



Neutral Citation Number: [2022] EWHC 309 (Comm)

IN THE HIGH COURT OF JUSTICE

Claim No. CC-2020-LDS-000013

BUSINESS AND PROPERTY COURTS

LEEDS CIRCUIT COMMERCIAL COURT (QBD)

Date: 21 February 2022

Before:

Mr Andrew Sutcliffe QC, sitting as a Judge of the High Court

BETWEEN:

LNT AVIATION LIMITED

Claimant

and

AIRBUS HELICOPTERS UK LIMITED

Defendant

Mr Gregory Pipe (instructed by **Clarion Solicitors Limited**) for the Claimant

Mr James Duffy (instructed by **DLA Piper UK LLP**) for the Defendant

Hearing dates: 7-10, 13-14 December 2021

JUDGMENT

MR ANDREW SUTCLIFFE QC :

Introduction

- 1 Airbus Helicopters SAS (formerly Eurocopter Group) (**Airbus**) is the helicopter manufacturing division of Airbus. In 1988, its predecessor manufactured a helicopter known as a Dauphin AS365 N1 with Serial Number 6309 (the **Helicopter**). The Defendant (**AHUK**) is a wholly owned subsidiary of Airbus

responsible for representing Airbus in the United Kingdom. It sells, maintains and offers upgrade design and customisation of Airbus products in conjunction with its French parent company.

- 2 Since 1988, the Helicopter has had several owners. In 2006, it was purchased from a seller in the United States by Mr Lawrence Tomlinson (**Mr Tomlinson**), a director and majority shareholder of LNT Group Limited which is the sole shareholder of the Claimant (**LNT**). Following LNT's incorporation in December 2012, ownership of the Helicopter was transferred to LNT in early 2013.
- 3 In June 2017, Airbus issued an Alert Service Bulletin 365-05.00.78 (the **ASB**) which required the planet gears in the main gearbox of the Helicopter (and that of many other helicopters of a similar type) to be replaced. The ASB was accompanied by an Airworthiness Directive issued by the European Union Aviation Safety Agency (**EASA**) which made the implementation of the ASB mandatory.
- 4 This dispute concerns the legal consequences of the issue of the ASB. LNT contends that, as a result of the ASB and communications that took place following the issue of the ASB between its representatives and AHUK's representatives, AHUK undertook contractual obligations to LNT which it breached and as a result LNT has suffered loss. AHUK denies that it entered into any contract with LNT.

The responsibilities and costs attaching to owning a helicopter

- 5 Before turning to the facts that gave rise to these proceedings, it is necessary to set out the wider context in which this dispute has arisen. Both parties and their respective experts agreed that the expense associated with the ownership and operation of a helicopter is not simply the cost associated with the purchase of the helicopter. It involves paying for all the associated required maintenance (Part 145) and airworthiness requirements (Part M), both scheduled and unscheduled. A Part 145 operator is a Civil Aviation Authority (**CAA**) licensed entity within the UK which has the right to work on certain makes/models/types of helicopter and to conduct the required maintenance for their continued operational use. The Part M operator deals with the airworthiness attributes and the record keeping associated with a helicopter. In the case of a complex helicopter such as a Dauphin AS365, it made sense for the Part 145 and the Part M operators to be kept under the same roof, so that they communicated coherently with each other and with the pilot who, in the case of LNT, was the primary contact for both the Part 145 and Part M operators.
- 6 In order to ensure that their aircraft are maintained in accordance with legal airworthiness requirements, most helicopter owners appoint a EASA Part 145 Approved Maintenance Organisation ("**AMO**") and a Continuing Airworthiness Management Organisation ("**CAMO**"). The AMO holds approval to be able to perform and certify maintenance performed in accordance with directions from the CAMO. The CAMO is responsible for managing the helicopter's Part M maintenance programme, ensuring its compliance with regulatory requirements and

- that all records are kept up to date. Part of the responsibilities of a CAMO includes monitoring Alert Service Bulletins. As their name suggests, Alert Service Bulletins are notices issued by aircraft manufacturers which alert aircraft owners (via their appointed CAMO provider or the owner's pilot or both) of any works, checks or changes which are required to be made to particular models of aircraft from time to time.
- 7 An unavoidable burden of owning a helicopter is that the helicopter is required to undergo specific work on a regular basis at the cost of the owner. The Part 145 and Part M engineering and service history for each component within a helicopter follows the aircraft. Each component has a specific life limit. At the end of a component's designated life limit, it must either be overhauled or replaced entirely. An aircraft's component's life is calculated by reference to calendar dates or a measure of usage (such as the number of flight hours), or a combination of the two and whichever occurs sooner. Therefore, whichever limit the component reaches first will determine when that component needs to be replaced.
 - 8 There is a log card (or history file) for every component on the aircraft, which contains details such as the serial number, date of manufacture, who manufactured the component, where the component was fitted, the service life remaining, etc. The log cards record if a part or a component on the aircraft has been modified. An engineering work-pack is created when any work is undertaken on an aircraft, or any major component is replaced, usually by the Part 145 engineering team, but sometimes by the OEM (original equipment manufacturer). Once completed, that work-pack will be added to the aircraft record history, along with the log card being updated (or replaced if it is a new or overhauled component) to reflect the work that has been undertaken. The log card will then be returned to the record-keeping Part M facility.
 - 9 At the end of a component's critical life, it must either be overhauled or replaced entirely. Taking the example of the main gearbox, the gearbox itself could have an overhaul life of 3000 flight hours before an overhaul is required. Within the gearbox, there are other components each with their own critical life. This means that when a gearbox is returned for overhaul, there will be some components which are tested/inspected and refitted back into it, and some that are automatically scrapped.
 - 10 All of these regular services and replacements are scheduled in accordance with the manufacturer's service requirements and the approved maintenance programme or any relevant regulatory requirement for the specific aircraft or component. This service is normally managed by the CAMO and paid for by the owner. Work packs and purchase orders are generated by the CAMO for the Part 145 maintenance organisation or overhaul company that are working on the project. The log card is issued by the manufacturer of the component. Not every component will have its own log card, but the main components such as engines, airframe and gearboxes have them. Once the work is completed, the date, brief synopsis of the work carried out, component time and cycles / landings etc will be noted on the log card and will

refer to the work pack for further details. The log card can be read chronologically and shows the various overhauls and repairs throughout a component's life. Next to the entries will be a stamp by the company that has carried out the work. The log card stays with the component. The work pack remains with the helicopter. If a new CAMO takes over managing maintenance of the aircraft, it will be sent by its predecessor a copy of the work packs and the original aircraft log cards.

The witnesses

- 11 In the course of a 6 day trial, I heard evidence from seven witnesses of fact. Five of those witnesses gave evidence on behalf of LNT as follows:
- 11.1 Mr Tomlinson who although not directly involved in the management of LNT was kept informed about any major issues relating to the Helicopter and was consulted on any significant expenditure and major decisions that needed to be made. When the dispute with AHUK arose, it was Mr Tomlinson who stepped in and was involved in the key decisions as to what LNT should do. Mr Tomlinson is a mechanical engineer and the owner of a number of businesses including in the field of sports and racing car manufacture, care home construction, software and climate protection systems for the aerospace and rail industries. He has been a successful racing car driver in cars manufactured by one of his companies. He was a qualified helicopter pilot (although his licence is now lapsed) and is therefore acutely aware of the dangers which would arise from defective engineering or mechanical failure. Mr Tomlinson became involved in direct negotiations with AHUK after he was informed by AHUK that the Helicopter's gearbox could not be upgraded and would need a replacement gearbox. In Mr Tomlinson's words, this caused him to be "off the scale angry". He felt that AHUK had been incompetent, only telling LNT over a year after the issue of the ASB that the Helicopter's gearbox could not be upgraded.
- 11.2 Simon Edwards (**Mr Edwards**) who, at the material time, was employed by LNT as the pilot of the Helicopter. He has 37 years experience within the aviation industry and qualified as a commercial helicopter pilot and flight instructor in 1999. He joined LNT on 25 July 2012 as chief pilot and engineering manager. In particular, he managed the Part 145 and Part M contracts and was the principal liaison between the Helicopter's CAMO and AMO (which during the period with which this case is concerned was AS Aerospace Ltd (**AS**) prior to 31 July 2017 and Multiflight Ltd (**Multiflight**) thereafter) and Mr Tomlinson regarding its repair.
- 11.3 Stephen Borrowdale (**Mr Borrowdale**), the managing director of Multiflight, who has 40 years experience of working in the aviation industry. Over his career, he has specialised on Airbus products but Multiflight also works on Bell, McDonnell Douglas and Leonardo

helicopters as well as fixed wing and engine repair/overhaul on other products. As Multiflight's managing director and accountable manager, he is responsible for maintaining the status of the Part 145 and Part M engineering company and the Flight Operations department as required by the regulatory authority and he is responsible as the designated person to the CAA, EASA and Federal Aviation Administration. On behalf of Multiflight, Mr Borrowdale liaised with both AHUK and LNT.

11.4 Thomas Campbell (**Mr Campbell**), Multiflight's Chief Rotary Engineer, who has worked at Multiflight since leaving university some 20 years ago. Mr Campbell explained it was Multiflight's role to issue the aircraft with a certificate of "release to service" and a maintenance statement, which tells the pilot what maintenance is required over the coming months. The manufacturers of the airframe, engine and other related components of the aircraft stipulate the frequency of inspection or replacement of individual items on either an hours, cycles or calendar basis. Multiflight provides forecasts of upcoming maintenance to the owner/operator at regular intervals to assist with planning. Mr Campbell liaised with his technical contact at AHUK and reported back to Mr Edwards on the situation regarding the ASB as regularly as he could following Multiflight's appointment as CAMO in August 2017.

11.5 Dermot Callinan (**Mr Callinan**) who is the Finance Director for LNT Group Ltd. Mr Callinan produced a spreadsheet setting out an overview of the alleged losses incurred by LNT between 25 September 2017, the date on which the Helicopter was grounded as a result of the ASB, and August 2021 when he made his witness statement. He then provided details of the various heads of loss claimed in support of LNT's alternative damages claim, based upon alleged reliance (as opposed to expectation) losses.

12 AHUK called two witnesses:

12.1 Steve Pickston (**Mr Pickston**) who has been Vice President of Support and Services at AHUK since 2014. His role covers all the support functions at the company, including aircraft maintenance, repair and overhauls, spare parts supply and coordinating training of pilots and technicians. He is also involved in AHUK's quality and safety functions, including occupational health and safety, facilities management and technical support. He has carried out this role at AHUK since 2004, but with differing titles. Mr Pickston was involved in discussions with LNT and Multiflight on behalf of AHUK at the relevant time.

12.2 Rodolphe Arnoult (**Mr Arnoult**) who is a Technical Support Representative at AHUK, having held this role since 2016. His role involves receiving and responding to technical queries from customers. Simple queries he can respond to himself, such as straightforward trouble-shooting and repair guidance. Other more complicated queries (such as complex structural

repair matters) require input from the relevant Product Support Managers or experts at Airbus. Mr Arnoult explained that Airbus provides continuous airworthiness management to ensure the safety of its fleet of aircraft which includes the issue of service bulletins and new modifications. It was Airbus that issued the ASB and was responsible for managing requests for replacement parts. Moreover, it was always envisaged that Airbus' maintenance department would carry out the work required by the ASB. Mr Arnoult was directly involved in the management of UK-based customer requests following the ASB. Mr Arnoult is French, and English is his second language. An interpreter was available when he gave evidence but in the event Mr Arnoult was able to give his evidence in English without any difficulty.

13 I also heard evidence from two expert witnesses in the fields of helicopter valuation and repairs/servicing:

13.1 Philip Seymour (**Mr Seymour**) was LNT's expert, of the International Bureau of Aviation Group Ltd (**IBA**), a firm providing aircraft valuation and appraisal services. Mr Seymour is a certified aircraft appraiser with the International Society of Transport Aircraft Trading. He also trained as an air transport engineer and performed maintenance servicing and repairs on aircraft for several airlines and aircraft owners. Since 2009 he has been the Accountable Manager for IBA with regard to its CAMO Part M responsibilities so is familiar with industry practice regarding procedures to ensure the safe operation of aircraft.

