

48. The contention of AirAsia is thus twofold. First, that the absence of an express obligation to redeliver the aircraft on a specific date means that time for redelivery was not of the essence. Second, that after the 17 June Expiry Date had passed BBAM exercised their option of allowing AirAsia to retain possession of the aircraft so as to perform their obligations under Clause 18 and Schedule 4 of the lease on terms that the lease would be extended.

49. I agree with Mr Shah QC for AirAsia that the provision of a contractual redelivery date could have been made more explicit. I can also see that in certain circumstances there could be a real debate as to whether contractual compliance had been achieved. Such would be the case in circumstances where the aircraft is delivered for technical acceptance prior to the Expiry Date but leaving insufficient time for redelivery to the Lessor at the Return Location to be achieved before the Expiry Date. For reasons which I will develop later I doubt if a few days overrun in practice gives rise to any real difficulty. I doubt if lessors typically make commercial arrangements contingent on their securing redelivery of a leased aircraft on precisely the expiry date under the relevant lease. BBAM contend that delivery to the Technical Acceptance Location ought to have left sufficient time for BBAM before the Expiry Date to verify compliance with the Redelivery Conditions in the manner prescribed by sub-clauses 18.3(a), (b), (c) and (d), the last sub-clause providing for an acceptance flight. Whilst this construction derives some support from Clause 18.3 – 'the period allowed for the Final Inspection shall have such duration as to permit the conduct by Lessor of' the tasks so prescribed, I doubt if this can be the nature of a time limited obligation since the lessee cannot know how long the lessor will in fact take in carrying out the required tasks. However the very minimum content of the obligation cast on the lessee is in my view to deliver the aircraft (and the aircraft documents) to the Technical Acceptance Location prior to the Termination Date for the purpose of an inspection in order to verify that the condition of the aircraft complies with the required redelivery condition. In any normal circumstances the lessee will only tender the aircraft for such inspection after completion of all such work as in good

faith it believes necessary to achieve that compliance. In the present case there is no doubt that AirAsia did not comply with that obligation, and did not come close to complying with it. Indeed, as at 17 June 2008 no Technical Acceptance Location had been designated.

50. In the face of that breach BBAM was by Clause 18.4 presented with an option either to terminate the lease and recover possession of the aircraft or to extend the term of the lease. If the term is extended, as in my judgment here it was, so the Termination Date is extended to the date when the aircraft is redelivered to the lessor in the required redelivery condition. In this case however that option was exercised, and the term extended, only after the lessee had already failed to deliver the aircraft to the Technical Acceptance Location prior to what was then the Termination Date. Clause 18.4 makes clear that the extension of the lease and of the termination date achieved by exercise by the lessor of its option in that regard does not relieve the lessee of his accrued liability for the breach which he has committed by failing to deliver the aircraft to the Technical Acceptance Location prior to the Termination Date. On the facts of this case therefore I am in no doubt that AirAsia's failure to present the aircraft for Technical Acceptance prior to 17 June 2008 amounted to a breach of contract.

Issue (ii) – Are BBAM estopped from asserting that AirAsia were in breach of contract by failing to redeliver the aircraft by 17 June 2008?

51. AirAsia contends that BBAM are estopped from requiring them to redeliver the aircraft by 17 June 2008. AirAsia relies on an estoppel by convention, defined in the leading case in the following terms:

> 'When the parties have acted in their transaction upon the agreed assumption that a given state of facts is to be accepted between them as true, then as regards that transaction each will be estopped against the other from questioning the truth of the statements so assumed.'

See *Amalgamated Investment and Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84. Mr Shah submits that the common assumption under which the parties acted is that the aircraft would not be in a condition to be redelivered by 17 June 2008. He submits that it is plain from the timelines that were produced from 9 May onwards that AirAsia would be unable to deliver the aircraft by that date. He suggests that the Claimants were not expecting the aircraft to be ready by 17 June 2008, and he points out that they did not expressly call upon AirAsia to redeliver by that date. Mr Shah submits that the evidence shows that what in fact occurred was that the parties worked together to try to effect redelivery as soon as was practicable. He submits that the common assumption is reflected by the way AirAsia allowed the Claimants to manage the engines shop visit on their behalf. The engines were returned prior to 17 June 2008. However they were not then technically airworthy because their shop visit reports were being amended by ST Engines at the request of the Claimants.

The fact that these records were not released until 8 July 2008 illustrates he submits the common assumption that the Claimants were not insisting on redelivery by 17 June 2008. Accepting that the Claimants could have procured the amendment of these documents more quickly had time been of the essence he nonetheless submits that that is of no relevance. He submits that what is important is what actually occurred which is that these critical documents were not re-issued until 8 July 2008.

52. I would point out at the outset of the discussion that an assumption that the aircraft would not be capable of redelivery by 17 June, which is the pleaded assumption, is not the same as an assumption that BBAM were not insisting on redelivery by 17 June, which is the assumption advanced by Mr Shah in his closing submissions. As late as 12 May Mr O'Gorman e-mailed Mr Tang as a follow up to discussions asking if he had had any further thoughts regarding the redelivery plan. 'It would' he said, 'be helpful if we could outline a schedule of activities that will occur between now and June 17th'. On 15 May Mr O'Gorman sent to Mr Tang an e-mail referring to 17 June as the scheduled redelivery date, and Mr Tang circulated it internally at AirAsia noting that AirAsia would have to push ST Aero hard for a slot. There was never any suggestion that 17 June was not the date by which redelivery was required to be effected. Indeed as Mr McCarthy put it pithily in evidence 'That was a contractual redelivery date, yes. It is not in issue.'

53. I do not accept AirAsia's case on this point. I agree that once it became apparent that AirAsia would not be putting the aircraft into the ST Aero facility for its redelivery check until 21 May at the earliest, it was apparent that redelivery by 17 June would not be achieved. However both before and after that time the parties conducted themselves on the basis that 17 June was indeed the date by which AirAsia was contractually obliged to redeliver. The fact that the parties co-operated with each other to bring about redelivery as soon as could practically be achieved, consistent with a recognition from 21 May onwards that this would not be achieved by 17 June, does not mean that they did not recognise, and continue to recognise, that 17 June remained the contractual redelivery date. Critically, as it seems to me, AirAsia did not until their closing submissions contend that the parties ever acted upon the basis of a common assumption that redelivery was not contractually required by 17 June. They were right not to do so. The parties simply, from about 21 May, acted upon the basis of a common assumption that redelivery would not be achieved by 17 June. Mr Tang, who was the person most principally concerned on the ground for AirAsia, recognised that BBAM were doing no more than reacting to the date for induction into the ST Aero hangar which was itself a date which was being supplied by AirAsia. All of AirAsia's witnesses accepted that they did not regard BBAM as having given up any legal rights. In particular Mr McCarthy, a highly experienced commercial man, did not think that there was ever 'any suggestion that BBAM was giving up its legal rights'.

54. Reliance upon BBAM's conduct in relation to the engines and the associated documentation takes AirAsia nowhere. As early as 15 February AirAsia told BBAM

that ST Engines had slots for both engines in early March and that turnaround time was 55-60 days. That would have led to their release from their shop visits in May. In the event the engines went into the shop on 11 and 13 March. They were released on 3 and 9 June 2008, i.e. still well in time for a June redelivery. It is true that the shop visit reports released on 11 June were rejected by BBAM as not reflecting the wording that had been agreed between AirAsia, ST Engines and BBAM as being an appropriate description of the work done. However by 11 June everyone knew that the damage to the fuselage which had been discovered on 26 May could not be repaired within such time as would permit redelivery by 17 June. It is common ground that had there been any urgency in the situation BBAM could have procured the necessary correction to the engine documentation within one or two days.

55. It follows that in so far as AirAsia has attempted, belatedly, to rely upon a relevant estoppel precluding BBAM from relying upon their legal rights, the argument simply fails on the facts. There was no relevant common assumption to the effect that redelivery after 17 June would not be regarded as amounting to a breach of contract by AirAsia or that BBAM would not seek to insist upon their legal rights. Having reached this conclusion it is unnecessary for me to consider the effect of Clause 20.4 of the sub-lease which provides:

> 'The rights of both parties against the other or in relation to the aircraft (whether arising under this Agreement or the general law) shall not be capable of being waived or varied other than by an express waiver or variation in writing; and in particular any failure to exercise or any delay in exercising any such rights shall not operate as a waiver or variation of that or any other such right; any defective or partial exercise of any such rights shall not preclude any other or further exercise of that or any other such right; and no act or course of conduct or negotiations on the part of such party or on its behalf shall in any way preclude it from exercising any such right or constitute a suspension or variation of any such right.'

Since AirAsia addressed no argument on this point, I say nothing about it.

Issue (iii) – Can BBAM claim either under one of the contractual indemnities or at common law compensation or damages in respect of the loss of the NAC Sale Agreement?

56. At the outset I should explain the basis upon which the case was argued, bearing in mind that it was Pindell not BBAM which entered into the contract to sell the aircraft to NAC and thus Pindell rather than BBAM which suffered loss consequent upon the inability to complete the transaction by timely delivery to NAC.

57. Clause 20.14 of the sub-lease provides:

A

'*Contracts (Rights of Third Parties) Act 1999*

(a) Each Indemnitee, each Tax Indemnitee and each person referred to in the final paragraph of Clause 11.2(a) may enforce the rights expressed to be conferred on it under this Agreement as the case may be, together with any ancillary rights against the Lessor or, as the case may be, Lessee.

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(b) The consent of the Indemnitees, Tax Indemnitees or persons referred to in the final paragraph of Clause 11.2(a) as the case may be, (in each case other than the Lessor or Lessee) it is not necessary for any variation (including any release or compromise in whole or in part of any liability) or termination of any provision under this Agreement.

C

(c) Except as expressly stated in Clause 10.14 of this Agreement the terms of this Agreement may be enforced only by the party's (sic) hereto and their successors and permitted transferees and assigns.'

