THE HIGH COURT

COMMERCIAL

[2025] IEHC 32

2022/5514P

AVOLON AEROSPACE (HAMILTON) AOE 1 LIMITED & OTHERS

-V-

LLOYDS INSURANCE COMPANY SA & OTHERS

2022/5538P

BOC AVIATION IRELAND LIMITED & OTHERS

-V-

LLOYDS INSURANCE COMPANY SA & OTHERS

2022/6087P

HERMES AIRCRAFT A1264 LIMITED & OTHERS

-V-

ALL UNDERWRITING MEMBERS OF SYNDICATE 1969 AT LLOYDS FOR THE LLOYDS 2021 YEAR OF ACCOUNT & OTHERS

2022/5759P

CDB AVIATION LEASE FINANCE DAC & OTHERS

-V-

LLOYDS INSURANCE COMPANY SA & OTHERS

2022/5975P

SMBC AVIATION CAPITAL LIMITED & OTHERS

-V-

LLOYDS INSURANCE COMPANY SA & OTHERS

RULING of Ms. Justice Eileen Roberts delivered on 23 January 2025

The Ruling required

1. Mr William Farmer is a retired insurance broker, consultant and underwriter. On the instructions of the War Risk defendants, he prepared a 28 page expert report dated 25 March 2024 which appended 19 exhibits. He was provided with copies of the policies the subject of these proceedings (the "Policies"). He was also provided with certain documents relating to the relevant aircraft lease arrangements at issue in these proceedings as well as certain documents discovered by the parties in the course of this litigation. In the introduction section of his expert report, Mr Farmer confirms his instructions were "*to prepare a report of my views in relation to the alleged loss of numerous Western leased aircraft following the Russian invasion of Ukraine on 24 February 2022.*"

2. Mr Farmer then sets out the seven specific "*issues upon which the War Risks Defendants have instructed me to opine.*". The seven specific headings outlined in his expert report are as follows:

(1) Market practice or understanding at the time when the Policies were written regarding the aim and purpose of contingent coverages with respect to their relationship with the Principal Insurances (i.e. the Insurances which the Lessees were required to effect under the lease Agreements). This is Section 3 of the report and runs to 33 paragraphs.

(2) Premium levels in the market for contingent coverages at the relevant time, how these compared to premium levels for possessed coverages, and the reason(s) for any difference or disparity. This is Section 4 and runs to 3 paragraphs.

(3) The background to and market understanding of AVN67B and AVN67C and the background to and reasons(s) for the introduction of the AVN67B and AVN67C endorsements. This topic is covered in Section 5 and comprises 11 paragraphs with several sub-paragraphs.

(4) The background to and reason(s) for the inclusion of paragraph 3.3 in AVN67C and any market understanding at the relevant time as to whether that paragraph was intended to be a clarification of, or an amendment to, the cover provided under AVN67B. This topic is covered in Section 6 and runs to 13 paragraphs.

(5) The aim and purpose of possessed coverages. Market practice or understanding at the time the Policies were written with respect to the relationship between contingent and possessed coverages. This is Section 7 and runs to 8 paragraphs.

(6) Any market practice or understanding at the relevant time that possessed coverages apply where (i) the Aircraft are in the Lessor's care, custody, control or under their

responsibility and/or (ii) not in the Lessee's care, custody, control or under their responsibility. This is Section 8 of the report and runs to 4 paragraphs.

(7) The availability in the market at the relevant time of any other insurance product(s) or standard market clauses providing cover to lessors against the risk of being unable to repossess aircraft from lessees and the coverage provided by any such product(s) or clauses. This topic is addressed in Section 9 and comprises 33 paragraphs.

3. This Ruling relates to the plaintiffs' application (heard on days 69 and 70 of the proceedings) for the exclusion of the proposed expert testimony of Mr Farmer. The application is not that the court should, having heard Mr Farmer's evidence, then disregard it but rather that the court should now decide *a priori*, in advance of any oral testimony from Mr Farmer, that his evidence is inadmissible and therefore it should not be heard by the court at all.

4. The War Risk defendants resist the application and argue that the appropriate course of action is for the court to hear Mr Farmer's evidence (having already heard the rebuttal expert testimony of Mr Hughes on behalf of the plaintiffs) and, having done so, the court should then determine whether Mr Farmer's evidence as an independent witness is admissible and, if so, what weight to attribute to it.