13.2 Ross Priday (**Mr Priday**) was AHUK's expert, an aviation consultant for GMR Aviation Consulting Ltd, which provides expert advice on aviation safety performance. Between 2000 and 2006, Mr Priday was Officer Commanding Aircraft Maintenance Flight at Royal Air Force (RAF) Kinloss working on Nimrod aircraft, in charge of 120 engineers and a number of aircraft. He undertook formal training in the management of ageing aircraft and was the project manager for a 'parting out' programme on several airframes, with responsibility for calculating the financial value of the spares recovered and reused on other aircraft. He was promoted to more senior positions within the RAF, one of which involved the oversight of an extensive 'parting out' programme. He ended his career in the RAF as Wing Commander, posted into the role of Type Airworthiness Authority for all the MoD's Hawk aircraft. He was the Principal Engineer for the maintenance and technical documentation aspects of a fleet of over 120 aircraft, each more than 40 years old. Since leaving the military, he has advised military and civil clients around the world on best practice in aviation safety performance, including hazard and risk management.

14 In addition to providing lengthy reports, the experts agreed a Joint Statement which was most useful in distilling the issues they had to consider.

- 15 My clear impression of all the witnesses was that they were doing their best to answer the questions put to them and to give their evidence to the best of their recollection. They were all honest witnesses and their evidence was almost invariably consistent with the documentary record. Indeed I believe there was only one instance where the evidence of two witnesses conflicted (namely, whether or not Mr Tomlinson accepted an offer that had been made to LNT by Mr Pickston on behalf of AHUK) which I address below in the course of my review of the evidence.

The evidence

Background to the ASB

- 16 AS365 Dauphin helicopters are medium weight aircraft originally manufactured by Airbus in France (then known as Aerospatiale). They are considered to be very flexible and versatile from an operational perspective. A large number of them are still used by the United States Coast Guard as one of their primary aircraft for Search and Rescue missions.
- 17 Despite its age in 2017 (at that time nearly 30 years old) the Helicopter had been well maintained and had had a considerable sum of money invested in it, in terms of maintenance, navigational and safety upgrades, and complying with airworthiness directives. Before it was grounded as a result of the ASB, it had only had some 5,750 hours of use. Its pilot, Mr Edwards, stated in evidence that there was what he called ‘a huge amount’ of operational service life left in the Helicopter.
- 18 The Helicopter was operated under the EASA CAA Non-Commercial Complex (NCC) Aircraft category, due to its complex systems, twin engine configuration and weight. On 30 June 2016, LNT appointed AS, located at Denham Aerodrome, as its CAMO and AMO. At the time the ASB and Airworthiness Directive were issued in June 2017, AS was the Part 145 and Part M provider for the Helicopter. However, shortly afterwards, on 1 August 2017, LNT appointed Multiflight to take over the provision of both the Part 145 and Part M services for the Helicopter, and Multiflight entered into a maintenance agreement with LNT on that date.
- 19 In mid-2017, at the time the ASB was issued, LNT was aware that two major scheduled maintenance operations had to be carried out on the Helicopter in the reasonably near future. The first of these operations, and the most relevant for the purposes of this dispute, concerned the Helicopter’s main gearbox (referred to as the **MGB**) which had a life limit of 3000 hours and in mid-2017 only 247 hours remained. The gearbox therefore had less than 10% of its life left before overhaul. The experts were agreed that a gearbox overhaul is a very substantial financial outlay for the aircraft owner, in the region of £450,000 / \$450,000. As Mr Borrowdale explained, more often than not gearboxes are service exchanged rather than overhauled due to the cost and time scale in carrying out an overhaul which can be significant and take months.

- 20 The second maintenance operation that had to be carried out on the Helicopter before the calendar limit expired in May 2019 was its G-Check which is required every 5,400 hours or 10 years, whichever is earlier. Mr Seymour's evidence was that the typical cost of this check is around \$450,000.
- 21 On 9 June 2017, Mr Fincham of AHUK sent a message to Mr Hill of AS via the Airbus technical request (TE) system stating that Airbus had decided to implement a protective measure to ensure all Dauphin AS365/565/8155 aircraft were fitted with a single type of planet gear. The message continued: "*As part of this we have been asked to contact all of our UK Dauphin operators and request copies of the MGB Log Cards. I have created this TE for you in order to enable you to upload the log cards and transmit them more easily. Can I please ask you to provide us with this information and I will keep you informed of further developments*". AS sent the Helicopter's MGB Log Card to AHUK the same day.

Publication of the ASB on 13 June 2017

- 22 On 13 June 2017, Airbus published the ASB in conjunction with the Airworthiness Directive which made compliance with the ASB mandatory. The ASB was issued to enhance safety in response to knowledge acquired as a result of the investigation of an accident involving a different type of helicopter (an EC225 Super Puma helicopter) that had occurred off the coast of Norway in April 2016. The outcome of the accident investigation is clearly explained in a YouTube clip that was provided to me¹.
- 23 The investigation concluded that the mechanical failure which caused the accident was a result of a cracked outer race in a planet gear within the MGB. A planet gear is part of the epicyclic reduction gear, essentially a collection of toothed-gears designed to reduce the rotational speed from the engine to the rotor. The investigation discovered that, of the two types of planet gear installed in the EC225 helicopter's MGB (produced by two different manufacturers), one was more susceptible to developing cracking as a result of higher contact pressures generated within the MGB. As a result, Airbus withdrew that type of planet gear from service as a proactive safety measure, with the result that only one type of planet gear could be installed in an EC225.
- 24 Following the outcome of that investigation, as the ASB states, Airbus reviewed its entire range of helicopters to see if the newly identified issue in relation to the manufacture of the planet gears potentially arose on any other helicopter type. The outcome of that review was that it was decided to implement precautionary measures on the Dauphin family of helicopters, of which the Helicopter is one example. The Dauphin class MGB comprises five planet gears within its epicyclic reduction gear and could be fitted with three different types of planet gear manufactured by three different suppliers (identified as 'X', 'Y' and 'Z' gears). Airbus determined that two of those three types of planet gear (types X and Y) had

¹ <https://www.youtube.com/watch?v=KvBLadpVscY>

- characteristics comparable to the planet gear removed from service from the EC225 type of helicopter. Therefore, as a precaution, it was decided to implement measures which would require the replacement of all X and Y type planet gears in Dauphin helicopters' MGBs with Z type planet gears only. The ASB stated that this was "*a precautionary measure, which is entirely unrelated to any accident involving a Dauphin helicopter, and is intended to enhance the safety of the helicopters concerned*".
- 25 The ASB mandated two changes across the Dauphin class fleet. First, amending the frequency of periodic checks that would need to be made of the MGB's magnetic plugs. Secondly, checking and, if necessary, replacing the type of planet gears installed in the MGB. It was for the operator of the helicopter (as usually delegated to the maintenance service provider) to check what type of gears were embodied in its MGB. If the MGB contained type Z gears, no change was required. If the MGB contained any type X gears, they would need to be replaced within 50 flight hours or in any event by 30 June 2019. If the MGB contained any type Y gears, they would also need to be replaced by 30 June 2019 and either within 50 or 300 hours depending on the time since they were new.
- 26 The ASB required each helicopter's operator to complete the 'Response Form for Alert Service Bulletin' appended to the ASB and return it to Airbus. The Response Form asked the operator to identify the customer, the helicopter details, the MGB details and the identification of all five planet gears, and to append a copy of the MGB log card. The ASB also indicated that replacing the gears would be expected to take approximately two days, assuming 40 hours' work by two mechanical engineering technicians. The work to replace the planet gears was designated a 'depot level maintenance operation' such that it could only be performed by Airbus or approved Airbus repair centres.

Impact of the ASB

- 27 As Mr Pickston stated in an email he sent to Mr Edwards on 22 February 2018, at the time the ASB was issued, there were approximately 810 Airbus helicopters of the relevant types in operation worldwide, over 185 of which were immediately affected by the 50-hour flight time restrictions. Accordingly, some 185 helicopters needed replacement gears in the immediate future and only Airbus (or its approved centres) could perform this work. A further issue was that, as helicopters came to the end of their MGB lifetime cycle and required overhaul (i.e. upon expiry of the 3000 flight hour limit), those helicopters also required replacement gears.
- 28 There is no doubt that the ASB caused a crisis for Airbus with the prospect of helicopters being grounded throughout the world. As a consequence of the ASB, the number of manufacturers able to produce planet gears which could be installed in the MGBs was reduced from three to one. This resulted in a worldwide shortage of bearings. Airbus had to develop a process for dealing with the crisis. It required operators to complete the response form sent with the ASB so that it could build up

- a worldwide view of the scale of the demand. For operators in the UK, AHUK undertook a preliminary review of the response forms to check whether the operator had indicated that it required replacement gears, i.e. whether it had ‘X’ or ‘Y’ type gears. If an operator was identified as needing replacement gears, the operator was required to submit a purchase order for the provision of replacement bearings. The purchase orders were then passed from AHUK to Airbus in France to generate a placeholder for the part. It was Mr Arnoult’s evidence, which was not challenged, that AHUK did not at that stage undertake a detailed review of the technical information or the modification state of the Helicopter. It was not until a later stage in the process – namely the work planning stage – that Airbus took a closer look at the materials to check the MGB’s modification status, following which an order was sent to Airbus’ Maintenance Department for an engineer to undertake the work that needed to be carried out. The purchase order would only be processed once there was a suitable part available to meet the operator’s request.
- 29 Airbus appointed a crisis team to work with the manufacturer to try to increase the number of planet gear sets available each month but inevitably there were considerable delays. Airbus queued the requests that had been submitted via purchase orders, giving priority to emergency services (air ambulances, police, coast guard etc) and military helicopters. This meant that the scope of the work required for any given helicopter – in the queue of some 185 aircraft affected by the ASB – would only be apparent once the relevant Airbus maintenance team in France had turned to the particular request and conducted a detailed technical review.
- 30 The initial version of the ASB dated 13 June 2017 stated in paragraph 2D, under the heading “*equipment or parts to be returned*”, that a retrofit solution would be proposed to each operator based on the information provided in the response form and continued: “*The practical procedures for the helicopters concerned by the retrofit will be provided to each customer. Specific commercial conditions will be proposed to process this retrofit*”.
- 31 The next day, on 14 June 2017, AS notified Mr Edwards, the Helicopter’s pilot and LNT employee, that the Helicopter’s five planet gears were all ‘X’ type and therefore needed to be replaced within 50 flight hours or by 30 June 2019 (whichever came earlier). AS also said that they had passed this information on to their AMO maintenance team to assess the procedure and costs involved. Mr Edwards’ response indicates that he was keen to find out what financial recourse LNT would have as a consequence of the ASB. The same day AS completed and returned the ASB response form, together with a copy of the MGB log card. The response form noted that the Time Since Overhaul of the MGB was 2,702.48 hours which meant that (at that time) the MGB had less than 300 hours remaining before overhaul. At the same time, AS asked AHUK some questions about the steps that needed to be taken including whether the cost was covered by Airbus. Mr Arnoult of AHUK responded as follows on 19 June 2017: “*Regarding the downtime and costs involved, unfortunately I don’t have that information yet. For the moment and*

as a first step in order to have the answers regarding these questions, please send your order as soon as possible with the remaining potential (date and flying hours) on the aircraft. This will start the process with Airbus for the replacement of the gears.”

- 32 AS submitted a purchase order (which it called a repair order) on 20 June 2017, with a notional value of €0.00 for what was described as “*embodiment*” of the ASB. The order also enquired whether it would be possible for AHUK to consider the option of carrying out the work at AS’s site. AHUK acknowledged the order the same day, noting “*we are investigating the solution for this ASB and will update you once we have more information*”.

Revision 1 of the ASB dated 30 June 2017

- 33 Some 10 days later, Airbus issued Revision 1 of the ASB dated 30 June 2017 which included a new paragraph 2A, under the heading “equipment or parts: price-availability-procurement”, that read as follows:
“Airbus helicopters has introduced a specific commercial policy. All direct consequences of the limitations introduced by this [ASB] are at Airbus helicopters’ expense:
- Supply of planet gears
- Transportation of parts
- Manpower costs related to the exchange
You can obtain the detailed conditions by contacting your usual commercial contact at Airbus helicopters.”

- 34 I shall consider in more detail below what, if any, contractual consequences resulted from the addition of paragraph 2A into the ASB on 30 June 2017.