D

58. Pindell is included within the definition of 'Indemnitee' in Clause 1 of the sub-lease.

59. Clause 19.1(a) of the sub-lease, which I set out hereafter, gives an indemnity to Pindell as an 'Indemnitee'.

E

60. Pindell submits that a right to enforce the redelivery provisions in Clause 18 of the sub-lease is a right 'ancillary' to its right under Clause 19 to claim an indemnity for late redelivery, and that accordingly Clause 18 provides rights which Pindell can enforce directly against AirAsia under the *Contracts (Rights of Third Parties) Act* 1999, hereinafter 'the Act' because the sub-lease so provides. Pindell also submits that in any event Clause 18 of the sub-lease purports to confer a benefit upon it.

F

61. Pindell relies also upon the indemnity afforded by Clause 17.1(c) of the sub-lease, which I set out hereafter, which expressly provides that the Lessee shall indemnify the Lessor against losses sustained or incurred by Owner, Lessor or indeed any Lender.

G

62. AirAsia does not accept that Pindell can maintain a direct contractual claim for common law damages and challenges each step in the argument deployed by Pindell to the effect that it can. However AirAsia accepts that BBAM is entitled to maintain a claim for substantial damages. It was asserted by BBAM that it has incurred a liability to Pindell for its failure to redeliver on time under the Head Lease and that the incurring of a legal liability to pay Pindell is sufficient to entitle BBAM to claim damages in respect of this liability from AirAsia – see *Total Liban SA v Vitol Energy SA* [1999] CLC 1301; [2001] QB 643. Mr Shah for AirAsia accepted that BBAM could claim on this basis, observing in his final address that obviously if BBAM

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failed in its indemnity claim against AirAsia, so too Pindell would equally fail in its indemnity claim against BBAM.

63. The case thus proceeded on the assumption that if AirAsia is liable to BBAM, so too BBAM must be liable to Pindell, and no real distinction was drawn between the position of BBAM as Lessor and that of Pindell as Owner. Thus at paragraph 185 of Mr Taylor's Closing Submissions the following was asserted:

> 'At the time the sub-lease was concluded, it was in AirAsia's reasonable contemplation that a not unlikely result of any failure to redeliver by the redelivery date would include a loss of profits to the aircraft's owner under a follow-on sale transaction concluded at some point during the course of the sub-lease at a market price.'

64. Whilst therefore Mr Shah for AirAsia asserted that if BBAM failed against AirAsia, so too Pindell would fail against BBAM, I do not think that he ever formally accepted that if AirAsia is liable to BBAM, so too BBAM must be liable in the same amount to Pindell. Technically the starting point of this discussion ought to be an attempt by Pindell to prove that it can recover substantial damages from BBAM in respect of the loss of the sale to NAC. It may be that the position must be the same under both head lease and sub-lease, but without deciding the point I will simply assume, as did the parties, that if BBAM can establish liability against AirAsia, so too Pindell can establish liability in the same amount against BBAM. On that approach, as Mr Shah recognised, it is also unnecessary to decide whether Pindell has a direct cause of action for common law damages against AirAsia. I will simply record that since in my view neither BBAM nor Pindell has in the circumstances a right under Clause 19 to an indemnity from AirAsia in respect of the lost sale to NAC, there is no relevant right to which any other rights can be ancillary in terms of Clause 20.14(a). I also struggle to understand how BBAM's right to enforce the delivery provisions in Clause 18 could properly be said to be a right 'ancillary' to Pindell's right to an indemnity under Clause 19, assuming that the latter existed. Finally, I am far from persuaded that Clause 18 is a term which 'purports to confer a benefit' on Pindell, the alternative route to direct enforceability. As it happens this head lease and sub-lease are back-to-back but in general terms there is no reason why, as Mr Taylor put it, 'having the aircraft in a certain condition on a certain date is a benefit to the Owner' where the head lessee has sub-let. However, I will turn to the question of AirAsia's liability to BBAM on the basis, as did the parties, that this can be determined independently of the position as between Pindell and BBAM and that the one follows inexorably from the other.

65. Before dealing with the issues of principle it is convenient to set out the nature of the claim and the further facts relevant to it. BBAM assert that had the sub-lease been performed by AirAsia effecting a timely contractual redelivery, Pindell would have sold the aircraft to NAC for a net price of US$10.6m, being the headline price of US$12m, reduced by the seller maintenance payments which the aircraft's condition

would have rendered payable, which it is agreed would have been US$1.4m. Following the cancellation of that sale in early August 2008, Pindell were unable to conclude a substitute sale or lease. It was not in dispute that BBAM made reasonable efforts to conclude a substitute transaction. It was also not in dispute that market conditions in the summer and autumn of 2008 were extremely challenging, reflecting the financial crisis which affected all markets that year. Bear Sterns went down in March and, of even greater significance, the collapse of Lehman Brothers occurred on 15 September 2008. Eventually in July 2009 BBAM concluded an eighteen month operating lease with Blue Panorama at a rent of US$90,000 per month, into which the aircraft was successfully delivered.

66. BBAM accept that, in principle, they must give some credit for the actual value of the aircraft that was redelivered by AirAsia. They submit that whilst 4 November 2008 is the earliest date by reference to which such residual value should be assessed, it is not the appropriate date because despite reasonable endeavours they were unable to sell or lease the aircraft at that time. They contend that they should therefore be required only to give credit for the contemporary value of the aircraft, which the valuation experts were able to agree as being of the order of US$4m in February 2010, adjusted by reference to the aircraft's then actual condition. Alternatively, if a value has to be attributed to the aircraft as at 4 November 2008, BBAM say that the evidence demonstrates that that value should be of the order of US$5m, having regard to contemporary indications of interest and reported sales, although both expert valuers came up with a figure in excess of this – Mr Kelly for BBAM US$5.5m and Mr Seymour for AirAsia US$5.8m, adopting their half-life figures. Whatever the figure eventually selected, it is apparent that BBAM's approach based upon the loss of their sale to NAC produces a substantial claim, ranging from in excess of US$6m, as most optimistically presented, to US$5.1m on the basis of their own valuer's 'with hindsight' valuation of the aircraft as at 4 November 2008.

67. As a fall-back, BBAM claim for the loss represented by the decline in the market value of the aircraft between the date when it should have been redelivered, 17 June 2008, and the date when it was redelivered, 4 November 2008. Mr Kelly suggested that the decline in value over that period was US$1.6m. Mr Seymour put it at US$500,000. I would simply observe at this stage that either of those figures would seem to reflect that the market was, between June and November 2008, affected by extreme volatility. As a percentage of value of the aircraft such a decline over four-and-a-half months is, on either showing, very considerable.

68. AirAsia deny that they are in principle liable to compensate Pindell by reference to their lost sale to NAC, that sale having been concluded on terms and at a time over which AirAsia had no control. However AirAsia also contend that that sale was in any event concluded at a price level which reflected special factors at work and was unrepresentative of prices generally achievable in the market at the time. At the trial, this point tended to be explored in terms of the sale price to NAC having been 'extraordinarily high'. The appropriate enquiry is however, I would suggest, simply

whether it was significantly out of line with what ordinarily could be expected in the market.

69. As I have already recorded there was evidence at trial from two experts in valuation. For BBAM, Mr Douglas Kelly gave evidence. He is Vice President of Avitas Inc, an American-based aviation consulting company providing advice on a wide range of matters including appraisal or valuation. For AirAsia Mr Philip Seymour gave evidence. He is President and Chief Operating Officer of the International Bureau of Aviation, a UK-based organisation carrying out similar functions. Both were well qualified to assist the court. In evaluating their evidence I have relied principally upon such contemporary documentary material as can serve to provide a cross-check. Unfortunately that material is sparse.

70. In their reports the experts refer to two types of market valuation. The first is the half-life valuation, which assumes that the aircraft is in half-life condition, i.e. half way between D check, engine shop visit and the expiry of LLPs – life limited parts. The experts call this half-life valuation the 'market valuation'. The experts also refer to an 'adjusted market valuation'. This assumes the aircraft to be in the condition described in the NAC contract of sale, rather than the standard assumption of 'half-life condition', i.e. fresh from D check, engines fresh from shop visit and six thousand cycles remaining on LLPs. It is agreed that this condition is, in certain respects, better than 'half-life' condition. In order to enhance the aircraft's condition from half-life to that required by the NAC contract would involve expenditure of a further approximately US$1.3m. It thus follows that the US$12m offered by NAC assumes a half-life value of about US$10.7m, or rather perhaps that their offer would have been at that level had the required delivery condition been half-life.

71. Certain points emerged very clearly from the evidence as a whole. It was argued on all sides that the market for aircraft is cyclical and that it reached a peak at around December 2007/early 2008. Mr Kelly described this as a 'very hot market'. There was also agreement between Mr Kelly and Mr Seymour that 'the Bear Sterns bankruptcy in March 2008 was a signal that the market was moving down from the peak'. The evidence shows that during 2008 the global financial crisis led to a very substantial fall in aircraft prices. Mr Dugger, senior marketer at BBAM, said that 'the market dropped off a cliff starting in 2008'. There was, he said, a very severe drop in the value of aircraft – 'probably the worst we have seen in the market' and unprecedented in his experience. Mr Abeledo, Vice-President of Sales and Acquisitions at NAC, said that during 2008 prices started 'plummeting'. In his view prices 'dropped at least 30% during the course of the year, especially towards the last part of the year'. The severity of the downturn caused Mr Kelly to make a 'with hindsight' adjustment of the value he attributed to the aircraft in November 2008. He recognised that the tools for valuation which his company had used at the time had failed to capture the true decline in the market. Mr Kelly and Mr Seymour were agreed that 'the financial crisis of September 2008 had a significant negative effect on the market for aircraft. The [lack of (sic)] financing of used aircraft was non-existent

or was very costly, which curtailed aircraft trading activity. There was a significant drop in lease rates and values by the end of 2008.' In his evidence Mr Kelly put the matter rather more starkly. The impact on prices of the events of September 2008 was, he said, more dramatic than that of the terrorist attack on New York in September 2001. It was particularly marked so far as concerned older aircraft types such as the Boeing 737-300.