The plaintiffs' position

5. The plaintiffs contend that Mr. Farmer's evidence (or at least the vast majority of it) is entirely inadmissible such that it should be excluded in advance of any oral testimony by Mr Farmer. A number of separate arguments were advanced which I summarise as follows:

6. First, and it is not a matter of controversy, the plaintiffs say that the interpretation of the Policies and the words used by the parties is a matter solely for this court and not for experts engaged by any party. That exercise is an objective one.

7. This approach, the plaintiffs say, clearly means that the subjective view or understanding of either the parties, or any other person for that matter, is both irrelevant and inadmissible. They say that the "*market understanding*" referenced in Mr Farmer's report is no more than a thinly veiled reference to Mr Farmer's own subjective view of what the Policies mean and how they should be interpreted, which view Mr Farmer then seeks to link with the supposed same subjective views of some unidentified market participants.

8. Second, the plaintiffs argue that Mr Farmer's assertion that there is an "*understanding*" in the market as to how the Policies operate, is unashamedly directed at putting forward subjective views with the intention of influencing how this court approaches the meaning of the words used in the Policies and how the Policies operate. They say this evidence is not only irrelevant and inadmissible but also "*wholly prejudicial*".[1] It is argued that this evidence cannot in any sense be considered to be factual matrix evidence. Rather they say it is an attempt to introduce a subjective view to alter the starting point for the consideration of the Policies under a false premise.

9. Third, the plaintiffs say that if a court is to depart from the ordinary meaning of the words used by the parties because of some particular custom or practice said to be relevant to the interpretation of those words, then such market practice must be notorious, universal and certain, such that any reasonable reader knowing that context would accept and understand that meaning. Even where evidence of market practice

[1] Day 69 p34 line 12

arises the plaintiffs say it must relate only to objective factual context. The plaintiffs say that the suggestion of various market "*understandings*" by Mr Farmer falls so far short of any notorious market practice that such understandings cannot be introduced as evidence by him.

10. Fourth, the plaintiffs concede that limited portions of Mr Farmer's report may contain admissible expert evidence – although apart from identifying the sections involved as sections 4 and 9 they have not provided a mark-up of precisely what they say should be excluded from these sections, nor was this clear from the plaintiffs' oral submissions. In principle however, the plaintiffs accept that evidence regarding the differences in premium for contingent and possessed cover (section 4) and the availability in the market of other insurance products such as repossession or political risk cover or standard market clauses directed to such cover (section 9) are not inadmissible. The court was referred to the decision of the Supreme Court in *Analog Devices BV v Zurich Insurance* [2005] IR 274 where the Supreme Court held that in interpreting the policies before him the High Court judge was entitled to take into consideration the terms of standard exclusions in other policies used in the insurance industry. The plaintiffs acknowledge that some evidence on the availability in the market of repossession or political risks insurance has already been given by other witnesses on behalf of the plaintiffs, including factual witnesses.

11. In relation to materials that apply to AVN67B and AVN67C, the plaintiffs say that while these materials may be instructive regarding how these clauses have evolved, they cannot be used as an aid to construction of the Policies. They accept that this would apply equally to any evidence already given on their behalf regarding these clauses by Mr Hughes.

12. Finally, the plaintiffs do not consider there is any need for expert evidence to assist the court. They say that all the court will need to construe the Policies is to consider the words used and the legal submissions of the parties.

13. The plaintiffs accept that there may be occasions where words or phrases have a customary meaning in a particular market which would be different from their ordinary or natural meaning. This is clear from the comments of Lord Hoffmann in *Chartbrook v Persimmon Homes* [2009] 4 All ER 677 where he said at para 45 :

"*It is true that evidence may always be adduced that the parties habitually used words in an unconventional sense in order to support an argument that words in a contract should bear a similar unconventional meaning. This is the "private dictionary" principle, which is akin to the principle by which a linguistic usage in a trade or among a religious sect may be proved'*.

14. A similar point was made in *Crema v Cenkos Securities Plc* [2011] 1 WLR 2066 where expert evidence was held to be admissible to explain the '*shorthand*' of a particular market even though falling short of trade custom. This particular authority was heavily argued by both parties with the War Risk defendants relying on it to a considerable degree. I deal with it below.

