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Case No: 2009 Folio 1249 and 1252

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings
Fetter Lane, London EC4A 1NL

Date: 30/04/2012

Before :

MR. JUSTICE TEARE

- -

Between :

ACG ACQUISITION XX LLC	**Claimant**
- and -	
OLYMPIC AIRLINES (IN SPECIAL LIQUIDATION)	**Defendant**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

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Michael McLaren QC and Harriet Jones-Fenleigh (instructed by **Simmons & Simmons LLP**) for the **Claimant**
Philip Shepherd QC and Edward Cumming (instructed by **Fulbright & Jaworski International LLP**) for the **Defendant**

Hearing dates: 24-27, 30-31 January, 1-3, 6-7 February and 22-23 March 2012

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Judgment
As Approved by the Court

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MR. JUSTICE TEARE

Mr. Justice Teare:

1. The following guide to the contents of this judgment may assist:

2. This action concerns the lease of a Boeing 737-300 aircraft for a period of five years by its owners ACG Acquisition XX LLC to Olympic Airlines SA, now in liquidation. The material events which span the years 2008 to 2011 may be briefly summarised as follows:

    a. The aircraft, having been redelivered to ACG[1] under a previous lease by AirAsia, an airline operator in the Far East, was delivered to Olympic in Singapore on 19 August 2008 and was put into commercial service on 23 August 2008. From then until 6 September 2008 it flew 112 flights. On that day, during a pre-flight inspection at Athens, a defect was discovered in one of the spoiler cables on the left wing. A repair was required before the aircraft could fly again. However, investigations revealed further defects (both to spoiler cables and other parts of the aircraft) which had to be reported to the Greek aviation authority (HCAA). On 11 September 2008 the HCAA suspended the aircraft's airworthiness certificate (ARC). Following an inspection report from Boeing and discussion between ACG and Olympic the aircraft was sent to Europe Aviation (EA) in Chateauroux, France, for the further inspections required to enable her ARC to be restored.

    b. The aircraft arrived in France on 9 January 2009. The work took longer than had been expected and the aircraft did not return to Athens until 23 July 2009. Before restoring the ARC the HCAA required a sample check of the aircraft's compliance with airworthiness directives (ADs). The HCAA was not satisfied with that check and the ARC was not restored.

[1] The previous lessor was in fact a related company of ACG, ACG Acquisition Labuan Limited, but no point was made of that and so I have referred to both lessors as ACG.

Olympic carried out no further work on the aircraft which remained at Athens. On 2 October 2009 Olympic ceased trading and entered a creditors' special liquidation.

c. On 29 March 2010 ACG served termination and redelivery notices. The aircraft was not redelivered to ACG until 24 November 2010 at Athens.

d. On 15 January 2011 the Federal Aviation Authority (FAA) permitted the aircraft to be flown to the United States. On 16 September 2011 the FAA issued an Export Certificate of Airworthiness and on 19 September 2011 AeroSur SA, a Bolivian operator, signed a lease for the aircraft and took delivery of the aircraft on 23 September 2011.

3. These events have given rise to substantial claims on both sides.

e. ACG claims the payment of rent and maintenance reserves in the sum of about US$4.6m to November 2010 plus damages for the loss of rent from 24 November 2010 until the end of the intended term of the lease, alternatively for conversion, about US$6.9m, less what it has and will receive from AeroSur plus the costs of deregistering and exporting the aircraft incurred in order to mitigate its loss.

f. Olympic counterclaims damages for breach of contract by ACG in failing to deliver the aircraft in the contractual condition, namely, Euros 6,798,497 in respect of the costs of hiring substitute aircraft and of attempting to trying to make the aircraft airworthy.

4. The nature of the respective cases can be summarised as follows:

a. ACG claims that the aircraft was delivered to and accepted by Olympic with the result that Olympic became liable to pay rent and maintenance reserves in accordance with the terms of the lease. The condition of the aircraft on delivery conformed with the requirements of the lease and in particular the aircraft was airworthy. If, however, the aircraft was not airworthy Olympic is estopped either by the terms of the Certificate of Acceptance or by law from asserting that it was not delivered in accordance with the terms of the lease and so there is no foundation for the counterclaim. Olympic's failure to pay rent or maintenance reserves was a repudiatory breach of the lease.

b. Olympic claims that the aircraft was not delivered in the condition required by the lease and, in particular, was not airworthy. The terms of the Certificate of Acceptance do not preclude Olympic from claiming that the aircraft was not in the required condition on delivery and Olympic is not estopped from so claiming. In consequence Olympic was never obliged to pay rent or maintenance reserves and Olympic is entitled to claim damages for breach of the lease. Alternatively, if any rent or maintenance reserves were payable Olympic is entitled to claim them back on the grounds that there was a total failure of consideration. In the further alternative the lease was frustrated by the HCAA's suspension of the ARC

on 11 September 2008 or by the HCAA's refusal to reinstate the ARC on 17 August 2009.

The events leading up to delivery

5. A pre-leasing survey of the aircraft was carried out in April 2008 in Kuching, Malaysia by Olympic Airlines Services (OAS), the maintenance repair and overhaul entity (an MRO) used by Olympic to service its aircraft. The purpose of this survey was to enable Olympic to decide whether or not to lease the aircraft. The aircraft was then about 17 years old. Mr. Ladopoulos, a superintendent employed by OAS, and two other inspectors carried out that inspection. The inspection was carried out at night between scheduled flights. Mr. Ladopoulos gave oral evidence. I considered that, although he sometimes had to be asked the same question more than once, he gave his evidence in a helpful manner. He accepted that he had been asked to conduct a "quick inspection."

6. Mr. Ladopoulos identified problems with the section of the spoiler cables which he could see and also noted that there were many repairs to the aircraft's fuselage. On 12 April 2008 he produced a manuscript note of his findings of which there were 43. In particular, he noted rust on the spoiler cables on the left hand wing and right hand wings (items 9 and 28), he said that the aileron cables must be checked (item 12) and he reported 26 doubler repairs to the fuselage.

7. On his return to Athens he produced a typed report dated 14 April 2008. He concluded that although the interior of the aircraft was in very good condition the exterior was in average condition "due to the multiple repairs to the fuselage as well as the general findings of the exterior inspection." He recommended that before deciding to incorporate the aircraft into Olympic's fleet "during the next C Check it must be inspected in detail ….and any findings must be repaired. Additional openings may be required other than those provided for by the C Check." A C Check is a maintenance check designed for each type of aircraft by reference to the type of operations the aircraft will be performing and environmental considerations.

8. AirAsia, the then lessee of the aircraft which was due to redeliver the aircraft to ACG, was to carry out the C Check. AirAsia used the services of ST Aerospace to carry out the C Check and the work required by the redelivery work package. The rationale for carrying out a C Check prior to redelivery is to attempt to harmonise the condition of the aircraft on redelivery with the condition which will be acceptable for onward delivery to the next lessee. The new operator will thus be able to put the aircraft into operation immediately.

9. Mr. Patrick Ryan, the senior vice-president of the technical services section of ACG[2], attended the inspection in Kuching. He exchanged emails with Steve Dimitriadis of Olympic on 15 and 16 April 2008 in which it was agreed that any "discrepancies" or "findings" could be addressed during the C Check. There was no evidence from Mr. Dimitriadis but Patrick Ryan did give evidence. He did so

[2] He is in fact employed by Aviation Capital Group Corp. which manages the leasing of the aircraft which are owned by separate companies within the group. Again, nothing turned on this distinction and so I have referred to Mr. Ryan as being a vice-president of ACG.

in what was, initially, a very defensive manner (especially with regard to the concept of airworthiness). Indeed, his witness statement was so defensive it barely recognised that ACG had an obligation under the lease to deliver the aircraft in a condition with Schedule 2 of the lease. His defensive manner suggested that it would be unsafe to rely on his evidence. However, as his cross-examination progressed he began to be more open and therefore more reliable. But in view of his apparent determination at the outset of his evidence not to give anything away which might be thought to harm ACG's interests I consider it appropriate to approach his evidence with caution, checking it against the contemporaneous documents and the probabilities.

10. By an amendment dated 12 May 2008 to the lease between ACG and AirAsia the required redelivery condition was amended so that it mirrored the delivery condition intended to be agreed between ACG and Olympic.

11. On 26 May 2008 ST Aerospace commenced the C Check and the redelivery work package.

12. On 30 May 2008 ACG and Olympic signed the 5 year lease of the aircraft. The lease provided that the aircraft and aircraft documents would be available for inspection by Olympic. They were made available for such inspection and Olympic inspected them. In June 2008 the aircraft documents, in particular the maintenance records, were inspected in Kuala Lumpur. The aircraft was inspected in Singapore. The inspectors from OAS did not give evidence though Mr. Peridis, the manager of the inspection department who assembled the inspection team, did so. He had no personal knowledge of those inspections and tended to downplay the extent of the inspection of the aircraft. His evidence about what he thought had happened on those inspections was not reliable.

13. ACG employed the services of Aircraft Engineering & Consulting Limited (AEC) to assist it with regard to the redelivery of the aircraft from AirAsia and the delivery of the Aircraft to Olympic in Singapore. Todd Smith assisted with particular regard to physical inspection of the aircraft and Jay Andre assisted with particular regard to the aircraft's documentation. I considered that Mr. Todd Smith sought to give his evidence honestly, carefully and fairly though that does not mean that all of his evidence about his inspection almost 4 years ago must be reliable. I also considered that Mr. Jay Andre sought to give his evidence honestly, carefully and fairly notwithstanding that some of his answers on the topic of airworthiness were difficult to sustain.

14. AEC, and in particular, Todd Smith, produced an Inspection Discrepancy List following an inspection of the aircraft. He took photographs to illustrate the discrepancies he had noted.

15. Todd Smith had dealings with Mr. Ioannis Kolydas, one of the inspectors from OAS. There was no evidence from him (or from any of the other OAS inspectors who went to Singapore). Mr. Kolydas produced a list of his findings dated 16 June 2008. Todd Smith said that Mr. Kolydas wanted his findings to be added to the Discrepancy List. Todd Smith added them to the list. They included at item 140 "LH wing just outboard of engine spoiler cables have rust" and at item 154 "RH wing spoiler cables at pylon area have rust." Item 292 also referred to "Aileron

and spoiler cables running wing rear spar and wheel well have rust at some points." (These items concerning rust on the spoiler and aileron cables mirrored what had been noted in April 2008 in Kuching, Malaysia, during the pre-lease inspection of the aircraft.) The full list of Olympic's discrepancies was provided to Todd Smith on 24 June 2008 by email from Mr. Dimitriadis (who had received it from Mr. Peridis who in turn must have received it from Mr. Kolydas). It set out defects affecting the horizontal stabilisers, the wings (including the spoilers), the fuselage, landing gear, engines, the cabin and the cockpit.

16. The full discrepancy list prepared by Todd Smith (including Olympic's findings) was provided to AirAsia and to ST Aerospace, the MRO acting on behalf of AirAsia, in order that the listed items could be rectified. There were 308 items. The majority were accompanied by photographs which suggested they had been noted by Todd Smith. The remainder, some 87 items, appear to have been added as a result of inspections by Mr. Kolydas. The work done (or not done) by ST Aerospace was a major issue at the trial. However, there was no oral or written evidence from any employee of either AirAsia or ST Aerospace. It is apparent from the contemporaneous documentation that the work took longer than had been anticipated causing disappointment to both ACG and Olympic.

17. Todd Smith's role included further inspections of the aircraft to verify that the discrepancies on the list had been dealt with. In his statement he said that he would expect to inspect "significant issues" and if a panel had been closed up overnight in his absence he would normally ask for it to be removed so that he could inspect the works. The exception would be where the task involved the replacement of a component in which case he would check the aircraft documents. In cross-examination he said that 90% of the items on the list would be checked by a physical inspection of the aircraft. If a panel had been closed up overnight "where I could not get back to it" he would have to rely on a check of the documents. These two accounts are slightly different. He had not mentioned the 90% figure in his statement though the figure is not necessarily inconsistent with his statement. I would expect the percentage of items physically checked to vary depending upon the number of "significant" issues, the number of tasks which involved replacement of components and the number of times a panel had been closed up where he "could not get back to it". However, Mr. Smith was not seeking to deceive the court. Since I formed the view that he was a conscientious aircraft inspector I would expect that typically he was able to carry out a physical inspection of the great majority of discrepancies but what percentage he was able to check physically on this particular aircraft is not known. He frankly accepted that he could not remember physically checking 90% of the items on this aircraft.

18. In late July 2008 the same inspection team from OAS which had conducted the pre-delivery inspection in June returned to Singapore to take delivery of the aircraft. That involved checking to ensure that all necessary maintenance works had been carried out. It is apparent from an email dated 29 July 2009 from Mr. Kolydas (who was "checking for defects rectification") to Todd Smith that Mr. Kolydas inspected the aircraft. He listed some 27 "findings". This list was passed on by Todd Smith to AirAsia. From 24 July 2008 the inspection team was joined by Mr. Dimitriadis. On 6 August 2008 he provided Mr. Ryan with a list of outstanding "findings". Again, Todd Smith passed on this list to AirAsia with

instructions in relation to each item. Mr. Peridis said in his witness statement that the inspection team's role was to check that the necessary work had been carried out by reference to the aircraft documents and not by a physical inspection of the aircraft. But the contents of the reports dated 29 July and 6 August show that the inspection also included an inspection of the aircraft.

19. On 13 August 2008 AirAsia and ST Aerospace agreed with each other that the C Check and Redelivery Package had been completed although it appears that work continued until 18 August 2008.

20. On 19 August at 8 am Mr. Dimitriadis and Mr. Ryan signed the Certificate of Acceptance. Pursuant to that certificate Olympic not only irrevocably and unconditionally accepted the aircraft but also confirmed that the aircraft complied in all respects with the condition required at delivery under the lease save for such items as were set out in an annex of discrepancies. After having signed the Certificate of Acceptance Mr. Ryan met with the AirAsia representative and signed the AirAsia Return Acceptance Receipt.

21. Also on 19 August 2008 the HCAA issued a certificate of airworthiness. It appears that the HCAA had three inspectors in Singapore for this purpose. The aircraft was flown to Greece on 19 August 2008.

Events after delivery

22. Mr. Kotitsas, the Director of the Engineering Department of OAS, gave evidence of the events from September 2008 to July 2009. However, he was prone to exaggeration (not only about Olympic's safety record but also about matters of more immediate relevance to this case) and I concluded that he was an unsatisfactory and unreliable witness. I therefore preferred, where possible, to base my account of the events on the contemporary documents.

23. The aircraft was immediately put into service. But on 6 September 2008 at Athens a flight spoiler cable was found in a less than satisfactory state. Olympic's documentary evidence of the discovery is an additional work card dated 6 September 2008 timed at 1000. It records that a mechanic (whose number was 1371) noted that during a PDI (a pre-departure inspection) "at LH [left hand] wing the control cable of no.2 flt spoiler found broken (Cable WSB1-3)". The card also reported that work was carried out on the same day by another mechanic (number 1368) and checked by an inspector (number 251). A "spoiler control cable WSB1-3" was fabricated and installed.

24. It is common ground between the experts that it is likely that what has been called the "rupture" of the flight cable occurred whilst the aircraft was landing on 6 September 2008, when the spoilers were retracting.

25. Mr. Peridis learnt about the defect on 7 September 2008 at the line maintenance daily meeting. He gave evidence that the mechanic who discovered the defect had found "one of the spoiler cables had multiple broken wires". Presumably this was reported to him at the meeting on 7 September 2008. He said that he had spoken to the mechanic just two days before giving evidence and was "assured by him that it [the spoiler cable] was totally broken." It was not clear what Mr. Peridis

understood by "totally broken". However, Mr. Kotitsas, the Director of the Engineering Department, said in his written statement which stood as his evidence in chief that he had been told on 6 September 2008 by the mechanic that "some of the wire strands which make up the cable had broken". Thus Mr. Peridis and Mr. Kotitsas gave similar evidence as to what they had been told by the mechanic in September 2008. That evidence suggested that some but not all of the 7 wires which make up the cable had been broken. In those circumstances I do not regard the hearsay evidence of what the mechanic told Mr. Peridis two days before he gave evidence, that the cable was "totally broken", as reliable evidence. (The cable was apparently inspected by Lufthansa much later. Its report is dated 19 December 2008. It describes the cable as being in two ruptured parts but it appears that some cutting of the cable had taken place in the meantime. In the circumstances this report does not assist in determining whether the cable was "severed", a description used in argument.) My finding therefore is that some but not all of the 7 wires which make up the cable were broken.

26. The aircraft was immediately grounded and further inspections of the flight controls, including all spoilers, ailerons, flaps and slats took place. Several spoiler and aileron cables were found to be corroded.

