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Case No: CL-2019-000167

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/01/2022

Before :

NICHOLAS VINEALL QC
SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

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Between :

NAS AIR COMPANY	**Claimant**
- and -	
GENESIS IRELAND AVIATION TRADING 3 LIMITED	**Defendant**

- -
- -

Matthew Reeve and Giles Robertson (instructed by **Norton Rose Fulbright**) for the Claimant
Edward Cumming QC and Erin Hitchens (instructed by **Alius Law**) for the Defendant

Hearing dates: 6-9, 13 and 15 December 2021, written submissions closed 29 December 2021

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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NICHOLAS VINEALL QC

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 31 January 2022 AT 14:00.

NICHOLAS VINEALL QC:

INTRODUCTION

1. This case is essentially about who should pay for the cost of repairs to an engine on an aircraft which was leased by the Defendant to the Claimant.

2. The Claimant lessee is a Saudi Arabian company which trades as Flynas, and was the first international and domestic low-cost airline in Saudi Arabia. I will call it NAS.

3. The Defendant lessor is incorporated in the Republic of Ireland. I will call it Genesis. It specialises in leasing aircraft, seeking to maximise return on its assets by using careful analyses which balance maintenance and repair costs against the remaining lifetime of airframes and engines. Sometimes that will mean transferring engines from one airframe to another.

4. The aircraft is an Airbus A320-214 airliner, MSN 1942, registration VP-CXF (the "Aircraft") and was fitted with two CFM56-5B4/P engines, with serial numbers 575548 and 575549 (the "Engines"). I will call them Engine 48 and Engine 49. By the time of its eventual redelivery Engine 48 had accumulated nearly 56,000 flying hours.

5. The original 36 month lease (the "Main Lease") was entered into on 2 April 2013. By virtue of some subsequent amendments the lease was extended to 28 February 2017.

6. Between February 2016 and March 2017 there were oral and email discussions between the parties about an extension of the Main Lease. The proposed extension raised a commercial issue of some importance to the parties. There were "performance restorations" to the Engines scheduled to take place after the end of the original lease period but which would arise during the proposed extended lease period. Engine "performance restorations" are defined in Section 2.1 of the Main Lease (the lease refers to sections rather than clauses). In essence, performance restorations are a shop (ie workshop) visit at which the engine undergoes a core restoration and, as necessary, refurbishment of modules, sufficient to achieve a full operating interval until the next anticipated performance restoration.

7. In order to understand the competing positions of the parties it is necessary to grasp a key element of the structure of the lease agreement, which I am told is a common feature of aircraft leases. The lessee not only rents the aircraft but also takes on onerous repairing responsibilities, set out in section 12. The lessee pays a rent for the aircraft (in this case initially $195k per month), but also pays a further sum by way of so-called maintenance rent. The maintenance rent accrues over time. If and when the lessee becomes obliged to carry out a particular class of repairs, the lessee is entitled to a credit in the amount of the maintenance rent paid to date in relation to that repairing obligation. If the repairs cost more than the relevant maintenance rent, the lessee must fund the difference. This is achieved by the machinery of section 5.3. An advantage of this structure for the lessor is that it reduces the chance that, by the time the lessee is obliged to do the repairs, the lessee is unable to afford them. The structure also means that it is open to the lessor and lessee to agree that, instead of the repairs being performed, the lessor will accept the aircraft or engine in an unrepaired state, but keep the relevant maintenance rent. One can see that there might arise circumstances in which it is in both parties' interests to agree to do that: specifically, if both (a) the cost

of repair exceeds the relevant maintenance rent, and (b) the relevant maintenance rent exceeds the increase in value which would be achieved by doing the repairs. In those circumstances the lessor would be better off keeping the maintenance rent as cash rather than paying it towards the repairs arranged by the lessor, and the lessee would also be better off because it would avoid having to fund the difference between the maintenance rent contribution and the actual cost of the repairs.

8. Following protracted negotiations, the parties entered into Lease Amendment Agreement No 4 ("LA4") on 3 March 2017 and Lease Amendment No 5, each successively extending the lease. LA4 is the important one in this dispute.

9. Following the extension, but before the extended lease term was over – and as the parties had anticipated - the Engines fell due for performance restorations.

10. At that point the essential dispute arose between the parties. Genesis, the lessor, required NAS to carry out the repair works. NAS took the position that it was entitled to require Genesis to accept a substitute engine (which would not need a performance upgrade in the balance of the lease term), so that that would enable Genesis to keep the maintenance rent, but would avoid NAS having to pay any further sums for maintenance.

11. The sums at stake were significant. In the event the repair works were done by NAS, under protest, and cost US$12,668,332.01. The relevant contribution for the maintenance rent was only $9,566,869.59, so NAS would have been some $3m or so better off if it could have required, or persuaded, Genesis not to insist on repairs.

12. So the central dispute is whether or not Genesis was entitled to insist on the repairs being done. But there are a series of further disputes, and the way in which they arise cannot be understood without an account of the somewhat complicated procedural history, to which I now turn. In what follows I shall round some of the figures to the nearest $100,000.

Procedural History

13. The Claim was started by NAS in March 2019. At that point NAS had done the repairs and had provided temporary engines for the Aircraft in the meantime, and its main claims were for the full cost of those repairs ($12.7m), essentially on the basis it should be refunded because it was not in fact obliged to carry them out. But in the alternative NAS claimed for the maintenance contribution of $9.6m by way of debt or damages, plus rental for the temporary engines.

14. Genesis' main defences at that stage were that, although NAS had been obliged to do the repairs, and was in principle entitled to maintenance contribution of some $9.6m, it was not yet entitled to the $9.6m because it had not been prepared to sign a settlement notice confirming that those were its only such claims. Genesis accepted that, subject only to providing such a claim settlement notice and acknowledgment, $9.6m was due.

15. NAS applied for an interim payment in the amount of its claim for the maintenance contribution. That application was heard by Mr Christopher Hancock QC sitting as a Deputy High Court Judge. He gave judgment on 8 October 2019, and awarded NAS some $9.6m by way of interim payment. His essential reasoning was that, whatever the

merits of Genesis' point on the settlement notice, sooner or later Genesis would have to pay $9.6m by way of maintenance contribution. He held that it was "clear or at least clearly arguable" that the provision of a settlement notice was not a condition precedent, but that, even if it was, that condition precedent would be satisfied at trial.