Events following issue of ASB, Revision 1

- 35 Also on 30 June 2017, AS chased AHUK for an update. Mr Arnoult replied as follows on behalf of AHUK: “*Unfortunately we still have no feedback from the factory yet. All the information you have provided regarding [the Helicopter] have been sent to the factory and we are now waiting for the worldwide work plan. Be sure that as soon as we have any information in order to go forward with this ASB we shall pass it on to you.*” AS forwarded this email to Mr Edwards of LNT.
- 36 On 4 July 2017, in response to a further request for an update from AS, AHUK’s email noted that the Helicopter’s MGB had already used up more than 80% of its Time Since Overhaul and continued “*it may be that we recommend the MGB is sent for overhaul in addition to the bearing replacement, but there would potentially be a pro rata charge for the overhaul*”. AHUK noted that this was subject to confirmation from Airbus and that it was still waiting to hear on “*what sort of timescales we are looking at*”.

- 37 On 5 July 2017, AS sent an email to Mr Edwards in the following terms: “*AHUK are asking is the target date for you to run out of hours on your epicyclic still the same? Also they are proposing that you get the [overhaul] carried out at the same time and they will make some sort of ‘commercial consideration’. Is this something you have considered?*”. Mr Edwards replied the following day stating that the Helicopter had 24 hours 15 minutes remaining on the planetary gears which on current usage meant that the hours were likely to be consumed by 31 July 2017. He stated that LNT had “*in the order of 300 hours*” remaining on the MGB which would operationally see them through to 2019 and tie in with the G check also due on the aircraft. This email continued: “*If [Airbus] are able to expand on any commercial gesture terms applied overall [MGB] costs and associated lead times for overhaul we would certainly be interested in hearing their proposal. However, currently, as per [paragraph 2A of the ASB] we would expect the planetary gear set to be replaced by [Airbus] ... at Airbus expense*”. This information was relayed by AS to AHUK who in turn forwarded it to Airbus, explaining that LNT “*will decide based on our financial offer*”.
- 38 AS chased again for an update on 13 July 2017, and Magdalen Batten, Customer Logistics Manager at AHUK, explained the same day that “*as soon as information is available, I will inform you of the situation*”. On 18 July 2017, AHUK again confirmed “*that there is no update to give you yet regarding the ASB and what can be offered*”.
- 39 On 23 July 2017, Mr Edwards notified AS that there were 17 hours 17 minutes remaining before time expired on the Helicopter’s planetary gear set and envisaged that those hours would be “*flown off*” by 31 August 2017. He acknowledged that Airbus was “*not going to provide a technical/commercial solution*” before 31 July 2017, “*after which time the responsibility for the progression of a solution*” would pass to Multiflight.
- 40 As indicated in Mr Edwards’ email of 23 July 2017, Multiflight replaced AS as LNT’s CAMO and AMO from 1 August 2017. From that point onwards Multiflight replaced AS as LNT’s agent in communications with AHUK. On 2 August 2017, AS cancelled its purchase order. The same day, AHUK emailed Multiflight, copying them into the previous chain of correspondence between AHUK and AS, and requesting that Multiflight submit an order to “*replace*” AS’s order. Mr Edwards instructed Multiflight to submit a purchase order “*to keep the administration tidy*”. His email continued: “*I do appreciate its pissing into the wind a little bit, but let’s dot the i’s and cross the t’s – it’ll make the lawsuit against AH a little more watertight*”. Mr Campbell of Multiflight emailed AHUK to say that they would be “*taking over*” the Technical Request that had been raised by AS. He then emailed Mr Edwards to confirm that AS’s request had been “*transferred*” to Multiflight “*so it means we are taking up from where they left off with the gearbox and our stores are submitting a repair order in replacement of the one AS had cancelled*”.

- 41 Multiflight’s purchase order (called a “Repair Order”) was issued on 8 August 2017. It identified the MGB by its part number and stated that the order was for a replacement MGB per the ASB for £0.00. The order provided that the “*date required*” for replacement MGB was “*1-Sept-2017*”, though Multiflight were obviously aware that neither AHUK nor Airbus had given an indication that the parts would be available in under a month’s time. AHUK responded to Multiflight’s order by stating that “*once a plan is available for the MGB, we will keep you informed*”. On the same day, Mr Edwards explained in an email to Mr Tomlinson that all aircraft documentation had been delivered to Multiflight and the “*toing and froing*” with Airbus regarding the planetary gears continued.
- 42 On 11 August 2017, in response to a request from Multiflight, AHUK provided them with a copy of its Standard Conditions of Sale. On 17 August 2017 Mr Edwards provided Mr Tomlinson with a further update, passing on what he had been told by Mr Borrowdale of Multiflight which was that “*AH are expected to release an update to the transmission ASB at the end of August ... Currently they are not committing to anything*”.
- 43 In his email exchanges with Multiflight and Mr Tomlinson in early September 2017, Mr Edwards expressed his considerable frustration at the fact that “*it’s been 3 months since the ASB was issued, with no sign of a technical resolution from AH*”, noting that the Helicopter would be “*out of hours in the last week of September*”. In the context of considering insurance quotes later that month, Mr Tomlinson indicated LNT should go with the lowest quote “*as who knows what’s going to happen with the gearbox*”. Mr Edwards replied that he would ask AHUK for a date when the gears would be replaced and who would be making payments for AOG (meaning aircraft on the ground) which was shortly to occur in respect of the Helicopter.
- 44 On 3 October 2017, Mr Edwards asked Multiflight for an update as LNT needed “*confirmation from AH as to when they intend to rectify their wrongs*”. He pointed out that the Helicopter had under two flying hours remaining which to all intents and purposes meant it was grounded. On 11 October 2017, Mr Borrowdale of Multiflight provided Mr Edwards and Mr Tomlinson with an update following his telephone call with AHUK. He explained that he understood the delay in the process was “*now purely a parts bottleneck*” at the bearing factory where Airbus had four full-time staff overseeing the production process. Civil customers (as opposed to military/heads of state which had secured the first batch of bearings) would “*fall in line for a replacement subject to availability*” and, although AHUK had not confirmed the position in writing, they should expect to see parts becoming available in March / April 2018. Mr Borrowdale also referred to the bearing replacement process as being estimated to progress well into 2019 and noted that AHUK had indicated that gearboxes within 200 hours of overhaul would not qualify for any replacement gears. By this stage, the Helicopter’s MGB had 247 hours remaining. Mr Borrowdale concluded his email by stating that he was constantly on the lookout for a good gearbox which LNT could use.

45 On 22 January 2018, Mr Borrowdale provided Mr Tomlinson with an update, noting that Airbus' position was "*a moving target and shifting time lines*". He suggested that the latest information was that LNT may not get allocated its box until June 2018 and that "*based on info to date we won't know for sure until we have notification the bearings have been dispatched with the Airbus engineer from France*". Mr Tomlinson replied the same day saying: "*I'm not sure what Airbus are likely to do to compensate us as this seems terrible. Is there any comeback on them or are we just screwed?*".

46 The next day (23 January 2018), Mr Edwards sent an email to Mr Tomlinson explaining that various unrelated maintenance work was required on the Helicopter, but he suggested holding off on carrying out this work until LNT had a confirmed date for rectification of the gearbox, "*just in case AHF drag their heels even further or come up with even more rectification caveats*".

47 On 31 January 2018, Mr Tomlinson and Mr Edwards had an exchange following Mr Edwards' learning that some UK-based helicopters had had their gears replaced. Mr Tomlinson asked whether he could "*presume*" that the Helicopter's MGB would now be fixed. Mr Edwards confirmed his understanding was "*not until AH 'allocate' the bearing sets to a specific aircraft*".

48 On 21 February 2018, Mr Edwards provided Mr Tomlinson with another update, stating: "*The last update from [Steve Borrowdale of Multiflight] was pretty negative, with [Airbus] not committing to any timeframes for bearing supply or rectification of the 3 remaining AS365's affected in the UK – of which [the Helicopter] is one. Instead, verbally stating that supply/rectification has been pushed back from the anticipated Feb/March to June. [Airbus] are driving the rectification process and allocating bearing sets to specific aircraft/serial numbers. AHUK have no control input and just re-iterate what they are told by [Airbus] – which is very little.*"

49 The following day, 22 February 2018, Mr Pickston of AHUK sent an email to Mr Edwards in the following terms:

"Thank you for making contact today.

As a follow up to our phone call I can confirm that the situation for [the Helicopter] is being followed closely.

Under the current planning by the crisis team in France there is a set of SNR bearings available from the bearings suppliers at the end of June. These bearings are then installed into a planet gear carrier with 5 planet gears and run on a test bed, this takes about 3 weeks. Once this is done the epicycle carrier is available to be installed into the gearbox by an onsite Airbus Helicopter tech rep. Under the current planning it is likely that some will come and install the unit into [the Helicopter] towards the end of July. This job takes approximately 3 days. Basically Multiflight have to remove the main rotor mast assembly, then the tech rep comes and removes the Epicyclic module, replaces the epicycle carrier, refits it to the Epicyclic module to the gearbox and Multiflight refit the mast assembly, followed by ground runs and air testing.

When the ASB was first issue[d] there was approximately 810 aircraft in service, 365/155, and over 185 were immediately effected with 50 hr flight restrictions. As time [has] moved on customers with [MGBs] that required overhaul are also now being effected.

Our Airbus Helicopter Crisis team have been working alongside the bearing manufacturer to ensure that everything that can be done is being done to ramp up the number of bearing sets available each month to support the worldwide fleet. It is hoped that the manufacture will be able to increase the production and that this will reduce the timescales for customers to get the epicycle modules they need.

Every month I review the current planning to ensure we are doing all we can to keep the UK schedule on track and to try and find improvements. At one point the bearings for LNT were planned for end of July and so we have made a 1 month improvement already. I'll continue to try to improve this.

Going forward I will keep both you and Multiflight informed on development concerning [the Helicopter].

We do understand that any down time for our customers is too much and are doing all we can to minimise this.”

- 50 Mr Edwards responded to Mr Pickston the same day, expressing LNT’s frustration at the “*costly situation for owner/operators and engineering providers alike*” and asking Mr Pickston to communicate any developments with regard to the provision of a bearing set for the Helicopter directly to himself as well as to Multiflight.
- 51 Over a month later, on 26 March 2018, Mr Edwards followed up on the February exchange of emails, asking Mr Pickston for an update. On 6 April 2018, Mr Pickston stated that the current plan was roughly the same as that described in his email of 22 February 2018, with bearings for the Helicopter being delivered to Airbus at the end of June, leading to a possible install date towards the end of July or early August.
- 52 In the meantime, on 20 March 2018, LNT instructed their solicitors, Clarion Solicitors Limited (**Clarion**), to write to AHUK with a threat to pursue legal proceedings against AHUK unless there was a swift resolution to the matter. The solicitors referred to the fact that as a result of the ASB the Helicopter had effectively been grounded since 25 September 2017 and that LNT had “*subsequently been informed that the Parts may be available and/or that the necessary installation work may be carried out at the end of July 2018*”, by which time the Helicopter would have been grounded for more than 10 months. Clarion’s letter proceeded to contend that AHUK was liable to LNT for product liability breaches, negligence and competition law breaches, none of which has been pursued in these proceedings. It is also notable that this letter did not make any allegation of breach of contract or misrepresentation. Clarion’s letter concluded with the threat that if the Helicopter was not repaired by 17 April 2018, LNT reserved the right to hire a replacement helicopter and to recover from AHUK the costs of doing so, in addition to the losses suffered as a result of the Helicopter being grounded.
- 53 AHUK (by its chief commercial officer, Mr Andy Dench (**Mr Dench**)) responded to Clarion’s letter on 9 April 2018, informing them that AHUK had made an