27. On 11 September 2008 the HCAA suspended the aircraft's airworthiness certificate. Mr. Dafaranas, an HCAA inspector, said in a written statement that this was the only occasion on which the HCAA had grounded an Olympic aircraft. On 16 September 2008 Mr. Dafaranas visited the OAS hangar and inspected the aircraft's spoiler cable. On 17 September 2008 the HCAA required Olympic to confirm that the aircraft was airworthy. On 24 September 2008 OAS informed Olympic that, in the light of its study of the AirAsia job cards relating to spoiler cables which it regarded as "untrue", a "special inspection package" was required before Olympic could say whether the aircraft was airworthy. On 25 September 2008 Olympic recorded defects with regard not only to the spoiler and aileron systems but also to, inter alia, the trailing edge flap system, the landing gears, the depressurisation system, the fuel system and fuselage.

28. On 7 October 2008 OAS concluded that it had lost trust in the aircraft's maintenance records (something which had not happened before) and proposed an inspection package. At the same time Olympic requested Boeing to send a team to advise on and approve the proposed course of action. However, due to existing maintenance schedules on other aircraft the proposed work, estimated to last 10-15 days, could not be done in Athens by OAS and had to be done by another MRO. OAS was estimated to have spent some 860 engineer hours on rectification of the faults found in Athens.

29. Boeing conducted an inspection over three days in mid-October 2008. Its purpose was not to determine the airworthiness of the aircraft but to provide further information for Olympic so that it could determine, in conjunction with the HCAA, how to restore the aircraft's airworthiness. Boeing recommended, inter alia, a review of the aircraft's compliance with Airworthiness Directives ("ADs") and of the dent locations in the fuselage. ADs are issued by the national aviation authority of the country in which the aircraft was designed when a problem is encountered which may compromise an aircraft's safety. ADs usually specify

additional maintenance or design actions that are necessary to ensure the airworthiness of the aircraft type.

30. Olympic began work on preparing a Work Package of the required checks thought necessary to regain an ARC. One was prepared by 14 November 2008, revised on 18 November 2008 and submitted to the HCAA on 21 November 2008. Meanwhile attempts were made, in particular by ACG, to find an appropriate service facility. ACG had also advised AirAsia of what had been found in Athens and put AirAsia on notice that the matter may be the subject of a claim for damages.

31. On 4 December 2008 Patrick Ryan reported that a slot was available from 15 December 2008 at European Aviation ("EA") in Chateauroux, France. At about the same time Olympic and ACG discussed the Work Package by telephone, in particular the scope of the AD review. Olympic informed EA that the intention was that completion of the work package would lead to the restoration of the ARC by the HCAA. EA was anxious to receive the Work Package as soon as possible in order to assess how long the required work would take.

32. On 12 December 2008 Boeing permitted the aircraft to fly to EA (a "non-revenue ferry flight"). On 16 December 2008 Boeing provided its comments on the work package. Permission to fly was also awaited from the HCAA.

33. On or about 5 January 2009 the HCAA and the European Aviation Safety Agency (EASA) gave permission for the flight to EA. On 8 January 2009 the aircraft flew to EA. Around this time there were discussions between Olympic and ACG about who would pay for the work in France. Olympic drew up a side letter pursuant to which ACG would pay all the costs. ACG was prepared to bear some cost on certain terms but no enforceable agreement was reached.

34. Between 12 and 15 January 2009 Olympic carried out an audit of EA. Olympic concluded that it was a small repair centre with limited in-house capabilities and that continuous on-site monitoring would be necessary to ensure the quality of work.

35. Throughout January 2009 discussions concerning the Work Package continued between Olympic and ACG. They concerned, in particular, the number of ADs which were to be checked. Between 22 and 26 January 2009 ACG and Olympic agreed that a total of 12 ADs would be checked by EA. There were also discussions concerning the CPCP (corrosion) checks.

36. Once the agreement between Olympic and ACG had been passed to EA a "workscope" was awaited for EA. Both Olympic and ACG were irritated by the delay in commencing the work. By the end of February 2009 concerns were also being expressed as to the slow pace of work and the quality of the work at EA. ACG's on-site representative accurately predicted, as he informed Patrick Ryan, that "there will be a big battle at the end over the Invoice."

37. The AD checks, the CPCP (corrosion) checks and the repairs to the fuselage led to further works of repair being required. OAS sent an aircraft mechanic and structural engineer, Mr. Fakourelis, to assist AE's "good…but…..quite young and

inexperienced" structural engineer with certain repairs (the repair of a dent which was out of limits, corrosion in way of the aft cargo door cut out and corrosion found on the horizontal stabiliser). Mr. Fakourelis gave evidence. I considered that he was candid when cross-examined and therefore reliable. For example he accepted that the corrosion found on the horizontal stabiliser could have developed after delivery of the aircraft. (Mr. Fakourelis had also seen the broken spoiler cable on 6 September 2008. He was asked questions about precisely what he saw but since he was not involved with the aircraft at the time he made no official report. In his statement dated 30 September 2011, some three years after his unofficial observation, he described the cable as "broken". In those circumstances I am not sure that much could be gained from his answers in 2012 concerning the manner in which the cable was broken, such as "cable with a loose end" or "one broken end".)

38. By 26 June 2009 the works at EA were eventually completed. A test flight was performed on 2 July 2009 and the aircraft returned to Athens on 23 July 2009. On 28 July 2009 Olympic submitted to the HCAA, inter alia, the findings of the AD and CPCP works at EA and requested such further clarification as the HCAA might require before re-issue of the ARC.

39. In early August 2009 Mr. Dafaranas of the HCAA met with Olympic to discuss the findings at EA. He required a further sample check of ADs which had been certified as having been carried out by the previous MRO, ST Aerospace. On 5 August 2009 the Authority wrote a letter requiring a sample check of 8 ADs.

40. On 10 August 2009 Olympic reported that after checking 5 ADs three were "without findings" and two were "with findings" (ie not in compliance).

41. On 17 August 2009 the HCAA decided that "detailed and full scale inspections" were required. Inter alia, all ADs had to be recertified, CPCP tasks had to be checked and all the tasks carried out in the C Check had to be rechecked. Only once that had been done would the HCAA consider re-issue of the ARC.

42. Before this Mr. Aris, the Technical Adviser to the Chief Executives of Olympic and OAS, was "confident that the plane would fly". Although there were inaccuracies in his statement (which he accepted) he gave his evidence in an open, engaging and helpful manner. By that stage the maintenance checks and repairs necessitated by ACG's breach had been completed by EA in France. As a result Olympic expected that the Authority would restore the aircraft's airworthiness certificate. Mr. Aris said "it was an airworthy plane as far as the work performed ….The plane could have obtained the ARC airworthiness certificate from the CAA, if the CAA were happy with it. There was nothing else to be done."

43. The demand of the HCAA for a full check of AD compliance caused Olympic, in the words of Mr. Aris, to "surrender...we threw the towel in, as I think you say". Mr. Aris feared that a full check would have cost "a lot of money, a lot more than we paid at Europe Aviation, maybe a lot more, or close, to the value of the plane." Mr. Aris accepted there was another reason why Olympic did nothing; "the company was about to close, it only had another 45 days".

44. On 19 August 2009 Olympic informed ACG that compliance with the requirements of the HCAA was "beyond economic repair of the aircraft".

45. On 23 September 2009 the aircraft was placed by Olympic in "long term storage".

46. On 2 October 2009 Olympic ceased trading and entered a creditors' special liquidation. The aircraft remained in Athens. Olympic commenced a process of selling off its own aircraft and returning leased aircraft to their owners. On 29 March 2010 ACG served termination and redelivery notices in respect of its aircraft. On 6 August 2010 this court ordered Olympic to redeliver the aircraft. The aircraft was not redelivered to ACG until 24 November 2010.

47. On 22 July 2011 ACG signed a letter of intent with AeroSur of Bolivia for the lease of the aircraft. After an inspection of the aircraft AeroSur required 82 items to be addressed. Olympic's expert witness considered that many of these items related to parts likely to have been taken off the aircraft at some stage to service other aircraft and to leaks likely to have developed whilst the aircraft was in storage. Mr. Ryan said that in addition further work was required to put the aircraft into the configuration required by AeroSur and as a result of deterioration suffered by the aircraft during the period of time it had remained idle in Athens. The required work, including a C Check, was carried out in Florida between July and September 2011. Olympic's expert described the C Check, based upon a sample audit of the work package, as comprehensive. AeroSur took delivery of the aircraft in September 2011 after the US Federal Aviation Authority had certified it as airworthy.

<u>The condition of the aircraft on delivery</u>

48. Although many alleged defects were referred to in the evidence attention was concentrated on the condition of the flight control cables, compliance with certain ADs, the accuracy of the aircraft's "dent and buckle chart", the condition of the fuel tanks and the presence of corrosion. These were the defects upon which Olympic's technical expert focussed his attention in his first report and on which Olympic's counsel, Philip Shepherd QC, directed his fire in his written closing submissions. He did not seek to establish that any other defects were present on delivery.

49. Both parties adduced evidence from experts on aircraft maintenance. ACG called Mr. Seymour and Olympic called Mr. Greenfield.

50. Mr. Seymour was an experienced expert witness. Notwithstanding that experience he was defensive in his answers and appeared more concerned to ensure that he got over points in favour of ACG than to answer the questions put to him in a straight forward manner. He gave the impression that he was an advocate for ACG. It was also worrying that he had not mentioned an earlier case in which he had given evidence, *Pindell v AirAsia* [2010] EWHC 2516 (Comm). Mr. Seymour accepted that he had a copy of the judgment of Tomlinson J. when he wrote his report and that he was aware from his involvement in the case that there was pressure on ST Aerospace in 2008 as a result of the number of 737s being redelivered that year by AirAsia. He was also aware that one of the issues in the present case was the quality of the work done by ST Aerospace in 2008. He

agreed that pressure on ST Aerospace was relevant to the issues in the present case. I asked him why he had not told the court in his report of the pressure on ST Aerospace in 2008. He said he had no excuse for that but that he was not trying to mislead the court. I accept his evidence that he was not seeking to mislead the court. But in circumstances where a recently published report of an earlier case in which he had been involved concerned the work of the same MRO whose quality of work was in issue in the present case and where the work in both cases was done at about the same time, for the same employer (AirAsia), and on the same type of aircraft he ought at the very least to have mentioned the report as having a potential bearing on the issues in this action. An expert owes a duty to the court not to omit matters which might detract from his stated opinion. He must consider carefully what those matters are or might be. Mr. Seymour cannot have given sufficient consideration to that duty. Similarly, when he provided the court with an extract from the February 2009 edition of Aircraft Values he cannot have given sufficient thought to whether the August 2009 edition might have contained additional material relevant to the issue of the value of 737s in 2009, as it did. These failures, coupled with his defensive response to questions put to him, have persuaded me that I cannot safely rely upon his evidence save to the extent that Mr. Greenfield accepted it when cross-examined.

51. Mr. Greenfield was, when cross-examined, generally fair and frank. He was not defensive. He had not given expert evidence before and perhaps as a result of that allowed those who instructed him to use him as a vehicle for putting forward arguments on the value of aircraft notwithstanding that he had made clear that he was not an expert in such matters. It was apparent that he lacked specialist technical knowledge on some matters in respect of which he had given evidence in his report but he did not seek to hide such matters when cross-examined. It was also apparent that he was considering some matters for the first time in the witness box when, probably, he should have considered them before completing his report. As a result not everything he said could be accepted. Nevertheless he was a fair witness.

The flight control cables

52. The evidence as to the condition of the flight control cables on delivery consisted of, first, the evidence as to what was done by AirAsia prior to redelivery under the previous lease and, second, the evidence as to what was discovered in Athens on and after 6 September 2008.

53. The work done by AirAsia (or on their behalf by ST Aerospace) was evidenced by "Inspection Cards". Two such cards were numbers 138 and 139. Each was dated 23 June 2008 and "originated" by a mechanic or engineer, Mr. Wong. He prepared them following the production of two Routine Maintenance Task cards dated 26 May 2008 and numbered 1C3A007 and 1C4A007. Inspection card 138 noted the task or defect as "LH wing outbd engine pylon spoiler cable found surface corrosion." Inspection card 139 noted the task or defect as "RH wing spoiler cables near pylon areas found surface corrosion." These would appear to be the result of inspections by Mr. Wong. Each card then noted the action taken. Card 138 noted "LH wing outbd engine pylon spoiler cable replaced as per AMM 27-61-00 REV 54" on 18 July 2008. Card 139 noted "RH wing spoiler cables near pylon area replaced as per AMM 27-61-00 REV 54" on 11 (or possibly 12) July

2008. Both cards record that the work was inspected (by inspector no.169) on 6 August 2008. Both cards note that a single cable was replaced and give the part reference number. It is common ground between the experts that the part number on card 138 identifies spoiler cable WSA2-3 as the cable replaced. Reference to a schematic diagram in the Boeing Maintenance Manual identifies WSA2-3 as one of 4 cables servicing flight spoiler no.3 on the left hand wing. The part number on card 139 identifies spoiler cable WSA1-4 as the cable replaced. The schematic diagram shows that was one of four cables servicing flight spoiler no.7 on the right hand wing. Authorised Release Certificates showed that those cables were released by Boeing on 12 July 2008.

54. There were three further inspection cards, each dated 30 June 2008, produced in response to "customer findings" which relate to spoiler and aileron cables. The terms of the task or defect mirror the discrepancies noted in the discrepancy list produced by Todd Smith and Mr. Kolydas at numbers 140, 154 and 292. The action taken is variously described as "refer to IC card 138", "refer to IC card 139" or "refer to IC card 138, 139." Reference is made to inspections on 3 July and 17 July 2008 by inspector no.169. No part numbers are listed as having been used and so it appears that the only work done was to the two cables identified in cards numbers 138 and 139.

55. There is evidence that on 7 August 2008, after inspector 169 had inspected the work on the spoilers recorded in cards 138 and 139 at 1400, there was a second inspection at 1500 by inspector number 178.

56. The evidence of these inspection cards therefore suggests that AirAsia (or ST Aerospace) inspected the spoilers as part of the 1C check and pursuant to the list of discrepancies produced by ACG and Olympic but that in the event only two spoiler cables (out of a total of 16) were replaced. It is therefore to be inferred that the other cables (and the 8 aileron cables) were considered satisfactory. This would suggest that the condition of flight cables on delivery of the aircraft to Olympic in Singapore was satisfactory.

57. However, not long after delivery of the aircraft a defect was discovered to a spoiler cable on the left hand wing during a pre-flight inspection at Athens on 6 September 2008. I have already described how this discovery was made.

58. There was no evidence from mechanic 1371 as to how he appreciated that the broken cable was WSB1-3. The experts said that any label on the cable would have been removed but that the mechanic was likely either to know from his experience which cable was which or would have had available the schematic diagram of the flight cables.

59. The additional work card which recorded the discovery of the broken spoiler cable also recorded that on 7 September 2008 cable WSA1-3 (which was "opposite to WSB1-3" and served no.2 flight spoiler) was also fabricated and fitted.

60. On 7 September at 0450 spoiler cable WSB2-3 (also on the left hand wing) was found "with corrosion" according to another additional work card. It was removed and a replacement installed. On 8 September WSA2-3 (the cable reported to have been replaced by AirAsia) was reported as having been replaced. WSA2-3 appears

from the schematic diagram to have been "opposite" WSB2-3 in the same way as WSA1-3 was opposite to WSB1-3. The card then notes: "the replaced cable found corroded and with broken wires out of limits."

61. On 9 September 2008 a further inspection of the spoiler and aileron cables took place. On the right hand wing spoiler cables WSA2-4 and WSB1-4 were noted to have corrosion and WSA1-4 (the cable reported to have been replaced by AirAsia) was noted to have broken wires and corrosion. On the left hand wing spoiler cables WSB1-3, WSA1-3, WSB2-3 and WSA2-3 were reported to be "with wear or broken". (Since these cables on the left hand wing had been reported to have been replaced by Olympic between 6 and 8 September it seems more likely than not that these were observations of the cables removed on 6 and 8 September.)

62. In addition 4 aileron cables were noted on 9 September 2008 to have broken wires.

63. On 12 September 2008 an Occurrence Report Form concluded that there had been "explicit bad or negligent workmanship during the last base (heavy) maintenance visit." It listed the spoiler and aileron findings. Two spoiler cables on the left hand wing, WSB2-3 and WSA2-3 (presumably the cables which had been removed) were reported to have corrosion, 2 spoiler cables on the right hand wing (WSA1-4 and WSB1-2) were reported to have broken wires and 2 spoiler cables on the right hand wing (WSA2-4 and WSB1-4) were reported to have corrosion. 4 aileron cables were reported to have broken wires.

64. On 13 September 2008 an Occurrence Report Form recorded that a documentary check was made on the work done by AirAsia in the recent 1C check. Inspection cards 138 and 139 were noted and it was stated that "our staff did not find any new cables in this aircraft."