16. The scheduled end date of the (extended) lease was 19 December 2019. The Aircraft was not redelivered to Genesis until 13 February 2020 when it arrived in Lithuania and passed to Genesis' control.

17. On 27 February 2020 HHJ Pelling QC sitting as High Court Judge gave judgment on a summary judgment application made by Genesis, seeking reverse summary judgment on two claims made by NAS; first the claim for some $3.1m, being the difference between the actual performance restoration costs ($12.7m) and the interim payment received, and second a further $866k, claimed by NAS as the cost of providing replacement engines.

18. The Judge declined to give judgment in favour of the Defendant on the additional claim for $866k, but in relation to the claim for $3.1m he did give summary judgment in the Defendant's favour holding that the claim for the balance of the repair costs must fail.

19. The reason the Judge summarily dismissed NAS' claim for the shortfall between the repair costs incurred and the maintenance contribution turned on his construction of Section 7 of LA4. That section (to which I shall return later) provided as follows

> "Section 7 Replacement Engine
>
> If any Engine requires a Performance Restoration or LLP replacement during the Extension Term, the Lessor may elect, in its sole discretion, to provide a replacement CFM56-5B4 engine which will have sufficient life remaining to operate through the end of the Extension Term (based on the Lessee's utilisation and hour to cycle ratio) (such replacement engine shall be referred to as the "Substitute Engine"). Immediately upon installation of a Substitute Engine on the Aircraft (i) the Substitute Engine shall become an Engine for the purposes of the Extended Lease; (ii) Manuals and Technical Records applicable to the Substitute Engine shall form part of the Aircraft Documentation, and (iii) Lessee shall install the identification plate required by the Extended Lease on the Substitute Engine. For the avoidance of doubt, the Substitute Engine procured may be purchased by Lessor or leased from a third party, in the sole discretion of Lessor. In addition, the Removed Engine which requires a shop visit or LLP replacement will cease to be an Engine under the Extended Lease and will be returned to Lessor, at Lessee's cost, in the same condition and configuration when such Removed Engine was in service immediately prior to its removal, and Lessee will no longer be entitled to claim contributions from the Engine Performance Restoration Maintenance Rent balance or Engine LLP Maintenance Rent Balance held by Lessor relating to such Removed Engine. At the end of the Extension Term, the Substitute Engine will be returned in serviceable, but otherwise as is condition, unless it is leased from a third party, in which case the delivery and return conditions will be dictated in the engine lease agreement (such return conditions shall be shared with Lessee prior to entering into the engine lease agreement). Lessee will have no financial obligation towards the costs of the Substitute Engine, however, the obligation to pay

> Maintenance Rent in respect of the Substitute Engine will continue for the remainder of the Extension Term as set forth in the Extended Lease.
>
> If Lessor is unable to provide a Substitute Engine, Lessee may offer to provide a suitable replacement engine from its pool of leased engines, or lease a suitable replacement engine from the market. In the event Lessee provides engines from its pool or leases a replacement engine, Lessor shall reimburse Lessee for the documented rent costs of such leased replacement engine up to a maximum amount of $60,000 per month for the actual duration of use of such leased replacement engine during the Extension Term. For the avoidance of doubt, Lessee shall be obligated to pay all monthly use (or similar) fees for the leased replacement engine to its lessor."

20. Judge Pelling held that the effect of the first part of the section was that the lessor, Genesis, could provide a replacement engine if it wished to do so, and if it were to do so that would become, for the terms of the lease, a "Substitute Engine", and the consequences set out in the first part of section 7 would flow – in other words the performance restoration would not take place, but the correlative maintenance rent could be retained by Genesis.

21. But Judge Pelling held that the second part of the section operated differently. He held that, even if the circumstances were that the lessee, NAS, provided a replacement engine, that would not fall to be treated as a Substitute Engine, and so the provision of such an engine would not excuse NAS from the performance restoration exercise.

22. There are three points to note. First, I am told that this construction of the agreement was not argued for by either party. Second, because of his findings as to the limited consequences of the provision of a replacement engine by NAS, the lessee, the Judge did not need to deal with the question of whether or not it was open to NAS to insist on the provision of a replacement engine if Genesis' position was that they (Genesis) wanted the performance restoration to take place. Third, Judge Pelling expressly noted that there was no claim for rectification and that the result might have been different had there been.

23. The Judge, and subsequently the Court of Appeal, refused permission to appeal.

24. NAS' response to that ruling was to seek to amend its claim in order to contend that the lease should be rectified, because it did not reflect the common intention of the parties. Mr Justice Foxton gave permission for that amendment, to add what has been called the rectification claim, on 13 November 2021.

25. Meanwhile Genesis had a new claim too, which, it said, arose from the condition in which the Aircraft had been returned to it on 13 February 2020. On 21 April 2020 Moulder J granted permission for Genesis to bring a counterclaim the gist of which was that the Aircraft was returned both late and in a state that did not meet the contractual Return Conditions. Genesis counterclaimed for basic rent and maintenance rent amounting to $556k plus an unparticularised sum for the costs of the necessary work to bring the engines up to Return Conditions.

26. On 22 January 2021 Genesis for the first time gave particulars of its repairs claim by way of a schedule of defects. 167 defects were identified, and the sum of $1,233,950 in total was claimed.

27. That claim was considerably amended in the run up to trial. All but one of the 167 defects were abandoned, leaving just one claim which was repairs said to be necessary in the light of a borescope inspection of Engine 48. In the schedule, that claim had been quantified at $517,000. But shortly before the PTR, the Defendant's expert valued that claim at $2,301,878, and the Defendants sought permission to amend so as to claim that increased sum by way of damages, or an indemnity for the costs of repairs, or in the alternative diminution in value. I heard the PTR and deferred the question of amendment to the first day of trial, because I could not be certain that this late amendment of the counterclaim could be heard without unfair prejudice to the Claimant. By the time the trial came on it was common ground that the amendment should be allowed.

28. By the end of the trial the quantum of Genesis' claim for outstanding rent (basic rent plus maintenance rent) had been agreed in the sum of $359,949.

29. As a result of various other concessions and agreements, the live issues at trial were limited to three main areas of dispute:

    (1) Rectification:

        a. should the terms of LA4 be rectified, and if so in what terms;

        b. if the lease were to be rectified, then under the terms of the lease as rectified, and on the facts as they were, was NAS entitled to insist on providing a replacement engine, and if it was entitled to insist on providing a replacement and in fact did so, would that absolve it of the obligation to carry out a performance restoration?