15. The plaintiffs accept that the meaning of technical words or technical legal words may be influenced by context.

The War Risks defendants' position

16. The War Risk defendants deny that Mr Farmer's evidence is seeking to introduce evidence of the parties' subjective intention in entering into the Policies or as to their subjective understanding of the meaning of the terms of the Policies. They deny that Mr Farmer's evidence is directed to the meaning of the contractual terms and say that

Mr Farmer's evidence stays aways from considering the individual contract terms of the Policies.

17. They accept that some of Mr Farmer's evidence does not seek to assert a notorious and universal market practice, but say that notoriety is not the test. They say his evidence of market understanding provides the court with information on relevant surrounding circumstances which may or may not assist the court in understanding the relevant niche insurance market and niche policies with which Mr Farmer has considerable expertise and experience. The defendants are not contending for an implied term as is the context in many of the reported cases. They say that objectively the aim of the transaction is admissible evidence and that a court can and should look at the commercial and market background which has or certainly may have a bearing on the construction of the contract.

18. The War Risk defendants also say that the plaintiffs are wrongly relying on Mr Hughes' evidence to argue that Mr Farmer's evidence is inadmissible. They say that this is entirely circular and is impermissible without affording Mr Farmer the same opportunity as Mr Hughes to give his oral testimony.

19. The War Risk defendants rely on an extract from *Margo on Aviation Insurance* at para 25.31 noting that: "*Consistent with the construction of insurance contracts in accordance with 'the surrounding circumstances, the matrix, the genesis and the aim,' courts are more flexible in allowing parties to call expert witnesses to testify at trial. Witnesses will frequently be called to give evidence on the custom and practice of the insurance market in view of the specialised nature of the market and its operations. Proving the existence of an established market custom or practice will add a term to an otherwise complete insurance contract, on the grounds that it is what the parties would unhesitatingly have agreed*.". The plaintiffs say this can only

be relevant to established "market custom or practice" and not merely to an alleged "*market understanding*". The defendants do not accept that there is a "*bright line difference between the two*".[2]

The legal authorities relied upon

20. There is a considerable degree of consensus as to how this court should approach the question of interpreting the Policies. The court must start with the words used by the parties, and this must be an objective exercise. The court is not permitted to consider the subjective views of the parties or any other person nor the negotiations between the parties as to what they intended the words to mean. That is the approach this court intends to take in this case.

21. Where the parties disagree in this application is the extent to which this court should, in advance of interpreting the Policies, hear expert evidence from Mr Farmer on various aspects of market practice and understanding. If that evidence is heard there will of course be arguments and submissions made to the court on that evidence in the usual way, but that is a different matter and only arises if the evidence is heard.

22. The decision of the UK Court of Appeal in *Crema* became the battleground of the authorities relied upon by the parties in this application and for that reason is worthy of some consideration in this Ruling.

23. *Crema* involved the interpretation of a contract, in particular whether the plaintiff (a sub-broker) was entitled to recover his agreed commission from the defendant irrespective of whether the defendant (as broker) had been paid its commission. At first instance the judge held that evidence of market practice which fell short of a trade usage was admissible as part of the factual background against which the

[2] Day 70 page 9 line 17

agreement was to be construed, and that the expert evidence of market practice in the City of London supported the conclusion, which he had reached independently of it, that on a true construction the agreement entitled the plaintiff to be paid only when the defendant had received its own commission.

24. On appeal (which was allowed) it was held that, whether the contract was wholly written or partly written and partly oral, the court was entitled to hear evidence of market practice falling short of trade usage or custom in order to assist it in a full understanding of the factual background. The judgment of Aikens LJ (at para 6) confirms that the expert witnesses gave evidence on the general industry practice in the City of London on when a sub-broker would be paid his commission by a broker when the sub-broker had been instrumental in raising finance for a client of the broker. The court noted that "[*N]either witness suggested that there was a settled "trade custom" in the sense of an invariable, certain and notorious usage, such as could imply a term into a contract, provided that it was not inconsistent with an express term."*