65. Olympic's findings thus suggest that on the left hand wing 3 spoiler cables were found with broken wires or corrosion (WSB1-3, WSB2-3 and WSA2-3) and that on the right hand wing 4 spoiler cables were found with broken wires or corrosion (WSA2-4, WSB1-4, WSA1-4 and WSB1-2). Those cables include the two cables said to have been renewed by AirAsia.

66. There is therefore a conflict between the evidence from AirAsia and the evidence from Olympic. The former suggests that the flight cables were in order. The latter suggests that several were not.

67. I shall deal first with WSB1-3, the cable on the left hand wing which was noted to have been "broken" on 6 September 2008. Whilst the experts are agreed that that cable failed during landing of the aircraft on 6 September 2008 they are also agreed that the cable must have been corroded on delivery. Having regard to the short period of time which elapsed between delivery and discovery of the corrosion I agree that that seems likely. It is true that the list of outstanding matters produced by OAS on 6 August 2008 mentioned some issues concerning spoilers but did not mention rust on the spoiler cables which would suggest that there was no rust on the spoiler cables at that time. However, in view of what was found in Athens by OAS this seems unlikely. It was suggested that the OAS inspector in Singapore must have checked the AirAsia documents only. But this

seems unlikely. The list of 6 August suggests that the inspector was making an inspection of the aircraft. It is more likely that his inspection of the spoilers was not sufficiently close up to enable him to check on the condition of the cables. There was no evidence from the OAS inspector in Singapore, Mr. Kolydas, to explain why, in circumstances where he had initially noted on rust on the cables, he did not make a detailed inspection to ensure that it had been removed by AirAsia.

68. It is common ground that WSB1-3 was not one of the cables replaced by ST Aerospace. Although a careful reading of the contemporaneous documents shows this to be so it does not appear always to have been so understood by Olympic. Mr. Papakyriazis, an inspector at OAS, conducted a review of the documents and signed a written statement which appeared to say that the cable which failed on 6 September 2008 had been replaced by AirAsia. He corrected his statement at the commencement of his evidence in chief. However, he told me that he had appreciated that the cable which had failed had not been replaced within a few days of 6 September 2008. If he had done so it is puzzling that he should have made a statement suggesting that the failed cable was the one said to have been replaced by St Aerospace. A similar mistake appeared to have been made by Mr. Peridis and Mr. Aris.

69. I shall next deal with WSB2-3 on the left hand wing which was found corroded at Athens on 7 September 2008. Again and for the same reasons it seems more likely than not that that corrosion was present on delivery, some two weeks earlier in Singapore.

70. On the right hand wing cables WSA2-4, WSB1-4 were found corroded on 9 September 2008. For the same reasons it is more likely than not that such corrosion was present on delivery. WSB1-2 was found with broken wires on 12 September 2008. It is odd that this does not appear to have been noted on 9 September 2008. This suggests that the broken wires must have been small in number. In the absence of corrosion (which was not mentioned) such broken wires must have come about as a result of wear. It is more likely than not that such broken wires were present on delivery.

71. That leaves the two cables apparently replaced by AirAsia but which were found with corrosion and broken wires by Olympic, namely, WSA2-3 (on the left hand wing) and WSA1-4 (on the right hand wing). The documents emanating from AirAsia and the documents emanating from Olympic cannot both be correct. For it is most improbable that a new cable fitted in July 2008 could be found suffering from corrosion and broken wires in September 2008. On behalf of Olympic it was suggested that the documents emanating from AirAsia were false and deliberately so. Reference was made (i) to the practice of “pencil-whipping”, that is, signing off on a job even though it was not carried out, (ii) to an apparent inconsistency between the date on the Boeing Release Certificate for the replacement cable WSA1-4 (though not for WSA2-3) and the date on which that cable had been replaced, (iii) to the contemporaneous documents which suggested that the time taken for the 1C check at AirAsia was longer than had been anticipated and (iv) to the judgment of Tomlinson J., as he then was, in *Pindell Limited and others v AirAsia* [2010] EWHC 2516 (Comm) where it was found at paragraph 22 that in the first half of 2008 resources of both ST Aerospace and AirAsia were severely

stretched because AirAsia was attempting simultaneously to prepare several aircraft for redelivery. On behalf of ACG it was suggested that a mistake must have been made at Olympic because it was deeply improbable that personnel at AirAsia or ST Aerospace would have certified that cables had been replaced when they had not been.

72. Todd Smith gave evidence that he recalled seeing the cables being replaced. But that was not mentioned in his evidence in chief (his written statement) and was only mentioned in re-examination. If he had a reliable recollection of seeing the cables replaced he would have mentioned that long before his re-examination. I therefore place no reliance on this evidence.

73. Nor do I consider that this dispute can be resolved by reference to the Occurrence Report Form dated 13 September 2008 which said that "staff did not find any new cable in this aircraft". It is unclear what the basis of that comment was. The author of the comment, Mr. Pagonis, had not himself carried out a physical inspection. (His report was of a documentary check.) There was no evidence from Mr. Pagonis who may simply have been reporting something he had heard from an unnamed member of staff. It is therefore difficult to decide what, if any, weight should be attributed to this report since it is not known who made it or the nature of the inspection, if any, on which it was based.

74. Notwithstanding that the experts had heard of the practice of "pencil-whipping" and notwithstanding the evidence that AirAsia and ST Aerospace were under pressure to complete the 1C check with as little delay as possible I accept the submission of Mr. McLaren QC, counsel for ACG, that the suggested lie in the maintenance records was improbable. A spoiler is one of the aircraft's auxiliary flight controls. Breakage during flight will or may affect the handling of the aircraft, making control of the aircraft, according to Mr. Greenfield, "more challenging" (although the landing of the aircraft does not have appear to have been affected on 6 September 2008). A corroded spoiler cable is therefore potentially dangerous to an aircraft and those who fly in it. It seems to me unlikely that a licensed mechanic would record that such a cable had been renewed when it had not been or that two inspectors would certify that they had checked that the cable had been replaced as recorded when it had not been. That is especially so in circumstances where the aircraft's owners had provided a list of discrepancies which expressly referred to the existence of such corrosion and where representatives of the owners and future lessee were checking that the discrepancies had been dealt with. Whilst perhaps two man days might be saved by not replacing the cable that is a tiny benefit to AirAsia or ST Aerospace as compared with the enormity of the risk they would be taking by not replacing the corroded cable. I accept that there is no obvious explanation for the apparent inconsistency between the date on the FAA Authorized Release Certificate for the replacement cable WSA1-4 and the date on which that cable had been replaced but I do not regard that inconsistency as necessarily sinister in circumstances where there was no similar inconsistency with cable WSA2-3.

75. But a mistake by Olympic in recording corrosion on cables WSA2-3 and WSA1-4 also appears improbable. The licensed engineer would be familiar with the cable numbers and unlikely to make a mistake in identifying the corroded cables

especially when the flight cables were being specially examined following the discovery on 6 September.

76. It is common ground that at least two spoiler cables were not renewed in Athens. Olympic must therefore have been content with the condition of at least two cables which could have been those replaced by AirAsia. I consider that it is more likely than not that two cables were replaced by AirAsia but that a mistake was made at AirAsia in identifying them as WSA2-3 and WSA1-4. In reaching this conclusion I recognise that the precise manner in which that mistake was made is difficult to identify in circumstances where the identification comes from the part numbers which are unique to each cable but I take comfort from the fact that Olympic's expert Mr. Greenfield, who gave his evidence in a demonstrably fair manner, was unable to dismiss some sort of error at AirAsia.

77. Nevertheless, the fact remains that on the basis of Olympic's records there was, on delivery to Olympic, one spoiler cable on the left wing in such a condition, probably as a result of corrosion, that it was able to fail after only two weeks of flying and two other spoiler cables which were corroded. On the right hand wing there were also three spoiler cables which were corroded on delivery to Olympic. In addition it is probable that there were four aileron cables corroded on delivery. I have considered the careful and detailed written submissions made by Mr. McLaren as to whether these defects ought to have been detected by AirAsia and ST Aerospace but in circumstances where AirAsia and ST Aerospace had been specifically requested to examine the spoiler and aileron cables for rust I have concluded that their inspection must have been poor. Whilst a 1C check (which was being carried out by AirAsia) requires only a "General Visual Inspection" whereas a 2C check (which was not being carried out by AirAsia) requires a "Detailed Visual Inspection", common sense suggests, in circumstances where rust had been reported on the spoiler cables on the left and right hand wings and on the aileron cables, that a detailed visual inspection should have been made, especially where the condition of two cables has been found to merit their replacement. It seems more likely than not that the inspections were rushed and were not as thorough as they ought to have been perhaps as a result of the resources of ST Aerospace being stretched because of the number of aircraft which AirAsia was redelivering that year.

Other matters affecting the flight controls

78. Pulleys. On 7 September 2008 Olympic found that two pulleys connected with the spoilers on the left hand wing were suffering from "wear". On 9 September 2008 both pulleys were replaced.

79. The Boeing maintenance manual requires that any pulleys "that match the worn condition description given in Figure 602" should be replaced. Although there is no evidence from the mechanic who replaced the pulleys and no "edge on" photographic evidence of the wear on the pulleys it seems to me, having regard to the fact that it was decided to replace the pulleys, that it is more likely than not that the extent of wear was such as to have required the replacement of the pulleys and, having regard to the short period of time which had elapsed between delivery and the discovery of the wear, that it is more likely than not that such wear was present on delivery. I have noted ACG's submissions on this point but consider

that whilst it is possible that the extent of the wear on delivery was just below that which necessitated replacement that is improbable.

80. But I also accept Mr. Greenfield's evidence that a 1C inspection did not require a detailed inspection of the pulleys. There is no evidence that ST Aerospace, Olympic or ACG inspectors found any issues with the pulleys on their general inspections prior to delivery. That suggests that the wear was only visible if a particularly careful look was made for wear. It is likely that the wear was only observed on 7 September as a result of a particularly careful look following the discovery and removal of certain spoiler cables.

81. The actuator. On 7 September 2008 evidence of an hydraulic leak was found during an inspection of the no.2 spoiler. On 12 September 2008 the actuator was replaced.

82. However, a leak in way of the same actuator had been found by ST Aerospace and the actuator had been "overhauled and reinstalled" prior to delivery. Whilst it is possible that the evidence noted was of a leak which had been present on delivery, it is also possible that the evidence noted was of a leak which had developed after delivery. I am not persuaded that is more likely than not that the actuator was leaking on delivery. Counsel for Olympic made no submission about this actuator in his Closing Submissions apart from suggesting that Mr. Seymour had conceded that the actuator had not been sent for overhaul and repair. However, whilst Mr. Seymour said that it did not look as if the actuator had been fully overhauled he said that it had been repaired and as part of that process it would have been function-checked to check whether it was leaking after the repair.

83. The flaps. On 7 September 2008 damage was found in way of the left hand flap and to the bearing support, the retainer cover, the leaf springs and the fairing. On 19 September 2008 and on subsequent days up until 14 October 2008 the damaged parts were replaced. There was much discussion about this damage in the evidence. However, Mr. Shepherd did not seek to establish in his written closing submissions that this damage was present on delivery and in those circumstances I shall not address it (or the lengthy submissions made by Mr. McLaren on this topic).

The dent and buckle chart

84. On 24 September 2008, after the aircraft had been grounded by the HCAA, Olympic wrote to ACG with a list of the defects which had been found. They noted that 8 dents had been found on the aircraft's skin and that 4-5 of them were "out of limits". When Boeing were asked to inspect the aircraft and advise as to how the aircraft might be made airworthy Boeing noted multiple dents outside "allowable damage limits". Boeing identified 9 that were not included in the aircraft's dent and buckle chart.

85. Whilst the operation of the aircraft between 23 August 2008 and 6 September 2008 exposed the aircraft to the risk of damage (for example whilst the aircraft was being manoeuvred on the tarmac and whilst other vehicles were being manoeuvred in close proximity to the aircraft) there is no record of any such incidents in the aircraft's log. It was therefore submitted by Olympic that it is

more likely than not that the dents not recorded on the dent and buckle chart but observed by Boeing were present on delivery of the aircraft. This was challenged by ACG who submitted that it has not been established on the balance of probabilities that the dent and buckle chart was inadequate at delivery. ACG relied on a number of matters. First, Mr. Ladopoulos had observed skin repairs in Kuching in April 2008 and so it was likely that Olympic's inspectors in Singapore would have paid particular attention to the condition of the fuselage. Yet the 9 dents noted by Boeing had not been noted. Second, as acknowledged by Mr. Greenfield, all of the dents would have been "perfectly visible to Olympic before delivery".

86. Those competing arguments are finely balanced. However, both experts were of the view that it was improbable that 9 dents could have been caused after delivery. Mr. Greenfield considered it "unrealistic" for the aircraft to have sustained so many dents in the two weeks that Olympic operated the aircraft. Mr. Seymour accepted that it was "highly unlikely" that the 9 dents occurred in those two weeks of operations. In those circumstances I am persuaded that it is more likely than not that the 9 dents were present on delivery but had not been noted on the dent and buckle chart. Why such dents had not been observed by Olympic is unexplained. There was no evidence from those who had inspected the aircraft in Singapore.

Compliance with ADs.

87. During the period that AirAsia operated the aircraft some 60 ADs were carried out. Mr. Shepherd submitted in his closing submissions that 3 ADs had not been properly complied with prior to delivery. It is necessary to consider each in turn.

88. AD 2005-07-19 (the "Cargo door cut out AD"): This AD required an inspection for fatigue cracks in the cargo door areas. The documents certified that it had been carried out in July 2008. The contention that it had not been properly carried out in July 2008 was based on the discovery of corrosion in the vicinity of the cargo door by EA in February and March 2009. Two questions arise. First, was that corrosion present in July 2008? Second, if so, ought it to have been discovered on a proper inspection?

89. A document prepared on 28 July 2009 by Mr. Velmachos, an inspector in the QA department of OAS who went to EA to check on the work carried out by EA, recorded "corrosion level 3" (the most serious category) and "severe corrosion" in way of the cargo door. EA's own documents do not record the degree of corrosion noted and so the source of Mr. Velmachos' comments is not clear. He did not give oral evidence. However, an email from Patrick Ryan dated 10 March 2009 refers to major corrosion in way of the door frame requiring a major repair. So it seems likely that the corrosion detected by EA was serious. Mr. Greenfield said that some corrosion was "almost certainly" present prior to delivery in August 2008 but agreed that it "may well have been at a much lower level." I accept that evidence.

90. Mr. Greenfield accepted that before EA noted the corrosion they had removed sealant and filler. He also accepted that the AD did not require the removal of sealant and filler and that if ST Aerospace did not remove the sealant and filler then they would probably not have seen the corrosion. He accepted that "on that

premise" the existence of corrosion would not be evidence that ST Aerospace had not complied with the AD. The corrosion "may well have been hidden". I accept this evidence and conclude that Olympic have not established on the balance of probabilities that ST Aerospace failed to comply with the cargo door cut out AD. However, some corrosion was present on delivery. Since it was "major" when observed in February or March 2009 I consider that it was more likely than not to have been out of limits on delivery.

91. AD 2005-13-15 (the "secondary vapour barrier AD"): This AD required sample checks of the secondary fuel vapour barrier in the aircraft. The ST Aerospace documents recorded detailed measurements of the thickness of the barrier at 155 locations and that the barrier had been restored to its required thickness. In 2009 EA noted "a few barrier cracks" but with no further details. Mr. Velmachos noted the cracks in his July 2009 report but again gave no further details. EA also noted that the APU fuel feed fitting had no secondary fuel vapour barrier though there was evidence that the fuel fitting did not require to be coated. Mr. Greenfield considered that if the barrier had been checked as suggested by ST Aerospace the cracks noted by EA ought not to have been present.

92. Olympic has to establish on the balance of probabilities that it is more likely than not that ST Aerospace failed properly to carry out the secondary vapour barrier AD. In the light of the evidence of detailed work by ST Aerospace in that regard compared with the relatively few findings by EA I do not consider Olympic have discharged this burden, notwithstanding Mr. Greenfield's view that the cracks found by EA should have been picked up by ST Aerospace.

93. AD 2008-06-29 ("the downstops AD"): This AD required a series of checks to detect and correct any loose or missing parts from the main slat track downstop assemblies which might otherwise puncture the slat can causing a fuel leak and fire. ST Aerospace recorded that this AD had been complied with on 30 July 2008. In June 2009 EA recorded "ten on twelve torques was out of limit and two installations was bad and fixed." Mr. Greenfield considered that ST Aerospace cannot properly have conducted the AD in July 2008. In the absence of any other evidence this would appear to be a reasonable conclusion given that the torque on the twelve nuts on the leading edge slat downstops was required to be measured, notwithstanding that no details were given of the readings. However, there was also evidence that the leading edge slat panels had been removed by EA in February or March 2009. This immediately throws into doubt any conclusions which would otherwise be drawn from EA's tests in June 2009. The degree of any such doubt is diminished by the experts agreement that the work in February or March 2009 did not involve interference with or adjustment to the down stop nuts. However, the down stops were accessible for a period of time thereafter and so the possibility remains that the down stops might have been interfered with.