    (2) Defects – What were the relevant return conditions, in what respects was Engine 48 not in compliance with those conditions when returned by NAS, and what damages was Genesis entitled to as a result?

    (3) Interest - Whether or not NAS was entitled to interest on the maintenance contribution that had been paid by way of interim payment.

30. I will address each set of issues in turn.

THE RECTIFICATION CLAIM

31. There are two types of rectification case - those where a written document fails to give effect to a prior concluded contract, and those where a contract is made in writing but the document does not accurately record the parties' shared common intention. This is the second type of case.

32. There was no dispute about the principles to be applied. They were decided by the Court of Appeal in FSHC Group Holdings v GLAS Trust Corporation Ltd [2019] EWCA Civ

1361, [2020] Ch 365. It is sufficient to cite the Court's conclusion as set out at paragraph 176 of the judgment of the Court handed down by Leggatt LJ (as he then was):

> "… before a written contract may be rectified on the basis of a common mistake, it is necessary to show either (1) [not relevant] or (2) that, when they executed the document, the parties had a common intention in respect of a particular matter which, by mistake, the document did not accurately record. In the latter case it is necessary to show not only that each party to the contract had the same actual intention with regard to the relevant matter, but also that there was an "outward expression of accord" – meaning that, as a result of communications between them, the parties understood each other to share that intention."

33. I have already set out Section 7 of LA4.

34. Mr Reeve, who with Mr Robertson appeared for NAS, submitted as follows.

    i) First, he said, the second part of Section 7 of LA4 should be rectified so as to reflect the common intention of the parties that the consequence or effect of the provision, by NAS, of a replacement engine would be to relieve NAS of the obligation to carry out a performance restoration. This he called Rectification A.

    ii) Next, he submitted that the phrase "offer to provide" in the second part of Section 7 of LA4 should be construed so as to mean that NAS was entitled to insist on the provision of a replacement engine; but if that were not the proper construction then the agreement should be rectified to reflect the fact that the parties had a common intention that when, during the extended lease period, the performance restorations were required and the Defendant was unable to provide substitute engines, the Claimant was allowed to provide its own engine, and/or that the restorations should take place only if there were no engines available from either side. This he called Rectification B.

35. Mr Cumming QC, who appeared with Ms Hitchens for Genesis, focussed his submissions on what he described as the key question, namely what was the trigger for whatever consequences were contemplated by section 7. He submitted that it was, throughout, the common intention of both parties that the decision as to whether or not there would be a performance restoration was for the Lessor alone: that is to say, that on the proper construction of the agreement, which did reflect the parties' common intention, it was only if the lessor wanted it to happen that there would be a substitute engine which would lead to the performance restoration being avoided: in those circumstances Genesis could provide a replacement engine; but if Genesis was unable to do so NAS could offer to provide a replacement, and if it was acceptable to Genesis, then that engine could and would go onto the engine. Although I did not understand Mr Cumming expressly to concede that the parties' common intention was that if a replacement engine was in fact provided by either party that would mean no performance restoration, he did not really argue against such a conclusion. Put another way, the focus of his case in answer to the rectification issue was to rebut Rectification B, rather than Rectification A.

36. I heard evidence on the rectification issue from the two individuals who negotiated the terms of LA4, Mr Mimani, for NAS, and Mr Nishi, for Genesis.

37. Mr Mimani is the Chief Aircraft Procurement and Financing Officer of NAS. He is a chartered accountant with a background in finance. He was an impressive and, in my view, honest witness. He believed that the lease extension was in the best interest of NAS but he faced some internal opposition from some of NAS' technical staff including Mr Al-Harbi who thought that the engines, because of their age and NAS' obligations to repair them, posed too great a commercial risk. In my view this led to Mr Mimani being inclined to present the terms of the deal internally in a way which played down the extent of the risk that NAS might be exposed to a hefty repair bill. He was a persistent and patient negotiator, and Mr Cumming described his approach to negotiations as artful. I think that is a fair description: Mr Mimani was in my view honest in his dealings with Mr Nishi, but he never lost sight of the fact that his task was to promote the interests of NAS.

38. Mr Nishi gave evidence remotely. Mr Nishi is employed by WNG Capital LLC who were the equipment servicer for Genesis. He trained as an attorney and is admitted to the California bar. He practised as a lawyer for two years, and quipped, self-effacingly, that that was just long enough to find out that he was not smart enough to be a lawyer. But he struck me as extremely smart, a user of precise and clear language, and having a very clear grasp of the nature of the obligations he was negotiating, and the potential commercial consequences of the effect of variations to the standard terms with which he was familiar. I consider that he gave honest and reliable evidence.

39. The negotiations between Mr Mimani and Mr Nishi either took place by email, or took place in online meetings or phone calls which were subsequently summarised or referred to in emails. In my view, nothing either witness said in their witness statements or cross-examination was directly inconsistent with the contemporaneous emails, and this, together with the availability of a very full chain of contemporaneous correspondence means that I can assess with perhaps an unusual degree of confidence the common intention of the parties at the time that they signed LA4.

40. The negotiations were sporadic and protracted, starting in around January 2016 and not reaching formal agreement until 22 January 2017.

41. In December 2016, and so towards the end of that period, there was one particularly revealing set of email exchanges. At that stage there was a letter of intent which contained a precursor of what was to become the second part of Section 7. It was in this form:

> "If the Lessor is unable to provide a Replacement Engine, the Lessee may offer to provide a suitable replacement engine from its pool of leased engines, or source a suitable Replacement engines from the market, in which case the Lessor shall reimburse Lessee of an actual documented Rent cost of such leased engines up to a maximum of USD 75,000 p.m. for the actual duration of use of such leased Replacement engine. Lessee shall have obligation to pay monthly use fee for the leased Replacement Engine to its lessor."

42. On 6 December 2016 Mr Mimani wrote to Mr Nishi as follows (I have added emphasis):

> "… Here is a marked draft LOI ... retaining two points from my last version, as we had talked about in my call last month, and I think you were flexible then to accept: …**In case Lessor would like to retain all MR and not shop the engine,** and if a

> Replacement Engine is not sourced by Lessor, Lessee may use source on its own / use one of this existing leased engine to operate until the remaining short term of lease to avoid aircraft grounding, which otherwise would be quite punitive for Lessee. However, I've reduced the engine rent reimbursement limit from $75k to now $60k p.m., which I hope you may find reasonably acceptable. Currently, we have 7 engines on lease at average rent of $66,400, which would put us out of pocket if we go lower while trying to support remaining term without engines"

Mr Nishi replied

> "We continue to agree to this concept and would accept a cap amount of $50k."