72. The experts were not agreed as to what they regarded as a 'reasonable market price' for the aircraft in December 2007. It was not of course until February 2008 that NAC committed themselves to purchase the aircraft, albeit at the price provisionally agreed in December 2007. Adjusting their figures so as to make them comparable with the delivery condition which the NAC price of US$12m required, Mr Kelly's figure was US$9.54m and Mr Seymour's was US$7.88m. Mr Kelly's figure derived some support from an offer made by Air Bulgaria at US$9.88m. It also derived some support from a sale by Mitsubishi to NAC at US$10.1m, although it is not known what were the delivery conditions in this contract.

73. Nonetheless the NAC price represents a substantial premium above Mr Kelly's figure. There is I think some force in his observation that when valuing older aircraft, especially a 20-year-old Boeing 737-300, a range of reasonable values is only to be expected and a difference of the order of 25% should not be regarded as 'extraordinary'. There were undoubtedly special factors driving the NAC transaction which made NAC , as Mr Abeledo put it, prepared to pay a little bit more. The business model of NAC included the provision of finance, the operation of aircraft in what Mr Abeledo called 'non-traditional jurisdictions', which included the Middle-East, Indonesia, South America and Africa. As a privately owned company their risk analysis assessment could and did differ from that of traditional sources of finance with an ownership structure involving publicly traded shares. Their financing was naturally at a premium commensurate with the risk. They looked to make a profit not only from the spread between purchase and sale price but also on the finance side of a transaction.

74. NAC's interest in the aircraft was driven by two business opportunities then available to them. The first, and less significant of the two, was a five year operating lease to Jet Time, a Danish charter operator which needed to increase its capacity and could find no 737-300s on the market. This offered the opportunity of a lucrative rental payment of the order of US$180,000 per month. Secondly, NAC had the prospect of concluding with AVE, a charter operator based in Sharjah, a very attractive ten-year financial lease. A ten-year financial lease in respect of a 20-year-old aircraft represented an unusual opportunity. The business of AVE was mostly flying contractors into and out of Iraq. This transaction had advanced to the stage of a Letter of Intent, pursuant to which AVE had paid a deposit. Mr Abeledo could not remember the precise terms of the proposed arrangement, but it would have involved a finance lease pursuant to which AVE paid a monthly instalment of rent and maintenance reserves, with title to the aircraft passing at the end of the ten-year term.

Mr Abeledo confirmed that there would have been a margin for NAC on both the purchase price and the interest element. These margins must have been sufficiently attractive to NAC to induce them to commit to the purchase from BBAM in February 2008, notwithstanding (i) that they had nothing more than a non-binding Letter of Intent from AVE and (ii) that on inspecting the aircraft in Singapore, in, as I infer, January 2008, AVE found its condition unattractive. Mr Abeledo described the result of their inspection in this way:

> 'AVE was not very happy with the technical condition of the aircraft. When they went to see the aircraft in Singapore, the aircraft was parked outside, several parts had been robbed, it was building up moisture and mould inside the cabin. So it was not really a very attractive aircraft to our buyer on a finance lease. They also had a concern with a very large number of dents and buckles which the aircraft had.'

75. There were therefore on any view special factors at work inducing NAC to agree to pay US$12m for the aircraft. On the other hand they agreed that price in the face of what they and evidently their customers perceived as a shortage of Boeing 737-300 aircraft available for sale in December 2007 and February 2008. So far as concerns this last point Mr Shah pointed to the evidence of Mr Kelly that there were in December 2007 15 737-300 aircraft for sale and eleven available for lease, and Mr Seymour's corroborative view that there were at the time 27 Boeing 737-300 aircraft available for sale or lease. However it was unclear to me whether those figures should properly be regarded as glut or famine, given that the operator base was about 1,000 aircraft and 100 operators. Plainly neither NAC nor their customers perceived there as being a plentiful supply, and that is I think rather more telling than expressions of opinion from consultants culled from bare statistics. It was, as I have already remarked, Mr Kelly's perception that the market was 'very hot'. It was also, as can be seen with the benefit of hindsight, at the peak of the cycle. The NAC price was undoubtedly a very good price, in excess of what others were at the time prepared to pay, but it was simply a product of market conditions and I find it difficult to characterise it as 'extraordinary'. The premium over and above that which Air Bulgaria offered or the figure at which Mr Kelly values the aircraft using the conventional tools is not I think such as to render it significantly out of line with what ordinarily could be expected in the market.

76. I accept that the premium over and above Mr Seymour's valuation at US$7.88m is of a different order. However I am satisfied that Mr Seymour's figure is simply too low. Mr Seymour's half life or market valuation for December 2007 and November 2008 was US$6.5m and US$5.8m respectively. The latter figure is in close or at least near agreement with Mr Kelly's 'with hindsight' figure of US$5.5m. However Mr Seymour's two figures presuppose a decline in value of only 10.7% between December 2007 and November 2008. Mr Kelly's half life or market valuation for December 2007 is US$8.2m, producing a decline in value over the following year of 32.9%. This is in line with the contemporary observations to

which I have already referred. The inescapable inference is that Mr Seymour has significantly underestimated the value of the aircraft as at December 2007.

77. I conclude therefore that the sale price to NAC was a very good price negotiated at the very top of the market. This however is not the end of the enquiry. Pindell lost the opportunity to enforce this sale because it was not in a position to tender the aircraft in the required delivery condition by 1 August 2008. Pindell's financial loss consequent thereupon was a direct consequence of the collapse in the market which occurred in 2008. This was on any showing a very volatile market, exemplified by Mr Kelly's appraisal that the market value (half life value) of the aircraft declined from US$7.1m to US$5.5m between 17 June and 4 November 2008 alone – a decline of 22.5% in just four and a half months. AirAsia's contractual obligation was, as I have already held, to present the aircraft for Technical Acceptance prior to 17 June 2008. The stark question is whether under one or other rubric of recovery the consequences of Pindell's sale having been lost in these circumstances may be visited upon AirAsia as a consequence of their breach, which for shorthand I will describe as a failure to redeliver on time.

78. It would I think be surprising if this loss is in principle recoverable under a standard form aircraft operating lease, particularly one in respect of an aircraft which on redelivery was over 20 years old. The discussion naturally revolved around a comparison of this situation with that which obtains when a charterer fails to effect timely redelivery of a time-chartered vessel, for that was the situation under discussion in *The Achilleas*, above, which is itself naturally the starting point of any contemporary discussion of the principle to be applied. The analogy is however far from exact. Starting with the most obvious point of difference, a ship, particularly a dry cargo ship as opposed to some of the more sophisticated LNG carriers and other specialised vessels, is very different in nature from a passenger aircraft. It is obvious that the latter is in principle far more vulnerable to a technical problem which will render it wholly, if temporarily, unusable. Ships do suffer major engine breakdowns, but the range of problems having a similarly paralysing effect is obviously far smaller than in the case of an aircraft. Secondly, and perhaps more tellingly, an aircraft operating lease is significantly different in character from a time charter party. Under a time charter the owner retains possession of the ship and is responsible for its maintenance and for its crewing and navigation. The charterer has a right to give instructions as to the vessel's employment, making therefore essentially commercial decisions as to the commitments which can be achieved during the period for which the vessel is at its disposal. Under an operating lease the position is very different. The lessee takes possession of the aircraft and becomes responsible for its maintenance and insurance. After delivery the aircraft, engines and every part are at the sole risk of the lessee, who therefore bears the risk of loss, theft, damage, destruction and unexpected mechanical problems.

79. It was BBAM's evidence that something of the order of 60% of modern passenger jet aircraft are operating under an operating lease in this or similar

form. Such leases are entered into by national flag carriers and charter or budget operators alike, notwithstanding a flag carrier purchasing an aircraft outright from a manufacturer would probably and generally secure more attractive discounts than does typically a leasing company. According to Mr McCarthy, there are many factors involved in the decision by an airline whether to buy or to lease, not least of course strength of the balance sheet and ability to borrow. However a principal driver in the decision is the knowledge that business will fluctuate and that capacity may need to be adjusted to deal with the vagaries of market conditions. The reason, he said, why '60% of the world's fleet is leased is that airlines take a view that they have so many variables in their business model that one of the variables ... that they don't want 100% exposure to is the aircraft marketplace, the value of aircraft'. He described the possibility of a 'penalty' in the nature of the liability sought to be fixed upon AirAsia in this case as being part of the risks that an airline would accept in entering into a lease as 'just mind-boggling for the industry, simply because no airline would lease aircraft if it was exposed to the kind of damages that are proposed here'. It would, he said, be 'easier to buy an aircraft if we are going to be exposed to this kind of loss'. I make due allowance for the fact that Mr McCarthy has an interest in the outcome of the litigation and I accept that there may here be some hyperbole. Nonetheless, I was impressed by his evidence and the authority with which he gave it. He plainly has a deep and contemporary knowledge and understanding of the airline business. Making the allowance I have mentioned, I consider that I should regard his evidence as describing an important part of the background or matrix in the context of which the operating lease was entered into.