94. In the absence of evidence as to what, if any, care was taken by EA between February or March 2009 and June 2009 to ensure that the nuts were not interfered with when they were accessible I am left in doubt as to whether the condition of the nuts in June 2009 is reliable evidence of their condition after they had been tested by ST Aerospace in July 2008. The same applies to the two "bad" installations. For this reason I am not persuaded that it is more likely than not that the downstops AD was not properly carried out by ST Aerospace.

95. When the aircraft returned from EA a further sampling of ADs at the request of the HCAA produced two "findings" which Olympic suggested revealed non-compliance with ADs by AirAsia. It is appropriate to consider those at this stage.

96. AD 2005-20-03 (the "intercostal AD"). The intercostal web had been checked by ST Aerospace in May 2007 in accordance with the AD. In August 2009 a small crack was found in the intercostals web. Mr. Greenfield gave evidence that, "given the existence and number of other defects on the aircraft", it was probable that the AD had not been complied with in May 2007. It was clear from his cross-examination that he relied on nothing else to support this opinion. I do not consider that a sufficient basis for his opinion. Any such opinion must be based upon a consideration of the crack, its dimensions, likely cause and so forth, rather than upon guilt by association. Given the small size of the crack and the long length of time since May 2007 Mr. Greenfield accepted that it was probable that the crack had started to develop after May 2007. I also accept that that is indeed probable, bearing in mind the intensive use the aircraft was said to have had. On that basis Olympic is unable to establish that it is more likely than not that the previous operator, AirAsia, had failed to comply with the intercostal AD. It is more likely than not that the aircraft had correctly been certified as having complied with the intercostal AD in May 2007.

97. AD 2002-02-08 (the "landing gear AD"). This AD was certified as having been complied with before the aircraft had been leased to AirAsia. In August 2009 the landing gear was found to be non-compliant with the landing gear AD because of the presence of self-locking nuts. However, there is evidence that EA fitted such nuts in March 2009 probably because a Boeing service bulletin wrongly suggested that such nuts be fitted. I accept that that is probably what happened. It follows that, on the balance of probabilities, the aircraft had complied with AD 2003-02-08 on delivery.

98. For these reasons I must reject the submission made on behalf of Olympic that on delivery there were ADs which had not been properly carried out.

Fuel tanks

99. Photographs of sealant and paint flakes in fuel tanks were in evidence. There was some discussion as to when these photographs were taken. Mr. Shepherd referred (on page 82 of his 87 page schedule provided on the eve of closing submissions) to evidence that they were taken before 30 September 2008. Whilst some photographs bore the date 28 September 2008 the photographs of the fuel tanks did not. Reference was made to metadata but no reference was given to such metadata in the bundles of evidence. Whether or not the photographs were taken before 30 September 2008 Olympic had a record of sealant and paint debris being observed on 3 October 2008 and also of sealant being removed between 2 and 4 October 2008 after a leak in a fuel tank had been found. In any event, the experts were agreed that debris contamination, including paint flakes, was present in the fuel tanks on delivery. However, they disagreed as to whether the level of debris contamination was acceptable.

100. Mr. Greenfield accepted that it was inevitable that paint and sealant will crack causing small particles of paint and sealant to contaminate the fuel tanks from

time to time. He also accepted that inspection of the fuel tanks was not required at a 1C check. Filters protect the engine from being damaged by such particles and so the extent of contamination of the tanks can be gauged by inspection of the filters. Mr. Greenfield accepted that his evidence in chief that absolutely no debris was permitted was wrong. He agreed that there was an acceptable level of debris.

101. In June 2008 ST Aerospace had replaced the low pressure and high pressure filters as part of the 1C check. There was no evidence of a build up of contaminants at that time. This suggests that at that time the amount of any contaminants in the fuel tanks was not unacceptable. However, the photographs suggest "debris" rather than "particles" and Mr. Greenfield said that contamination can be present in fuel tanks before problems with the filters are manifested. I accept that evidence. Mr. Velmachos, the OAS inspector sent to France to act as Olympic's on-site representative, said in a written statement that on 13 February 2009 he inspected the fuel tanks and "readily identified flaking paint". The matter is again finely balanced but having regard to the photographs of debris I am persuaded that at the time of delivery in August 2008 it is more likely than not that there was an unacceptable amount of debris in the fuel tanks.

102. There was also an issue as to microbiological contamination. Between 20 and 23 June 2008 tests by SGS showed there was less than 1 CFU (colony forming unit) per 100 ml. There was no suggestion at the time that this was unacceptable. However, on 26 November 2008 80,000 CFUs were found and on 1 December 2008 some 2,000,000 CFUs were found. These figures suggest that there had been a considerable increase in CFUs between June and November 2008. But Olympic were unable to show that it was more likely than not that the amount of CFUs on delivery in August 2008 was unacceptable.

Other corrosion

103. I have already accepted that there was corrosion in way of the cargo door cut outs. Mr. Shepherd mentioned one other item of corrosion in his closing submissions, namely, corrosion of the left hand horizontal stabiliser. The discrepancy list prepared for the end of lease survey prior to delivery in August 2008 had noted corrosion on areas of both horizontal stabilisers and that several screws on the left hand horizontal stabiliser had been found rusted. Such corrosion ought to have been dealt with because, as Mr. Seymour accepted, the horizontal stabiliser was an "absolutely vital control surface". Yet in 2009 Mr. Fakourelis attended EA to assist in the repair of corrosion of the horizontal stabiliser. He explained that the horizontal stabiliser is a trimmable section of the tail of the aircraft which provides stability to the aircraft and keeps it flying straight. Severe corrosion had been found on the shims, lugs, clevis and clevis holes of the left hand stabiliser. Mr. Fakourelis said that the corrosion was not recent and would take several months to develop but he accepted, when cross-examined, that it could have started at some point after delivery of the aircraft in August 2008. However, since corrosion was found in way of the left hand stabiliser before delivery and was also found in that location in 2009 it seems more likely than not that the corrosion had not been properly eradicated before delivery, though it may have worsened after delivery.

104. There were three specific items of further corrosion discussed in the evidence; corrosion in lavatory D, corrosion in way of the aft galley and corrosion on the VHF antenna support. Although Mr. Shepherd made no submissions about these items he did rely on "unacceptable corrosion" and so I shall comment on these items.

105. In October 2008 some corrosion was found by Olympic in lavatory D. However, there was evidence that this lavatory was sent away for inspection and repair prior to delivery as part of the end of lease survey. Mr. McLaren submitted that it was implausible that a third party would have ignored any corrosion to the lavatory had it been present.

106. There is a photograph of the corrosion dated 13 October 2008. Whilst lavatories may well be highly susceptible to corrosion as submitted by Mr. McLaren the photograph does not suggest that it had only developed since delivery. It looks much older than that. I therefore consider that there was serious corrosion in way of lavatory D on delivery.

107. In February 2009 EA found "light" corrosion under the aft galley. However, ST Aerospace had repaired an area of corrosion on the aft galley floor. Further, there was evidence of an open tap in the aft galley whilst Olympic was operating the aircraft. In those circumstances I am not persuaded that it is more likely than not that the corrosion found under the aft galley in February 2009 had been present on delivery. It is possible that it was present but also possible that it developed between September 2008 and February 2009 as a result of the open tap.

108. In April 2009 some light corrosion was found on the VHF antenna support. The support is external to the aircraft and had not been observed during the pre-delivery surveys. Mr. Greenfield was inclined to accept that it was probable that this corrosion had developed after delivery. In those circumstances I am not persuaded that it is more likely than not that this corrosion was present on delivery.

109. In summary, however, it appears that the principal defect affecting this 17 year old aircraft on delivery in August 2008 was corrosion. There was corrosion in way of the flight cables (which caused the failure of a spoiler cable on 6 September 2008), in way of the cargo door cut outs and in way of the horizontal stabilisers.

<u>Compliance with the required condition on delivery</u>

110. The most material parts of the lease provided as follows:

> "3.4 Lessee's Conditions Precedent
>
> Lessee's obligation to accept the Leased Property on lease from Lessor under this Agreement is subject to the satisfaction by Lessor of the following conditions precedent:
>
> (a) Certificate: the receipt by Lessee of a certificate of a duly authorized officer of Lessor setting out a specimen

of the signature of each individual that executes an Operative Document on behalf of the Lessor;

(b) Representations and Warranties: the representations and warranties of Lessor under Section 2.4 are correct and would be correct if repeated on Delivery; and

(c) Delivery Condition: the Aircraft shall be in the condition set forth on Schedule 1, Part 1 and in the condition required in Schedule 2, except for any items set forth on Annex 2 of the Certificate of Acceptance and any other items agreed in writing by Lessor and Lessee, as referenced in Section 4.2 below.

…….

4. COMMENCEMENT

4.1 Leasing

(a) Lessor will lease the Leased Property to Lessee and Lessee will take the Leased Property on lease at the Delivery Location on the Delivery Date in accordance with the Operative Documents for the duration of the Term.

(b) Lessor and Lessee intend that this Agreement constitute a “true Lease” and a lease for all United States federal income tax purposes.

4.2 Delivery

(a) Delivery Condition: Lessor shall deliver the Leased Property “as is, where is” and in the condition required in Schedule 2, except for any items set forth on Annex 2 to the Certificate of Acceptance and any other items agreed in writing by Lessor and Lessee.

(b) Delivery Inspection: At least fifteen (15) days before the Scheduled Delivery Date, Lessor shall make the Leased Property available for Lessee to conduct a ground inspection of the Aircraft and an inspection of the Aircraft Documents to its satisfaction (collectively, the “Delivery Inspection”). The Delivery Inspection of the Aircraft shall include the following:

……..

(d) Acceptance Flight: Before the Delivery Date, Lessor shall cause an acceptance flight of the Aircraft to be performed of up to three hours at Lessor’s cost (with up to two representatives of Lessee on-board as observers),

and such further acceptance flights as may be necessary in the event that the first or subsequent flights do not confirm that the Aircraft complies with the delivery conditions set forth in Schedule 2.

…….

(f) Correction of Discrepancies: The obligation of Lessee to lease the Leased Property from Lessor is subject to Lessor delivering the Leased Property to Lessee in compliance with the conditions set forth on Schedule 2. If Lessor corrects all material discrepancies from the conditions set forth on Schedule 2 before Delivery, or if Lessor and Lessee agree that Lessor will correct or pay for their correction as set forth on Annex 2 to the Certificate of Acceptance, then Lessee shall accept the Leased Property. If, on the Scheduled Delivery Date, the Aircraft is not, in all material respects, in the condition set forth in Schedule 2 and either Lessor does not correct all material discrepancies or Lessor and Lessee do not agree upon the correction of such material discrepancies within 45 days after the Scheduled Delivery Date, then Lessee may by notice to Lessor terminate this Agreement, in which event neither Lessor nor Lessee shall have any further obligations under this Agreement except as set forth in Section 7.4. If Lessee fails to give any such termination notice within 45 days following the Scheduled Delivery date, Lessee shall be deemed to have accepted the Leased Property for all purposes of this Agreement.

……..

5.14 Absolute

Lessee’s obligations under this Agreement are absolute and unconditional irrespective of any contingency whatever including (but not limited to):

(a) any right of offset, counterclaim, recoupment, reduction, defence or other right which either party to this Agreement may have against the other;

(b) any unavailability of the Aircraft for any reason, including a requisition of the Aircraft or any prohibition or interruption of, interference with or other restriction against Lessee’s use, operation or possession of the Aircraft;

(c) any lack or invalidity of title or any other defect in title, airworthiness, merchantability, fitness for any

purpose, condition, design or operation of any kind or nature of the Aircraft for any particular use or trade, or for registration or documentation under laws of any relevant jurisdiction, or any Total Loss in respect of or any damage to the Aircraft;

(d) any insolvency, bankruptcy, reorganization, arrangement, readjustment of debt, dissolution, liquidation or similar proceedings by or against Lessor or Lessee;

(e) any invalidity, unenforceability or lack of due authorization of, or other defect in, this Agreement; or

(f) any other cause which, but for this provision, would or might otherwise have the effect of terminating or in any way affecting any obligation of Lessee under this Agreement;

provided always, however, that this Section 5.14 shall be without prejudice to Lessee's right to claim damages and other relief from the courts in the event of any breach by Lessor of its obligations under this Agreement, or in the event that, as a result of any lack or invalidity of title to the Aircraft on the part of Lessor, Lessee is deprived of its possession of the Aircraft.

……..

7.9 Conclusive Proof

DELIVERY BY LESSEE TO LESSOR OF THE CERTIFICATE OF ACCEPTANCE WILL BE CONCLUSIVE PROOF AS BETWEEN LESSOR AND LESSEE THAT LESSEE HAS EXAMINED AND INVESTIGATED THE AIRCRAFT, THAT THE AIRCRAFT AND THE AIRCRAFT DOCUMENTS ARE SATISFACTORY TO LESSEE AND THAT LESSEE HAS IRREVOCABLY AND UNCONDITIONALLY ACCEPTED THE AIRCRAFT FOR LEASE HEREUNDER WITHOUT ANY RESERVATIONS WHATSOVER (EXCEPT FOR ANY DISCREPANCIES WHICH MAY BE NOTED IN THE CERTIFICATE OF ACCEPTANCE).

……..

8.11 Maintenance and Repair

Lessee shall:

(a) keep the Aircraft airworthy in all respects and in good repair and condition, and all maintenance will be carried out to the standards of major international air carriers;

……..

(i) maintain in good standing a certificate of airworthiness for the Aircraft in the appropriate category for the nature of the operations of the Aircraft issued by the Aviation Authority except when the Aircraft is undergoing maintenance, modification or repair required or permitted by this Agreement, and from time to time Lessee shall provide to Lessor a copy on request;

……

SCHEDULE 2 – OPERATING CONDITION AT DELIVERY

On the Delivery Date the Aircraft, subject to ordinary wear and tear to an extent consistent with similar aircraft engaged in commercial airline operations, will be in the condition set out below:

1. General Condition

The Aircraft will comply with the following:

(a) have been cleaned to meet international airline standards both internally and externally immediately prior to redelivery;

(b) have installed the full complement of Engines and Parts (including accessories and loose equipment) as when originally delivered to the previous lessee, and be in a condition suitable for immediate operation in commercial service;

(c) be airworthy, conform to type design and be in a condition for safe operation with all equipment, components and systems operating in accordance with their intended use and within limits established by the manufacturer and approved by the Aviation Authority of the previous lessee, and all pilot discrepancies and deferred maintenance items cleared on a terminating action basis;

(d) have a valid export certificate of airworthiness and a standard transport category certificate of airworthiness with respect to the Aircraft issued by the aviation authority of the previous Lessee for Greece;

(e) comply substantially with the Manufacturer's original specifications to the extent that it so complied on Delivery to the previous lessee and subject to any alterations made pursuant to and in accordance with the previous lease agreement after such date;

(f) have undergone, immediately prior to Delivery, the next scheduled, full zonal block C-Check (or higher check, if applicable) including all corresponding lower level checks and all other inspections and tasks (including all phases and multiples and including CPCP and any aging aircraft inspections) all structural systems/zonal inspections and out-of-sequence inspections then due so that all airframe inspections due within the C-Check interval as defined in, and in accordance with, the Airframe manufacturer's current revision of the MPD which shall be sufficient enough to clear the aircraft for not less than 4,000 Flight Hours, 3,000 Cycles and 15 months until the next scheduled C-Check; and during the C-Check, Lessee shall have the right to inspect the Aircraft and any defects shall be rectified, at Lessor's cost prior to Delivery.

……..

(p) the Aircraft will be free of fuel, oil and hydraulic leaks and damage resulting there from. Any temporary leak repairs will have been superseded by permanent repairs carried out in accordance with the applicable maintenance or repair manual or the Manufacturer's instructions (as the case may be);

…….

(r) any damage to the Aircraft which occurred during the prior lease term which exceeds the Airframe Manufacturer's SRM limits will have been permanently repaired in accordance with the SRM or, if the damage is outside the scope of the SRM, the repair shall have received an FAA 8110-3 or FAA 8100-9 certification;

…….

(t) all structural damage that is within SRM limits (and which therefore does not require repair work to be performed), noted at the time of delivery, will be noted on a damage mapping chart (sometimes called a dent and buckle chart) or will be noted on a combined repair and damage mapping chart;

…….

11. Corrosion

(a) The Aircraft will be in compliance with the CPCP and will have been inspected and treated with respect to corrosion as required by the CPCP.

(b) Fuel tanks will be free from contamination and corrosion and the fuel tank treatment program required under the Manufacturers aircraft maintenance manual.