My Mimani countered

> "We would not like to go deeper out of pocket. Both engines, although currently complying with re-delivery condition, would most likely be due for removal in Q1-2018. This would mean that if Lessor does not provide Replacement Engines, Lessee will be out of pocket by **~`$700k** [i.e. $16,400 x 2 engines x 21 months remaining term (until Dec-2019)]. This would be quite punitive. My proposal of $60k rent cap each engine, resulting in out of pocket loss of $6,400 each would amount to total loss to us for **~$270k** (6400 x 2 engines x 21 months) , which is similar to the rent cost of alternate engine, that we would have to incur if both original engines were to undergo refurbishment SV for 70-80 days. Just because WNGC wants to save from MR drawdown of $5-6m on each engine, I cannot justify why Flynas should pay additional ~$700k. if you find it difficult to accommodate $60k rent, I suggest we should remove the clause of Replacement Engine, and just follow the standard requirement of performing the refurbishment SVs in Q1-2018; and thereafter continue to use both original engines until lease expiry. Please let me know your thoughts."

And finally Mr Nishi said

> "I will agree to increase the cap amount to $55k assuming we could agree to the other points above."

43. It will be noted that in talking about his proposals for the text of the second part of the section, Mr Mimani prefaces his discussion with a conditional, describing the circumstances in which the issue which he is negotiating about (that is to say the rent to be paid if NAS procure preplacement engines) would arise. He says (emphasis added) "In case lessor would like to retain all MR and not shop the engine *and* if a replacement Engine is not sourced by Lessor, Lessee may …". This is very difficult to reconcile with a suggestion that at this stage the parties were ad idem that the lessee was able to *force* the lessor to accept a replacement engine. On the other hand the parties' exchanges at this stage seem to me to be entirely consistent with the suggestion that they were negotiating the provisions of the second part of Section 7 on the clear shared understanding that if there were, after a lessor election under Section 7, to be a lessee-provided replacement engine in lieu of a lessor-provided replacement engine under Section 7, the impact would be essentially the same as if the lessor had provided it under the first part of Section 7, the only difference being that the parties had agreed a rent that the lessor would pay to the lessee for it.

44. The witnesses' evidence was in my judgment entirely consistent with the impression given by this exchange.

45. In his witness statement Mr Nishi said this:

> "34. In the LOI sent on 11 October 2016 Mr Mimani had made another change. Under the section on Replacement Engine he added the words at the bottom which start "If the Lessor is unable to provide a Replacement Engine, Lessee may offer to provide a suitable replacement engine form its pool …" This had not been discussed in advance as far as I can recall. I understood Mr Mimani proposed this wording to follow on from a scenario dealt with in the first part of the paragraph, namely where Genesis exercised its option to replace the old engines and avoid the Shop Visit, If Genesis was unable to provide a replacement engine in that scenario, he wanted NAS to have the right do so, with some pre-agreed credit or reimbursement for the cost.
>
> 35. I was generally amenable to this. I could see why he would want the right for NAS to source replacement engines itself for a pre-agreed (but capped) contribution."

46. It seems to me clear, and I find as a fact, that Mr Nishi believed and understood that the parties were proceeding on the basis that both parts of section 7 were dealing with circumstances in which there would not be a performance restoration, or put another way, if a replacement engine was provided by NAS as part of the section 7 machinery, there would be no performance restoration.

47. However, it is equally clear, and I find as a fact, that Mr Nishi did *not* want to commit Genesis to a position in which Genesis lost its right to insist on a performance restoration. He was entirely clear about this both in his witness statement and when cross-examined.

48. In cross-examination he was shown the 6 December email exchange which I have set out above and then there was this exchange:

> Q. Okay. He is reminding you that you were willing to accept that NAS -- for this purpose -- would be allowed to install its own engines if Genesis did not source replacements itself. And I point you to the phrase: "If a replacement engine is not sourced by lessor, lessee may use/source its own/use one of the leased engines." He is reminding you of that, isn't he?
>
> A. Yes, he is.
>
> Q. That you had discussed NAS being allowed to install their own engines?
>
> A. If I may say, there are two things that need to happen in order for NAS -- based on this statement, NAS is allowed to install replacement engines. If I may expand on that. If we want to retain the maintenance reserves and not shop the engine, that is one, so we or Genesis makes the decision not to do an engine shop visit. That is one. Two, and we don't provide a replacement engine, then at that point lessee may source its own engine --

> Q. Okay. Can we –
>
> A. -- for replacement.

49. A little later he said this:

> A. In my view, in my position, in my view, if those two things did not happen -- if those two conditions occurred, one is we retain the maintenance reserve and not shop visit the engine, and two, if we don't provide a replacement engine, at that time lessee has a right to provide their own replacement engine, whether it is within their pool or whether it is a leased engine.

50. Mr Nishi made similar points elsewhere in his evidence: see for instance the transcript for day 4 at page 13, page 31 and page 41. And at page 20 he was asked about the advantages in avoiding a shop visit. He explained the position like this:

> A. Well, I am not necessarily saying I would like to avoid a shop visit. If we would like to avoid a shop visit, we would have put that in the lease amendment and we would have eliminated the shop visit requirement. We would have amended the return conditions for the engines, contract engines. But we didn't do that. So we weren't avoiding that. We wanted to have what we would consider the optionality to avoid a shop visit if we think it is more commercially reasonable to provide a replacement engine, whether we go out and acquire a replacement engine or we go out and lease an engine. So we wanted to have the optionality. I think that is a common theme you will see in the discussions, including the 6Y maintenance reserve. We wanted to keep the optionality, even though, as you see, NAS was pushing that they had the option whether or not to perform the 6Y. No, that option should remain with the lessor, because that is our asset. That is our asset. We should decide -- I am sorry, go ahead.
>
> Q. Can you articulate for us what the commercial advantages were, as viewed from November 2016, for Genesis now in avoiding performance restorations?
>
> A. I am sorry, I can't articulate what the commercial – it may have been a commercial advantage, it may not have been. We would have to determine that at a later stage, prior to having a shop visit being performed, or having the engine requiring an engine shop visit. At that time, you would make the determination.