25. In determining the issue as to whether a court can take into account expert evidence on "market practice" for the purposes of the construction of the express terms of a contract, the court said (at para 43):

"*In my experience, it has been common practice for the Commercial Court to hear evidence of "market practice", which does not amount to evidence of an alleged "trade usage or custom", in order to assist the court with a full understanding of the factual background to the proper construction of a written contract. The landmark decision of the House of Lords in Prenn v Simmonds [1971] 1 WLR 1381, 1383H-1385H4 reminded both judges and practitioners that written contracts were not to be interpreted "isolated from the matrix of facts in which they were set and interpreted*

purely on internal linguistic considerations". Therefore, evidence of the factual background known to the parties at and before the date of the contract, including evidence of the "genesis" and objectively the "aim" of the transaction, but not of negotiations, was admissible."

26. At para 46 of his judgment Aikens LJ expressed the view that : *"[I]f there is a disagreement on what a market practice is, then the judge must decide whether a particular market practice exists or not. If it does, then it is again up to the judge to decide if it is useful background evidence against which to construe the contract in question*."

27. On the evidence in *Crema*, the expert witnesses accepted that they had never encountered an exactly similar scenario, leading Aikens LJ to conclude at para 50 that their views "*were therefore entirely hypothetical and not based on market experience*." This is mirrored by the comments of Hughes LJ at para 60 where he states : "*I agree that the judge was entitled to look at market practice, but there was none because neither expert had ever encountered the question arising*."

28. The plaintiffs seek to distinguish *Crema* and the authorities referred to in it. They say the present proceedings do not make a case that any term has been omitted from the Policies, as was the situation in *Crema.* They say that the court in *Crema* was referencing "practices", not "*understandings*". They describe the circumstances in which market practice evidence was heard in those cases as "*fairly unique*".[3] They argue that this line of authority does not open the gateway to an entitlement to lead evidence of general "market understanding" as part of establishing the relevant factual matrix for the purposes of interpreting a contract and say that the decision has not been followed in Ireland at any high level or endorsed at Supreme Court level in the

[3] Day 69 page 79 line 3

UK. They point to the later decision of the UK Court of Appeal in *Aspen Insurance v Adana* [2015] EWCA Civ 176, [2015] 1 C.L.C. 270.

29. In *Aspen,* the trial judge expressed reservations about the relevance and admissibility of proposed expert evidence from an Insurance expert regarding the contention of a conventional understanding as to the division between public liability and product liability under the policies at issue in those proceedings. Nevertheless, the judge agreed to hear this evidence. Having done so, he found the evidence to be irrelevant and disregarded it.

30. In the Court of Appeal in *Aspen* (who allowed the appeal in part), Christopher Clarke LJ at para 18 of his judgment stated : " *Aspen at one stage alleged that there was a market understanding, which should inform the interpretation of the policy, that, where there was both Public and Product Liability cover, cover under the Public Liability section ceased in respect of events occurring following the handover by the relevant contractor of the completed works. This market understanding, inadmissible as evidence, turned out to be no more than the views of a number of individuals as to how, as a matter of practical reality, claims by insureds after handover would most commonly be made*."

31. It is true that the Court of Appeal in *Aspen* stated that the evidence adduced of "market understanding" was inadmissible as evidence. However. the evidence had been given in that case and been tested by cross-examination in the High Court. There is no criticism as I read the judgment of the fact that the evidence had been heard, despite the trial judge's initial reservations.

32. Another case relied upon by the plaintiffs, although it is an older authority, is *Barlee Marine Corporation v Trevor Rex Mountain* [1987] 1 Lloyd's Rep. 471. I mention it in this Ruling as there are some clear parallels with the present application. *Barlee*

involved a claim on a marine insurance policy. The footnote recites : "*Held, by Q.B. (Com. Ct.) (Hirst, J.), that (1) the evidence put forward in the defendants' solicitors' affidavit was inadmissible as an aid to construction; it was essentially an attempt to influence the construction of the agreement subjectively by reference to the opinions of market practitioners as to the normal and proper scope of the clause; this was completely unsound in principle and commercially unworkable* …."