80. There are some further obvious practical considerations, to some of which Mr McCarthy made reference. It is obvious that the sale by Pindell to NAC was a transaction of which AirAsia had no knowledge when made and over the terms of which it had no influence. In particular, AirAsia had no control over the length of the 'window' agreed by Pindell and NAC between the last date for redelivery by AirAsia to BBAM and the last date for delivery by Pindell to NAC. As it happens the window was six weeks, which proved insufficient to enable Pindell to tender the aircraft in the required condition. The evidence demonstrates that, as one would expect, delivery windows are a matter of negotiation. According to Mr Dugger, in his experience more than 50% of transactions are open-ended, but a delivery window when agreed could be of anything from 30 to 120 days. Mr Lynch of BBAM thought that most purchase leases had a long stop date. For Mr Robinson, BBAM's expert in market practice, a 90 day window was not unusual. For his part he thought open-ended transactions were less common – unusual but not unknown, probably in no more than 10% of transactions. The evidence establishes that 'drop-dead' provisions are plainly not uncommon. It also establishes that a six week delivery window is not unusual, but nor is it standard. This evidence was at a high level of generality. In retrospect, I am not sure that any of this evidence was necessarily directed to the particular case of the sale of an over 20-year-old Boeing 737-300.

81. Had the redelivery window here been one day or one week, or even I suspect two or three weeks, I would have unhesitatingly concluded that BBAM's claim, at any rate for simple damages for breach of contract, could not possibly succeed. That is because the evidence demonstrates that late redelivery of aircraft is common. There was a debate as to whether delay was typically to be measured in days rather than weeks. The BBAM witnesses tended to suggest the former. But their expert on market practice, Mr Robinson, had experience of delays, which he characterised as unusual, lasting weeks and, even more unusually, of delays measured in months. Redelivery by AirAsia of the Mitsubishi 737-300 to which I have referred earlier was delayed because of problems with the landing gear. It is obvious that the older the aircraft the more likely it is that unforeseen problems will delay delivery. The evidence demonstrated that for 20-year-old Boeing 737-300s this was a well-known problem. This is reflected in the evidence of AirAsia to which I have already referred in paragraph 32 above, to the effect that ordinarily they would have wished to have a period of the order of one to two months in which to perform a redelivery check for this aircraft. Thus any lessor who concluded a sale or follow-on lease of a 20-year-old 737-300 which was dependent upon delivery being effected within two or three weeks of the scheduled redelivery from an existing long term lease would be taking an obvious risk. Looking at the matter in entirely conventional terms, I would not regard the loss of that contract, if it occurred, as either arising naturally, according to the usual course of things, from the mere fact of late redelivery or as being such as might reasonably be supposed to have been in the contemplation of the lessor and the original lessee at the time they entered into the original lease as the probable result of late redelivery. In most cases the lessor would have negotiated a more generous if not open-ended delivery window. In the great multitude of aircraft leases, particularly of elderly aircraft, the loss of a sale or follow-on lease would not ordinarily occur in consequence of late redelivery from the lease, just as in *Hadley v Baxendale* itself it was concluded that in the great multitude of cases of millers sending off broken shafts to third persons by a carrier under ordinary circumstances, the millers would not, in all probability, be unable to operate their mill until they received a new shaft modelled on the broken shaft. Thus in ordinary circumstances the millers might have a spare shaft. Alternatively the machinery of the mill might be in other respects defective, rendering it temporarily inoperative even had the replacement shaft arrived more quickly. Thus I have to ask myself whether the result here is different, where the window was not two or three weeks or less but was six weeks. Again, in my view, it would be surprising if in the latter case a different result ensued. Not only does this raise the question where is the line to be drawn. It raises the question whether as between lessor and lessee the lessee assumes the risk of market fluctuation in value or rental value in the event of a breach consisting in late redelivery.

82. I have not so far in this discussion mentioned Clause 18.4 of the sub-lease, the terms of which I have set out in paragraph 44 above. However it provided for payment of rent at 150% of the basic rent in the event of late redelivery, with a possible exception of the first 21 days overrun in the event that the lessee has made commercially reasonable efforts to satisfy its redelivery obligations. The latter

exception is recognition that despite the exercise of commercially reasonable efforts late redelivery may occur. To my mind this of itself militates against a contractual allocation to the lessee of risk for market fluctuation consequent upon late redelivery. Wisely Mr Shah did not argue, as at one time AirAsia might have wished to do, that Clause 18.4 provides an exclusive remedy for late redelivery in the shape of holdover rent. That argument, if pursued, would have ignored the words in parentheses 'without relieving the Lessee of any liability for damages of any kind suffered by Lessor by reason of such delay'. Mr Shah did however rely on the stipulation for holdover rent as providing not just an incentive for early or timely redelivery but as providing also compensation for loss of use of the aircraft after the scheduled redelivery date. Given, he submitted, that BBAM would be compensated for loss of use during the period of delay, the imposition of additional liability for the loss of the future sale would result in an unquantifiable, unpredictable, uncontrollable and disproportionate liability.

83. Both parties relied upon evidence from experts in what was said to be relevant market practice. For BBAM Mr Alan Robinson, Managing Director of ALM Aircraft Leasing and Management, gave evidence. ALM is a consulting company specialising in aircraft remarketing, lease management and airline advisory services. For AirAsia Mr Charles Cleaver, Senior Vice President of Cabot Aviation, gave evidence. The business of Cabot is similar to that of ALM. Mr Robinson's conclusion was:

> 'I have concluded that the loss suffered by the Claimants was a kind for which the Defendant ought fairly to be taken to have accepted responsibility, since it is universally the case within the aircraft operating lease industry, that a lessee takes responsibility for the losses of the lessor which flow directly from a lessee's inability or failure to redeliver the aircraft on time and in the required redelivery condition.'

Mr Robinson's reason for this conclusion was that:

> 'This is one of the cornerstone principles that is enshrined in a standard form of aircraft operating lease agreement.'

To my mind this amounts to no more than saying that the question of allocation of risk is a matter of construction of the contract, and Mr Robinson's oral evidence confirmed that this was in truth his approach. I respectfully agree that the court is concerned with the question of construction but the court must also resolve it, unassisted by another person's view as to what the contract means. It was however significant that Mr Robinson was aware of only one other claim similar to the present against a lessee by a lessor in respect of a sale lost in consequence of late redelivery. For whatever reason he had not thought fit to mention this in his expert's report prepared for the trial. The claim had apparently been compromised, just as had apparently a claim made by Mitsubishi against AirAsia in respect of the late redelivery of the Boeing 737-300 to which I have referred several times already in the course of this judgment. That latter claim was, according to Mr McCarthy, settled on effectively a nuisance

and face-saving basis, which is in the circumstances a plausible explanation. I accept Mr McCarthy's evidence about this. Mr Cleaver's evidence was I am afraid wholly unhelpful, although that was not necessarily his fault. He was inclined completely to ignore the terms of the contract. The resolution of the issue did not, he said, depend on what the lease said but on what the market practice says. In English law for a market practice to be relevant to the resolution of a contractual dispute it must among other things not be inconsistent with the terms of the contract.

84. Like Flaux J in *The Amer Energy* [2009] 1 Ll Rep 293, Cooke J in *Classic Maritime Inc v Lion Diversified Holdings Bhd* [2010] 1 CLC 445 and Hamblen J in *Sylvia Shipping Co Ltd v Progress Bulk Carriers Ltd* [2010] EWHC 542 (Comm); [2010] 1 CLC 470, I do not consider that the decision in *The Achilleas* has effected a major change to the approach to be adopted to the recoverability of damages for breach of contract. In any event I am bound by the rationalisation of the rule as expounded by the Court of Appeal in *Supershield Ltd v Siemens Building Technologies FE Ltd* [2010] 1 CLC 241 where at para. 43 Toulson LJ said:

> '*Hadley v Baxendale* remains a standard rule but it has been rationalised on the basis that it reflects the expectation to be imputed to the parties in the ordinary case, i.e. that a contract breaker should ordinarily be liable to the other party for damage resulting from his breach if, but only if, at the time of making the contract a reasonable person in his shoes would have had damage of that kind in mind as not unlikely to result from a breach. However, *South Australia* [1996] CLC 1179 and *Transfield Shipping* [2008] 2 CLC 1 are authority that there may be cases where the court, on examining the contract and the commercial background, decides that the standard approach would not reflect the expectation or intention reasonably to be imputed to the parties. In those instances the effect was exclusionary; the contract breaker was held not to be liable for loss which resulted from its breach, although some loss of the kind was not unlikely. But logically the same principle may have an inclusionary effect. If, on the proper analysis of the contract against its commercial background, the loss was within the scope of the duty, it cannot be regarded as too remote, even if it would not have occurred in ordinary circumstances.'

85. I continue to have reservations about equating the position of BBAM to that of an owner who is also a lessor. Nonetheless, approaching the matter on that basis, as did the parties at trial, it would have been obvious to the parties when they made their contract in 2003 that the lessor would be likely, at or before the end of the lease, either to conclude another lease or to sell the aircraft, so as to take advantage of what remained of the aircraft's useful life. It would also have been obvious to the contracting parties that the lessor would be likely in its own interest to try to structure the arrangements so that there was the minimum possible interval between redelivery from the existing lease and delivery into the new arrangements. It would also be obvious to them that market conditions fluctuate, and may fluctuate rapidly in response to events over which the parties have no control. Furthermore, it was the

A evidence of Mr Carl Nelkin that when lessor and lessee enter into a lease agreement, it is possible for them to contemplate that if the aircraft is redelivered very late, it may be that as a result of that lateness the lessor will be unable to deliver the aircraft into the new lease or the new sale, because he may have missed the delivery date, in which event the lessor will have to go out into the market to make new arrangements. Mr Nelkin is an Irish solicitor specialising in aviation with 21 years' experience of B dealing with aircraft leases. He had been closely involved in the negotiation of this lease and, with Mr McCarthy, attended lengthy meetings with BBAM personnel in April 2003. It was common ground that at no stage during these negotiations was there any discussion of BBAM's intentions as to the use or disposal of the aircraft at the end of the projected lease, which was of course five years away, and no discussion C of the prospect of losses arising as a result of a loss of a prospective sale or lease in the event of late redelivery.