51. I accept this evidence of Mr Nishi's, and find as a fact that Mr Nishi did not intend, (and did not believe Mr Mimani to intend) that Genesis should lose its right to insist on performance restoration, nor did he intend that NAS should somehow be given the power to determine that a performance restoration would not take place if Genesis wanted one to take place.

52. I now turn to Mr Mimani. I find that, like Mr Nishi, he understood and intended that the purpose of the second part of Section 7 was to extend Section 7 to a situation in which it was NAS rather than Genesis which provided the replacement engine. From his point of view this was the principal purpose of the second part of Section 7 – to extend the ambit of the first part to deal with a situation in which it was NAS, and not Genesis, that in fact that provided the replacement engine.

53. But I am unpersuaded by the suggestion that Mr Mimani believed that the parties had reached a common understanding that Genesis had given up its right to insist on there being a performance restoration.

54. Mr Mimani said in his witness statement (paragraph 5) that as a result of his exchanges with Mr Nishi he was led to believe that "... in the event that Genesis did not or was unable to provide replacement engines from its own sources, NAS was entitled to do so, and that performance restoration was to be avoided unless there were no replacement engines available from either side", but he sensibly acknowledged that he could not recall precise details of every conversation. Such an understanding of the agreement between the parties is inconsistent with Mr Mimani's own email of 6 December 2016, and it is clear from Mr Mimani's answers in cross-examination that he had not really focussed at all on whether Genesis was intending to give up its right to insist on a performance restoration: he said that he "did not discuss with Bobby Nishi about the sole discretion point at all" (Day 2 page 81); he said "my focus was only on the replacement engine, because I didn't doubt about lessor's ability to ask for shop visit, which was already in the Main Lease. So the whole concept of my negotiation was how to create a place for a replacement engine." (Day 2 page 125, and to similar effect at page 132).

55. It is clear that at the time LA4 was negotiated both parties anticipated that when the performance restoration fell due it would not be in Genesis' interests to have a performance restoration and that Genesis would be better off keeping the maintenance reserve. For that reason it seems to me likely that neither party focussed particularly closely on what would happen if in fact Genesis opted to have a performance restoration, and NAS and Mr Mimani focussed very strongly on negotiating terms which could make NAS confident that *if* Genesis wanted to avoid a performance restoration, and therefore wanted to find a replacement engine, but could not do so, NAS would have the ability to procure a suitable replacement engine on relatively predictable terms as to rental stream from Genesis.

56. On the balance of probabilities then, I find that Mr Mimani did *not* intend that NAS be entitled to provide a replacement and thereby avoid a performance restoration, in circumstances where Genesis wanted a performance restoration to take place.

57. So to summarise:

    i) I find that the parties shared a common intention, which had been communicated between them, that if there were to be the provision of a substitute engine by NAS as anticipated by the second part of section 7, then the performance restoration would not take place. It follows that something along the lines of Rectification A would be justified .

    ii) I find that neither party intended that NAS should, against the wishes of Genesis, be able to dispense with the obligation to perform a performance restoration, by providing a replacement or substitute engine (using those words non-technically). Put another way, the parties shared a common intention that Genesis alone had a discretion to dispense with the performance restoration. It follows that nothing along the lines of Rectification B is justified.

58. It will be recalled that NAS also had an argument on the construction of section 7 which, they argued, meant that they did not in fact need Rectification B. The argument is that the words "may offer to provide" are the only trigger for the consequences of the second part of Section 7 (that is to say, to remove the requirement of a performance restoration), so that all that needs to be done by NAS is to offer to provide a replacement engine, and that will dispose of the performance restoration obligation.

59. I reject this submission. The opening words of the second part of section 7 are "If Lessor is unable to provide a substitute Engine, Lessee may offer to provide a suitable replacement engine from its pool of leased engines, or lease a suitable replacement engine from the market. In the event that Lessee provides engines from its pool or leases a replacement engine.. ". I construe these words to be a condensed shorthand for "If the lessor (under Part 1 of the section) has said that it wants to provide a replacement engine which can stand as a Substitute Engine so as to avoid a performance restoration, but it cannot in fact provide one, then the lessee can step in and can offer to provide one (etc)." The whole of this second part of Section 7 is in my view clearly predicated on the lessor wanting to avoid a performance restoration but being unable to do so by, itself, providing a replacement engine.

60. I rather think that this point was decided against NAS by HHJ Pelling QC who decided (see paragraph 29 of his judgment) that the second part of section 7 was triggered only if a Substitute Engine was not provided by Genesis. But I prefer to base my decision on my own reasoning as to construction because I have accepted that in one respect the contract terms do not reflect the shared common intention of the parties, and in those circumstances it is better that I review questions of construction having taken into account that finding.

61. Success on Rectification A is not sufficient for the Claimant to succeed on its claim for the full repair costs: it needed to succeed on both aspects of its rectification claim (or on the alternative construction point which I have just rejected).

62. I did not understand Mr Reeve to press for a partial rectification and I see no purpose in granting any relief by way of rectification when the rectification would make no difference to either of the parties and, because the contract is now fully executed, it cannot affect anyone else either.

THE DISREPAIR CLAIM

63. The first question is whether or not the effect of Section 6.1 of LA4 was to waive the Return Condition in relation to engine 48.

64. The Return Conditions appear from Exhibit G to the main lease.

65. LA4 Section 6 is entitled Lessor Maintenance Contribution and after a seven line opening paragraph it has a series of numbered paragraphs. 6.1 is entitled Airframe, 6.2 is entitled Engine LLP (LLP stands for life limited part), 6.3 is Thrust reverser Overhaul, 6.4 is Airworthiness Directives, and 6.5 is Modifications. Then section 7 is entitled Replacement Engine.

66. One would at first blush therefore anticipate that section 6.1 was intended by the parties to regulate any changes made, by the lease extension, to the parties' repairing obligations insofar as, but only insofar as, they arose in connection with the airframe.