- arrangement with LNT to enable the return of the Helicopter to a flight condition. Under this arrangement, a loan helicopter MGB was to be provided to LNT until such time as the replacement bearings for LNT's own MGB came into service. Mr Dench then gave detailed reasons for taking issue with the allegations made in Clarion's letter. In particular, he took issue with Clarion's assertion that Airbus had supplied a defective product and had failed to provide any justification for reducing to one the number of suppliers of epicyclic bearings.
- 54 In early April 2018, as Mr Dench stated in his letter to Clarion of 9 April 2018, it was identified that Multiflight had a suitable MGB, which had had its gears replaced (the **Loan MGB**) and which could be lent to LNT and installed into the Helicopter to keep it flying. AHUK put forward a proposal to LNT for the rental of the Loan MGB from Multiflight, whereby AHUK would fund the installation of the Loan MGB into the Helicopter, as well as its later removal, and the flying time would be charged at an hourly rate by Multiflight to LNT. On 4 April 2018, Mr Borrowdale explained the proposal to Mr Tomlinson noting that the removal of the Helicopter's MGB and installation of the Loan MGB which was to cost £6,640 would be "*at Airbus cost as a gesture of goodwill*". Airbus agreed to pay a similar amount on the removal of the Loan MGB and refitting of the Helicopter's MGB, as well as the cost of inspection and recertification of the removed MGB.
- 55 On 6 April 2018, Mr Dench emailed Mr Tomlinson (copying Mr Edwards and Multiflight) confirming the arrangements that had been made with Multiflight to enable LNT to operate the Helicopter "*until receipt of the main gearbox replacement epicyclic bearing kit deal at the end of July or early August*". He explained that the costs of installation of the Loan MGB and the removal and reinstallation of the original MGB were to be borne by AHUK "*as a commercial gesture of goodwill to LNT and payable to Multiflight as work is completed*". Mr Dench expressed the hope that AHUK's "*gestures can maintain the goodwill between our organisations*". His email continued: "*The decisions made to introduce the Airworthiness Directive reducing the lives of particular Main gearbox epicyclic bearings were based only in the continued safety and airworthiness of the AS365 aircraft type. We are also acutely aware of the inconvenience and difficulties that this has created for many of our customers and are taking all possible steps to try to minimise the effects from this*".
- 56 On 10 April 2018, Philip Raven, a director of LNT, responded to Mr Dench's email to Mr Tomlinson, indicating that LNT had signed the loan agreement with Multiflight (this appears to have happened the previous day), thanking him for his efforts and stating that LNT looked forward to being able to use the aircraft again and would be in touch in the future "*once everything is sorted out*".
- 57 AHUK issued Multiflight with a purchase order to cover the cost of the removal and re-installation works and Multiflight commenced the work in replacing the Helicopter's MGB with the Loan MGB.

- 58 Unfortunately, despite everyone's best intentions, the Loan MGB was not a success and its installation did not allow the Helicopter to return to service. During the ground runs carried out to ensure that the Loan MGB was working correctly, metal particles were found in the oil of the dynamic assembly in the Helicopter. Checks were required to identify the exact source and cause of these particles, which in some cases can indicate wear and tear. It was thought that the source of the particles could potentially have been either the Loan MGB or the mast of the Helicopter. The particles were sent for specialist analysis and the results showed that some of the debris could only have come from the mast of the Helicopter itself and may have damaged the Loan MGB. This indicated that the mast bearing on the Helicopter was starting to wear, which meant, according to Mr Pickston whose evidence I accept, that there was no guarantee the Helicopter would have been able to fly the remaining flight hours before G-Check which it had available prior to the issue of the ASB. According to Mr Pickston, due to the low modification state of the Helicopter's MGB, any particles from the mast could fall straight into the MGB and damage it.
- 59 On 3 May 2018, Mr Pickston sent a long email to Mr Edwards, copied to Mr Tomlinson, Mr Borrowdale and Mr Dench. His email followed up on a discussion he had had with Mr Edwards that morning which in turn had been prompted by an email from Mr Edwards to Mr Pickston earlier that day raising a series of questions about the metal particles that had been detected in the Loan MGB and asking for an update as to when the replacement bearings would be available for the Helicopter's own MGB. Mr Pickston's email reported first on the actions that were being taken with the Loan MGB. In relation to the Helicopter's own MGB, he said that he had checked with his colleagues in France who were managing the crisis and the latest was that "*the bearing manufacture has still not been able to ramp up production*" with the result that "*the forecast availability date*" was moved back to the original timeframe of end of July / early August.
- 60 On 23 May 2018, Mr Pickston sent a further email to Mr Edwards, again copied to Mr Tomlinson, Mr Borrowdale and Mr Dench. By that time it was clear that the problem with particles in the Loan MGB was not at all easy to resolve. Mr Pickston acknowledged that LNT's "*preferred solution*" was a replacement of the original MGB's gears and reassured LNT that "*we are doing what we can to get this to you as soon as we can*". He continued: "*I would also like to reassure you that you are receiving your Epicyclic unit before others both in the UK and worldwide*".
- 61 On 25 June 2018, Clarion sent a further letter to AHUK setting out LNT's dissatisfaction with the issues that had arisen in relation to the Loan MGB and stating that LNT had lost all confidence in Airbus and its helicopters, with the result that AHUK's offer of a leased or replacement Airbus helicopter (at LNT's cost) was not an acceptable solution. Clarion stated that their client had been patient "*in the hope that a swift and amicable solution could be found that would allow our client's Helicopter to return to full service*". They went on to complain that AHUK had "*failed to take any steps to remedy the situation*" and that the only "*proposed*

resolution” was the Loan MGB which had proved unsatisfactory. The letter concluded: “Our client therefore proposes that in return for our client agreeing that it will forego a claim for the considerable losses it has and continues to suffer, and for the value of the Helicopter, which clearly cannot be made safe, Airbus purchases the Helicopter for the sum of \$1,500,000. If this proposal is not accepted by 4.00pm on 16 July 2018, our client will have no choice but to issue legal proceedings against Airbus without further notice”.

62 Mr Dench responded to this letter on behalf of AHUK on 28 June 2018. He agreed it was very unfortunate that all the efforts made by AHUK to provide LNT with an operational helicopter prior to Airbus’ provision of an epicyclic bearing replacement kit had thus far been unsuccessful or declined by LNT. He explained that Airbus was carrying out a worldwide programme and that AHUK was coordinating the supplies to customers in the UK, with the latest update being that they expected a technical expert from France to be able to install the new bearing kit at the beginning of August 2018. Mr Dench asked Clarion to confirm that LNT still wished to proceed in order to allow AHUK to reconfirm this into the worldwide planning for Airbus.

63 Mr Pickston provided Mr Edwards with a verbal update on 2 July 2018, in which he stated that the aim was still to carry out the work to the MGB at the beginning of August, but that he would not discuss the topic further as it was now being handled by lawyers.

64 On 10 July 2018, Ms Batten of AHUK emailed Multiflight to explain that Multiflight would need to have certain parts available for the work to be carried out in August, and she asked Multiflight to check that they had them, or else they would need to order them. Her email continued: *“I am awaiting further information regarding the epicyclic (whether a separate order is required as was the situation last time) and will keep you posted if there are any further requirements.”*

65 On 16 July 2018, the Airbus maintenance team in France contacted AHUK to say that a new set of planet gears for the Helicopter was expected the next day. The engineer asked for the MGB’s log card with the updated hours and cycles and concluded his email by saying: *“If everything works well I’d say we could be able to deliver a retrofitted part by mid-August”.*

The Modification

66 Unfortunately, everything did not work well. On 20 July 2018, Lyndia Bezanger, Airbus’ Support & Service Europe Manager, emailed Mr Pickston to explain that after analysis of the MGB technical data conducted by the French maintenance team, it had been discovered that the proposed retrofit of the new planet gears was not compatible with the modification status of the Helicopter’s MGB. In Ms Bezanger’s words: *“This modification is very old, so we do not have any more the [planet gears] for this configuration”.* The analysis showed that the MGB had not embodied a much earlier modification, Modification 077244 (the **Modification**),

- which had been introduced in July 1997 (some 20 years previously, well before the Helicopter came into LNT's ownership) in order to reduce the noise generated by the Dauphin AS365 helicopter type MGB.
- 67 The Modification was not mandatory. It is included in Airbus' list of modifications with the description: "*Noise of MGB reduced by modifying the sun gear, planet gear and ring gear teeth.*" The experts were agreed that, if the Modification had been carried out, it would have resulted in the replacement of the MGB's internal components comprising the epicyclic reduction gear (including the planet gears). This meant that MGBs, depending on whether they were pre or post Modification, would need to be fitted with different models of planet gears.
- 68 At some point after 1997 and before the issue of the ASB, the pre-Modification models of the planet gears were no longer manufactured. As the experts explain in their Joint Statement, this resulted in an obsolescence issue: "*The issue of Pre-Mod parts obsolescence could have become a problem at any time, had a repair been required for the MGB on [the Helicopter] for any other reason ... In the case of the MGB fitted to [the Helicopter], it would (by default) embody [the Modification] during the next overhaul as the Pre-Mod parts to keep such MGB serviceable don't exist anymore*".
- 69 The Helicopter's MGB was fitted with pre-Modification 'X' type planet gears (part number 360A32.3675.09), which meant that they needed to be replaced pursuant to the ASB. However, the 'Z' type equivalent of the pre-Modification model of planet gears (part number 360A32.3675.10) – which, if already installed on the Helicopter, would have meant that the gears did not need to be changed – were neither available nor manufactured.
- 70 Mr Arnoult explained the problem that had arisen in this way: "*The type of bearings that could be installed in LNT's MGB (part number 360A32-3675-10) are no longer manufactured and have not been manufactured since the ASB was first issued. When it was discovered that [the Modification] had not been embodied on the Aircraft, checks were made by [Airbus] just in case there were any of these parts leftover in France, but there were none available*".
- 71 The consequence of the discovery by the Airbus maintenance team on about 18 July 2018 that the Modification had not been carried out to the Helicopter's MGB was that the 'Z' type planet gears that had been sourced for installation in August 2018 were not compatible with the Helicopter's unmodified MGB. This meant that the only ways in which the Helicopter could be fitted with ASB-compliant 'Z' type planet gears were either to overhaul the MGB (which, in effect, would render its modification status consistent with the Modification) or to replace the MGB with a new or overhauled MGB which already embodied the Modification. Since the Helicopter's MGB had less than 250 hours of the 3,000 hours permitted left before overhaul, LNT would have been faced with having to adopt one of these options in the reasonably near future in any event. This was irrespective of the ASB. The experts were agreed that when the MGB came to overhaul, it would have to have

- had its modification status rendered consistent with the Modification as the older parts were obsolete.
- 72 The experts were also agreed that there was a considerable difference in the scale of work required between, on the one hand, replacing the planet gears and, on the other, carrying out an MGB overhaul. Replacing five ‘X’ or ‘Y’ gears with a set of ‘Z’ gears was estimated by the ASB to require just 40 man hours (of two Airbus employees) and two days of downtime for the Helicopter. LNT’s expert, Mr Seymour, agreed with Mr Pickston that the cost to the owner of carrying out this work (removing the main rotor mast assembly and then refitting that assembly following replacement of the gears and doing the necessary ground runs) would be no more than €4,000.
- 73 By contrast, the experts agreed that an MGB overhaul is a substantial, time-consuming and costly exercise. LNT, as owner, was obliged to incur the MGB overhaul costs when the 3,000 hour MGB limit expired. Mr Pickston estimated the cost at around €450,000. LNT’s expert assumed a guideline cost of \$450,000 whereas AHUK’s expert considered that a figure of £450,000 would be conservative, given the age and possible condition of the Helicopter. Mr Borrowdale’s evidence was that, when an MGB required an overhaul, more often than not it would be service exchanged rather than overhauled due to the cost and time scale involved in carrying out an overhaul.
- 74 It is important to bear in mind that neither side had in contemplation that Airbus would be required to overhaul the MGB as a consequence of the ASB. As the figures demonstrate, this task was an altogether different order of magnitude. The possibility of carrying out an overhaul at the same time as replacing the gears was raised by AHUK with AS in July 2017 on the basis that LNT would be liable for the pro rata cost of the overhaul work. The suggestion was never pursued by LNT.
- 75 It is not disputed that neither Airbus nor AHUK discovered the issue arising from the fact that the Modification had not been carried out before about 18 July 2018. Mr Pickston’s evidence was that, faced with demands for hundreds of new gears and replacement work as a result of the issue of the ASB, Airbus was only able to conduct the necessary technical analysis when it reached the planning stage for replacement of the bearing in a particular aircraft, which only occurred once the replacement parts had become available for installation on that aircraft. LNT says that AHUK ought to have realised sooner that the newer model of gears would have been incompatible with the Helicopter’s MGB. However, I accept the evidence of AHUK’s expert, Mr Priday, that it would not have been reasonable to expect the non-technical individuals at AHUK or Airbus to appreciate that the Modification had not been carried out purely from a review of the part numbers on the MGB log card, since matters of this level of technical complexity would not be immediately obvious.
- 76 Having discovered the problem resulting from the fact that the Modification had not been carried out to the Helicopter’s MGB, AHUK first communicated the bad