86. However, having given very careful consideration to all the evidence as to the nature of this contract and taking into account the structure of the contract, I do not consider that reasonable contracting parties in the shoes of BBAM and AirAsia D would, when making this contract, have had it in mind that the loss of a follow-on sale or lease was not unlikely to result from a failure by the lessee to effect timely redelivery. In one sense this follows from my acceptance of Mr McCarthy's evidence to the effect that for a lessee the 'ownership issue' is 'almost immaterial', by which he meant, I think, that one reason for an operator entering into a lease is so that he E need not contemplate the possibilities as to the future value or use of the aircraft on expiry of the lease. I would however stress that my overall conclusion is fact-specific, reached in the context of the agreement in 2003 of a five year operating lease in respect of a 1987-built Boeing 737-300.

87. If it were relevant or necessary to go further, I would also conclude that on a F proper interpretation of the contract against its commercial background, the loss of a follow-on lease or sale in the event of late redelivery was not loss of a type for which the lessee assumed responsibility. In reaching that conclusion I have not overlooked that Clause 18.4 of the sub-lease expressly contemplates that there may be loss suffered by the lessor by reason of the delayed redelivery for which the lessee may G be liable and for which holdover rent is not an exclusive remedy. One can envisage many types of such loss and expense. Such loss does not however, in my judgment, encompass the loss of a follow-on lease or sale.

88. Independently of the above conclusions, I have in any event concluded that the loss suffered in this case was not the ordinary consequence of late redelivery but H was rather caused by the extremely volatile market conditions in 2008. It was those conditions which meant that Pindell could not, as the parties would otherwise have expected, conclude in the market a substitute sale on terms broadly similar to that which they had lost. It is I believe axiomatic that such losses are irrecoverable, as expressly held by Lord Rodger, Lord Walker and Baroness Hale in *The Achilleas*. I am not sure that for present purposes it would be right to concentrate solely on market

conditions between 17 June and 4 November 2008, but for the avoidance of doubt, as I have already pointed out in paragraph 67 above, the market conditions during this period were of extreme volatility.

89. I do not need to decide whether under an aircraft lease in this form a claim for the difference between the lease rent and the contemporary market rent during the period of overrun after the contractual redelivery date may be maintainable. No such claim is made in this case, for obvious reasons. If any such claim were maintainable it would plainly be necessary to give credit for the payment of holdover rent.

90. Having concluded that BBAM has no claim against AirAsia at common law in respect of the NAC Sale Agreement, I turn next to consider whether it can claim under one or other of the contractual indemnities. Two such indemnities are relied upon, that at Clause 17.1(c), Payments on Event of Default, and that at Clause 19.1(a)(i). The indemnity at Clause 17.1(c) is as its sub-title suggests dependent upon proof of an event of default, so I must set out also the relevant parts of Clause 16, which deals with events of default.

> 'Clause 16. *Default*
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> 16.1. *Classes of Events*. Each of the following shall constitute an Event of Default.
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> . . .
>
> (e) Lessee fails to observe or perform any of its obligations (other than the obligations mentioned in paragraphs (a), (b), (c) and (d) above) under any of Lessee's Documents or under any undertaking or arrangement entered into in connection herewith or therewith and Lessee's failure is incapable of being remedied or, if capable of being remedied, is not remedied to Lessor's reasonable satisfaction within thirty days after notice from Lessor requiring such remedy; provided that nothing in this paragraph (e) shall permit operation of the Aircraft otherwise than in accordance with all applicable laws;
> . . .
>
> 16.2 *Lessor's Rights*. Upon the occurrence of any Event of Default and any time thereafter so long as the same shall be continuing, Lessor may at its option by notice in writing to Lessee treat such event as a repudiation by Lessee of its obligations under this Agreement or declare this agreement to be in default; provided that, upon the occurrence of any Event of Default specified in Sections 16.1(h), (i), (j), (k), (l), (m) or (n), this Agreement shall automatically be deemed to have been repudiated by Lessee and declared in default. Once this Agreement has been repudiated by Lessee or declared in default, or is deemed to have been repudiated by Lessee or declared in default, in accordance with the foregoing sentence then, and at any time thereafter,

Lessor shall be entitled automatically to exercise any of the following remedies as Lessor in its sole discretion shall elect, to the extent permitted by applicable law then in effect without making demand or giving notice or the taking of any other action:

(a) proceed by appropriate court action or actions, either at law or in equity, to enforce performance by Lessee of the applicable covenants of Lessee hereunder and to recover damages for the breach thereof and to rescind this Agreement' and/or

(b) terminate the leasing of the Aircraft hereunder by written notice and repossess the Aircraft.

(i) require that the Lessee, and Lessee shall upon the written request of Lessor, immediately return the Aircraft to Lessor in the manner specified in such notice, in which event such return shall not be delayed for purposes of complying with the return conditions specified in clause 188 hereof (none of which conditions shall be deemed to affect Lessor's possession of the Aircraft) or be delayed for any other reason. Notwithstanding the foregoing, at Lessor's option, Lessee shall be required thereafter to take such actions as would be required by the provisions of this Agreement if the Aircraft were being returned at the end of the Term.

(ii) sell at private or public sale, as Lessor may determine, or hold, use, operate or lease to others the Aircraft as Lessor in its sole discretion may determine, all free and clear of any rights of Lessee, in each case to the extent permitted by applicable law;

In effecting repossession, Lessor and its representatives and agents, to the extent permitted by law shall: (i) have the right to enter upon any premises where it reasonably believes the Aircraft, the Airframe, and Engine or Part to be located and take immediate possession of and, at Lessor's sole option, remove the same (and any engine or part which is not an Engine or Part but which is installed on the Airframe, subject to the rights of the owner, lessor or secured party thereof) by summary proceedings or otherwise; (ii) not be liable, in conversion or otherwise, for the taking of any personal property of Lessee or any other person which is in or attached to the Aircraft, the Airframe, and Engine or Part which is repossessed; provided, however, that Lessor shall return to Lessee or such other person at Lessee's expense all personal property of Lessee or such other person which was on or attached to the Aircraft at the time Lessor re-takes possession of the Aircraft; (iii) not be liable or responsible, in any manner, for any inadvertent damage or injury to any of Lessee's property in repossessing and holding the Aircraft, the Airframe, an Engine or Part, except for that caused by or in connection with Lessor's wilful misconduct or recklessness; (iv) have the right to maintain possession of and

dispose of the Aircraft, The Airframe, an Engine or Part on any premises owned by Lessee or under Lessee's control; and (v) have the right to obtain a key to any premises at which the Aircraft, the Airframe, and Engine or Part, may be located from the landlord or owner thereof.

If required by Lessor, Lessee shall assemble and make the Aircraft, the Airframe, and Engine or Part available at a place designated by Lessor in accordance with Clause 18. Lessee hereby agrees that, in the event of the return to or repossession by Lessor of the Aircraft, the Airframe, Engine or Part, any rights in any warranty (express of implied) heretofore assigned to Lessee or otherwise held by Lessee shall without further act, notice or writing be assigned or reassigned to Lessor, if assignable.

No remedy referred to in this Clause 16.2 is intended to be exclusive, but, to the extent permissible hereunder or under applicable law, each shall be cumulative and in addition to any other remedy referred to above or otherwise available to Lessor at law or in equity; and the exercising or beginning of exercise by Lessor of any one or more of such remedies shall not preclude the simultaneous or later exercise by Lessor of any of all of such other remedies. No express or implied waiver by Lessor of any Default shall in any way be, or be construed to be, a waiver of any further or subsequent Default. To the extent permitted by applicable law, Lessee hereby waives any rights now or hereafter conferred by statute or otherwise that may require Lessor to sell, lease or otherwise use the Aircraft or any Engine which may otherwise limit or modify any of Lessor's rights or remedies hereunder.

Lessee hereby appoints each of Owner and Lessor as Lessee's irrevocable agent and attorney-in-fact to execute all documents deemed necessary to release, terminate and voice Lessee's interest in the Aircraft leased hereunder, to de-register and export the Aircraft and to file said documents for recordation with the Aviation Authority and any other appropriate agency; provided that neither Owner nor Lessor will use this agency unless an Event of Default has occurred and is continuing or the leasing of the Aircraft hereunder has been terminated.

Clause 17. *Payments on Event of Default*

17.1. *Payments*. Upon the occurrence of any Event of Default, and at any time thereafter, whether or not Lessor shall have exercised, or shall thereafter exercise, any of its rights under Clause 16.2, Lessee shall, upon receipt of notice from Lessor:

(a) pay to Lessor all arrears of Rent and any other sums (whether in respect of interest, costs, fees, expenses or otherwise) then accrued under Lessee's Documents;

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(b) pay to and indemnify Owner and Lessor against all fees, costs and expenses (including legal, professional, inspection and out-of-pocket expenses and other costs but without duplication of any amounts referred to in sub-clauses (a) or (c) of this Clause 17.1) payable or incurred by owner, Lessor and/or the Lender(s) in connection with such Event of Default or the enforcement of, or preservation of any of Lessor's rights under, this Agreement or in respect of recovering possession of the Aircraft or carrying out any works or modifications required to place the Aircraft in the condition specified in Clause 18; and

B

C

(c) pay to and indemnify Lessor against any loss (including loss of profit), damage, expense, cost or liability that Owner, Lessor or any lender may sustain or incur as a result of the occurrence of any Event of Default and/or termination of the leasing of the Aircraft pursuant to Clause 16.2 (an 'Event of Default Loss'), including, without limitation, (A) any loss of profit suffered by Owner and Lessor (but not any lender) because of the inability to place the Aircraft on lease with another lessee on terms as favourable to Owner and Lessor as the terms hereof or because whatever use, if any, to which Owner or Lessor (but not the Lender) is able to put the Aircraft upon its return to Lessor (or the funds arising upon a sale or other disposal thereof) is not as profitable as leasing the Aircraft in accordance with the terms hereof would have been and (B) any loss, cost, expense or liability sustained or incurred by Owner, Lessor of any Lender owing to Lessee's failure to redeliver the Aircraft in the condition required by this Agreement but excluding any costs or expenses not reasonably incurred by Lessor after all Events of Default have been cured by Lessee. Lessor will endeavour to use reasonable efforts to mitigate any such Event of Default Loss that it may incur; provided, however, such obligation on the part of the Lessor shall not include or give rise to any obligation to consult with Lessee about any Event of Default Loss or mitigation effort, nor shall any failure to so mitigate prejudice any of Lessor's, Owner's of Lender's rights under this subclause (C) or any other rights under this Agreement.