67. The opening words of LA4 Section 6, and Section 6.1, provide as follows:

> **Section 6.** Lessor Maintenance Contribution. Notwithstanding anything to the contrary contained in the Lease, and provided no Event of Default has occurred and is continuing and subject to the exclusions set forth in Section 5.5 (*Exclusions of Maintenance Contributions*) of the Lease, Lessor shall pay to Lessee during the Extension Term, by way of contribution to the direct cost of any MRA (following the provision by Lessee to Lessor of supporting documentation in form and substance acceptable to Lessor), the amounts stipulated in this Section 6, subject to satisfaction of all of the conditions stipulated in Section 5.4.1 of the Lease.
>
> 6.1 Airframe. Lessee and Lessor hereby agree that the next due 6Y Airframe Major Check is expected to occur in or around December 2019. At Lessor's option, Lessor may choose to waive Lessee's obligation to perform such 6Y Airframe Major Check and request Lessee to return the Aircraft to Lessor in the same condition as when in regular passenger service with Lessee immediately prior to the Expiry Date, in which case Lessor will be under no obligation to make any payments or apply any credit to Lessee in respect of the 6Y or 12Y Airframe Major Checks. In the event that Lessor consents to Lessee performing the next due 6Y Airframe Major Check immediately prior to the Expiry Date and Lessee completes the next due 6Y Airframe Major Check immediately prior to the Expiry Date in accordance with the then-current MPD (which 6Y Airframe Major Check will in each case include, but not be limited to (i) the performance of all C7/6Y or applicable C checks as per the then-current MPD tasks as applicable, (ii) the performance of all lesser tasks that are recommended to be performed at such interval in accordance with the then-current MPD, and (iii) a full cabin refurbishment and receipt by Lessor of the proper documentation in accordance with the Extended Lease), Lessor will pay the Lessor contributions in accordance with the terms and conditions of the Extended Lease. In the event that the MRA Maintenance Rent Balance with respect to such 6Y Airframe Major Check exceeds the actual cost of performance of the 6Y Airframe Major Check referenced above that is eligible for contribution in accordance with the term of the Extended Lease then Lessor shall, so long as no Event of Default has occurred and is continuing, pay Lessee such excess. For purpose of clarification, Lessee shall not be entitled to any payment (whether by way of contribution from the related MRA Maintenance Rent balance, by Lessor or otherwise) in respect of the 12YAirframe Major Check.

68. It is common ground that Genesis did waive the 6Y Airframe Major Check. NAS' argument turns on the use of the word Aircraft as opposed to Airframe in line 4:

> At Lessor's option, Lessor may choose to waive Lessee's obligation to perform such 6Y Airframe Major Check and request Lessee to return the *Aircraft* to Lessor in the same condition as when in regular passenger service with Lessee immediately prior to the Expiry Date, in which case …

69. NAS' argument is that the use of the word aircraft is deliberate, and that it means that the effect of a waiver of the Airframe 6Y check is to also to alter the Return Conditions of the engines.

70. I reject this construction. The recitals to LA4 defined Aircraft as the airframe plus engines. But I note that by the definitions in the Main Lease,

> **"Aircraft"** means the Airframe to be delivered and leased hereunder together with the two (2) Engines whether or not such Engines are from time to time installed on the Airframe or any other airframe, the Parts and the Aircraft Documentation, as further described in Exhibit A and the Delivery Acceptance Certificate, collectively. As the context requires, **"Aircraft"** may also mean the Airframe, any Engine, any Part, the Aircraft Documentation or any part thereof individually.

71. In my view the natural, and only remotely commercial, reading of LA4 Section 6.1 is that it is dealing with the consequences of a waiver of the requirement to do an airframe check, and what it is saying is that when there is such a waiver then the Aircraft is to be returned to the lessor in the same condition, *insofar as the airframe is concerned*, as when in regular service with the lessee. The reason the parties have not used the word airframe in the fourth line is because it will inevitably be the entire Aircraft that is returned, not just the airframe. But it seems to me entirely clear from the overall context that the parties cannot be taken, by this language, to have been varying the return conditions of the *engines* by the waiver of a check on the *airframe*. In my view very clear and explicit language would be required to achieve such a surprising result.

72. It may be that, as NAS submit, there are some repairing obligations which are not easy to characterise as being clearly airframe as opposed to engine repairs, but even if that is so, it is not a point which seems to me to carry any material weight in the construction process.

73. I turn then to the substance of the repair claim, which arises from three alleged aspects in which Engine 48 failed to meet the return conditions when it was subject to a borescope inspection ("BSI") (the First BSI) on 15 February 2020:

(1) The LPT Stage 1 blades had untwisted resulting in the outer shroud interlock being out of flush;

(2) The LPT Stage 3 blades had untwisted severely enough to have resulted in unlatched shrouds;

(3) The LPT Stage 1 outer air ducts were dislodged.

74. NAS agreed that defects (1) and (2) were present but argued that defect 3 was not, so the first issue is whether or not the LPT Stage 1 outer air ducts were dislodged.

75. Before I resolve it I need to say something about the experts.

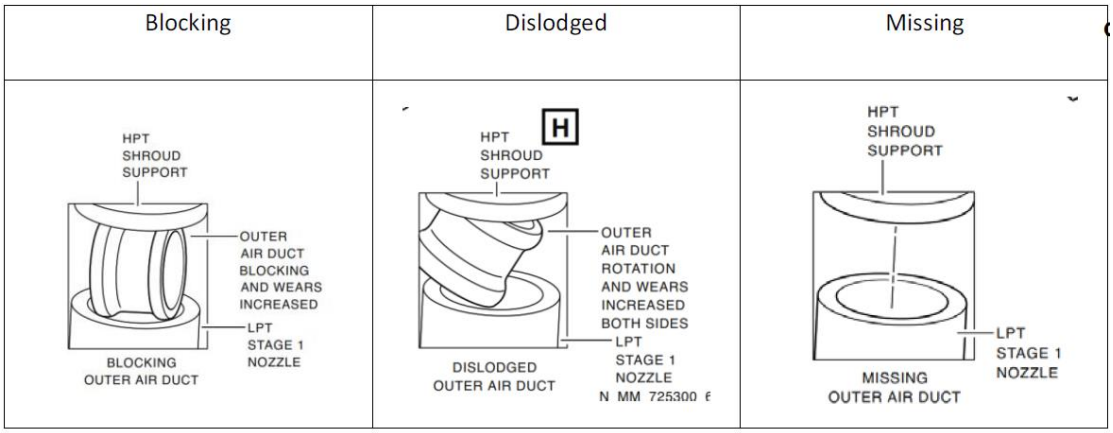
76. NAS called Mr Paolo Lironi of SGI Aviation, a consultancy. Mr Lironi holds a Master's degree in Aeronautical Engineering from Politecnico di Milano and has worked on and with airline engines since 1997 in engineering and managerial roles since then. Mr Lironi disclosed that his company has a contract with NAS, worth a maximum of

$50,000, and with which he is not personally involved. I do not consider that this adversely affects his independence. His report was detailed and precise, and he had attended a borescope inspection of Engine 48 on 7 November 2021 ("the Second BSI").