Exhibit A – Certificate of Acceptance

Certificate of Acceptance

This Certificate of Acceptance is delivered on the date set forth in paragraph 1 below by Olympic Airlines S.A. ("Lessee") to ACG ACQUISITION XX LLC ("Lessor") pursuant to Lease Agreement 25071, dated _____ ___, 2008, between Lessor and Lessee (the "Agreement"). Capitalized terms used but not defined in this Certificate of Acceptance shall have the meaning given to such terms in the Agreement.

1. Details of Acceptance.

Lessee hereby confirms to Lessor that at ____:____ ___.m. G.M.T. on this ____day of _____2008, at _____, Lessee irrevocably and unconditionally accepts and leases from Lessor, in accordance with the provisions of the Agreement, the Aircraft, as more particularly defined in the Lease Agreement, including the following:

(a) one Boeing Model 737-3M8 airframe, bearing manufacturer's serial number 25071 and _____registration mark_____;

(b) two CFM International Model CFM56-3B2 engines, bearing manufacturer's serial numbers 724945 and 725925;

(c) APU bearing manufacturer's serial number_____;

(d) three landing gear assemblies bearing manufacturer's serial number_____(LM),_____(RM) and_____(N);

(e) all Parts installed on, attached to or appurtenant to the Airframe and Engines;

(f) the Aircraft Documents specified in Part 2 of Schedule 1 to the Agreement; and

(g) the Engine LLP disk sheets listed on the attached Annex 3.

2. Lessee's Confirmation.

Lessee confirms that as at the time indicated above, being the time of Delivery:

(a) Lessee's representations and warranties contained in Sections 2.1 and 2.2 of the Agreement are hereby repeated;

(b) the Aircraft is insured as required by the Agreement;

(c) Lessee confirms that there have been affixed to the Aircraft and the Engines the fireproof notices required by the Agreement;

(d) the current status of the Airframe, Engines and APU and Landing Gear are in the condition set forth on Annex 1 attached hereto; and

(e) the Lease Property complied in all respects with the condition required at delivery under Section 4.2 and Schedule 2 of the Agreement, except for the items, if any, listed on the attached Annex 2 (the "Discrepancies"). Lessor and Lessee agree that the Discrepancies, if any, shall be corrected as set forth on the attached Annex 2.

3. Lessor's Confirmation.

Lessor confirms to Lessee that, as at the time indicated above, being the time of Delivery, Lessor's representations and warranties contained in Section 2.4 of the Agreement are hereby repeated."

111. Thus the terms of the lease, in particular clause 4.2(a), placed upon ACG an unqualified obligation to deliver the aircraft "as is, where is and in the condition required in Schedule 2." Schedule 2 required the aircraft on delivery to be airworthy and in a condition for safe operation.

112. There was a dispute between the parties as to the meaning of airworthiness. ACG maintained that an aircraft was airworthy if the aircraft had been properly maintained notwithstanding that there existed a defect which, had the operator known of it, would have prevented the aircraft from flying. Olympic maintained that an aircraft was only airworthy if it was safe to fly.

113. In the light of my finding as to the poor standard of inspection by AirAsia with regard to corrosion of the flight cables this debate would appear to be academic because the aircraft had not been properly maintained. On the basis of that finding the aircraft was not airworthy on delivery by ACG to Olympic on ACG's own case. I shall however consider the meaning of airworthiness because it was a major debate between the parties.

114. ACG's contention is based upon the assumptions underlying the detailed maintenance regime prescribed by aircraft manufacturers and approved by aviation authorities. That regime allows for parts to deteriorate and in some cases to fail and yet still reduces the risk of a serious accident to less than 1 in 10 million flight hours. That level of risk, consistent with a risk of a serious accident being reduced to 0.00001%, is assessed as acceptable with the result that if the maintenance regime is properly applied the aircraft will be considered airworthy. Thus ACG said that in that regime "the existence and subsequent discovery of unknown issues is inevitable and an inherent consequence of the way in which aircraft are maintained." Olympic's expert Mr. Greenfield accepted that if the maintenance regime is properly carried out an aircraft will be considered airworthy until a defect is discovered which renders the aircraft unairworthy and that such an approach was reflected in industry regulations which contained the phrase "no known condition exists that would make the plane unairworthy". ACG also referred to other regulations which required a physical survey "to ensure that ….no evident defect can be found that has not been addressed".

115. The meaning of the word "airworthy" depends upon its true construction in the context of the lease in which it is found, having regard to the factual background of which both parties are aware. The lease in this case is of an aircraft intended for the safe carriage of passengers. In that context the ordinary and natural meaning of airworthy is, in my judgment, fit or safe for the carriage of passengers by air. Whether a particular defect renders an aircraft unfit or unsafe for flight will depend upon the function of the part in question and the severity of the defect. It will not depend upon whether the operator of the aircraft knows of the defect or not. An aircraft with a defective part which renders the aircraft unfit or unsafe for flight is not rendered fit or safe for flight on account of the operator of the aircraft being unaware of the defect.

116. Both parties to the lease were aware of the maintenance regime which applies to aircraft and of the circumstances in which aviation industry and authorities will regard an aircraft as airworthy and grant an ARC. I accept that both parties will have appreciated that an ARC may be granted notwithstanding that there may be a hidden defect which, when revealed, will have to be corrected before the aircraft can safely fly. However, I do not accept that an aircraft with an ARC following proper maintenance is airworthy where, unknown to the operator and aviation authority, the aircraft carries a defect which, had it been known, would have caused the aviation authority to refuse an ARC until it was corrected. Safety, and hence airworthiness, depends upon the condition of the aircraft at the material time. It does not depend upon whether or not a defect is known to the operator. I do not consider that any prudent lessor or lessee of commercial aircraft intended for the carriage of passengers would regard an aircraft as airworthy if the aircraft carried a hidden defect which, if the lessor and lessee had known about it, would have to be corrected before the next flight.

117. If, as is common ground, a corroded flight cable must be replaced before the aircraft may fly (that being a requirement of Boeing's maintenance programme) an aircraft with a corroded flight cable is not airworthy. It is possible, as accepted by Olympic's expert Mr. Greenfield, that such corrosion may be missed on the general visual inspection appropriate for a 1C maintenance check and so may be

considered safe to fly notwithstanding the presence of such corrosion. However, the presence of a corroded cable renders the aircraft *in fact* unsafe to fly because, had the prudent operator known of the corroded flight cable, he would not have permitted the aircraft to fly without replacing the corroded flight cable.

118. The lease also expressly requires the aircraft to be "in a condition for safe operation". I accept that on my construction of airworthiness these words add nothing to the delivery condition of airworthiness. I do not, however, consider that this casts doubt on my construction. On the contrary I consider that it serves to support and explain the meaning of airworthiness in the sense which I have understood it. If however, and contrary to my view, the requirement of a "condition for safe operation" is an additional requirement to that of airworthiness such that airworthiness must be understood in the restricted sense suggested by ACG then the additional requirement makes plain that the aircraft must in fact be "in a condition for safe operation."

119. Counsel were unable to refer me to any authority which considered the meaning of airworthiness. However, the meaning of seaworthiness in the context of the carriage of goods by sea is well established. The classic test of unseaworthiness, as explained in *Scrutton on Charterparties* 22nd ed. at paragraph 7-020 is: "Would a prudent owner have required that the defect should be made good before sending his ship to sea, had he known of it. If he would the ship was not seaworthy." Notwithstanding that aircraft maintenance appears to be more detailed, more regulated and more heavily prescribed than ship maintenance (such that one should be cautious in drawing analogies between ships and aircraft, cf *Pindell Limited v AirAsia* [2010] EWHC 2516 (Comm) at paragraph 78), I am unable to see any reason for understanding airworthiness in a materially different manner from seaworthiness. On that basis an appropriate test for airworthiness is: "Would a prudent operator of an aircraft have required that the defect should be made good before permitting the aircraft to fly, had he known of it. If he would the aircraft was not airworthy."

120. In his "Final Submissions Responsive to Olympic's Late Further Submissions" Mr. McLaren submitted, at footnote 20, that the prudent operator of an aircraft is one who reduces the risk of a serious incident to no greater than 1 in every 10 million flight hours by complying with the requirements of the maintenance regime. This submission ignores the assumption which I consider should be made in judging airworthiness, namely, that the operator knows of the defect in question. That assumption ought to be made when assessing airworthiness because otherwise one is not considering the actual condition of the aircraft. In the context of a lease of an aircraft intended for the safe carriage of passengers it seems to me that the reasonable lessor and lessee would each expect the requirement in the lease that the aircraft be airworthy on delivery to relate to the actual condition of the aircraft, not to its assumed condition.

121. Having regard to my findings as to the condition of the aircraft on delivery it follows that the aircraft was not in an airworthy condition on delivery or in a condition for safe operation in breach of Schedule 2 para.1 (c) to the lease. In particular, certain of her flight control cables were corroded and the related pulleys were worn. A prudent operator of an aircraft, had he known of the corroded flight cables, would have required the corroded flight cables to be

replaced before permitting the aircraft to fly because that was what the manufacturer recommended. The extent of wear to the pulleys was outside the recommended limits and so a prudent operator of an aircraft, had he known about such wear, would have required the pulleys to be replaced before permitting the aircraft to fly. The same must apply to the corrosion in way of the left hand stabiliser since it was an important flight control and also to the corrosion in way of the cargo door cut out since that was the subject of an airworthiness directive and was probably out of limits on delivery.

122. Schedule 2 para.1(f) of the lease required the aircraft to have undergone immediately prior to delivery the next C check, which happened to be a 1C check. The aircraft had undergone such a check immediately prior to delivery. But the lease required the check to be sufficient enough to clear the aircraft for not less than 4000 flight hours, which in the event it was not, by reason of the condition of the same matters which rendered the aircraft not airworthy.

123. In addition, in breach of Schedule 2 para.1(r) of the lease the aircraft's fuselage on delivery carried some damage which was out of Boeing's limits and had not been permanently repaired and some damage which, although within Boeing's limits, had not been noted on the dent and buckle chart.

124. In the light of my findings I have rejected the allegation that the aircraft had not "accomplished all outstanding airworthiness directives" in breach of Schedule 2 para.1(g) of the lease.

125. Schedule 2 para.11(a) of the lease required the aircraft to have been in compliance with the CPCP (Corrosion Prevention and Control Programme) and to have been inspected and treated with respect to corrosion as required by the CPCP. In the light of my findings the aircraft was in breach of this provision of the lease on account of corrosion in way of the cargo door cut outs, the left hand stabiliser and in way of lavatory D.

126. Schedule 2 para.11(b) of the lease required the fuel tanks to be free from contamination. It was submitted that this clause was breached because there was some contamination in the fuel tanks, namely sealant and paint debris. Although the amount of such debris had not proved to be unacceptable when the filters where changed by ST Aerospace I was persuaded that the amount of debris in the fuel tanks was unacceptable on delivery. There was therefore a breach of this requirement also.

<u>The conclusive evidence clause</u>

127. ACG contends that Olympic is, however, precluded from alleging that ACG delivered the aircraft in breach of Schedule 2 to the lease. The foundation of ACG's argument is the Certificate of Acceptance signed by Olympic. ACG says that the effect of clause 7.9 of the lease is that the statement in the certificate of acceptance that the aircraft complies with the delivery condition is agreed to be conclusive proof of that statement. Alternatively, ACG says that that statement gives rise to an estoppel in accordance with the ordinary principles of English law.

128. The Certificate of Acceptance contained confirmation by Olympic that

> "Lessee irrevocably and unconditionally accepts and leases from Lessor …..the Aircraft"

and that the

> "Lease[d] Property complied in all respects with the condition required at delivery under Section 4.2 and Schedule 2 of the Agreement……"

The leased property was defined as the aircraft and the aircraft documents.

129. Clause 7.9 of the lease provided as follows:

> "Conclusive Proof
> Delivery by Lessee to Lessor of the Certificate of Acceptance will be conclusive proof as between Lessor and Lessee that Lessee has examined and investigated the aircraft, that the aircraft and the aircraft documents are satisfactory to lessee and that Lessee has irrevocably and unconditionally accepted the aircraft for lease hereunder without any reservations whatsoever (except for any discrepancies which may be noted in the certificate of acceptance)."

130. Clause 7.9 therefore provides for what was called in argument a "contractual" estoppel because the effect of clause 7.9 is that those matters of which the delivery of the certificate of acceptance is said to be conclusive proof cannot be questioned as between the lessor and lessee.

131. On behalf of ACG it was submitted that one such matter was the statement made by Olympic in the Certificate of Acceptance that the aircraft "complied in all respects with the condition required at delivery under section 4.2 and Schedule 2." That was said to be a statement that "the aircraft and aircraft documents are satisfactory to the lessee" because only by compliance with section 4.2 and Schedule 2 could the lessee determine whether the aircraft and aircraft documents were satisfactory.

132. On behalf of Olympic it was submitted that the contractual estoppel in relation to the aircraft and aircraft documents being satisfactory to the lessee only applied in so far as the lessee had been able to form a meaningful view on the basis of its limited inspection and on the assumption that the aircraft and documents had been tendered in compliance with Schedule 2 of the lease. This explained why clause 7.9 dealt first with the lessee's inspection and second with the aircraft and documents being satisfactory to the lessee. The submission also reflected clause 4.2(b) of the lease which provided for an inspection of the aircraft and documents to the satisfaction of the lessee 15 days prior to the scheduled delivery date.

133. It is apparent that the language of the Certificate of Acceptance, notwithstanding that the form of the certificate is set out in Exhibit A to the lease and that the certificate is referred to in clause 7.9, does not exactly mirror the wording of clause 7.9. Thus the Certificate of Acceptance says nothing about the lessee

having examined and investigated the aircraft. Nor does it say anything about the aircraft and documents being "satisfactory" to the lessee. The Certificate of Acceptance does say that the lessee has "irrevocably and unconditionally accepted" the aircraft but does not add the words "without any reservations whatsoever".

134. The ambit of the contractual estoppel created by clause 7.9 must depend upon the true construction of clause 7.9. The first matter of which delivery of the certificate of acceptance is said to be conclusive proof is that the lessee has examined and investigated the aircraft. In the context of the lease I consider that that is to be construed as a reference to the delivery inspection referred to in clause 4.2(b) of the lease. The second matter of which delivery of the certificate of acceptance is said to be conclusive proof is that the aircraft and aircraft documents are satisfactory to the lessee. I consider that, in the context of the lease, this is to be construed as a reference to the opportunity afforded by the delivery inspection in clause 4.2(b) to the lessee to conduct an inspection of the aircraft and aircraft documents to its satisfaction. The third matter of which delivery of the certificate of acceptance is said to be conclusive proof is that the lessee has irrevocably and unconditionally accepted the aircraft for lease. I consider that, in the context of this lease, this is to be construed as a reference to the requirement in clause 3.4 of the lease that the lessee shall accept the leased property on lease.

135. The effect of ACG's submission as to the meaning and scope of clause 7.9 is that it precludes a claim by the lessee for damages for breach by the lessor of its obligation to deliver the aircraft in the condition required by clause 4.2 and schedule 2 of the lease. However, clause 7.9 says nothing in terms about the lessor's obligation to deliver the aircraft in the condition required by clause 4.2 and Schedule 2 of the lease. The reasonable man would regard the lessor's obligation to deliver the aircraft in the condition required by those provisions as an important clause of benefit to the lessee and so, had the parties intended that clause 7.9 preclude the lessee from making a claim for damages for breach of that obligation of the lessor, the reasonable man would expect to find a clear reference in clause 7.9 to clause 4.2 and Schedule 2. The only possible reference in clause 7.9 to clause 4.2 and Schedule 2 is indirect. The clause refers to the lessee's acceptance of the leased property. That is a reference to clause 3.4. Clause 3.4 refers to the condition precedent that the condition of the aircraft on delivery shall be as required by Schedule 2. Also, whether the aircraft is "satisfactory" to the lessee will no doubt be judged by the lessee by reference to the delivery condition in Schedule 2. Hence there is an indirect reference to the delivery condition in Schedule 2. But that, in my judgment, is not a sufficiently clear reference to have the effect of precluding a claim by the lessee for damages for breach by the lessor of its obligation to deliver the aircraft in the condition required by clause 4.2 and schedule 2 of the lease.

136. The effect of clause 7.9 is, in my judgment, to waive any right the lessee might otherwise have had under clause 3.4 to refuse to accept the aircraft under lease. It does not purport to waive any right the lessee might have to claim damages for breach of the lessor's obligation to deliver the aircraft in the requisite condition. Those rights are separate and distinct rights. Clause 7.9 waives the one but not the other.