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Clause 19. *Indemnities*

19.1. *General Indemnities*

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(a) Lessee hereby agrees at all times to indemnify, protect, defend and hold harmless each Indemnitee from and against all and any liabilities, losses, claims, proceedings, damages, penalties, fines, fees, costs and expenses whatsoever (any of the foregoing being referred to as a 'Claim') that any of them at any time suffers or incurs:

(i) arising directly or indirectly out of, or in any way connected with, the manufacture, ownership, possession, registration, performance, transportation, management, control, use or operation, design, condition, testing, delivery, leasing, maintenance, repair, service, modification, overhaul, replacement, removal or redelivery of the Aircraft (either in the air or on the ground) or any part of the Aircraft or Aircraft Documents, whether or not such Claims may be attributable to any defect in the Aircraft or any part thereof or the Aircraft Documents or to the design, testing or use thereof or to any maintenance, service, repair, overhaul, or to any other reason whatsoever (whether similar to any of the foregoing or not), and regardless of when the same shall arise (whether during, or after termination of, the leasing of the Aircraft under this Agreement);

. . .

(b) The following are excluded from Lessee's agreement to indemnify any particular Indemnitee under Clause 19.2(a):

. . .

(v) any Claim to the extent covered pursuant to another indemnity provision of this Agreement;

. . .

(c) An Indemnitee shall promptly after obtaining actual knowledge thereof notify Lessee of any Claim as to which indemnification is sought; provided that a failure to so notify will not diminish or relieve Lessee of any obligations thereunder, except to the extent Lessee's successful defense of any Claim is precluded thereby. Without prejudice to the obligation of Lessee to indemnify pursuant to this Clause 19.1 and provided that no Event of Default has occurred and is continuing, Lessee shall have the right to investigate and, in its discretion, to defend or compromise (other than with respect to a compromise of a non-monetary Claim, the compromise of which may adversely affect the indemnitee), any Claim for which indemnification is sought under this Clause 19.1 and each Indemnitee shall cooperate at Lessee's cost with all reasonable requests of Lessee in connection therewith; provided that (i) such proceedings do not involve any material risk of loss or forfeiture of title to the Aircraft (unless Lessee shall have posted a bond or other security satisfactory to Lessor in respect of such risk) or any material risk of any civil or criminal penalty being assessed against any Indemnitee and (ii) Lessee shall have agreed to indemnify, and shall indemnify on demand, such Indemnitee in a manner reasonably satisfactory to it for all costs and expenses which it may incur in connection with such Claim and shall deliver to such Indemnitee a written acknowledgement to indemnify it whether or not any contest of such Claim is successful. Lessee shall be subrogated to such Indemnitee's rights in any matter with respect to which Lessee has actually reimbursed such Indemnitee

A for amounts expended by such Indemnitee or for which Lessee has actually paid such amounts directly pursuant to this Clause 19.1; provided, however that Lessee may not enforce any such right of subrogation against any Indemnitee. Where Lessee or its insurers undertake the defense of an Indemnitee with respect to a Claim, no additional legal fees or expenses of such Indemnitee in connection with such defence of such Claim shall be indemnified hereunder B unless such fees or expenses were incurred at the request of Lessee or such insurers; provided, that if in the written opinion of counsel to such Indemnitee an actual or potential material conflict of interest exists where it is advisable for such Indemnitee to be represented by separate counsel, the reasonable fees and expenses of such separate counsel shall be borne by Lessee. Subject to the C requirements of any policy of insurance, any Indemnitee may participate at its own expense in any judicial proceeding controlled by Lessee pursuant to the preceding provisions, and such participation shall not constitute a waiver of the indemnification provided in this Clause 19.1. Nothing in this Clause 19.1 shall be deemed to require an Indemnitee to contest any Claim or to assume responsibility for or control of any judicial proceedings with respect thereto' D

91. In my judgment any claim under these indemnities is simply precluded by my conclusion that the loss in respect of which BBAM seeks an indemnity was caused by extremely volatile market conditions. However in case that conclusion is wrong I proceed to consider the matter more generally.

E

92. By Clause 1 of the sub-lease 'Lessee's Documents' includes 'this Agreement'. The obligation to redeliver is not one of those mentioned in paragraphs 16.1(a)-(d). No notice requiring remedy of the breach was served. The first question which arises therefore is whether AirAsia's failure to redeliver on time was incapable of being remedied. If it was so incapable, it constituted an event of default. Mr Shah relied F upon *Expert Clothing Service & Sales Ltd v Hillgate House Ltd* [1986] Ch 340 as showing that in the law of landlord and tenant a breach of a positive covenant is ordinarily capable of remedy by the performance of the covenant and the payment of compensation. He points out also that in argument in that case counsel for the Defendants, Mr David Neuberger, gave as an example of a breach incapable of G remedy a breach of a positive covenant which in the event would only be capable of being fully performed, if at all, after the expiration of the relevant term. Here he pointed out the term had been extended by the operation of Clause 18.4. It is true that the term was extended, although only after AirAsia had already failed to deliver the aircraft to the Technical Acceptance Location prior to what was then the Termination Date. The original term had therefore expired, albeit it had subsequently H been extended. As Mr Shah accepted, the operating lease here is removed from the field of landlord and tenant. I do not consider that the breach consisting in failing to deliver the aircraft to the Technical Acceptance Location prior to the originally agreed Termination Date was capable of being remedied by subsequent delivery. There was therefore, in my judgment, an event of default.

93. This notwithstanding, I do not consider that Clause 17.1(c) avails BBAM. On its true construction I do not consider that it extends to a loss which BBAM here seeks to recover. As Mr Shah points out, Clause 17.1(a) requires payment of accrued rent, plainly in contemplation of early termination. Clause 17.1(b) requires payment of all fees or costs incurred as a consequence of an Event of Default. What is contemplated are the incidental costs in having to deal with an Event of Default such as costs of having to recover possession. Clause 17.1(c) deals with a loss and damage caused by an Event of Default or termination of the leasing. The type of loss and damage which is contemplated is loss of the bargain contained within the lease. The meaning of the words 'any loss' as used in this clause is informed by the specific examples which the draftsman has chosen to use. These examples are significant because they set out the two types of loss that one might reasonably expect from an Event of Default. The first is loss of bargain, where following premature termination the lessor has to return to the market and is unable to secure a new lease at a rate as favourable as that under the lease for the balance of the term. The second is where because of an Event of Default the lessee has failed to redeliver the aircraft in the condition required under Schedule 4. In this context therefore 'any loss' was not in my judgment intended to include the loss of a future lease or sale into which the lessor proposed to place the aircraft on expiry of the contractual term.

94. In these circumstances I do not need to decide the further question whether a loss may be recovered pursuant to the indemnity available under Clause 17.1(c), even though it was not within the reasonable contemplation of the parties as not unlikely to result from the relevant event of default. This is as Staughton LJ observed in *Total Transport Corp v Arcadia Petroleum Ltd (The Eurus)* [1998] CLC 90, a question of construction of the contract. I would simply note that nothing said in that case gives any real encouragement to the argument that BBAM can here recover a loss of a type which would not be within the reasonable contemplation of the parties as not unlikely to result from an Event of Default consisting in a failure to make timely redelivery of the aircraft.

95. I also agree with Mr Shah that Clause 19.1 does not avail BBAM. Its scope is limited to third party claims against the relevant Indemnitee that arise out of the operation of the aircraft at any time whilst it was in the possession or control of AirAsia. The opening part of Clause 19.1(a) combined with 19.1(a)(i) contemplates that AirAsia will indemnify and hold harmless BBAM and Pindell in respect of any liabilities, losses or damages that either of them suffer arising out of the redelivery of the aircraft. The broad language of Clause 19.1(a) must obviously be read in the context of 19.1 as a whole and in particular Clause 19.1(c). Clause 19.1(a) expressly defines the indemnity as being in respect of a 'Claim'. Sub-paragraph (i) is directed to a liability arising out of the operation or use of the aircraft by AirAsia, which would include operational aspects of redelivery. An example might be an accident during a redelivery test flight or the positioning flight to the redelivery location which could result in a claim against the lessor or owner. Clause 19.1(b) contains a number of exclusions, which include a Claim covered by another indemnity provision of the

Lease. Most tellingly Clause 19.1(c) contains conditions consistent with standard claims handling. Hence there is an obligation to give notice of any Claim in respect of which an indemnity is sought, a duty to co-operate in the investigation and defence of the Claim and the right to subrogation to the extent that AirAsia has indemnified BBAM or Pindell. The language and content of these provisions show that Clause 19.1 does not contemplate an indemnity in respect of Pindell's own financial loss or BBAM's liability to Pindell. Rather they connote a third party making a claim against the Lessor or Owner consequent on AirAsia's operation of the aircraft. On BBAM's construction of the clause the Lessee could maintain a claim for loss arising out of redelivery even if the redelivery involved no breach of contract.

Issue (iv) - Could and would NAC in any event have terminated the sale agreement on account of the condition of the engines following their shop visits to ST Engines?

96. In view of my conclusions thus far this issue does not arise. I will therefore deal with it relatively shortly. AirAsia contends that even had it redelivered the aircraft on time it is 'probable' that NAC would still have rejected the aircraft on the ground that one or both of its engines did not comply with the delivery conditions in the NAC contract. BBAM contends that the engines did comply with the delivery conditions and what is more that Mr Tom Underhill, on NAC's behalf, acknowledged that that was so by signing off on the Engine Shop Reports and Engine Overhaul Records.