- news to Multiflight on 26 July 2018. Before speaking directly to LNT, AHUK wanted to consider what alternative commercial proposals it could present. Also on 26 July 2018, Clarion sent a four page letter before action to AHUK. It appears Clarion were unaware of the Modification issue at the time they sent their letter. The letter stated that LNT had lost confidence in Airbus' ability to resolve the problems with the Helicopter and was left with no choice but to pursue Airbus through the courts to recover its losses. Clarion's letter referred back to their previous letter of 20 March 2018 which had set out the basis for LNT's claims said to be founded on Airbus' breach of product liability legislation, negligence and breaches of competition law. Those claims were repeated in this letter, together with a claim under the Consumer Protection from Unfair Trading Regulations 2008. As with Clarion's earlier letter, there was no allegation of breach of contract or misrepresentation.
- 77 Solicitors instructed on behalf of AHUK, DLA Piper UK LLP (**DLA**), sent a holding response on 8 August 2018 and a detailed response on 26 September 2018 in which DLA maintained that there had been no assumption of legal responsibility to LNT by AHUK and explained why each of LNT's heads of claim identified in Clarion's letters of 20 March and 26 July 2018 was denied.
- 78 Also on 8 August 2018, Mr Edwards and Mr Pickston spoke on the telephone. Mr Edwards' evidence about this call, which I accept, is that Mr Pickston was elusive when asked to confirm a specific date for the MGB work to be undertaken and said that he would clarify matters in his forthcoming email. Mr Pickston's email was sent on 10 August 2018 to Mr Tomlinson, copied to Mr Edwards. It explained the issue caused by the "*very old modification state*" of the MGB, such that no replacement planet gears for that model of epicyclic gear system existed. Mr Pickston set out in his email what he described as four "*practical options*" for returning the Helicopter to service, namely: (1) purchase of a new MGB; (2) purchase of a freshly overhauled exchange MGB; (3) purchase of a part-life exchange MGB; or (4) rental by flight hour and weeks of an MGB (indicative rental prices for this option were provided).
- 79 Mr Tomlinson was unhappy with the news communicated by Mr Pickston's email. In his response on the same day, he replied: "*I'm not sure of the exact details you outline but it seems that AH have kept my aircraft on the ground for 9 months waiting for a gearbox upgrade that you now say isn't possible, something that AH should have known from day one. AH now want me to scrap my gearbox that worked perfectly well and either buy a new/used one or rent one. Is this summary correct?*".
- 80 Mr Pickston responded on 13 August 2018 indicating that he was not able to comment on Mr Tomlinson's email given that lawyers had been formally engaged but that he would very much like to maintain a constructive dialogue in relation to the matters set out in his email concerning return of the Helicopter to service. His email concluded: "*please let us know if you would like to proceed with the potential hire solution or alternatively if you would like us to provide a price for the full*

overhaul life MGB which is currently available and also if you wish us to continue our research for a lower life remaining unit. Alternatively, please let me know if you prefer to leave matters entirely in the hands of your lawyers.”

- 81 Mr Tomlinson responded the same day seeking details of the costs of the options set out in Mr Pickston’s email of 10 August 2018 and timescales for the Helicopter to be back in service.
- 82 On 3 September 2018, Mr Pickston provided pricing estimates for options (1) to (3) outlined in his 10 August email (having already provided rental prices for options (4) in that email) as follows: (1) purchase of a new MGB: €1m; (2) purchase of a freshly overhauled exchange MGB: €766,000; (3) purchase of a part-life exchange MGB with over half of its Time Before Overhaul (1,772 flight hours) remaining: €453,000. Mr Pickston indicated that the rental option would be available within 2 weeks, option (3) was immediately available, whilst the remaining option would be available at the end of September. He suggested that option (3) would seem to be the best option since it provided LNT with an MGB with lots of time remaining before overhaul, the shortest lead time and the lowest cost.
- 83 Despite further discussions between the parties, no progress was made. As mentioned above, DLA sent its letter of 26 September 2018 with a detailed rebuttal of each of the causes of action identified by Clarion in its letters of 20 March and 26 July 2018.

AHUK’s open offer

- 84 On 26 October 2018, Mr Pickston sent an email to Mr Raven of LNT, copied to Mr Tomlinson, noting the threats made by LNT to bring litigation against AHUK and making an open offer in an attempt to avoid what Mr Pickston referred to as the irrecoverable time and cost of proceedings. AHUK’s open offer, which was stated by Mr Pickston as being made “*as a gesture of goodwill without any admission of liability*”, was for AHUK to apply a €176,000 discount to the cost of a part-life exchange MGB which would be accompanied by a standard factory warranty. Since such an MGB (i.e. option (3) in Mr Pickston’s email of 3 September 2018) would normally cost €453,000, AHUK’s offer had the effect of providing LNT with a discount of approximately 40%.
- 85 Mr Tomlinson stated in cross examination that he had accepted or would have accepted this offer made by AHUK. This evidence was denied by AHUK who pointed to Mr Pickston’s later email dated 2 November 2018 which had stated: “*the gearbox we had made available is not “spare”. There are other customers who want it. We ring-fenced it for you for more than a month in a genuine goodwill attempt to be helpful. However, as our goodwill offer has not been accepted, the factory has no option now but to release it to another customer.*” I have seen no evidence of any acceptance by LNT of the offer made by AHUK in Mr Pickston’s email of 26 October 2018 and I reject Mr Tomlinson’s evidence that he or LNT did accept such offer.

86 On 6 January 2020, Clarion sent a further letter of claim on behalf of LNT. This letter alleged for the first time that LNT had a claim for damages against AHUK arising from a breach of contract. A claim form with attached particulars of claim alleging breach of contract and negligent misrepresentation was issued on 4 June 2020.

Was there a contract?

87 The central issue I have to decide is whether LNT and AHUK entered into a contract with regard to the installation of a replacement planet gear assembly in the Helicopter's MGB and, if so, when was that contract entered into and what were its terms.

Summary of LNT's submissions

88 In his opening note for the trial, counsel for LNT, Mr Gregory Pipe, explained that LNT's claim was for expectation, alternatively reliance, damages for breach of contract resulting from AHUK's failure to supply and install a new planet gear assembly in the Helicopter's MGB.

89 In its particulars of claim, LNT pleaded various alternative contracts that it alleged had been made between AHUK and itself in 2017 and 2018.

90 First, it was alleged (in paragraphs 24 to 26 of the particulars of claim) that when AHUK entered the purchase order submitted by Multiflight on 8 August 2017 on its computerised order recognition system (which was accessible to Multiflight), that constituted an acceptance by AHUK of the order and resulted in a contract whereby, in consideration of LNT making the Helicopter available to AHUK for dismantling and repair, AHUK agreed to replace the gears with new gears in accordance with the ASB. I shall refer to this as **Alleged Contract 1** although, as I explain below, LNT put its case differently in relation to Alleged Contract 1 when the case came to trial.

91 Second, it was alleged (in paragraph 28 of the particulars of claim) that AHUK's email dated 22 February 2018, in which it informed LNT that it would replace the gears in the Helicopter at about the end of June 2018, constituted an acceptance of the Multiflight purchase order and an agreement in similar terms to Alleged Contract 1. I shall refer to this as **Alleged Contract 2**.

92 Third, it was alleged (in paragraphs 29 and 30 of the particulars of claim) that by permitting Multiflight to work upon the Helicopter and install the Loan MGB at AHUK's cost, LNT accepted and/or gave consideration for an agreement in similar terms to Alleged Contracts 1 and 2. I shall refer to this as **Alleged Contract 3**.

93 Fourth, it was alleged (in paragraphs 34 and 35 of the particulars of claim) that Multiflight's purchase order constituted an offer by LNT which AHUK accepted

- by email dated 10 July 2018, thus giving rise to an agreement in similar terms to Alleged Contracts 1, 2 and 3. I shall refer to this as **Alleged Contract 4**.
- 94 Fifth, it was alleged (in paragraph 36 of the particulars of claim) that AHUK's email dated 10 July 2018 constituted an offer by AHUK which LNT accepted in a telephone call on 8 August 2018, resulting in an agreement in similar terms to Alleged Contracts 1, 2, 3 and 4. I shall refer to this as **Alleged Contract 5**.
- 95 In his opening note for the trial, Mr Pipe indicated that it was LNT's case that Alleged Contract 1 was concluded by the issue of Multiflight's purchase order and that he did not need to rely on the subsequent entry of the order on AHUK's computerised order recognition system. He formulated a different way of arguing Alleged Contract 1 which was based upon AHUK's pleading in paragraph 21 of its defence that "[AHUK] required a purchase order in order to arrange for the replacement gears pursuant to its *ex gratia* offer" and Multiflight's purchase order amounting to an acceptance of that offer. Thus, relying on paragraph 21 of the defence, Mr Pipe submits that a contract was concluded by the issue of the purchase order and refers to this as the "Primary Contract". I shall therefore consider this reformulated version of Alleged Contract 1 and not Alleged Contract 1 as originally pleaded.
- 96 In his oral closing submissions, Mr Pipe moved away from the position adopted by LNT in its pleadings and submitted that this was in fact a simple dispute as to whether or not there was a contract to install compliant replacement gears into the Helicopter. He said the only central term was whether AHUK had an obligation to fit compliant gears because if there was such a term, that obligation had been breached. He submitted that, in the absence of 'Z.10' gears being available (the only type of 'Z' gear that would have fitted the Helicopter's unmodified MGB), the only way for AHUK to implement the ASB was to carry out substantial works by implementing the Modification and thereafter installing type Z gears which fitted the modified MGB. He said that from 30 June 2017, the date when Revision 1 of the ASB was published, it was clear AHUK had agreed that appropriate parts would be supplied and fitted free of charge (as he put it, "*in other words, round pegs to go in round holes, square pegs to go in square holes*"). He said the commitment from AHUK was to implement the ASB by supplying the right bearings and this commitment was made in the course of oral and written discussions that took place principally with Mr Pickston during the period after 1 August 2017 when Multiflight was appointed CAMO and AMO.
- 97 Mr Pipe submitted that the effect of this contract was that AHUK took the commercial risk that, if it was unable to supply the correct gears into the Helicopter's unmodified MGB, it would have to bear the substantial cost of overhauling the MGB and installing the correct gears as part of the overhaul process. He said it was up to AHUK, once it realised that it could not satisfy its commitment in the way that it originally contemplated, to satisfy its commitment in some other way and if it did not do so if it was in breach of contract. He pointed

out that until August 2018 there was no suggestion from either Airbus or AHUK in any of their dealings with Multiflight and LNT that the terms of the contract were anything other than as set out in revision 1 of the ASB. What Multiflight and LNT were told was that the work was going to be done. The only question was when.

Summary of AHUK's submissions

- 98 Counsel for AHUK, Mr James Duffy, submitted that LNT's claim for breach of contract failed to engage with the central requirements which had to be satisfied for a contract to be found to exist.
- 99 He submitted that there was never a formal offer by AHUK to contract on specified terms or a final and unqualified expression of assent to the terms of such an offer by LNT. He referred to the communications between the parties and submitted it was impossible to say that a contract had been formed at any given point. He relied on the formal pre-action letters from LNT's solicitors in 2018 which did not make any allegation of breach of contract or misrepresentation but instead complained of product liability breaches, negligence and competition law breaches.
- 100 In addition to arguing that there was no offer and acceptance, Mr Duffy submitted that there was no intention to create legal relations, that the alleged terms of the contract failed for uncertainty and that there was a lack of consideration. In relation to LNT's alternative claim for negligent misstatement, he submitted that there was no actionable promise by AHUK that the Helicopter would be successfully repaired.