33. Mr Justice Hirst in *Barlee* noted that " *it is of course common ground that the Court can and should construe the contract in the light of the matrix in which it was set, i.e., the factual background known to the parties at or before the date of the contract, including evidence of the genesis and objectively of the aim and commercial purpose of the transaction. What is, however, in issue is the admissibility under this heading of evidence as to market practice and other allied topics as an aid to construction*". He rejected as inadmissible the proposed evidence of market understanding, noting that "*different considerations would, of course, apply*" if the evidence was seeking to establish a custom or usage or if it was setting up an established market shorthand or dictionary meaning for any of the words in the relevant clause.

34. The most recent Irish authority relied on by the parties was *Hyper Trust v FBD* [2021] IEHC 78, a case in which the court was principally concerned with the interpretation of an insurance policy, McDonald J confirmed that the principles developed by the courts governing the interpretation of contracts do not permit parties to give evidence of their subjective intention in entering into the contract or as to their subjective understanding of the meaning of its terms. I have no doubt that this rule applies equally to the subjective understanding of expert witnesses as to the meaning of contractual terms.

35. The correct approach was identified by McDonald J in para 6 of his judgment which confirms that : *"[T]he courts approach the question of interpretation on an objective basis and it is now well established that the court's task is essentially to work out the meaning of a contractual term by reference to the contractual language used construed in the context of the terms of the contract as a whole and also in the context of the relevant factual and legal background. This process of interpretation has now become known as the "text in context" approach*."

36. It is clear therefore that the court should interpret a contract by reference to the meaning it would convey to reasonable persons having all the relevant background knowledge that would have been reasonably available to the parties at the time the contract was entered into.

37. In *Hyper Trust* two applications in terms similar to the present application were made at the early stages of the hearing. The first such application sought to exclude as inadmissible certain discovered internal FBD documents which on one reading appeared to suggest that FBD considered that the relevant policies provided cover in respect of Covid 19 pandemic claims. FBD objected to the admissibility of these documents on the basis that expressions of subjective intention are inadmissible as an aid to the interpretation of a contract. McDonald J initially refused to rule out this evidence on the basis that it might be relevant to a pleaded business efficacy argument although he was clear that admitting the evidence did not suggest anything in relation to the weight to be attributed to it. It was only when FBD later confirmed that it was not relying on such a plea that the material was not then admitted into evidence nor was the proposed expert evidence relating to it.

38. The second ruling in *Hyper Trust* related to the proposed exclusion from evidence of certain expert reports as inadmissible or irrelevant. While the plaintiffs in this case

also argue that Mr Farmer's evidence is irrelevant, they are not pursuing that particular argument in this application. Two expert reports were argued in *Hyper Trust* to be inadmissible (in that case on the grounds that the technical evidence would not have been available at the relevant time to anyone in the position of the parties). The counterargument advanced was that the evidence simply provided the court with evidence as to market practice in a specialised market and was admissible as part of the factual context and would, in any event have been available to brokers for the parties. McDonald J ruled that one report (which contained information likely to be known to brokers) was admissible and that the expert should be permitted to give this evidence. He ruled as inadmissible identified sections of the other report on the basis that the material would not reasonably have been available to brokers in Ireland and so could not be said to have been known to both parties. He also ruled out evidence that related purely to matters of law.

39. Of greater direct relevance to the present application, McDonald J was also asked to rule as inadmissible an identified paragraph in an expert report which was the only paragraph in that report still being tendered on behalf of FBD. McDonald J held that part of this paragraph was admissible (inter alia as evidence of market practice) and part was not. The inadmissible sentences were so held because of the court's assessment that a conclusion had been reached without an explanation and because the expert was purporting to give evidence as to the understanding of others.

Analysis and the background relevant to this Ruling

40. If this court was to rule out Mr Farmer's evidence without an opportunity for him to be heard and tested on that evidence it seems that this court would need to be very clear that there was no possibility that Mr Farmer's evidence could be of any

assistance to the court or have any evidential value on any matter before the court. This may well explain why in the vast majority of cases courts hear expert evidence even when it is challenged and, having done so, then determine the admissibility, relevance and weight to be attached to that evidence.

41. Of course, a court has jurisdiction to decide that it will not hear particular evidence on the grounds of inadmissibility. If, however, there is any doubt about admissibility it seems to me that the better course of action is generally to hear and test the evidence following which the court will be best placed to determine its admissibility and relevance.