77. Ms Gray has a BSc in Mechanical Engineering from the University of Southampton, trained as a Rolls Royce undergraduate apprentice, and since graduating has worked as a Powerplant Engineer, a Powerplant Manager, and then a general Manager of Technical Support. She has 38 years of experience. She too attended the Second BSI.

78. I am satisfied that both experts were appropriately qualified to opine on the technical issues raised in the case.

79. Defect 3 concerns outer air ducts in the Low Pressure Turbine Stage 1 assembly. These ducts are arranged circumferentially. They bring cooled air into the engine. They are shaped like a short cylinder with slightly thicker ends. Each duct sits between two supports, the HPT shroud support and the LPT nozzle. The fit is not tight: that is necessary to allow for thermal expansion of the parts when the engine is in use. As a result there is a possibility that the air duct can become misaligned as between the shroud support and the nozzle, or even fall out completely. A diagram in the Aircraft Maintenance Manual shows the ways in which this can happen, and the resulting appearance when viewed from the side:



80. On the First BSI the inspector thought that there were two dislodged ducts. Because of the way in which he did his inspection, he was limited to a sideways view ("View A") of the ducts, that is to say similar to the direction from which the diagrams above are drawn. One photograph, taken from the video at 09.57, and reproduced in Mr Lironi's report at paragraph 84, is said by Genesis to show a dislodged duct. I agree with Mr Lironi that the photograph is not sufficiently clear for one to be at all confident as to whether that duct is dislodged. Certainly if there is any dislodgment it is not nearly so great as in the example diagram.

81. At the second BSI the inspector was able to achieve two views of the ducts, from the side (View A), for some but not all of the ducts, but also, for each of them, from above, looking through the shroud support through the duct and through the LPT Stage 1 Nozzle (View B). The advantage of View B is that if there is a dislodged or blocking duct it will be very obvious on View B.

82. Mr Lironi told me, and I accept, that he watched the Second BSI as it took place, and that in relation to each of the ducts the View B inspection suggested that the outer air duct was neither dislodged, nor missing, nor blocking the airpath.

83. I conclude, applying a balance of probabilities approach, that defect 3 is not made out. Insofar as any problem might have been created by the fact that the initial inspection had considered the air ducts to be unserviceable, I find that this would have been overcome by a further borescope inspection or in the course of other repair works.

Damages to reflect Defects 1 and 2

84. I need to assess an appropriate award of damages to reflect the breach of contract constituted by defects 1 and 2, which are admitted.

85. Genesis has not arranged for defects 1 or 2 to be rectified. The engines have been sitting in a hangar in Lithuania unused since February 2020. The Genesis' evidence did not explain what Genesis' future intentions are in relation to Engine 48. Nevertheless the parties proceeded on the basis that I should assess the cost of repairs, and Genesis submitted that in any event the diminution of value of the engine was equal to the cost of repairs.

86. I remind myself that the burden is on the claiming party to establish the quantum of its claim.

87. Assessing quantum is not straightforward. The repairs have not been done. Various estimates have been provided, but they are on different bases in terms of the degree of risk as to workscope that is taken on by the repairer. The experts disagree about the seriousness, precise extent, and causes, of the defects. Genesis' own case has varied. Until October 2021 its case on the quantum of its claim arising out of the first BSI was for $517,000. That claim was verified by a statement of truth. That case was amended very shortly before trial to increase the quantum to $2.3m, in respect of the same defects.

88. Shortly after the First BSI, Genesis obtained a series of quotes from three engine repair shops ("MROs"). The differences in price vary depending on the maximum scrap rates of the turbine blades, and whether or not the price quoted was a fixed price or a capped or not-to-exceed (NTE) price. And of course different providers gave different prices. The quotes can be summarised thus:

MRO	Included '*scrap rate*'	Cost
SRT	None	$265,000 (*fixed*)
AeroNorway	LPT1 blades: 20% scrap LPT3 blades: 5% scrap	$299,000 (*NTE*)
SRT	LPT1 & 3 blades: 15%	$350,000 (*NTE*)
SRT	LPT1–4 blades: 20% scrap LPT2–4 nozzles: 20% scrap	$425,000 (*NTE*)
AeroNorway	LPT1–4 blades: 20% scrap LPT2–4 nozzles: 20% scrap	$459,000 (*NTE*)
MTU	LPT1–4 blades: 20% scrap LPT2–4 nozzles: 20% scrap	$788,987 (*fixed*)

89. It seems a reasonable inference – and I do infer - that the figure of $517,000, which until shortly before trial was the Genesis' figure for the cost of repairing defects 1, 2 and 3, was in some way derived from these contemporaneous quotes.

NAS's approach

90. Mr Lironi's approach to assessing quantum, adopted by NAS, began with the SRT quotes, which he chose because they were the most detailed. From them he extracted charges for various categories of work, which he then divided into Workscope A, which was core work, which he accepted would inevitably be required, and Workscope B, which was contingency. He described his contingency figure as setting a figure which he thought there was only a "very limited" risk of exceeding. His figure was a core cost of $199,958 and contingency on top of that of up to $237,532, depending on how many blades in fact needed to be replaced as opposed to repaired.

Genesis' approach

91. Ms Gray's analysis, adopted by Genesis, noted that MTU gave an informal quote of $980,00 before it was asked to quote for the "most limited workscope". She noted that the three final quotes (as in my table) allow for 20% scrappage of LPT blades in LPT 1 and 3 and calculated that if in fact 100% replacement were necessary this would add $533k to the overall cost. She commented that "this is currently an unknown but remains a possible exposure"

92. She also estimated that if all of the LPT Stage 1 vanes had to be replaced that would add $650,400 to the repair costs and noted that the condition of the LPT Stage 1 vanes is "not known since they have not been inspected".

93. She carried out a similar exercise in relation LPT Outer Air Seals.

Conclusion

94. I do not find this sort of speculation as to the costs that *might* be incurred if it turns out that Engine 48 is in a worse state than it has been demonstrated to be in, of any material assistance to my task of assessing damages by reference to likely repair costs. In circumstances where repairs have not been undertaken by Genesis but Genesis has had ample time to inspect the engine in order to identify what work requires to be done, it seems to me that Mr Lironi's general approach to assessing damage is to be preferred, and that my starting point should be the contemporaneous quotations.