Discussion

- 101 In my judgment, when the background facts set out in detail in the earlier part of this judgment are properly analysed, it is quite clear that no binding contract was ever entered into between LNT and AHUK. My reasons for reaching that conclusion are as follows.
- 102 I do not consider that there was ever a formal offer by either party to contract on specified terms or any final and unqualified expression of assent to the terms of such an offer. In other words, there was no offer and acceptance capable of forming a contract.
- 103 The terms of paragraph 2A of Revision 1 of the ASB dated 30 June 2017 cannot in my judgment be said to constitute an offer by AHUK which was capable of acceptance by LNT. The paragraph indicated that Airbus was introducing a specific commercial policy whereby it would pay for all "*direct consequences of the limitations*" introduced by the ASB. However, it is highly relevant that this was a document issued by AHUK's parent company to the owners or operators of some 180 helicopters throughout the world. In that context, this revised ASB amounted to no more than an invitation to treat: an indication by Airbus that the Airbus group

was prepared to bear the costs involved in the supply of planet gears, transportation of parts and manpower costs related to the exchange of those parts in any affected helicopter. The invitation was clearly subject to agreement of specific contract terms between Airbus or its relevant subsidiary and the owner of the relevant helicopter(s) in any particular country.

- 104 Having given an indication that the work resulting from the ASB was envisaged to take two days to complete (being about 40 hours work carried out by two mechanical engineering technicians), the concluding sentence of paragraph 2A expressly states: “*You can obtain the detailed conditions by contacting your usual commercial contact at Airbus helicopters*”. Quite apart from the fact that the ASB emanated from Airbus and did not purport to come from AHUK, I regard the fact that the document specifically envisaged further detailed conditions being agreed between individual parties as clearly demonstrating this was not an offer made by AHUK which was capable of acceptance by LNT.
- 105 My conclusion in this respect is reinforced by paragraph 2D of the ASB which states, under the heading “*equipment or parts to be returned*”, that a retrofit solution would be proposed to each operator based on the information provided in the response form and continued: “*The practical procedures for the helicopters concerned by the retrofit will be provided to each customer. Specific commercial conditions will be proposed to process this retrofit*”. Again, the ASB plainly envisaged that there would be specific conditions applying to each customer whose helicopter was affected by the ASB as it was clearly envisaged each so-called “retrofit” would differ depending on the nature of the work required to be carried out to each individual customer’s helicopter.
- 106 It is necessary to consider whether any of the alleged contracts relied on by LNT amounted to a binding contract enforceable against AHUK.
- 107 Alleged Contract 1 relies on AHUK’s pleading in paragraph 21 of its defence that “[AHUK] required a purchase order in order to arrange for the replacement gears pursuant to its *ex gratia offer*” and contends that Multiflight’s purchase order amounted to an acceptance of that offer. In my view, this seeks to read far too much into the terms of paragraph 21 of AHUK’s defence. The purchase order required by AHUK was clearly stated to be a first step in the process of working out what was required for individual customers. Its purpose was to “start the ball rolling”. It is quite clear that neither AS’s nor Multiflight’s purchase orders were intended to propose or accept contractual terms. They contained very little information and cannot be construed as either proposing clear terms for acceptance or amounting to acceptance of any terms already proposed (which terms LNT has in any event failed to identify).
- 108 In the case of AS’s purchase order issued on 20 June 2017, it contained no detailed terms and enquired whether it would be possible for AHUK to consider the option of carrying out the work at AS’s site. AHUK’s acknowledgment of this order the

- same day stated: “*we are investigating the solution for this ASB and will update you once we have more information*”. Moreover, after the AS purchase order was placed, the parties had various exchanges which showed that AHUK was still awaiting the “*worldwide workplan*” from France, considering various options and that LNT’s assent to any plan would depend on what “*commercial gesture was being offered*” by Airbus.
- 109 In the case of Multiflight’s purchase order issued on 8 August 2017, it is clear that this was nothing more than an administrative tidying up matter, intended to replace the AS order, “*taking up from where [AS] left off*” so that LNT did not lose its place in the queue for a solution to be proposed. It purported to provide a “*date required*” of 1 September 2017 (some 3 weeks after the date of the purchase order), which could never have been intended to be a binding term. Neither Airbus nor AHUK had agreed that any parts would be supplied or any repair conducted in under a month’s time. Indeed, it is plain that at the time Multiflight’s purchase order was placed, there had been no agreement between the parties as to the date by which anything was to be provided. AHUK responded to Multiflight’s order by stating that “*once a plan is available for the MGB, we will keep you informed*”.
- 110 AHUK’s position as regards the effect of the Multiflight purchase order also accords with commercial common sense. LNT’s approach to the purchase order would have the effect of binding AHUK to a contractual obligation before AHUK had even assessed its ability to meet the request. I accept Mr Pickston’s evidence where he stated (in paragraphs 29 and 31 of his witness statement) as follows: “*Under normal circumstances for the routine replacement of aircraft parts, a customer (which may be an operator or a maintenance organisation) would be required to place a Purchase Order (“PO”) with AHUK, specifying the type and quantity of parts required. AHUK would then review the PO, confirm availability of the part and send a formal notification to the customer accepting the PO and the timeline for supply. [...] In theory, a PO could be placed with AHUK for any part, but this does not mean that the part is available at that time, or that it can be supplied by AHUK. When the part arrives at AHUK, it is booked in and reissued out to the customer. Once the customer is in receipt of the part, an invoice would be sent out, the timing of which is dependent on the customer’s credit terms. A contract for supply of the requested part is therefore only formed when the part is available and can be provided to the customer.*”
- 111 Accordingly, I find that the Multiflight purchase order did not constitute an offer to contract on any particular terms nor did it constitute an acceptance of any terms put forward by AHUK. I do not therefore consider that Alleged Contract 1 represented a binding contract between LNT and AHUK.
- 112 Alleged Contract 2 seeks to rely on AHUK’s email dated 22 February 2018 (when AHUK informed LNT that it would replace the gears in the Helicopter at about the end of June 2018) as constituting an acceptance of the Multiflight purchase order. This purported contract suffers from the same problem as Alleged Contract 1

- because it relies on the Multiflight purchase order. I do not consider that the Multiflight purchase order amounted to an offer by LNT to contract on particular terms or an acceptance of any offer by AHUK. As for AHUK's email dated 22 February 2018, I have set out this email in full in paragraph 49 above. In that email, Mr Pickston provides an estimate for the work to be carried out on the Helicopter at around the end of June 2018. This is some 10 months after the date of 1 September 2017 given as the date for installation in the Multiflight purchase order. It is clear that LNT were not happy with the estimated date of the end of June 2018. Clarion's letter sent to AHUK on 20 March 2018, sent just under a month after Mr Pickston sent his email of 22 February 2018, did not suggest that this email had the effect of creating a binding contract. It referred to LNT as having been informed that "*the Parts may be available and/or ... the necessary installation work may be carried out*" (my emphasis) and concluded with the threat that if the Helicopter was not repaired by 17 April 2018, LNT reserved the right to hire a replacement helicopter and to recover from AHUK the costs of doing so, in addition to the losses suffered as a result of the Helicopter being grounded.
- 113 Moreover, I do not regard the terms of this email of 22 February 2018 as constituting an acceptance of any offer. At that stage, AHUK was only expressing itself in hopeful terms ("*...Under the current planning it is likely that [Airbus technical representatives] will come and install the unit into [the Helicopter] towards the end of July*") and promising to keep LNT and Multiflight informed of any development concerning the Helicopter. Accordingly, I do not consider that Alleged Contract 2 represented a binding contract between LNT and AHUK.
- 114 As to Alleged Contract 3 (which seeks to rely upon LNT having permitted Multiflight to work upon the Helicopter and install the Loan MGB at AHUK's cost), I cannot see any basis for a contract having been entered into as a result of these separate arrangements that were made between LNT, Multiflight and AHUK regarding the installation of the Loan MGB. There is no evidence of any promise by AHUK to carry out repairs to the Helicopter on terms which were conditional on LNT making its Helicopter available to it for the installation of the Loan MGB. Accordingly, I do not consider that Alleged Contract 3 represented a binding contract between LNT and AHUK.
- 115 Alleged Contract 4 (which relies on Multiflight's purchase order as having been an offer by LNT which AHUK is said to have accepted by email dated 10 July 2018) cannot amount to a contract for the same reason as applies to Alleged Contracts 1 and 2. The Multiflight purchase order did not amount to an offer that was capable of acceptance. Moreover, the email of 10 July 2018 sent by Ms Batten of AHUK to Multiflight did not constitute an acceptance of any offer. Ms Batten refers in that email to "*awaiting further information regarding the epicyclic*" and to the possibility of there being further Airbus requirements, including the need for a separate order. Accordingly, I do not consider that Alleged Contract 4 represented a binding contract between LNT and AHUK.

- 116 Alleged Contract 5 relies on AHUK’s email of 10 July 2018 as having constituted an offer which is said to have been accepted by LNT in a telephone call between Mr Edwards and Mr Pickston on 8 August 2018. For the same reason that it is impossible to see how the 10 July 2018 email could have constituted an acceptance of an offer made by LNT, it is impossible to see how this email (with its reference to awaiting further information and the possibility of there being further requirements) could have constituted an offer by AHUK that was capable of acceptance by LNT. Moreover, Mr Edwards’ evidence as to the content of his telephone call with Mr Pickston on 8 August 2018 did not support LNT’s case that he accepted an offer from AHUK in the course of that call. Mr Edwards described Mr Pickston as being “elusive” when asked to confirm a specific date for the MGB work to be undertaken. It is hardly surprising that Mr Pickston came across to Mr Edwards as being elusive in the course of that telephone call because, by that time, he had become aware of the Modification issue, although he did not give LNT that news until he sent his email to Mr Tomlinson two days later on 10 August 2018. Accordingly, I cannot accept that Alleged Contract 5 represented a binding contract between LNT and AHUK. There is no basis for concluding that AHUK and LNT entered into a contract on 8 August 2018.
- 117 Having rejected the pleaded bases on which LNT claims that a contract was entered into, I need to consider the case that was ultimately arrived at by Mr Pipe on behalf of LNT in his closing submissions. He relied on answers given by Mr Pickston in cross-examination to support a submission that, in its written and oral communications with LNT and Multiflight, AHUK made a commitment to LNT to provide replacement epicyclic bearings. In particular, he relied on Mr Pickston’s statement that AHUK had given a commitment to do everything that was necessary to provide the “required” epicyclic bearings. Mr Pipe submitted that since it was known that, in the absence of the Modification, the required epicyclic bearings were ‘Z.10’ bearings, that was the commitment that Mr Pickston made on behalf of AHUK. It was a commitment to implement the ASB by supplying the right bearings. He relied on Mr Pickston’s acceptance of the fact that, until July 2018 when it became clear that the only replacement bearings compatible with the Helicopter’s unmodified MGB were no longer manufactured and unavailable, Airbus and AHUK had never indicated they might not fulfil this commitment by carrying out the necessary work. He submitted that, in making this commitment, AHUK took the commercial risk that it might not be able to perform the contract and that LNT’s agreement to keep the Helicopter in a state of readiness so that the ASB could be implemented amounted to consideration for the binding commitment that AHUK entered into.
- 118 In response to the objection that LNT was unable to identify any offer and acceptance, Mr Pipe relied on a passage from the judgment of David Richards LJ in *Premier Paper Group Limited v Buchanan MacPherson Ltd* [2018] EWCA Civ at [29]:

Finally, under ground 4, the appellant challenges the finding of a binding settlement agreement on the ground that the basic contractual elements of offer, acceptance,

consideration and certainty of terms were missing. Focusing on the finding of an agreement in November 2010, it is said that the judge made no finding of any acceptance by the respondent of any offer made by the appellant, or of any consideration emanating from the respondent, and that an agreement that the claim would be “sorted out in due course” was insufficiently certain. In my judgment, this challenge cannot succeed. First, the agreement found by the judge to have been made in November 2010 involved clear consideration on the part of the respondent in forbearing to sue and agreeing to accept a reasonable sum in respect of its losses. **The judge found that the parties were agreed on the terms and, where there is agreement, it is unnecessary to identify the precise mechanics of offer and acceptance.** There can be no doubt that the quantification of the respondent’s losses was subsequently agreed, through a discussion between the parties’ representatives and the issue of the credit note and its acceptance by the respondent. (Emphasis added)

- 119 Mr Duffy referred to *Gibson v Manchester City Council* [1979] 1 WLR 294 where (at 296G-H) Lord Diplock disapproved of the approach taken by Lord Denning MR who was in the majority in the Court of Appeal in the following terms:

Lord Denning M.R. rejected what I have described as the conventional approach of looking to see whether upon the true construction of the documents relied upon there can be discerned an offer and acceptance. One ought, he said, [1978] 1 W.L.R. 520, 523H, to “look at the correspondence as a whole and at the conduct of the parties and see therefrom whether the parties have come to an agreement on everything that was material”.