42. The following factors appear to this court to be particularly relevant in the context of this application.

43. In the present case, many of the defendants have expressly pleaded and relied on various aspects of what they allege to be "*market practice*", "*ordinary market practice*", "*market understanding*" or "*market practice/understanding*". All of the defendants reserve the right to rely on the defences advanced by each other defendant. Thus, various market practices and understandings are pleaded issues (often used together and/or interchangeably) in respect of which the defendants bear the burden of proof.

44. The plaintiffs in these proceedings are sophisticated purchasers of insurance and the evidence is that each of them engaged expert brokers to place the Policies with the defendants. Any knowledge of relevant market practice (if it in fact exists) would, in all likelihood, be known to these specialist brokers, none of whom are scheduled to give evidence in these proceedings.

45. The aviation insurance market is a highly specialised and niche market with market standard endorsements regularly featuring and being relied upon in policies of

insurance and reinsurance. The insurance of a leased aircraft is achieved not simply by way of a single policy by one entity with one entity. Expert evidence on aspects of this specialised market may be of assistance to the court.

46. In the present case expert evidence regarding aspects of market practice in the London aviation insurance market and political risks market has already been given over a 2 day period by Mr Hughes on behalf of the plaintiffs. This evidence was challenged by way of a preliminary objection by the War Risks defendants on the basis of the stated expertise and experience of Mr Hughes but, subject to that objection, the evidence was heard and the defendants cross-examined Mr Hughes on that matter and other aspects of his evidence and independence.

47. Mr Hughes' report is dated 29 April 2024 and thus postdates Mr Farmer's report. It is clear on its face (and from Mr Hughes' oral evidence)[4] that the purpose of Mr Hughes' report was to directly respond to Mr Farmer's report. In that regard Mr Hughes was instructed by the plaintiffs to consider and comment upon sections 3, 5, 6, 7, 8 and 9 of Mr Farmer's report, and his report does so.

48. Mr Hughes and Mr Farmer (and one expert witness no longer due to give evidence) also engaged in the production of a 19 page joint memorandum on market practice following their joint discussions on 17 May 2024 (the "Joint Memorandum"). The Joint Memorandum confirms a divergence of views between Mr Hughes and Mr Farmer on various matters referred to in their respective reports including the significance of market practice or understanding; the scope of cover in contingent policies; the market practice and understanding regarding the relationship between contingent and possessed coverages as well as the cover provided by endorsements AVN 67B, AVN 67C and LSW555D.

[4] Day 66 page 133 line 17

49. It is thus clear that Mr Hughes disagrees that there are any invariable practices or understandings of the market as suggested by Mr Farmer. He also disagrees with Mr Farmer regarding the industry standard AVN67 clauses and the perspective from which the market would consider any loss. He expanded on these matters in his oral evidence and provided an overview of the general framework of aviation insurance. In giving his evidence, Mr Hughes was frequently referred to Mr Farmer's report both by the plaintiffs' counsel and counsel for the defendants. Mr Hughes answered questions (including from counsel for the plaintiffs)[5] regarding whether in his experience there was ever "*an understanding in the market*" on certain issues.

50. Therefore, there has already been evidence tendered by the plaintiffs in response to the same expert report the plaintiffs now say should be excluded in its entirety without permitting Mr Farmer to give evidence. The plaintiffs say that the solution to all this is simply to also exclude the evidence of Mr Hughes. I do not however think that matters are as simple as that. Mr Hughes gave general evidence on useful background matters. Furthermore, it would likely not be entirely straightforward to identify which aspects of his evidence should be excluded in response to the exclusion of all or most of Mr Farmer's evidence.

51. The reality is that there is a dispute between experts about whether there is a market understanding or a market practice on certain matters. I have heard one expert's evidence saying there is none. I believe that fairness and equity require me to hear the other expert's evidence, which I am certain will be robustly cross-examined by the plaintiffs. The court will then have the benefit of all the evidence and can decide how to deal with it.

[5] Day 67 page 120 line 17

52. This is particularly important in light of the fact that Mr Farmer's report often interchangeably uses the phrases "market practice" and "market understanding", indeed sometimes referring to both phrases as one. As the caselaw shows and as I think was correctly argued by the plaintiffs, there may well be a significant difference from an admissibility perspective between both concepts. It would be far clearer for the court to assess the true extent of Mr Farmer's evidence however were he to be required to give his evidence orally and be cross-examined on it.