95. I need to make a fair assessment of what if any reduction I should make from the quoted NTE prices based on a maximum of 20% blade scrappage to reflect the likelihood that fewer than 20% of blades would require replacement. Having considered carefully what both Mr Lironi and Ms Gray have said about the extent to which blades are likely to require replacement I consider that an appropriate award of damages is $350,000. This equates to SRT's NTE quote assuming a cap of 15% for each set of blades.

INTEREST ON THE AMOUNT OF THE INTERIM PAYMENT

96. The final issue relates to interest on the interim payment. Genesis submits that the effect of Section 5.4.11 of the Main Lease is that it is a condition precedent to its liability to pay a maintenance rent contribution that NAS has first executed a Claim Settlement Notice.

97. Section 5.4 of the Main Lease deals with Maintenance Contribution. It is a long and convoluted section extending over 5 pages of the lease, with 12 subdivisions, numbered 5.4.1 to 5.4.12. It begins like this (I have added emphasis, and line breaks to make the structure clearer).:

> "5.4.1 Provided no Event of Default has occurred and is continuing and subject to the exclusions set forth in Section 5.5 *(Exclusions of Maintenance Contributions)* below, Lessor shall pay to Lessee, by way of contribution to the direct cost of any MRA, the amounts stipulated in this Section 5.4. **Payment of such amounts shall be conditional upon** submission by Lessee to Lessor within 12 (twelve) months from the commencement of an MRA [by the definitions MRA means Maintenance Rent Activity], but in any event within 6 (six) months from the Expiry Date of
>
> (i) an invoice with supporting documentation, as set out in Exhibit M, satisfactorily evidencing to Lessor the completion of such MRA;
>
> (ii) a statement from Lessee setting out warranty claims pending with or paid by Manufacturer or Maintenance Performer, if any, with respect to such MRA; and
>
> (iii) the acknowledgement of receipt by Maintenance Performer of the exact net (after all credits, returns, allowances, rebates, discounts and the like) amount paid by Lessee for such MRA (such net amount being the **"Qualifying MRA Amount")** and evidence satisfactory to Lessor that the Aircraft (including any uninstalled Engines or Parts) has been released by the Maintenance Performer free and clear of all Security Interests of the Maintenance Performer;

> (iv) to the extent permitted by the relevant Maintenance Performer, evidence satisfactory evidence satisfactory to Lessor that any warranty given by the Maintenance Performer in connection with the MRA is fully transferable or assignable to Lessor or that Lessor has been made a beneficiary of such warranties given."

98. Then section 5.4.2 says that upon completion of the MRA and subject to *satisfaction of the conditions stipulated in Section 5.4.1*, Lessor shall pay to the Lessee an amount equal to the lower of the qualifying MRA amount and the applicable MRA Maintenance Rent Balance at the date of commencement of the MRA.

99. Pausing there, the Section has so far identified a series of three preconditions to payment (in Section 5.4.1) and has then repeated the point, in Section 5.4.2, that payment is to be made upon completion of the MRA but subject to the conditions in 5.4.1 being satisfied.

100. The words on which Genesis rely come much later, in Section 5.4.11. That section uses the terms Settlement Amount which is defined as "the amount to be paid by Lessor to Lessee and agreed between Lessor and Lessee as the full and final settlement with respect to the amount to be contributed by Lessor to Lessee pursuant to section 5.4 (Maintenance Contribution) with respect to an MRA Claim". Section 5.4.11 provides as follows:

> "5.4.11 Upon Agreeing a Settlement Amount with respect to an MRA Claim, Lessor and Lessee shall execute the MRA Claim Settlement Notice and Acknowledgment prior to Lessor paying such Settlement Amount to Lessee."

101. The wording of the Claim Settlement Notice requires the receiving party, here NAS, to agree that it has no further claims. That is why NAS was unwilling to sign one in order to obtain the $9.6m to which, as was common ground, it was in principle entitled.

102. The issue is whether or not execution of a Claim Settlement Notice is a condition precedent which must be satisfied before Genesis as lessor becomes liable to pay a Maintenance Contribution. In other words, does Section 5.4.11 impose a condition precedent?

103. In my view it does not.

104. First, the language of Section 5.4.11 taken on its own is not sufficiently clear to create a condition precedent. It is true that it requires there to be an executed settlement notice before payment is made, but that is not sufficient to make it a condition precedent: if it were, everything which a party had contracted to do before an obligation in its favour arose would be a condition precedent. All that this section does is say when the Settlement Notice must be executed. It says nothing about the consequences of a failure to do so, and contains no language expressly suggesting that the obligation to pay only arises if and when the obligation to execute a Settlement Notice has been satisfied. In those circumstances the consequences of a breach of the obligation to sign are in my view limited to a claim for damage if the lessor can prove that it has sustained damage as a result of the lessee's failure to sign the notice.

105. Second, the conclusion I have reached based on the language of Section 5.4.11 taken alone is bolstered by comparing it with the careful language the parties have used in Section 5.4.1 in order to set out a series of matters which they clearly have agreed are preconditions to a liability: they have expressly said that payment is to be "conditional upon" the matters identified at (i) to (iv).

106. Third, it would seem very odd indeed to separate into different ends of Section 5.4 a series of conditions precedent each of which was supposed to operate in the same way.

107. Fourth, I do not see how Section 5.4.11 is supposed to work on Genesis' case. Suppose that there is a perfectly reasonable disagreement between lessor and lessee as to what is due, so that the lessor refuses to agree a Settlement Amount. If such an agreement were a condition precedent to any liability existing, the mere fact that there was a reasonable disagreement would lead to there in fact being no liability to pay. That makes no sense to me.

108. Finally, I reject Genesis' suggestion that the reference in Section 5.4 to "the amounts stipulated in this Section 5.4.1" somehow imports into the condition precedent machinery of Section 5.4.1 a requirement under Section 5.4.11 to agree a Settlement Amount. Section 5.4.11 has nothing to do with the calculation of the amounts stipulated elsewhere in Section 5.4

109. I am comforted that my conclusion accords with the provisional view of Mr Hancock QC, who said in his judgment on the interim payment application that "it is clear or least very clearly arguable, the provision is not a condition precedent" and said that it would be commercially nonsensical for the Claimant's rights to be dependent on the submission of a document which would evidence the settlement of a claim arising out of those rights.

110. Although NAS' written submissions post-trial deal with what award of interest should flow on the interim payment, I think it preferable to deal with all competing claims for interest together, when the parties make their submissions as to what order should be made in the light of this judgment.