Estoppel

137. For these reasons I have concluded that clause 7.9 does not assist ACG to resist Olympic's claim for damages. However, unlike clause 7.9 the certificate of acceptance contained a clear and unequivocal representation that the aircraft and aircraft documents "complied in all respects with the condition required at delivery under Section 4.2 and Schedule 2 of the Agreement, except for the items, if any, listed on the attached Annex 2 (the "Discrepancies")". That representation formed the basis of ACG's alternative argument that Olympic was estopped under the ordinary principles of English law from alleging that the aircraft and aircraft documents did not comply with the condition required at delivery under Section 4.2 and Schedule 2 of the lease.

138. The certificate of acceptance also contained a representation by ACG and so, in addition to it being signed on behalf of Olympic by Mr. Dimitriadis, it was signed on behalf of ACG by Patrick Ryan. The certificate was clearly intended to be taken seriously. Indeed it was an "operative document" which, by reason of clause 2.1(d) of the lease, was represented by the lessee to be a valid and binding agreement enforceable against the lessee.

139. It was submitted on behalf of Olympic that "in a commercial context a court should be slow to resort to equitable doctrines." Reliance was placed on the observation of Lord Browne-Wilkinson in *Westdeutsche Landesbank v Islington LB*C [1996] 2 AC 669 that "wise judges have often warned against the wholesale importation into commercial law of equitable principles inconsistent with the certainty and speed which are essential requirements for the orderly conduct of business affairs." However, the representation in the certificate of acceptance was both envisaged and required by the lease. Use of the law relating to estoppel does not import the representation into the contract. It was put there by the parties. Nevertheless I have been doubtful whether it was open to ACG to argue that the representation contained in the certificate of acceptance gave rise to an estoppel precluding Olympic from alleging a breach of clause 4.2 and Schedule 2 in circumstances where the parties had applied their minds to the question of what matters delivery of the certificate of acceptance was to be regarded as conclusive proof and had not included compliance with clause 4.2 and Schedule 2 as one of those matters. This was not a point advanced by Mr. Shepherd in his written closing submissions but he adopted it when I suggested it to him.

140. Having considered this question I have come to the conclusion that the fact that the representation in question is not, on the true construction of clause 7.9, to be treated as conclusive proof of the truth of the representation does not preclude the representation from giving rise to an estoppel. The effect of clause 7.9 is that the delivery of the certificate of acceptance operates as conclusive proof of the matters listed in that clause. That is a contractual right which arises independently of the principles of estoppel. It is not necessary to show that Olympic made a clear and unambiguous representation intending that it be acted upon or so conducting itself that ACG reasonably understood that it was to be acted upon, that ACG believed the representation to be true, that ACG relied upon it to its detriment or that it would be unconscionable to permit Olympic to assert the opposite of what it had represented to be the case. By contrast those matters must be shown in order

to establish an estoppel. There is nothing in clause 7.9 which expressly or impliedly disables ACG from relying upon the ordinary principles of estoppel. The certificate of acceptance contains other representations of fact by the lessee, for example, that the aircraft is insured as required by the Agreement. There is, in my judgment, no reason why that representation or the representation as to the condition of the aircraft should not be capable of founding an estoppel.

141. Patrick Ryan gave the following evidence with regard to the certificate of acceptance:

> "Olympic noted a number of issues on the Certificate of Acceptance before executing it. These…were discrepancies against the delivery condition, which Olympic was entitled to fix and bill the Lessor for. Aside from that, the acceptance indicated, for Olympic, that all of the other issues it had raised had been dealt with to its satisfaction." (Paragraph 67 of Mr. Ryan's first statement.)
>
> "I signed the Olympic certificate first and then met with the AirAsia representative to sign the AirAsia Return Acceptance Receipt. The Olympic representatives knew that this was the order in which the documents would be signed, and why. I did this for the practical reason that we first needed to be absolutely certain that the Aircraft was acceptable to Olympic before taking redelivery from AirAsia. As Lessor, we do not want any surprises at the last minute, or to be left with an aircraft that a new lessee suddenly refuses. I believed, based upon what Steve Dimitriadis had told me, and the fact that he signed the Certificate of Acceptance, that Olympic considered the condition of the Aircraft acceptable to it. It was on that basis that I then accepted re-delivery from AirAsia on behalf of the previous lessor. I would not have taken redelivery from AirAsia if Olympic were not satisfied with the condition of the Aircraft. I remember that Mr. Dimitriadis also indicated that the Aircraft was acceptable to the HCAA. Again, he would not have signed the Certificate of Acceptance had it not been." (Paragraph 22 of Mr. Ryan's second statement.)

142. Mr. Ryan was asked in cross-examination about his recollection of the sequence of events. He confirmed that after ST Aerospace had released the aircraft from the C Check he and Mr. Dimitriadis jointly reviewed what was outstanding, discussed the delivery conditions, noted the list of discrepancies and agreed that the aircraft met its delivery condition. "We sign for it and then I would go to AirAsia and take redelivery of the airplane."

143. The effect of Mr. Ryan's evidence was therefore that, whilst, as he accepted in cross-examination, he relied "quite heavily" on what Todd Smith and Jay Andre of AEC told him about the condition of the aircraft, he also discussed the delivery condition of the aircraft with Mr. Dimitriadis and agreed with him that the aircraft

met that delivery condition. They both then signed the certificate of acceptance. Mr. Ryan accepted that he was saying to Olympic that the aircraft complied with Schedule 2 of the lease but he added "and they were confirming that to me." Mr. Ryan then went to AirAsia to take redelivery of the aircraft.

144. There was no evidence, written or oral, from Mr. Dimitriadis who signed the Certificate of Acceptance on behalf of Olympic.

145. Counsel for Olympic submitted that the representation in the certificate of acceptance was not clear, unambiguous and unequivocal. However, in my judgment the confirmation in the certificate of acceptance was clear, unambiguous and unequivocal. I do not understand what part of it can be said to be unclear. Counsel submitted that Olympic "understood that it was simply confirming that the aircraft was in the requisite condition insofar as its inspections had allowed it to form any meaningful view and insofar as they were reasonably capable of revealing any defects or discrepancies." There was no evidence from Mr. Dimitriadis who signed the certificate of acceptance to say that that was his understanding. But in any event no such words of limitation are to be found in the representation made by Olympic. On the contrary the scope of the statement that the aircraft complied with clause 4.2 and Schedule 2 "in all respects" is only limited by the defects set out in annex 2 to the certificate.

146. It was not submitted that Olympic did not intend the representation to be acted upon by ACG. In circumstances where the certificate was signed by both parties and was a formal document required to be delivered by Olympic to ACG Olympic must have intended the representation made in the certificate to be acted upon.

147. Counsel for Olympic further submitted that the confirmation in the certificate of acceptance that the aircraft "complied in all respects with the condition required at delivery under Section 4.2 and Schedule 2 of the Agreement" referred only to the condition precedent to the lessee's obligation to accept delivery in clause 3.4(c) that the aircraft was in the condition required in Schedule 2 and did not refer to the lessor's obligation in clause 4.2 to deliver the aircraft in the condition required by Schedule 2. Had the certificate of acceptance contained only the confirmation in paragraph 1 of the certificate that the lessee "irrevocably and unconditionally accepts and leases" the aircraft from the lessor it would be strongly arguable that such confirmation merely prevented the lessee from refusing to accept delivery on the grounds that a condition precedent had not been complied with but did not prevent the lessee from claiming damages for breach of a lessor's obligation. But the certificate of acceptance contained the further confirmation in paragraph 2 that the aircraft and aircraft documents "complied in all respects with the condition required at delivery under Section 4.2 and Schedule 2 of the Agreement." Since that confirmation refers expressly to the obligation of the lessor in section (or clause) 4.2 the confirmation clearly applies to that obligation of the lessor.

148. Counsel for Olympic also submitted that clause 4.2(f) showed that the certificate of acceptance was "not absolute". Clause 4.2(f) provides that if the lessor does not correct all material discrepancies before delivery or within 45 days after the scheduled delivery date the lessee may terminate the lease. However, the discrepancies to be corrected within 45 days of the scheduled delivery date are those set out in annex 2 to the certificate of acceptance. I therefore agree that the

certificate of acceptance is not "absolute" with regard to such discrepancies. The certificate does not purport to be absolute with regard to such discrepancies. They are expressly excluded from its effect. But if there are no such discrepancies or if there are but they are corrected within 45 days there is nothing in clause 4.2(f) to suggest that the certificate is not "absolute" with regard to any other defects.

149. Counsel for Olympic submitted that ACG was not in fact concerned with whether the aircraft was actually in the condition required by clause 4.2 and Schedule 2 but merely with whether Olympic signed the certificate of acceptance "because of its belief that such signature would allow it to evade its fundamental obligation under the lease irrespective of whether the statement as to the aircraft's condition was true or not." In support of this submission counsel relied upon Mr. Ryan's acceptance in cross-examination that he relied on Olympic signing the certificate of acceptance because he thought it released ACG from further responsibility altogether.

150. I consider that counsel's submission places too much on this answer. I do not doubt that Mr. Ryan believed that ACG's signature on the certificate of acceptance released ACG from further responsibility for the condition of the aircraft on delivery. The important question is why he believed that to be the case. If he believed that to be the case because he believed that the aircraft was in the delivery condition and that such belief was induced in part by Olympic's statement that that was so then there is nothing in his answer which disables ACG from establishing the estoppel. Mr. Ryan's evidence was that he required Olympic to sign the certificate of acceptance because it would make him absolutely certain that the condition of the aircraft was acceptable to Olympic so that Mr. Ryan could accept redelivery from AirAsia.

151. Although the defensive nature of his evidence in chief and the defensive manner in which Mr. Ryan answered questions at the beginning of his cross-examination caused me to approach his evidence with caution I do not consider that there is any reason to doubt his evidence in this regard. That evidence is consistent with the probabilities. The aim of ACG in instructing AEC was to ensure that the aircraft was in the required condition with regard to the condition of the aircraft on redelivery by AirAsia and on delivery to Olympic. The terms of the lease with AirAsia had been amended to ensure that the redelivery and delivery conditions were one and the same. Mr. Greenfield's experience was that lessors "will go to the 'nth degree' to ensure that an aircraft complies with its redelivery conditions, so as to ensure that it will also comply with the onward delivery conditions of any new lease." Indeed, he accepted in cross-examination that it is usual for a lessor not to accept redelivery from the outgoing lessee until he knows that the incoming lessee is prepared to accept delivery and that it would be "commercial madness" to do otherwise. Mr. Ryan had agreed with Mr. Dimitriadis of Olympic in an exchange of emails on 15 and 16 April 2008 that any findings or discrepancies noted by Olympic were to be inspected and rectified during the pre-delivery inspection. He knew that AEC would be liaising with AirAsia and Olympic. The discrepancies noted by OAS in the course of its inspection of the aircraft were passed on to ACG and then to AirAsia. The efforts of ACG, AEC, Olympic, OAS and AirAsia were all directed at one and the same aim, namely, to ensure that the condition of the aircraft on redelivery to ACG and delivery to Olympic complied

with the terms of the respective leases, which were one and the same. It is therefore in accordance with the probabilities that at the end of that process Mr. Ryan would believe that the condition of the aircraft complied with the delivery condition, save for such discrepancies as were listed in the annex to the certificate of acceptance, and that Olympic's representation in the certificate of acceptance contributed to that belief. If he did so believe, as is probable, then it is not surprising that he thought that Olympic's signature on the certificate of acceptance released ACG from further responsibility.

152. Mr. Ryan stated that he only signed the redelivery certificate with AirAsia after he and Mr. Dimitriadis had signed the delivery certificate. That makes commercial sense and seems to me to accord with the probabilities. If Olympic had refused to sign the certificate because it was unable to confirm that the aircraft complied with the delivery condition then Mr. Ryan would have been able to take Olympic's objections to AirAsia and request them to remedy the outstanding defects before ACG accepted redelivery from AirAsia. Mr. Greenfield said that a lessor will seek to ensure that the operator returning the aircraft will carry out all the works necessary to enable the lessor to comply immediately with the delivery conditions of the new lease. Mr. Ryan said that Olympic knew the order in which the documents would be signed and why. There was no evidence from Mr. Dimitriadis to the contrary.

153. There is therefore reliable evidence of reliance by ACG on Olympic's representation. Such reliance was reasonable in circumstances where Olympic (through OAS) had in June 2008 provided its own list of discrepancies (which included rust on the spoiler and aileron cables) to Todd Smith, who incorporated them into the list of discrepancies provided to AirAsia, after which OAS, having inspected the aircraft again in July towards the end of ST Aerospace's work, provided its list of findings to Todd Smith so that he could advise AirAsia of the findings. In those circumstances it is understandable that Mr. Ryan wished to be "absolutely certain" that Olympic considered that the aircraft complied with the required condition. Such reliance was to ACG's detriment because ACG gave up such right or opportunity that it would otherwise have had to refuse to accept redelivery of the aircraft from AirAsia.

154. Counsel for Olympic submitted that it was unlikely that ACG would rely upon Olympic to determine the condition of the aircraft in circumstances where ACG had its own inspectors AEC to advise it as to the condition of the aircraft and knew more about the aircraft than Olympic. I accept that ACG must have relied on the advice of AEC in concluding that the aircraft complied with the delivery condition (as Mr. Ryan accepted) and that ACG must have known more about their own aircraft than Olympic but the important question is whether the statement by Olympic in the certificate of acceptance also induced ACG to conclude that the aircraft complied with the delivery condition. Mr. Ryan's evidence that he had to be "absolutely certain" that the aircraft was acceptable to Olympic suggests that it did. That is also in accordance with the probabilities in circumstances where Olympic had inspected the aircraft and produced a list of discrepancies.

155. Counsel for Olympic submitted that ACG could not credibly assert that they believed that the aircraft was in the required condition as a result of Olympic's

representation to that effect. Reliance was placed on ACG's case that short of disassembly (which is impractical) it is impossible to inspect an aircraft fully and therefore to eliminate the risk of undiscovered defects upon delivery. But the fact (if it be a fact) that there might be latent defects despite appropriate maintenance checks does not mean that ACG believed that there were latent defects which rendered the aircraft unairworthy. On the contrary it is improbable that ACG, as the lessor of a commercial aircraft to a national airline, would deliver an aircraft to the airline which it believed was in fact defective and unairworthy. It is more likely than not that ACG believed the aircraft was in the required delivery condition. As I have said all parties, including Olympic, were working to ensure that that was the case, although, as between ACG and Olympic, it was ACG's responsibility to deliver the aircraft in the required condition.

156. Counsel for Olympic submitted that ACG would suffer no real detriment because ACG could claim damages from AirAsia for breach of its obligation to redeliver. But loss of a right to refuse to accept redelivery is, it seems to me, a real detriment. The exercise of that right is the means by which ACG can seek to ensure that there is no doubt as to the condition of the aircraft on redelivery to it. Also, it gives ACG the opportunity to persuade AirAsia to remedy any defect at its expense rather than incur the expense itself and subsequently incur the expense of claiming damages from AirAsia.

157. Counsel for Olympic submitted that it would not be inequitable for Olympic to be allowed to go back on its representation because it was impossible for Olympic to verify whether ACG had complied with its obligations by means of its pre-delivery inspections and that it would be unconscionable and inequitable for Olympic to be precluded from pursuing its claim in respect of ACG's breaches of its "fundamental" obligation under the lease.

158. It is necessary to bear in mind the context in which this question has arisen. The court is considering the effect of a representation made in a certificate of acceptance by a major airline, Olympic, pursuant to a lease which it had freely negotiated with a leading participant in the aircraft leasing industry, ACG. Prior to signing the lease Mr. Ladopoulos had recommended an inspection "in detail" and Mr. Dimitriadis (who eventually signed the certificate of acceptance) agreed with Mr. Ryan that Olympic could carry out a "detailed inspection of the aircraft" and that "all findings will be rectified at [ACG's] cost prior to delivery". That is reflected in clause 4.2(f) of the lease which refers to the lessor correcting "all material discrepancies" before delivery. Olympic made the representation after it had exercised its right under clause 4.2(b) of the lease to inspect the aircraft and the aircraft documents before delivery. Thus, although the inspection was a "ground" inspection and the aircraft remained in the possession of the previous lessee so that there would be limitations on the ability of Olympic to inspect and open up the aircraft, and although the completed list of discrepancies was never shown to Olympic, Olympic were not in the position of having to sign the certificate of acceptance without having had some opportunity to inspect the aircraft and the aircraft documents and require ACG to make good such items as Olympic wished to be made good. In addition Olympic had the right, pursuant to clause 4.2(d) of the lease, to an acceptance flight before delivery "and such further acceptance flights as may be necessary in the event that the first or subsequent

flights do not confirm that the Aircraft complies with the delivery conditions set forth in Schedule 2." None of this removes ACG's obligation under clause 4.2(a) to deliver the aircraft in the condition required by Schedule 2 but it is part of the context in which counsel's submission must be judged.