- 120 Lord Diplock continued at 297D-F:

My Lords, there may be certain types of contract, though I think they are exceptional, which do not fit easily into the normal analysis of a contract as being constituted by offer and acceptance; but a contract alleged to have been made by an exchange of correspondence between the parties in which the successive communications other than the first are in reply to one another, is not one of these. I can see no reason in the instant case for departing from the conventional approach of looking at the handful of documents relied upon as constituting the contract sued upon and seeing whether upon their true construction there is to be found in them a contractual offer by the corporation to sell the house to Mr. Gibson and an acceptance of that offer by Mr. Gibson. I venture to think that it was by departing from this conventional approach that the majority of the Court of Appeal was led into error.

- 121 I consider this is a case where it is necessary to adopt what Lord Diplock calls the conventional approach by seeking to identify a contractual offer and an acceptance of that offer. There is no reason for treating the facts of this case as constituting one of the exceptional types of contract referred to by Lord Diplock which do not fit easily into the normal analysis of a contract as being constituted by offer and acceptance. I do not consider I can safely rely on the single paragraph in the Court of Appeal’s judgment in *Premier Paper* as justifying an approach in this case which ignores the conventional approach. The Court in *Premier Paper* does not seek to analyse the circumstances in which it is appropriate to depart from the conventional approach. Moreover, the reference in *Premier Paper* to it being unnecessary to identify the precise mechanics of offer and acceptance is made in the context of the facts of that particular case where the judge had specifically found that the parties

were agreed on all the terms of the agreement. By contrast, this is a case where it is clear that the parties had not agreed all the contractual terms with sufficient certainty.

- 122 In considering the question of certainty of terms, the starting point has to be paragraph 2A of the revised ASB dated 30 June 2017 which referred to individual owners/operators being able to obtain “*the detailed conditions*” by contacting their “*usual commercial contact at Airbus helicopters*”. No detailed conditions were ever agreed between LNT and AHUK. LNT put forward various different, high-level formulations for the alleged obligation on AHUK, namely, “*to replace the Gears*” (paragraph 25 of the particulars of claim), “*to take all necessary steps to replace the Gears with new Gears that did not require replacement under the ASB*” (paragraph 25 of the particulars of claim) and “*to implement the ASB irrespective of its state of modification*” (paragraph 52 of LNT’s opening). The problem with these general formulations was that they did not address various important matters such as the timing of the gear replacement; any of the obligations owed by LNT in the course of the gear replacement (such as the scope of any preparatory work that it was envisaged Multiflight would have to perform); any parts that would need to be acquired and the parties’ respective obligations for paying for them; the duration of the work; the specification of the replacement gears; any limits to the work to be carried out (for example, in the event of confirmation that the Helicopter’s mast was generating metal debris); and the recourse and remedies available to parties in the event of non-compliance with any particular term.
- 123 The communications between the parties did not address what the parties’ obligations would be in relation to these matters, and there is no objective standard or other mechanism by which the court could safely supply these details. It is not possible to imply a term which required AHUK to carry out “*all necessary steps*”. That is self-evidently potentially a very onerous term. It cannot be said that it is a term which must necessarily be implied in order to give business efficacy to the contract, nor is it so obvious that parties must have agreed to it. A requirement that “*all necessary steps*” are taken by AHUK imposes an absolute obligation on AHUK to replace the gears by doing all that is necessary, irrespective of the modification status of the MGB, irrespective of the availability of parts, irrespective of the availability of the Airbus maintenance team, irrespective of the cost. The burden of showing that such a provision is necessary for the business efficacy of the contract or so obvious that parties must have agreed to it is an extremely high one and I do not consider that LNT has come close to discharging it.
- 124 The obligation which LNT suggests was imposed on AHUK “*to implement the ASB irrespective of [the MGB’s] state of modification*” also does not accord with commercial common sense.
- 125 First, it would commit AHUK to a substantial potential cost exposure. The difference in the scope of work between, on the one hand, replacing a set of compatible planet gears (envisaged – as stated in the ASB - to take approximately 2 days, assuming 40 hours worked by 2 mechanical engineering technicians) and,

on the other, conducting a full MGB overhaul in order to ensure compatibility with the gears (an operation which takes weeks and costs in the region of £450,000) is very considerable. The latter obligation was obviously not a commitment to which AHUK would readily agree.

126 Second, were AHUK obliged, in order to implement the ASB irrespective of the state of modification of the MGB, to conduct and pay for an overhaul of the MGB for free, this would give rise to a very significant saving of a future expense which LNT acknowledged it could not avoid. It would also add substantial value to the Helicopter. It is not realistic for LNT to suggest that AHUK committed itself to performing that work instead and thereby both saved LNT substantial expense and created value for it. It is also inconsistent with the arrangements the parties made in relation to the Loan MGB, by which LNT was required to pay Multiflight for the right to use the Loan MGB.

127 Third, LNT's suggested contractual term does not accord with commercial common sense. Its effect would be to require AHUK to make an open-ended commitment to install compatible plant gears in circumstances where Airbus, not AHUK, was in charge of the process of implementing the ASB and assessing the work that needed to be carried out, following an investigation by Airbus' team in France. As Mr Pickston said in paragraph 58 of his witness statement:

"... AHUK did not state that the bearings would be compatible with the current modification state of the Aircraft MGB, as the full modification state was not known by [Airbus] until July 2018. Considering the fact that [Airbus] is not aware of the modification state of every helicopter manufactured by [Airbus] flying around the world or the status of the wear and tear of each component on the helicopter, it is unrealistic to expect that a blanket commitment could be made to bring every gearbox to the correct modification / state of repair to accept the replacement epicyclic assemblies currently in production free of charge."

128 I accept this evidence. It was not realistic for either AHUK or Airbus to give a blanket commitment in respect of every MGB affected by the ASB irrespective of its state of modification or wear and tear. AHUK did not have the necessary information regarding the state of the Helicopter's MGB to enable it to have a proper appreciation of the extent of the commercial risk involved in making such commitment.

129 Moreover, the likelihood of AHUK having made such a commitment needs to be assessed in the context of the issues that Airbus was dealing with worldwide, with some 185 helicopters requiring consideration, a worldwide parts shortage and there being a long queue of remedial work which needed to be triaged. Given these circumstances, it is inconceivable that AHUK committed itself to an uncertain scope of work with uncertain financial liability, irrespective of part availability.

130 LNT submits (at paragraph 48 of its written opening) that whether or not AHUK anticipated that the scope of work could be substantially more significant than simply replacing the planetary gears "*is nothing to the point*". I disagree. It is

- plainly relevant to the objective question of whether “it goes without saying” that AHUK accepted the risk of “*taking all necessary steps*” and thereby assumed an inherently uncertain liability. In my judgment, no such open-ended obligation was either expressly or impliedly agreed by AHUK.
- 131 I also consider that the agreement alleged by LNT is too uncertain and incomplete to amount to a binding contract. The communications between AHUK and LNT from the time that the ASB was issued are in my view more consistent with AHUK seeking to reach a goodwill agreement without any intention of creating legal relations.
- 132 In this regard, Mr Duffy relied upon the Court of Appeal’s decision in *Orion Insurance Co Plc v Sphere Drake Insurance Plc* [1992] 1 Lloyd’s Rep 239, a case which concerned protracted commercial negotiations regarding the allocation of liabilities in an insurance pool. Those negotiations eventually resulted in a written record of an agreement reached in a meeting, which the parties abided by for several years. However, the note recorded that it was merely a “*goodwill agreement*”. The Court of Appeal upheld the decision of Hirst J that the agreement had been concluded without any intention of creating legal relations and was therefore not a binding contract. It also upheld (by majority) the judge’s conclusion that the agreement had been no more than a goodwill agreement which was not legally enforceable.
- 133 I accept Mr Pipe’s submission that the result in *Orion Insurance* depended on the particular findings of fact made by the judge at trial. It is therefore important to look at the facts of this case in determining whether the proposals put forward by AHUK were in the nature of a goodwill agreement only, made without an intention to create legal relations.
- 134 I consider that the following exchanges between the parties are relevant to the question of whether there was an intention to create legal relations:
- 134.1 In early July 2017, emails passing between AS and LNT refer to the fact that AHUK may consider making “*some sort of ‘commercial consideration’*” in view of the fact that there were only some 300 hours remaining on the MGB before it required an overhaul. This was in the context of a suggestion by AHUK that “*it may be that we recommend the MGB is sent for overhaul in addition to the bearing replacement, but there would potentially be a pro rata charge for the overhaul*”. LNT’s view (expressed by Mr Edwards) was that it would certainly be interested in hearing AHUK’s proposal, depending on what “*commercial gesture*” was being offered. (See paragraphs 36 and 37 above).
- 134.2 In early April 2018, both Multiflight and AHUK referred to AHUK’s proposals in relation to the Loan MGB as amounting to “*a gesture of goodwill*” and “*a commercial gesture of goodwill*”. (See paragraphs 54 and 55 above).

- 134.3 Clarion’s letter of 25 June 2018 referred to the fact that LNT had been patient “*in the hope that a swift and amicable solution could be found that would allow our client’s Helicopter to return to full service*” (see paragraph 61 above). This letter indicates that up to that time no amicable solution had been found. No doubt that was why LNT had chosen to instruct its solicitors to write a formal letter threatening to issue legal proceedings.
- 134.4 AHUK’s emails of 26 October and 2 November 2018 refer to its offer being made “*as a gesture of goodwill without any admission of liability*” and to its “*goodwill offer*”. (See paragraphs 84 and 85 above).
- 135 Moreover, the fact that the arrangement between the parties was not reduced to writing indicates that they did not intend themselves to be legally bound. In my view, it is unlikely that AHUK would have intended to create legal relations where (on LNT’s case) it was potentially assuming an obligation to incur a liability of some £450,000, without drawing up, possibly with the assistance of lawyers, a written agreement which stated each party’s obligations in a clear and unambiguous manner.
- 136 I do not therefore accept LNT’s assertion in paragraph 33 of its written opening that “*the only issue ... is whether there is consideration*”. LNT’s case in contract fails for all the reasons I have given. Nevertheless, for the sake of completeness, I consider LNT’s case on consideration.
- 137 LNT pleads that it provided valid consideration in “*making the Helicopter available to*” AHUK. However, since compliance with the ASB was mandatory, I consider that making the Helicopter available for dismantling and repair benefitted LNT because, unless the gear replacement work required by the ASB was carried out, after 50 flight hours the Helicopter became unusable. Equally, AHUK suffered a detriment, not a benefit, because it had to incur expense in fitting the replacement gears.
- 138 For the same reason, I do not accept LNT’s suggestion that giving AHUK “*the right to interfere with its goods*” amounted to a detriment to LNT which constituted valid consideration. This again ignores the fact that LNT had to comply with the ASB and, if it wanted to keep the Helicopter airworthy, it had to make it available to Airbus/AHUK in order to allow the necessary work to be carried out.
- 139 Finally, LNT’s suggestion that allowing AHUK to replace the Helicopter’s gears would provide a relevant reputational benefit to AHUK and its parent company of avoiding the “*risk of its helicopters falling from the skies*” is also misconceived. The effect of the ASB, combined with the force of the AD published by EASA, was that compliance was mandatory, such that helicopters without compliant ‘Z’ type gears would not lawfully be able to operate. Whether or not there was a

reputational or commercial benefit to Airbus and its subsidiary as a result of the work required by the ASB being carried out is nothing to the point. It was obviously in AHUK's and Airbus' interests to do all they could to maintain LNT's goodwill. However, I do not accept that LNT giving permission to AHUK or Airbus to carry out work on the Helicopter amounted to valid consideration.

- 140 Accordingly, I accept Mr Duffy's submission that, even if AHUK made a promise to carry out remedial work on the Helicopter, that promise was given gratuitously and LNT gave no valid consideration for such promise.