97. BBAM is in my judgment plainly right on both points. BBAM's technical case was supported by expert evidence from Ing. Paolo Lironi, an executive director of SGI Engine Advisory BV. He was appropriately qualified with extensive relevant experience. He gave his evidence with authority derived from his obvious clear understanding of the technical issues about which he was asked. For AirAsia evidence in this discipline was again given by Mr Philip Seymour, who had earlier given evidence on questions of valuation. His evidence on the technical issues was unconvincing and I am afraid that he gave the impression that he was out of his depth. To some extent this impression was compounded by the circumstance that there had evidently been no collaboration between Mr Seymour and the AirAsia technical personnel such as Mr Tang and Mr Yap, who could have told him whether, for example, the engines were fitted with turbine clearance control ('TCC') timers. Thus some of Mr Seymour's evidence was based upon speculation as to features of the engines which could have been clarified. Thus it was only after Mr Seymour had completed his evidence that AirAsia made clear that it was not running a case that TCC timers were either not fitted to the engines or were inoperative, both points about which Mr Seymour had speculated and as to which Mr Tang or Mr Yap could have given evidence if asked. I found this approach puzzling, as was also AirAsia's determination to ignore that NAC, in the person of Mr Underhill, had expressed its contemporary satisfaction with the work done to the engines.

98. Central to the argument is Schedule 3(e) of the NAC contract which provides that:

> 'Each Engine (and each module thereof) shall be fresh from a performance restoration shop visit (the 'Engine Delivery Condition') and no Engine life-limited Part shall have less than 6,000 Cycles remaining to the next scheduled removal (the 'Engine LLP Delivery Condition'). No Engine and (no module thereof) shall (x) be 'on watch' or subject to special or reduced inspection intervals of (y) exhibit any adverse trends (computer monitored) or indicate a rate of acceleration in performance deterioration that is higher than normal based on AirAsia's maintenance experience. The remaining EGT margin on each Engine will be consistent with the number of Cycles remaining of the life limited Part in such Engine with the lowest remaining Cycles until removal or overhaul on the Delivery Date ...'

99. AirAsia's case is that:

(1) The engines did not satisfy this clause because the engines had not undergone 'a performance restoration shop visit' and because the remaining EGT margin on each engine was not consistent with the number of cycles remaining on the life limited part in such engine with the lowest remaining cycles until removal or overhaul on the delivery date;

(2) These matters gave NAC a right to refuse to take delivery of the aircraft; and

(3) Even if AirAsia had redelivered the aircraft prior to 1 August 2008, it is 'probable' that NAC would have rejected it because of the condition of one or both of the engines.

100. I take the following explanation concerning the inter-relationship between LLP (Life Limited Parts) and EGT (Exhaust Gas Temperature) largely from Mr Taylor's closing submissions. Any aircraft engine contains a number of LLPs. These are parts which can be used for a certain number of cycles (a cycle is one take-off and landing) before the engine has to go into maintenance for the LLPs to be replaced. As well as monitoring LLPs, an aircraft operator also has to monitor the performance of an engine. The most critical measure of an engine's performance is its exhaust gas temperature ('EGT'). EGT is, as the name suggests, the temperature (in ºC) of the exhaust gas as it comes out of an engine. Each type of aircraft engine has a maximum permitted EGT. The EGT margin is the difference between the maximum permitted EGT and the actual EGT. For example, if an engine's maximum EGT is 1000 ºC and it reaches 950 ºC when operating at full thrust, its EGT margin will be 50 ºC. The higher the EGT margin, the more efficiently the engine is operating, generating less heat to reach the required thrust. As the engine is used, the EGT margin reduces as the engine becomes less efficient. Once an engine has 0ºC EGT margin, it must undergo an engine shop visit (which requires at least partial disassembly of the engine). If

the LLPs and EGT margin are 'in phase', then performance restoration work on the engines can take place simultaneously with replacement of LLPs. Having the EGT margin and LLPs out of phase causes duplication of work and wasted costs. If they are in phase, costs and down time are kept to a minimum, thus maximising revenue generated by the aircraft. Hence the requirement in the NAC contract that the remaining EGT margin in each engine be consistent with the number of cycles remaining on the life limited part in such engine with the lowest remaining cycles until removal. AirAsia contends that the engines did not have sufficient EGT margin to last 6,000 cycles, which was the minimum required remaining life on all life limited parts.

101. Again I gratefully adopt Mr Taylor's summary of the evidence as to the engines' EGT margin after the shop visit. First, as was eventually conceded by AirAsia late on Friday, day 8 of the trial, the engines were fitted with a 'Turbine Clearance Control System' (TCC System). ST Engines produced two sets of data: engine test cell data and engine on-wing data. However, the figures for EGT margin in ST Engine's data were measured when the TCC System was deactivated (as it must be for both test cell and on-wing tests). Accordingly, the figures produced by ST Engines for EGT margin has to be increased by 17 ºC. In his report, Mr Lironi analyses the two sets of data. In paragraphs 104 to 110, the test cell results are analysed and the correct EGT margins for each engine are shown to be 36 ºC for Engine 721-816 and 42 ºC for Engine 7210821. In paragraphs 112 to 117 Mr Lironi analyses the on-wing test results (which are the results that would be used by the operator to analyse and record EGT margin deterioration). These in fact provide higher EGT margins, which ST Engines maintained were correct, but Mr Lironi notes that the AMM (Aircraft Maintenance Manual) states that an on-wing test is not a good test for the performance analysis of an engine. In Mr Lironi's experience, it is standard to apply a 20/25 ºC margin of error to these results. Applying this margin, the table at paragraph 115 of Mr Lironi's report shows the average on-wing EGT margins, adjusted for error and for the presence of the TCC system, to be 56ºC and 63 ºC respectively. Considering both the test cell and on-wing results together, Mr Lironi concludes that the EGT margin for Engine 721-816 was between 26 and 56 ºC and for Engine 721-821 was between 42 and 63 ºC. As Mr Seymour accepted in cross-examination, if the EGT margin of 17 ºC for the TCC timers is included, the Engines did have more than enough EGT margin to last 6,000 cycles. While Mr Seymour sought to argue that the TCC timer should be ignored, the factual evidence from Mr Abeledo was that the use of a TCC timer was a 'valid way of increasing EGT margins'. I see no reason to reject Mr Abeledo's evidence on the point. I reject Mr Seymour's evidence on this point which for good measure was inconsistent with the Boeing Aircraft Maintenance Manual and with an email of 8 October 2008 from the engine manufacturers CFM.

102. Furthermore, both Mr Abeledo and, as I have indicated above, Mr Underhill, were provided with information as to the engines' EGT margins following the shop visits. In the case of Mr Abeledo, on 4 June 2008 he was given an updating email on progress which included that Engine 721-816 had an EGT margin of 18 ºC. Mr

Abeledo's response to this email was that 'it looks good'. On 11 June 2008 NAC was informed that the EGT margin for Engine 721-821 was higher, at 24 ºC. In evidence Mr Abeledo confirmed that he was happy with the EGT margins:

> 'Q. ... So you were informed of the EGT margin, Mr Abeledo, weren't you, well before the delivery, or the long stop delivery date, or indeed the delivery date for the aircraft, and you were happy with that?
>
> A. Yes, and that's based on my understanding that the HD degradation of course is not linear but on the average it goes at a rate of 2 degrees centigrade per thousand hours, so that means that 18 degrees would probably be enough for 9,000 hours. It goes quicker in the beginning but then it levels off.
>
> Q. Yes. You would have been, whilst you can't remember now, you would have been in touch with Mr Underhill in relation to figures like this, wouldn't you?
>
> A. Yes.
>
> Q. EGT margins?
>
> A. Yes.
>
> Q. Yes. And as you told Mr Shah, Mr Underhill didn't raise any problems with the engines, did he, Mr Underhill didn't flag up any problems with the engines to you?
>
> A. No, he never mentioned that the engines were in a show stopper peril.'

Mr Abeledo was proceeding upon the conventional basis that each cycle of one take off and one landing would involve 1.5 running hours. In the case of Mr Underhill he received the Engine Shop Visit Reports including the Test Cell results. He annotated his Documents and Snag List to indicate that everything was in order, declaring all relevant items as 'closed'. Indeed, Mr Underhill was present when the on-wing power assurance run was performed.

103. The expression 'performance restoration shop visit' is not defined in the NAC contract and it is not a term of art. I reject AirAsia's case that the manufacturer's Workscope Planning Guide, hereinafter the 'WPG' defines the scope of what contractually was required to be achieved. Mr Seymour described this as the fundamental reference document for maintaining CFM 56-3 Engines and said that it sets out 'the maintenance tasks which must be performed in relation to each part of the engine, and specifies the circumstances in which they are to be conducted'. Manifestly this is not so, as Mr Lironi explained at paragraphs 56-60 of his Report. After dealing with the significance of the relevant approved Aircraft Maintenance

Programme, the Aircraft Maintenance Manual and the Engine Shop Manual, Mr Lironi said:

> '58. The CFM56-3 Workscope Planning Guide (WPG) is a document issued by Commercial Fan Moteur (CFM), which manufactures the CFM56-3 engine model, to provide guidelines for the off-wing maintenance of such engines. In particular, the WPG provides operators with guidelines on how to accomplish off-wing maintenance, inspection, repair, refurbishment and/or overhaul as the case may be.
>
> 59. The complete WPG for the Engines is available in Appendix 3.
>
> 60. It has to be highlighted that, unlike the ESM, the WPG is a reference document only, it is not an FAA approved document. The introduction to the WPG states that: 'The recommendations contained within this Workscope Planning Guide are not intended to alter the 'on-condition' maintenance concept of the CFM56-3 engine, but to optimize the maintenance performed during each shop visit. These recommendations are directed towards improving EGT outbound performance margins, the durability of the engine hardware, as well as the overall reliability of the engine. These are RECOMMENDATIONS ONLY, and should NOT be interpreted as requirements in addition to those currently applicable per the operator's Approved Maintenance Plan'.