159. It is also necessary to bear in mind that commercial men generally prefer certainty to doubt. This is reflected in the observation of Lord Browne-Wilkinson already quoted that "certainty and speed are the essential requirements for the orderly conduct of business affairs." It is therefore understandable that ACG required a statement that the condition of the aircraft on delivery complied with clause 4.2 and Schedule 2 of the lease. Moreover, Olympic was willing to make such a statement, having had and taken the opportunity to inspect the aircraft and the aircraft documents. That statement was made by Olympic in a formal and signed document required by the lease and delivered at the time of delivery. The reasonable man with knowledge of the background would be surprised if that statement did not have consequences and that Olympic, having formally stated that the aircraft complied in all respects with the condition required at delivery under Section 4.2 and Schedule 2 of the Agreement, was nevertheless free to allege the contrary.

160. Finally, it is necessary to bear in mind that, although Olympic were not party to any contract with AirAsia, they knew, through Mr. Dimitriadis, that Mr. Ryan wished the certificate of acceptance to be signed first, before Mr. Ryan met the AirAsia representative to sign the AirAsia Return Acceptance Receipt, and why that was so, namely, to be certain that the Aircraft was acceptable to Olympic before taking redelivery from AirAsia.

161. In this context, and having considered the arguments and evidence relied upon by counsel for Olympic, I am persuaded that it would be inequitable for Olympic to be permitted to allege, contrary to the representation made in the certificate of acceptance, that the condition of the aircraft on delivery did not comply with Schedule 2 of the lease notwithstanding that the effect of such an estoppel is to prevent Olympic from pursuing its claim for substantial damages for breach of ACG's obligation to deliver the aircraft in the required condition. The fact that ACG relied upon Olympic's representation to its detriment by giving up its right to refuse to accept redelivery of the aircraft from AirAsia is sufficient, having regard to the context which I have described, to make it inequitable for Olympic to be permitted to go back on its representation. I have in mind, in particular, the formal nature of the representation, the fact that it was made after an inspection of the aircraft by Olympic and the fact that Olympic knew that ACG wanted the certificate signed before taking redelivery from AirAsia and why. Further, the fact that there might be hidden defects which could not be detected by Olympic by means of its pre-delivery inspection does not make it unconscionable or inequitable to prevent Olympic from alleging non-compliance with the delivery condition because it would have been appreciated by Olympic before signing the lease and agreeing to provide a certificate of acceptance in the terms agreed that there might be hidden defects which could not be detected by Olympic by means of its pre-delivery inspection. In any event some of the major respects in which the aircraft failed to comply with Schedule 2 do not appear to have been hidden from Olympic. The corrosion of the flight cables had been added to the list of

discrepancies at the request of Mr. Kolydas in June 2008 and could have been checked by him in July 2008. The dents in the fuselage which should have been listed in the dent and buckle chart should have been visible to Mr Kolydas. Corrosion in way of the left hand stabiliser (indeed in way of both stabilisers) had also been noted in Olympic's findings which had been passed on to Todd Smith and so could have been checked in July 2008. There was no evidence from Mr Kolydas who inspected the aircraft in Singapore that these defects were hidden from him. It was suggested that Olympic's representatives would have had to rely on an inspection of AirAsia's documents which showed that the work in question (eg replacing spoiler cables) had been done but the lists of findings provided by OAS to ACG in late July and early August 2008 show that Mr. Kolydas was also inspecting the aircraft, in particular, in way of the spoilers.

162. Counsel for Olympic relied upon the decision of the Court of Appeal in *Lowe v Lombank* [1960] 1 WLR 196. That case concerned a dispute between the claimant, a widow aged 65 years, and a hire-purchase company. The claimant had agreed to buy a car on hire-purchase terms. In the event the car turned out not to be fit for use as a means of transport. The claimant sued the defendant for damages and was met with an argument that she was estopped from alleging that the car was unfit for its purpose because, on taking delivery, she had signed a delivery receipt stating that she had examined the goods and that they were in good order and condition. The Court of Appeal held that she was not estopped from alleging that the car was unfit for its purpose for several reasons, two of which in particular were relied upon by analogy. Diplock J. (who gave the judgment of the court) said that the representation was not clear and unambiguous but was capable of meaning that the goods were free from patent defects and thus did not apply to latent defects. Further, he said that the hire purchase company had not acquired the car from the dealer or executed the hire purchase agreement because they believed the representation as to the condition of the goods was true but because "the defendants required the delivery receipt to be signed by the plaintiff ……..because of their belief that the obtaining of such a receipt enabled them to evade the provisions of section 8(2) and (3) of the Hire-Purchase Act 1938, irrespective of whether the statement in it as to the condition of the car was true or not." It was submitted by counsel for Olympic that the present case was analogous to *Lowe v Lombank*. However, the circumstances of *Lowe v Lombank* and the present case are very different. First, the terms of the representation relied on in each case were different. The terms "good order and condition" when following a statement that the goods have been examined are capable of meaning good order and condition in so far as the examination is capable of revealing defects. But a statement that the aircraft "complied *in all respects* with the condition required at delivery" (emphasis added) is not so capable. Second, the claimant in *Lowe v Lombank* had agreed to buy a car on hire purchase and before signing the delivery receipt had not inspected the car. It had been brought round to her house but had not been left with her. By contrast Olympic is a national airline which had agreed to lease a passenger aircraft and, before accepting delivery and making the representation relied upon, had sent three inspectors from its MRO to inspect the aircraft and its documents and to provide a list of discrepancies to ACG in order that ACG might arrange for them to be corrected by the previous lessee. Third, whereas it was improbable that the hire purchase company acquired the car from the dealer or executed the hire-purchase agreement because it believed the

representation by the claimant to be true, it is probable that ACG decided to accept redelivery from AirAsia in part because it believed the representation made by Olympic to be true. I therefore do not find the case of *Lowe v Lombank* to be analogous. The estoppel argument must be addressed on the facts of this case and not by reference to the facts of *Lowe v Lombank.*

163. Having reviewed the facts of this case I have concluded, for the reasons I have endeavoured to express, that Olympic is estopped from alleging, contrary to the representation which it made in the certificate of acceptance, that the aircraft failed to comply with clause 4.2 and Schedule 2 of the lease.

ACG's claim in debt and damages and the defences to it

164. ACG has a claim in debt (for rent unpaid from delivery in August 2008 until redelivery in November 2010 and for unpaid maintenance reserves for the same period) and a claim in damages for Olympic's repudiatory breach of the lease (the rent and maintenance reserves which would otherwise have been payable from redelivery in November 2010 until the end of the lease less credit for the rent and other payments received from AeroSur in mitigation of such damage after deduction of the costs of such mitigation). There does not appear to be any dispute as to the figures though the calculation of the present value of future rental payments and the credit to be given for payments from AeroSur may have to be brought up to date.[3]

165. Three defences are advanced to the claim in Olympic's closing submissions. I shall consider each in turn.

No liability to pay rent

166. It was submitted that in circumstances where delivery had not taken place in accordance with provisions of the lease Olympic's obligation to pay rent and maintenance reserves was never triggered. I do not accept this submission. Olympic is estopped from contending that delivery had not taken place in accordance with the terms of the lease for the reasons I have already explained. In any event, Olympic irrevocably and unconditionally accepted and leased the aircraft from ACG pursuant to paragraph 1 of the certificate of acceptance so that rent became due.

Total failure of consideration

[3] One item of the claimed costs of mitigation was mentioned in submissions, namely, the costs paid by ACG for the C check in Florida. ACG appear to have spent some $818,000 on the work in Florida. The invoice states that the purpose of the work package was a C check but ACG have attributed (in their particulars of damage) only some $312,000 to the cost of the C check. However, this sum appears to have been the balance payable in respect of the invoice sum of $818,000 after allowing for payments on account. It may be that, since part of the work package costing $818,000 included work specific to AeroSur, ACG have estimated that $312,000 is the sum which may be properly claimed as damages. This was not explored in cross-examination with Mr. Ryan but since Mr. Greenfield said that in his experience a 1C check costs on average about $300,000 the estimate does not appear to be on the high side. There was no suggestion by Olympic that a lesser sum should be attributed to the costs of the C check.

167. Where money has been paid under a transaction that is or becomes ineffective the payer may recover the value of the money provided that the consideration for the payment has totally failed. Any performance of that which was promised is fatal to recovery. Money will only be recoverable on this ground where the contract is discharged; see *Chitty on Contracts* 30th ed. Vol.1 para.29-054 and 29-058.

168. It is not immediately obvious why this principle is engaged. Olympic never paid any money and did not bring the contract to an end. Olympic did not seek to discharge the lease at any time. On the contrary it stated in August 2009 that it had no intention of terminating early any contracts. The lease was terminated by ACG in March 2010 but Olympic retained possession of the aircraft until November 2010. Olympic's argument is, however, that if it were to pay any sums to ACG for rent and maintenance reserves it would immediately be entitled to recover them back from ACG on the basis of a total failure of consideration.

169. I shall assume, without deciding the point, that Olympic, if it is liable to pay rent and maintenance reserves for the period August 2008 until November 2010, is entitled, upon the discharge of the lease by ACG in March and/or November 2010, to recover back such sums provided that there has been a total failure of consideration.

170. I shall also assume, without deciding the point, that for the purposes of the claim for money paid for a consideration that has wholly failed it is possible to apportion consideration to parts of a contract and in the context of a lease of an aircraft it is appropriate to do so month by month.

171. ACG was obliged to deliver possession of the aircraft to Olympic and to deliver the aircraft in the condition required by clause 4.2 and Schedule 2 of the lease. ACG undoubtedly delivered possession of the aircraft to Olympic in August 2008 which possession Olympic retained until November 2010. Olympic is estopped, for the reasons I have given, from alleging that on delivery the aircraft was not in the condition required by clause 4.2 and Schedule 2 of the lease. It follows that Olympic is unable to establish a total failure of the performance for which it had bargained.

172. If my finding on estoppel is reversed on appeal then the position is that although ACG delivered possession of the aircraft to Olympic it failed, in a number of respects, to deliver the aircraft in the required condition. Although some of the defects were quickly rectified by OAS on behalf of Olympic (for example, replacing the corroded spoiler cables) the consequence of the breach was that the aircraft's airworthiness certificate was suspended and the aircraft could not be used for the purpose for which it had been leased, namely, as a passenger aircraft until the airworthiness certificate had been restored. In such circumstances, Olympic would have a common law claim to damages in respect of the loss caused by ACG's breach and a restitutionary claim would not be required to prevent unjust enrichment. It was not suggested that this was one of those cases where a restitutionary claim might give a remedy where the damages claim would not (see *Chitty* at para.20-059). I shall therefore not lengthen this judgment by a consideration of the precise ambit of the restitutionary claim.

Frustration

173. Olympic contended that the lease was frustrated by the withdrawal of the airworthiness certificate on 11 September 2008 and/or by the refusal of the HCAA to renew it on 17 August 2009. If the lease was frustrated then, it is submitted, any sums payable under the lease ceased to be so payable pursuant to section 1(2) of the Law Reform (Frustrated Contracts) Act 1943 and Olympic is entitled to recover from ACG the sums which it paid to EA for the works which it carried out pursuant to section 1(3) of the 1943 Act.

174. The lease was for a period of 5 years. Olympic was obliged to keep the aircraft airworthy and to maintain in good standing a certificate of airworthiness for the aircraft; see clause 8.11(a) and (i). Clause 5.14 was entitled "Absolute" and provided:

> "Lessee's obligations under this Agreement are absolute and unconditional irrespective of any contingency whatever including (but not limited to):
>
> ……
>
> (b) any unavailability of the Aircraft for any reason, including a requisition of the Aircraft or any prohibition or interruption of, interference with or other restriction against Lessee's use, operation or possession of the Aircraft;
>
> (c) any lack or invalidity of ……..airworthiness
>
> ……..
>
> (f) any other cause which, but for this provision, would or might otherwise have the effect of terminating or in any way affecting any obligation of Lessee under this Agreement……..".

175. The alleged frustrating events (which for this purpose must be regarded as having come about without any breach of contract by ACG) are the withdrawal by the HCAA of the airworthiness certificate in September 2008 following the discovery of corroded flight cables and the refusal of the HCAA to restore the airworthiness certificate in August 2009 until a complete check of ADs had been made. In circumstances where Olympic is obliged by the lease to maintain a certificate of airworthiness and where Olympic's obligations are described as absolute and unconditional irrespective of any contingency whatever there would appear to be difficulty in saying that the suspension of the airworthiness certificate in September 2008 and the refusal of the HCAA to reinstate it in August 2009 was an event which rendered Olympic's obligations radically different from those which it had undertaken in the lease.

176. Counsel for Olympic submitted that properly construed clause 5.14 applied where Olympic's use of the aircraft was restricted by a temporary period of unairworthiness which could be remedied by some relatively simple maintenance

process but did not apply where Olympic was unable lawfully to operate the aircraft as a result of the aircraft being delivered in such an unairworthy condition that the HCAA withdrew its airworthiness certificate almost immediately, never to renew it. The clause was not intended to deal with Olympic being totally disabled from performing a commercial passenger service.

177. There is, I apprehend, some confusion in this submission in that it appears to be premised upon a breach of the lease by ACG. There can be no dispute that if there were such a breach then clause 5.14 would not prevent a claim for damages by Olympic since the proviso to clause 5.14 expressly so provides. The need to rely upon the doctrine of frustration only arises in the event (as I have held to be the case by reason of an estoppel resulting from the certificate of acceptance) that Olympic is unable to allege a breach of the lease by ACG. Nevertheless the sense in which I understand counsel's submission is that, properly construed, clause 5.14 applies to a temporary period of unairworthiness which could be remedied by some relatively simple maintenance process but does not apply to a situation in which Olympic is unable lawfully to operate the aircraft and is totally disabled from performing a commercial passenger service.

178. In considering whether the lease was frustrated by one or other of the events relied upon by Olympic I have borne in mind the guidance given by Rix LJ in *Edwinton Commercial Corp. v Tsavliris Russ (The Sea Angel)* [2007] 2 All R (Comm) 634. Rix LJ began his analysis of the doctrine of frustration by referring to two statements of principle at paragraphs 84 and 85:

> 84. Two classic modern statements of the incidence of frustration are to be found in the dicta of Lord Radcliffe in *Davis Contractors Ltd v. Fareham Urban District Council* [1956] AC 696 at 729 and Lord Simon of Glaisdale in *National Carriers Ltd v. Panalpina (Northern) Ltd* [1981] AC 675 at 700. Lord Radcliffe said:
>
> "…frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do."[1]
>
> 85. Lord Simon said:
>
> "Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance."

179. Having referred to several other authorities Rix LJ gave the following guidance at paragraphs 111-112:

“111. In my judgment, the application of the doctrine of frustration requires a multi-factorial approach. Among the factors which have to be considered are the terms of the contract itself, its matrix or context, the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of contract, at any rate so far as these can be ascribed mutually and objectively, and then the nature of the supervening event, and the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances. Since the subject matter of the doctrine of frustration is contract, and contracts are about the allocation of risk, and since the allocation and assumption of risk is not simply a matter of express or implied provision but may also depend on less easily defined matters such as "the contemplation of the parties", the application of the doctrine can often be a difficult one. In such circumstances, the test of "radically different" is important: it tells us that the doctrine is not to be lightly invoked; that mere incidence of expense or delay or onerousness is not sufficient; and that there has to be as it were a break in identity between the contract as provided for and contemplated and its performance in the new circumstances.

112. What the "radically different" test, however, does not in itself tell us is that the doctrine is one of justice, as has been repeatedly affirmed on the highest authority. Ultimately the application of the test cannot safely be performed without the consequences of the decision, one way or the other, being measured against the demands of justice. Part of that calculation is the consideration that the frustration of a contract may well mean that the contractual allocation of risk is reversed. A time charter is a good example. Under such a charter, the risk of delay, subject to express provision for the cessation of hire under an off-hire clause, is absolutely on the charterer. If, however, a charter is frustrated by delay, then the risk of delay is wholly reversed: the delay now falls on the owner. If the provisions of a contract in their literal sense are to make way for the absolving effect of frustration, then that must, in my judgment, be in the interests of justice and not against those interests. Since the purpose of the doctrine is to do justice, then its application cannot be divorced from considerations of justice. Those considerations are among the most important of the factors which a tribunal has to bear in mind.”

180. I shall consider the factors identified by Rix LJ.

The terms of the contract, its context, the parties' expectations as to risk.