LNT's claim in negligent misstatement

- 141 LNT's alternative claim that it relied on a negligent misrepresentation by AHUK that "*the gears could be replaced*" was not pursued at trial with any enthusiasm. Indeed, LNT appeared to accept that this claim stands or falls with the contractual case (describing it in paragraph 61 of its written opening as "*academic*"). This was not a claim that was raised in pre-action correspondence. It is based upon an allegation that AHUK made "*promises*" by its emails dated 22 February 2018 and 10 July 2018 "*that it would replace the gears*". I do not accept that either of those emails, properly construed, amounts to a promise on the part of AHUK that it would replace the gears on the Helicopter. However, even if they did, the statements do not give rise to an actionable representation that "*the gears could be replaced*".
- 142 At no time did AHUK state (expressly or impliedly) that any proposed replacement gear would be compatible with the current modification status of the MGB. This fact was outside AHUK's knowledge until Airbus had conducted a detailed analysis in France. At most, any statement made by AHUK could only amount to a statement of opinion as to the future (i.e. that in AHUK's opinion the gears could be replaced). Accordingly, the alleged representation could only be actionable if the representor had no honest belief in the opinion at the time it was expressed. There is (quite properly) no allegation by LNT that the opinion was not held honestly. In any event, an alleged representation that "*the gears could be replaced*" would not have been false since the gears could be replaced if LNT committed to an overhaul of the MGB in order to update its modification status. It would then be able to embody the available 'Z' type planet gears.
- 143 I am also not satisfied that, even if (contrary to my above conclusions) the alleged statement was made by AHUK and was false, it was made negligently. The statement would have been made in the context of AHUK managing the triage process and against the backdrop of dealing with numerous other customers. As AHUK's expert (Mr Priday) opined, it would not have been unreasonable for AHUK to have overlooked the impact of the omission of a modification which was released several decades before. Accordingly, the alleged statement (if made) would not have been made negligently.

Conclusion on liability

144 So for all these reasons, LNT's claims in contract and negligent misstatement must be dismissed.

Causation and quantum

145 In view of my conclusions in relation to liability, it is not strictly necessary to address arguments that were made in relation to damages. I do so however for the sake of completeness and in case the matter goes further.

146 In accordance with LNT's case that AHUK agreed to carry out whatever work was necessary to supply and install appropriate gears, Mr Pipe submitted that LNT was entitled to be put in the position it would have been in if the contract had been performed. He accepted that if the alleged contract had been performed in August 2018, LNT would have had an airworthy Helicopter with some 297 flying hours available on its MGB (247 hours plus what he called an optional 50 hours extension). Nevertheless, he submitted that the true measure of LNT's loss was to be calculated by reference to the value the Helicopter would have had in an airworthy condition with that number of flying hours available on the MGB.

147 Mr Pipe relied on paragraph 20.1.1 of Mr Seymour's report which stated that the value of the Helicopter in flying condition would have been in the order of \$762,000 (or \$769,500 allowing for the 50 hours extension). He then relied on the evidence of Mr Priday that the Helicopter's only value if the ASB was not implemented was its scrap value and said that LNT did not challenge Mr Priday's August 2018 valuation of between \$250,000 and \$300,000 (paragraph 6.106 of Mr Priday's report). He submitted that the relevant date for calculating loss would be when the negotiations between the parties broke down in June 2020 or a short time afterwards when it became clear to LNT no solution was going to be found. He relied on Mr Seymour's valuation of the Helicopter in October 2021 of \$100,000 to \$150,000 and submitted that LNT's loss was the difference between the value of the Helicopter if the work had been done and (given that it is no longer airworthy) its current scrap value. That loss came to approximately \$600,000 using Mr Seymour's figures or \$450,000 using Mr Priday's figures.

148 I observe that these valuations do not take into account the problems caused by the detection of metal debris in the MGB. The evidence suggests that this debris originated from the Helicopter's mast bearings as opposed to the Loan MGB. It is self-evident that this would have had a substantial negative effect on the Helicopter's value were the Helicopter otherwise usable as it would require further investigation, and potential remedy, at the owner's cost before the Helicopter could be used.

149 On behalf of AHUK, Mr Duffy had several arguments to counter the way in which LNT put its case on loss and damage.

150 First, he argued that, if there was a contract, it must incorporate AHUK's Standard Conditions of Sale (the **Conditions**). He relied on the fact that Multiflight requested, and was provided with, a copy of the Conditions three days after it placed the purchase order on LNT's behalf. Mr Campbell of Multiflight, who was responsible for placing the purchase order, accepted that Multiflight was aware that AHUK would only contract on its standard terms. LNT submitted that there was no basis on which AHUK could assert that the Conditions were incorporated into any contract. I reject that submission. On the basis of AHUK's dealings with Multiflight, who were LNT's agents for this purpose, I find that it was clearly understood that any contract entered into between AHUK and LNT would be governed by the Conditions.

151 LNT then submitted that the Conditions only applied to contracts of sale and that because this contract only involved services and did not involve any money consideration, the Conditions had no application to this transaction. I also reject that submission. By clause 2, the Conditions are expressed to "*apply to any sale of Products and/or Services sold by [AHUK] to its Customer(s), excluding brokerage or other distributor activities*". It is clear that the Conditions apply to services and would extend to any arrangements pursuant to which AHUK agreed to supply parts and carry out services such as would have been entailed by an agreement to replace the MGB's planetary gears. Moreover, the fact that, had there been a contract, it was envisaged that those services and parts would have been provided free of charge does not in my judgment mean the Conditions would cease to apply. The Conditions have to be given a commercial construction. If, as I find, AHUK is entitled to rely on the Conditions when it was charging for the supply of products or services, it makes no commercial sense for the Conditions to cease to apply in circumstances where AHUK agreed to supply the same products or services for free.

152 Mr Duffy placed reliance on the following clauses in the Conditions.

152.1 Clause 3.2 which states that "*Customer's Orders shall be confirmed by the Seller in writing. The Contract shall become binding upon receipt by the Customer of the Seller's Order Confirmation*". He submits that this clause supports AHUK's case that no contract was entered into because there is nothing in the communications between the parties which could be said to constitute an Order Confirmation from AHUK. In light of my findings earlier in this judgment, I accept that submission.

152.2 Clause 3.3.1 which refers to AHUK's entitlement to carry out modifications in the event of obsolescence and continues: "*Should the requirements affect specification and/or performance of the Product and/or Services, related costs and/or delivery time, the Seller and the Customer shall agree the contractual consequences.*" Mr Duffy submits that AHUK's inability to

install replacement gears due to the Modification not having been carried out meant that the parties were obliged to seek to agree the contractual consequences. If (contrary to my finding) there was a contract between AHUK and LNT for the supply of replacement gears, I agree with Mr Duffy that since replacement gears were not available for the MGB in its unmodified state, this clause would have required the parties to seek to agree the contractual consequences. If they were unable to reach agreement, unless it could be shown that AHUK had acted irrationally or wholly unreasonably, LNT would not be able to allege that AHUK had acted in breach of contract. Moreover, by mid-July 2018 AHUK had ASB-compliant ‘Z’ type planet gears available to install in the Helicopter. This could have happened if LNT had authorised an overhaul of the MGB at the same time. However, LNT was not prepared to consider the installation of ASB compliant gears in conjunction with an overhaul of the MGB and as a result the Helicopter has remained grounded. The fact that the Helicopter has remained grounded is the consequence of LNT’s refusal to negotiate further with AHUK, as opposed to any breach of contract on the part of AHUK.

- 152.3 Clause 12 which provides as follows: *“Notwithstanding any provision to the contrary in the Contract or elsewhere, the total and cumulated liability of the Seller under the Contract, due to any and all causes whatsoever, whether based on breach of contract or in tort or otherwise, shall in no event exceed in aggregate an amount equivalent to ten per cent (10%) of the total net Contract price. ... In no event shall the Parties be liable for any indirect, consequential, incidental, special or punitive damages of any kind, including, but not limited to, damages for any loss of use or profit, loss of assets, loss resulting from business disruption, loss of goodwill or loss of contractual opportunity by the other Party.”* Mr Duffy submits that, had there been a contract as alleged by LNT, the *“total net Contract price”* would have been nil and thus LNT would have been precluded by this term from recovering its alleged loss. Mr Pipe submits that clause 12 is subject to the requirement of reasonableness under section 3 of the Unfair Contract Terms Act 1977 (UCTA) and says that AHUK is unable to satisfy the court that the term is reasonable as it is required to do by section 11(5) of UCTA. On the hypothesis that a contract was made, this would have been a bargain entered into between two commercial entities. I consider that, this being so, there is nothing unreasonable in AHUK seeking to limit the extent of its risk in this way. A term which limits the aggregate liability of the supplier of parts or services to 10% of the total net contract price is not on its face unreasonable. On LNT’s case, AHUK was agreeing to carry out potentially very expensive work for free. In the circumstances, it was reasonable for AHUK to limit its liability in this way. LNT had access to internal and external legal advice and was in a position to seek to negotiate different terms had that been thought appropriate. Clause 12 allocates commercial risk. I am satisfied that its terms are reasonable and that AHUK would have been entitled to rely on it.

- 153 Second, Mr Duffy argued the following point on causation. He submitted that the relevant counterfactual was that, if the gears had been replaced to ensure compliance with the ASB, then the Helicopter's MGB would have been able to use the last 247 hours of its life. After those 247 hours had been used up, the MGB was due for its 3,000 hour overhaul. In other words, the only effect of not replacing the non-compliant gears with ASB compliant gears is that LNT lost the last 247 flight hours remaining on the MGB. Mr Duffy relied on paragraph 19.3.17 of Mr Seymour's report which used a guideline cost of \$450,000 for overhaul of the MGB and divided that sum by 3,000 (being the number of hours of life of a new or newly overhauled MGB before it is due for its next overhaul) to provide what Mr Seymour calls an "hourly adjustment" of \$150 per hour. Mr Duffy then multiplied 247 hours by \$150 to arrive at a figure of \$37,050 which he submitted would have been the extent of LNT's loss, being the difference between the value, on the one hand, of an MGB with replacement gears installed and 247 remaining flight hours and, on the other, an MGB with no replacement gears installed and thus unable to use up its 247 remaining flight hours.
- 154 It is apparent that there is a very significant difference in the parties' approaches to causation and quantum. LNT claims the difference between the value of the Helicopter if the work had been done and its current scrap value, seeking damages up to US\$600,000. AHUK says that any damages figure should be limited to the value of the flight hours lost on the MGB before it was due for overhaul (some \$37,000).
- 155 I prefer the approach of AHUK. It seems to me that the insuperable problem which LNT fails to address is that there were only 247 hours remaining before the MGB had to be overhauled in any event. In the course of that overhaul, gears would have had to be installed which complied with the ASB. LNT's approach ignores the fact that it would always be responsible for the cost of overhauling the MGB. It could not expect AHUK to have to bear that cost. The effect of the ASB, and AHUK's failure to supply and install replacement gears, was that LNT was deprived of the last 8% of usage of the MGB before having to undertake the overhaul of the MGB.
- 156 As Mr Pickston's email of 3 September 2018 makes clear, whatever route LNT chose to take with the MGB in imminent need of its 3,000 hour overhaul was going to be expensive. The options Mr Pickston gave LNT at that time were (i) to purchase a new MGB for €1m, (ii) to purchase a newly overhauled exchange MGB for €766,000 or (iii) to purchase a part-life exchange MGB with over half of its Time Before Overhaul (1,772 flight hours) remaining for €453,000. None of those options was said by LNT to be unrealistic. In his subsequent email dated 26 October 2018, Mr Pickston offered to apply a €176,000 discount to the cost of the part life exchange MGB (€453,000) which AHUK had reserved for LNT. In circumstances where I have found that, had there been a contract which was breached, LNT's loss would have been limited to the value of the lost 247 flight hours (some \$37,000), the offer made by AHUK was a generous offer which LNT would have been wise to accept.

157 LNT chose not to accept that offer. Instead it has chosen to keep the Helicopter grounded and to seek to recover as damages from AHUK an amount broadly equivalent to the cost of the overhaul of the MGB. I do not consider that to be a legitimate approach.

Overall conclusion

158 For the reasons given in this judgment, LNT's claim must be dismissed.