I might add that there are other passages in the WPG which make clear that its terms are not prescriptive, that the Workscope for an engine shop visit must be tailored to achieving the desired on-wing life and that a judgment needs to be made as to the appropriate level of module penetration. Accordingly, I reject Mr Seymour's evidence that ordinarily the expression 'performance restoration shop visit' would be understood in the industry as meaning a performance restoration in accordance with the manufacturer's Workscope Planning Guide. In my judgment what was envisaged was a Workscope for the engines which would restore performance to permit the aircraft to operate for at least 6,000 cycles, on the conventional basis of 1.5 hours per cycle. Furthermore, the requirement that each module of the engine shall be fresh from a performance restoration shop visit does not involve that each module of the engine must necessarily have been separated and completely overhauled. Thus AirAsia complains that the fans and boosters of the engines were not disassembled. However the WPG itself indicates that 'Experience shows that it is not cost-effective to disassemble the Fan Major Module for performance restoration. This module should only be separated for a cause.' A similar statement is made in respect of the LPT (Low Pressure Turbine) Module: 'Experience shows that it is not cost-effective to disassemble the rotor/stator for performance restoration. They should only be separated for cause.'

104. Mr Seymour contended that the use of certain Designated Engineering Representative ('DER') parts in the repairs prevented the work from qualifying as

a performance restoration of those modules in accordance with the manufacturer's WPG. I have already dealt with the significance of the manufacturer's WPG. In fact that guide does not mention the use of DER repairs. It may be accepted that manufacturers prefer the use of their own supplied parts, and that it may be taken as read that that is their recommendation. However, a DER is authorised by the US Federal Aviation Administration. Such approval is provided to an individual or company which shows that it has the relevant experience, tooling, equipment and reference material to produce repairs to a standard acceptable to the Federal Aviation Administration. It is perfectly normal and safe practice to use DER parts, a practice followed at all material times by AirAsia. It may have implications for manufacturers' warranties. The NAC contract did not prohibit the use of DER parts. There is accordingly nothing in this point.

105. I am quite satisfied that on leaving the engine shop each engine and each module thereof was 'fresh from a performance restoration shop visit' which had restored performance to the level required. Perhaps more importantly NAC was so satisfied at the time. There is no basis whatever for the assertion that NAC either could or would have rejected the engines as non-compliant. In these circumstances it is unnecessary to address the further question whether in any event non-compliance would have invested NAC with a right of rejection or simply with a right to recovery of Seller Maintenance Payments. This is simply a question of the proper construction of the contractual provisions and since it is unnecessary to do so I express no view on the point.

Issue (v) - Which remaining items of BBAM's various claims arising out of the delayed redelivery of the aircraft are recoverable?

Holdover Rent

106. AirAsia accepts a liability to pay holdover rent between 17 June and 4 November 2008, save in respect of the first 21 days thereof. AirAsia is only excused this obligation if it has made commercially reasonable efforts to satisfy its redelivery obligations. Manifestly it did not make such efforts. It preferred its own interest in effecting redelivery of the Mitsubishi aircraft 'AAY' and in consequence the BBAM aircraft was only inducted into the ST Aero facility for its redelivery check on 26 May 2008, a mere three weeks before the redelivery date. Far from being commercially reasonable this was hopelessly inadequate. The failure to start dent and buckle mapping before this date was particularly egregious, especially having regard to BBAM's earlier requests in this regard. As I understand it, it is agreed that in the light of this finding holdover rent in the sum of US$189,758.05 is due and unpaid. It may also be agreed that interest at the contractual default rate is payable on this amount but I heard no argument on that point and I leave it over.

A *Overhaul Payments and Maintenance Payments*

107. AirAsia admits that it is liable to pay US$3,808.70 and US$974.12 in respect of Overhaul and Maintenance Payments. The position as to interest may be the same as in respect of holdover rent, but again I leave it over.

B

108. BBAM claims further costs and expenses incurred as a result of the late redelivery of the aircraft as particularised in Schedule 1 to the Particulars of Claim. These are quantified at US$1,090,777.00. Mr Taylor summarised these costs in his skeleton opening as broadly falling into the following categories:

C

'(1) Costs incurred in Singapore overseeing the redelivery of the Aircraft after the redelivery date of 17 June 2008. A company called Time Aviation were engaged on the ground in Singapore. BBAM's Mr Cotter had to travel to Singapore (Schedule 1, paras 1 and 2): US$155,094

D

(2) Costs incurred in taking delivery of the Aircraft at ATC Lasham in Hampshire, which would not have been incurred had the Aircraft been sold to NAC, including a boroscope engine inspection after the ferry flight from Singapore to Lasham (Schedule 1 paras 2, 4 and 7) US$14,266.73.

E

(3) Costs of storing the Aircraft at ATC Lasham in Hampshire which would not have been incurred if the Aircraft had been sold to NAC (Schedule 1, para 5): US$144,348.79.

(4) Costs of technical oversight while the Aircraft was stored at ATC Lasham (Schedule 1 para 12): US$2,706.90.

F

(5) Cost of insuring the Aircraft from the date it was redelivered to the Claimants until the date when it was leased out to Blue Panorama. If the Aircraft had been sold to NAC, no insurance costs would have been incurred (Schedule 1, para 6): US$33,032.32.

G

(6) Costs of re-registering the Aircraft in the US (Schedule 1 paras 9, 10, 11). Such cost would not have been incurred under the NAC sale, which permitted the Aircraft to be delivered to NAC registered with the Department of Civil Aviation in Malaysia: US$84,640.35.

H

(7) Costs of putting the Aircraft into the condition required by the new lessee, Blue Panorama, which would not have been incurred had the Aircraft been sold to NAC (Schedule 1 paras 14 and 16). This included bringing the Aircraft up to EASA standards, obtaining an annual Airworthiness Review Certificate, carrying out return to service inspections and repairs which were effected at ATC Lasham (following the Aircraft's extended period of storage an A-check had to be carried out to put it in condition for delivery to Blue Panorama

during which corrosion was discovered that had to be rectified.) (Schedule 1 paras 14 and 16): US$570,149.

(8) Costs of supervising the maintenance carried out during the delivery to Blue Panorama (Schedule 1 para 13): US$39,456.56.

(9) Costs of legal fees incurred in leasing the Aircraft to Blue Panorama (Schedule 1 para 15): US$47,082.52.'

109. On the first day of the trial I was told that AirAsia accepted liability for these costs and expenses, subject to three points. Firstly, their acceptance was contingent upon their being found to be in breach of the sub-lease. Secondly, their acceptance was contingent upon the court's finding as to the date upon or by which they were in breach. Thirdly, AirAsia contended that their liability for these costs and expenses should be reduced 'because of the income that will be received under the Blue Panorama lease'. No further attention was paid to this aspect of the claim until final submissions.

110. In his final written submissions Mr Shah said:

'178. In respect of the Claimant's claim for expenses incurred as a consequence of its continuing ownership the amounts are not disputed.

179. To the extent that AirAsia is liable to the Claimants then as the Claimants have mitigated their loss by entering into a lease with Blue Panorama for 18 months at a rent of US$90,000 per month the Claimants should credit as against AirAsia's liability the revenue which will be earned from the Blue Panorama lease. Over the 18 month term this will generate an income of US$1,620,000.'

111. The latter paragraph in Mr Shah's submissions is, I suppose, directed in large part to the claim for the lost sale. However, there is in that respect no liability against which a credit falls to be given.

112. In final oral submissions the costs and expenses were, again, only lightly touched upon. There was some pressure of time. However Mr Shah then made the point, in fact in the course of Mr Taylor's address, that items 7, 8 and 9 as summarised by Mr Taylor all relate to costs incurred in preparing the aircraft for the lease to Blue Panorama. In his own final speech Mr Shah said simply that if a claim is going to be made in respect of the Blue Panorama expenses, then so too the income from the lease to Blue Panorama ought to be brought into account.

113. I am not persuaded that the parties have sufficiently addressed the recoverability of these costs and expenses in the event of the finding which I have made, to the effect that there is no liability for the loss of the sale to NAC. I shall

invite further submissions from the parties as to how this aspect of the claim should be resolved. It may however be helpful if I indicate my preliminary conclusions. Insofar as these costs and expenses were incurred in consequence of the delay in redelivery from 17 June until 4 November, liability would appear to be made out. That, as it seems to me, is likely to include all or most of the costs under item 1. As at present advised however, I am unpersuaded that the balance of the costs claimed were incurred by BBAM as a result of the breach of contract which I have found. On the contrary, items 2, 3, 4, 5 and 6 seem to consist largely of expenses which would not have been incurred had the sale to NAC proceeded, but which have nothing to do with late redelivery of itself. Similarly I find it difficult to understand how items 7, 8 and 9 can be recoverable as damages for the breach which I have found.

114. It may be that these claims can now be resolved by agreement. However, I consider it appropriate that both sides should be afforded the opportunity to make further submissions on these claims, if so advised, and as indicated above I invite further submissions as to the manner and forum in which that might be done. I would hope that this further exercise may prove unnecessary.

Issue (vi) - The final balance of account as between BBAM's claims and AirAsia's admitted counter-claim of US$2,780,934.25 (US$1,620,934.25 in respect of work done to the engines and US$1,160,000 in respect of unreturned security furnished by AirAsia)

115. Resolution of this issue must await agreement or final determination of BBAM's claims particularised in Schedule 1 to the Particulars of Claim.

116. I shall hear counsel on the form of order which should appropriately be made in the light of this judgment.

(*Order accordingly*)