181. I have already set out the terms of the lease of most relevance when considering the possible application of the doctrine of frustration. They are found in the context of a "dry" lease pursuant to which possession of the aircraft is transferred to the lessee who is the operator of the aircraft. In such a lease, particularly one where the lease is for a substantial period of 5 years, the parties would expect the lessee to assume the risks inherent in operating an aircraft. One such risk is that the aircraft authority might withdraw the certificate of airworthiness and impose certain conditions before it is reinstated. Whilst such events might occur only rarely it is an obvious risk of operating a passenger aircraft. Clause 5.14 emphasises the risk assumed by the lessee because it provides that the lessee's obligations are absolute and unconditional irrespective of any contingency whatever. The examples given of matters which are not to affect the lessee's obligations, and hence of which it is envisaged that the lessee will take the risk, are not obviously limited to "a temporary period of unairworthiness which could be remedied by some relatively simple maintenance process". Rather, the examples contain no words of limitation ("any unavailability of the Aircraft for any reason, including ….any prohibition or interruption of …Lessee's use, operation or possession of the aircraft" and "any lack …of airworthiness"). Since the clause includes the words "irrespective of any contingency whatever" it is not possible, in my judgment, to imply words of limitation. This is emphasised by the inclusion within the list of examples of "any other cause which, but for this provision, would or might otherwise have the effect of terminating or in any way affecting any obligation of Lessee under this Agreement."

The nature of the supervening event and the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances.

182. In September 2008 the suggested frustrating event was the withdrawal of the airworthiness certificate by the HCAA. It was withdrawn in the wake of the discovery of the "broken" spoiler cable and the discovery of other corroded flight cables. Whilst there was evidence that such discoveries were most unusual, perhaps even unprecedented, I find it difficult to regard the withdrawal of the airworthiness certificate in such circumstance as an event of which the parties did not expect Olympic to take the risk by reason of the lease being a dry lease. In October 2008 the parties must have anticipated that after the checks advised by Boeing the aircraft's airworthiness certificate would be restored. That was the purpose of sending the aircraft to EA in France. They expected that the aircraft would return to Greece in 2009 and regain her airworthiness certificate. Of course such checks would cost money and in the meantime Olympic would not be able to use the aircraft but those are the sort of matters of which the parties expected Olympic to take the risk. Moreover, there would remain over 4 years of the lease to run. I would not judge performance of Olympic's obligations under the contract to be radically different as a result of the withdrawal of the airworthiness certificate in September 2008 from what had been anticipated.

183. In August 2009 the HCAA refused to restore the airworthiness certificate until after there had been a complete review of the aircraft's AD compliance. This decision was taken after findings suggested that the aircraft failed to comply with 2 ADs. Again, that appears to me just the sort of event of which the parties to a dry lease would have expected the lessee to take the risk. Olympic considered that the cost of carrying out a full AD check was prohibitive and probably it was for Olympic which was about to go into liquidation. But Olympic cannot pray in aid that circumstance. The fact that the costs of performing an obligation are much greater than had been anticipated is unlikely to make performance of a party's obligations radically different from that which had been anticipated where the increased costs result from events of a type of which the lessee was to take the risk. In any event, in August 2009 there were still four years of the lease to run. There was therefore considerable scope for further performance, even if a full AD check had then to be carried out during which the aircraft could not be operated by Olympic. Olympic did not "throw in the towel" because the aircraft could not be expected to regain an airworthiness certificate after a full AD check but because of the cost of carrying out a full AD check and because of the impending liquidation of Olympic. Economic conditions in the latter half of 2009, particularly for the aviation industry, and particularly it seems for Boeing 737-300s, were poor (as was apparent from Mr. Seymour's Aircraft Values Book) and operators of such aircraft would not have been attracted to spending large sums on such aircraft but that is something of which Olympic as a dry lessor took the risk.

The demands of justice

184. I am not persuaded that the demands of justice favour frustration of the contract. The lease was for 5 years. Only one of those years had elapsed. The alleged frustrating events (absent any question of breach) were events of which Olympic would have been expected to take the risk. Olympic had the opportunity to arrange for the required AD check, albeit (to use counsel's phrase) "costly work, the extent of which was uncertain." Such a course was impractical for Olympic given its impending liquidation and would have seemed unattractive even to a financially healthy operator of 737-300s in the Autumn of 2009. But to hold that the lease was frustrated would reverse the allocation of risk on which the parties (absent any question of breach) had agreed.

185. I therefore do not accept the submission that the lease had been frustrated.

186. It follows that ACG is entitled to judgment on its claim.

Damages otherwise recoverable on Olympic's counterclaim

187. It is strictly unnecessary for me to assess the damages which would have been payable by ACG had not Olympic been estopped from alleging that the condition of the aircraft on delivery was in breach of the lease. However, in case my decision on estoppel is reversed on appeal I shall state, as shortly as I can and to the extent possible, the findings which I would have made had they been necessary.

188. Before doing so I should consider whether the refusal of the HCAA in August 2009 to reinstate the ARC until after there had been a full AD check was caused by ACG's breaches of the lease.

189. The immediate cause of that refusal was the report to the HCAA that in two respects the aircraft was said not to comply with ADs. Mr. Dafaranas, the airworthiness inspector of the HCAA to whom this information was reported, understood that the previous operator, AirAsia, had not complied with the ADs which, to his mind, put in doubt the reliability of the aircraft documents as a whole. However, for the reasons I have already given Olympic has not established that AirAsia failed to comply with those ADs (the intercostal AD and the landing gear AD). The probabilities are that but for those findings the HCAA would have granted the aircraft an ARC. Mr. Aris certainly expected that. When asked whether, had there been no problems following the sample checks, the HCAA would have issued the airworthiness certificate he said "my opinion is yes." However, once the HCAA demanded a full AD check Olympic decided to take no further action on the grounds of the expense of such a check and the impending liquidation of Olympic.

190. In those circumstances I accept that there was a break in the chain of causation between ACG's breach in August 2008 and the events of August/September 2009 when the HCAA required a full check of AD compliance before reconsidering the aircraft's airworthiness. The reason that an airworthiness certificate was not granted in August/September 2009 was the discovery of (i) a crack in the intercostal web and (ii) the use of self-locking nuts in the landing gear. Neither of these can be attributed to a failure by ACG to ensure that the appropriate AD checks had been properly carried out before delivery. Neither is attributable to ACG's breach of the lease. Notwithstanding that the HCAA's decision was taken in the context of the earlier withdrawal of the airworthiness certificate and would not have been taken but for that earlier decision I do not consider that ACG's breach of the lease was an effective cause of the refusal of the Authority to restore the airworthiness certificate in August/September 2009. In the language of Gross J. in *Borealis v Geogas Trading* [2010] EWHC 2789 (Comm) the breach was "obliterated" as an effective cause by (i) the rectification of the defects which amounted to a breach and (ii) the discovery of a crack in the intercostal and of the use of self locking nuts in the landing gear by EA neither of which was attributable to a failure by AirAsia to carry out necessary ADs or to any breach by ACG. The latter are matters in respect of which Olympic, as the dry lessor of the aircraft, must take the risk.

191. It follows that, even if Olympic's claim for damages succeeded, Olympic would remain liable to pay rent and maintenance reserves from August 2009 until November 2010 and thereafter damages for the unexpired portion of the lease. In the light of Olympic's ceasing to trade in October 2009 it would in any event be impossible for Olympic to prove that any prior breach of ACG had caused Olympic loss after October 2009 since the aircraft would have been grounded in any event.

192. Olympic sought to prove their damages by adducing evidence from Ms. Assimakopoulou who was the Chief Financial Officer of Olympic. Her evidence was not particularly detailed and her knowledge of the underlying documentation was of a general, unspecific nature. Olympic asserted that all relevant documentation had been given. ACG was not convinced that it had. I was shown very little documentation. It is fair to say that relatively little attention was given to the question of damages compared with the attention given to the question of liability.

193. Costs incurred at EA in France in the sum of Euros 1,255,782: The first issue to determine is whether the despatch of the aircraft to EA in France for repair was caused by ACG's breaches of the lease. This was not a topic addressed in any detail by counsel for ACG. Indeed, in the course of his closing submissions he confirmed that the first occasion when any issue of a break in the chain of causation arose was in August/September 2009 when the Authority decided not to reconsider certification of the aircraft until after all ADs had been rechecked. But he later indicated that an issue could arise, depending upon the court's findings as to the extent of any breach by ACG, as to whether the despatch of the aircraft to EA in France for repair was caused by that breach.

194. The decision to send the aircraft to an MRO appears to have been taken in October 2008 after (i) Olympic had lost trust in the aircraft's maintenance records following its inspections of the aircraft after the discovery of the defective spoiler control cable on 6 September 2008 and (ii) Boeing had inspected the aircraft and recommended, inter alia, a review of the aircraft's compliance with ADs and of the dent locations in the fuselage. Whilst the defective flight cables were renewed within a few days of their discovery I consider that the breaches of the lease were an effective cause of the aircraft being sent to an MRO. Having regard to the errors in the ST Aerospace maintenance records concerning the identity of the spoiler cables renewed, the lack of care by ST Aerospace in inspecting and renewing corroded flight control cables and the failure of ST Aerospace to complete the dent and buckle chart fully the decision of Olympic, following the receipt of advice from Boeing, to send the aircraft to an MRO to, inter alia, check compliance with ADs and repair as necessary the dents not noted on the dent and buckle chart was a natural consequence of, and therefore caused by, the breaches of the lease by ACG.

195. The required checks and repairs could not be done in Athens (because of a lack of maintenance capacity) and so the aircraft had to be sent elsewhere. EA in France does not appear to have been a major repair facility but it appears to have been the only facility with capacity at that time. It follows that, notwithstanding the suggested shortcomings of EA, the decision to send the aircraft to EA was a natural consequence of, and therefore caused by, ACG's breaches of the lease.

196. Whilst almost a year was taken to complete the works recommended by Boeing which was much longer than the parties had foreseen I was not persuaded that Olympic had failed to take reasonable steps to mitigate its loss.

197. I do not consider, despite some contemporaneous demands for a work package to be produced promptly and the comments of Mr. Seymour in his second report, that there was an unreasonable delay in producing the work package. One was produced by Olympic on 14 November 2008 but it is apparent that there was much debate between Olympic and ACG thereafter as to what the scope of it should be. Nor am I persuaded that Olympic unreasonably delayed in sending the aircraft to a repair facility. Some time was inevitably required to get permission both from Boeing and the HCAA for the aircraft to fly to EA in France. In so far as the delay was caused by the limited facilities or shortage of skilled workers at EA such was the consequence of selecting EA as the repair facility. Counsel for ACG suggested in his closing submissions that the delays between April and September 2009 were caused by "mismanagement either by Olympic or by EA, or more likely a combination of the two." However, whilst such complaints were made in general terms by ACG's representative at EA in his emails to ACG, there was no evidence from him and the case of "mismanagement" was not particularised in counsel's closing submissions. The long delay was not anticipated but then neither Olympic nor ACG appear to have had experience of having to review an aircraft's maintenance at a small facility in the circumstances which gave rise to this maintenance review.

198. However, it seems more likely than not that some of the work which was done by EA was probably work which Olympic would have had to pay for at some stage during the 5 year lease. Not all of the findings at EA with regard to ADs and CPCPs as submitted to the HCAA on 28 July 2009 were said to amount to a breach of the lease. I do not consider that in those circumstances the entirety of the work done at EA can fairly be considered as damage caused by the breach. Had there been no breach some of those costs would probably have been incurred by Olympic at a later stage during a heavier maintenance check. In my judgment therefore, the only costs incurred at EA which can be claimed by Olympic as damages caused by ACG's breach are:

    g. The costs of rectifying the defects which amounted to breaches of the lease whether found in Athens or in France (and which had not already been rectified by OAS in Greece).
    h. The costs of carrying out the 12 AD checks, CPCP checks and any other checks in the agreed work package.

199. These costs have not been assessed by Olympic. Olympic have claimed the sum in fact paid to EA (Euros 1,255,782) for the work done without making a deduction in respect of work which was not caused by ACG's breaches. If these costs cannot be agreed by the parties then, in the event that my decision on estoppel is reversed on appeal, directions will have to be given for an assessment of such costs.

200. Costs of leasing replacement aircraft in the sum of Euros 4,339,008: This is claimed for the period from October 2008 until September 2009. No claim is made for the period after September 2009 because Olympic ceased to operate and so there were no more wet leases.

201. I consider that this is a good claim in principle. Had the contract been performed these costs of "wet leasing" would not have been incurred. I accept Ms. Assimakopoulou's evidence that short wet leases were reasonably taken because a dry lease was inappropriate given the uncertainty as to the length of time a replacement aircraft was required. The actual costs appear to have been proved. However, there seems to be legitimate doubt as to whether appropriate credit has been given, not only for the rent and maintenance reserves which would have been payable during that period for an aircraft which was being operated, but also for any maintenance costs over and above those reserves which would have been payable by Olympic. It is not clear that the credit has been properly calculated. If these damages cannot be agreed then, if my decision on estoppel is reversed on appeal, directions will be necessary for a further hearing to assess them.

202. If damages are claimed in respect of the costs of leasing replacement aircraft then the rent and maintenance reserves otherwise payable cannot also be claimed because that would put Olympic into a better position than they would have been in had the contract been performed. They would have had the benefit of the use of an aircraft from October 2008 until September 2009 without having had to pay for it.

203. Costs payable to OAS in respect of repair work in Greece in the sum of Euros 413,508: These costs are made up primarily of labour costs. I accept the evidence of Ms. Assimakopoulou that these sums have been charged to Olympic by OAS in respect of work on this aircraft and are payable by Olympic to OAS. The circumstance that both companies are in liquidation does not cause this liability to cease to be a loss.

204. Allowances and accommodation in connection with the work at EA in the sum of Euros 53,950: I accept that this sum has been proved.

205. Application to renew the ARC in the sum of Euros 12,000: Ms. Assimakopoulou does not seek to prove this sum and so I have not allowed it.

206. Sum paid to Boeing for its report in the sum of $20,000: I accept that Olympic is liable to reimburse OAS in respect of this sum.

207. Commitment fee of US$465,000: This was paid pursuant to clause 5.1 of the lease. The same clause provides that the sum became the unencumbered property of the lessor and is only returnable in circumstances which have not occurred. Olympic claims restitution of the sum on the redelivery of the aircraft in November 2010. There is no basis for such a claim and none has been articulated. I do not allow this sum.

208. Reimbursement of costs of US$9,129 paid by Olympic to ACG: This sum was paid by Olympic pursuant to ACG's invoice dated 29 July 2008. The invoice records that certain work was requested by Olympic prior to delivery in respect of which Olympic was obliged to indemnify ACG. There is no evidence to the contrary. On the basis of the invoice there is no basis on which the sum can be reclaimed. Olympic puts its claim in the alternative on the basis of its claim for restitution as a result of a total failure of consideration and/or frustration of the lease. Since I have rejected both bases of claim I reject the claim for $9,129.

209. Deposit and reimbursable fees of US$493,575: These sums are said to be due and payable pursuant to a side letter dated 16 April 2009. The sum claimed is made up of US$408,575 in respect of a security deposit and other costs of US$85,000. This is a curious claim because it arises in relation to another aircraft. It is true that pursuant to the side letter the lessor was obliged to return the deposit in certain circumstances and that certain costs, in particular the costs of the fuel for a ferry flight, were to be borne by the lessor. However, the deposit was only repayable "so long as no default has occurred and is continuing under ……..any other agreement between lessor and lessee." There has been a continuing event of default from September 2008 in respect of Olympic's failure to pay rent under the lease relating to the aircraft which is the subject of this action. It follows that the deposit is not repayable. So far as the sum of $85,000 is concerned there is no documentary evidence that such sum was incurred in respect of fuel in respect of the ferry flight concerning the other aircraft. Ms. Assimakopoulou appeared to suggest that the sum was in respect of fuel and other costs but in the absence of documentary evidence I do not consider it safe to rely upon that suggestion. I therefore reject this head of claim.

210. Insurance costs from August 2009 until November 2010 in the sum of $68,869: These are claimed in the sum of US$68,869 on the basis that "ACG left the aircraft abandoned in Athens from August 2009." This claim cannot be maintained. The aircraft remained under lease until March 2010 after which Olympic refused to redeliver the aircraft. These are costs which Olympic must pay because insurance was for Olympic's account under the lease and the non-use of the aircraft from August 2009 was not caused by ACG's breaches of contract. Olympic remained liable for the insurance of the aircraft whilst the lease subsisted which it did until March 2010. Thereafter Olympic retained possession of the aircraft until November 2010 (having been ordered to redeliver it in August 2010). No basis for claiming the insurance payable from March to November 2010 has been articulated. I do not allow it.

211. Costs of active preservation in the sum of Euros 31,990: This is a sum in respect of work after the return of the aircraft from France. I accept that it has been incurred. It is for the period 23 July 2009 until 24 November 2010. Save for the first month this is not recoverable because the decision of the HCAA in August 2009 not to reactivate the ARC was not caused by AGC's breaches of contract. The costs thereafter must be borne by Olympic who retained possession of the aircraft during that period under the lease and after the lease had been terminated notwithstanding a court order to redeliver the aircraft.

Conclusion

212. ACG is entitled to judgment on its claim. Olympic's counterclaim must be dismissed. The parties should agree the quantum of ACG's claim.