53. Another important consideration for the court is the practical implications of what is suggested by the plaintiffs. If I accede to the application, it appears that a number of further steps will be required. First the court or the parties would have to determine or agree exactly what language should remain in sections 4 and 9 of Mr Farmer's report which are conceded by the plaintiffs to be partly admissible. While the request is to exclude sections 3 and 5-8 in their entirely it was also conceded by the plaintiffs' counsel that parts of those sections were uncontroversial – yet it would appear are still sought to be excluded entirely. Second there would need to be a reconsideration of the evidence of Mr Hughes to determine the knock-on effects of the exclusion of Mr Farmer's evidence – not just Mr Hughes' report but also his 2 days of oral evidence and the Joint Memorandum.

54. Furthermore, from a case management perspective I believe it would have been and will be more efficient to allow Mr Farmer to give his evidence. Mr Farmer is scheduled to give his evidence over 2 days and, had the present application not been brought, that would have been the time his evidence would have taken up. Instead, this application itself took 2 days of court time and was preceded by the exchange of detailed legal submissions. The court was then required to prepare this Ruling. It is accepted that some of Mr Farmer's evidence is admissible so he will have to give oral

testimony in any event – but a complicated exercise of identifying precisely what that admissible evidence is would have to be undertaken if the remainder is to be excluded in advance. All this is in contrast to the *Hyper Trust* situation where the application to exclude was made at the very outset of the trial before any other witness had given evidence and where a clearly identified paragraph was all that was at issue.

55. The plaintiffs will be entitled to fully and robustly cross-examine Mr Farmer. The parties will also be entitled to make legal submissions on the extent to which the expert evidence should be admitted. I therefore see no prejudice to the plaintiffs in allowing Mr Farmer to give his evidence in the normal way and I believe that ultimately this will be the fairest and most efficient way of proceeding in the circumstances.

56. There is one caveat to this conclusion however and that relates to Section 8 of Mr Farmer's report which I am persuaded should be excluded as inadmissible on its face and which I am satisfied will not give rise to the difficulties outlined above as Mr Hughes did not give evidence as to his view on the meaning of "*in the course of repossession*". Therefore, the matter can be entirely dealt with by the exclusion of paragraph 7.3 of Mr Hughes' report and section 9 of the Joint Memorandum, both of which directly comment on section 8 of Mr Farmer's report.

57. Section 8 of Mr Farmer's report is in the following terms:

8.1 "*The two circumstances identified in the heading are the general circumstances in which the Possessed cover would attach, as I have already explained in my discussion above. An equally relevant question for the purpose of this litigation is whether the Possessed cover can attach where the aircraft are not in the care, custody, control or under the responsibility of the Lessors and/or are in the care, custody, control or*

under the responsibility of the lessee. This brings into focus the concept of the "course of repossession", typically included in the Possessed section of the C&P policy.

8.2 *Cover for aircraft "in the course of repossession" will ensure that there is continuous coverage while an aircraft is being physically transferred to the lessor or its agent.*

8.3 *I understand the Lessors contend that the "course of repossession" started when they asked the operators to ground their aircraft. I do not agree that the market would understand that a mere letter or oral demand for return is sufficient to constitute the "course of repossession". In my experience, the market would expect physical acts rather than an exchange of correspondence, for example the Lessor's appointed agent taking control of the aircraft, including taking care of tasks such as filing flight plans, fuelling, moving the aircraft on the ground/ organising a tug, pre-flight checks and actually flying the aircraft. I believe that my view on this is supported by the wording of the Repossession Expenses coverage, which suggests that repossession involved physical steps. The market in relation to these policies is concerned with physical events.*

8.4 *I have never come across a situation which has turned on the meaning of "in the course of repossession". However, applying the market understanding, if a lessor demanded the return of the aircraft, but it remained with the lessee, the aircraft remains on the Contingent cover. The aircraft is not in the course of repossession and it remains the responsibility of the lessee to preserve it from harm. I would expect the insuring requirements under the lease to endure even when the lessor has requested return — as such the aircraft should remain covered under the Operator's Insurances with back-up under the lessor's Contingent cover."*

58. Para 8.1 is entirely introductory to the overall section and contains no expert evidence. Para 8.2 refers to the exact wording of the Policies namely "*in the course of*

repossession" and to that extent this particular section is not worded in the same generalised terms as the remainder of the report. Mr Farmer continues into para 8.3 where he refers to the particular facts of this case and considers the argument made by the plaintiffs as to when the process of repossession started. These paragraphs go further than a description of a market practice or understanding and instead offer a view on how this phrase or wording should be interpreted in the Policies. Ultimately that is a matter of law and for this court alone to determine.

59. Mr Farmer continues in para 8.3 to refer to how the "*market would understand*" such wording. He confirms however in para 8.4 that he has never in fact come across a situation which has turned on the meaning of *"in the course of repossession*". In light of that admission, there is self-evidently no market understanding let alone a market practice of relevance as the situation has not arisen before. Insofar as Mr Farmer purports to ascribe a market understanding to unidentified other parties he cannot do so. He provides no explanation of how he can assert a market understanding in the face of an admission that this situation has never previously arisen to his knowledge. Similar to the finding in *Crema* I believe that on its face this aspect of Mr. Farmer's report is entirely hypothetical and self-evidently not based on any market experience.

60. For those reasons, and similar to the approach adopted by the court in *Hyper Trust*, I direct that this section of Mr Farmer's report be excluded *a priori* as inadmissible evidence.

61. Section 8 deals expressly with actual wording used in the Policies and seeks to apply a "market understanding" to how that should be interpreted in light of specific fact arguments advanced in these proceedings. I contrast this with the more general evidence given by both Mr Farmer and Mr Hughes on the interplay between contingent and possessed coverages and between operator and lessor policies. While I

may ultimately disregard this general evidence, I will nevertheless allow both experts to give their evidence on these more general aspects (and indeed Mr Hughes has already done so).

62. I wish to assure the plaintiffs that insofar as a concern was raised by counsel that ".. *it has been a feature of this case that witnesses have been invited to offer views as to what the meaning of a term in a lease is or the meaning in (sic) a term of an insurance contract is at various points in time*.."[6], I permitted such questions not for the purposes of interpreting the Policies or the lease obligations but rather for other reasons relevant to the specific witness such as, for example, to assess their credibility on other evidence they gave.

63. This court has already heard a substantial amount of evidence *de bene esse* under some form of objection, for example on the grounds of hearsay. This court will ultimately have to put any such evidence out of its mind if, following the scheduled written and oral submissions on the evidence, this court determines that some or all of that evidence is inadmissible or ought for whatever reason to be given little or no weight. That is something any competent judge is expected to be able to do and it happens all the time There are many cases in which I have accepted expert testimony; preferred one expert's testimony over another; rejected all expert testimony or held particular expert testimony inadmissible or irrelevant to the issues I had to decide. I do not believe that Mr Farmer's evidence is likely to be so powerful that I will be unable to put it out of my mind if I hear it and later decide it is inadmissible or carries no weight in whole or in part.

64. By agreeing to hear Mr Farmer's evidence (save for the provisions of Section 8 of his report) I wish to be clear that I am not convinced this evidence will necessarily be

[6] Day 69 page 16, line 18

held by me to be admissible or relevant. If this evidence, when tested, goes no further than establishing a subjective market understanding held by some persons in that market, it will not properly form part of the factual matrix against which this court must interpret the Polices and will be inadmissible as evidence as to what the Policies mean.

The Ruling made by the court

65. For the reasons outlined above I direct that Mr Farmer be permitted to give evidence to the court on his report over the period set aside in the trial timetable for him to do so. However, section 8 of his report is, for the reasons outlined, self-evidently inadmissible and this section should be excluded from Mr Farmer's report before it is tendered in evidence. This will as a consequence require the removal of para 7.3 from the report of Mr Hughes and section 9 of the Joint Memorandum, both of which comment on section 8 of Mr Farmer's report.

66. The court in agreeing to hear this evidence should not be taken to have accepted its admissibility or relevance and the parties will be free to make legal submissions on this evidence as part of their closing submissions.