IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

Cause No: FSD 152 of 2013 (IMJ)

BETWEEN

TOBY

Plaintiff

AND

ALLIANZ GLOBAL RISKS US INSURANCE COMPANY

Defendant

IN OPEN COURT

Appearances: **Mr. Tom Weitzman QC instructed by Mr. Marc Kish, Ms. Aleisha Brown and Mr. Dhan Vekaria of Harney Westwood & Riegels for the Plaintiff**
Mr. Ben Elkington QC instructed by Mr. Richard Annette and Ms. Farrah Sbaiti of Stuarts Walker Hersant Humphries for the Defendant

Before: **The Hon. Justice Ingrid Mangatal**

Heard: **20, 21, 22, 25, 26, 27, 28, 29 September 2017 and 4, 5 October 2017**

Pleadings Further Amended by Order of the Court, by the Defendant, on 13 October 2017, and by the Plaintiff, on 23 October 2017

Draft Judgment Circulated: **1 August 2018**

Judgment Delivered: **29 August 2018**

JUDGMENT

INDEX

HEADNOTE

Insurance – Aviation Insurance - Confiscation of Aircraft in Brazil by Revenue Authorities - Avoidance - Misrepresentation - Non-disclosure - Brazilian Law - Whether unlawful use of Temporary Admission Regime - Whether Confiscation of Aircraft unlawful.

Illegality - Law Compliance Condition - Whether all Reasonable Efforts made by Insured to comply with Law - "Any Other Financial Cause" Exclusion - Whether loss within Policy period - Claims Procedure Condition - Loss Payee Clause.

Introduction

1. This is an insurance claim relating to a Cessna C680 aircraft with the registration marks "VP-CAV" ("**the Aircraft**"). The Aircraft was leased by the Plaintiff Toby ("**Toby**") and insured by the Defendant Allianz Global Risks US Insurance Company ("**Allianz**"), and was subsequently confiscated by the Brazilian authorities.

2. This matter has been of some complexity, involving numerous aspects of insurance law, including civil aviation insurance, as well as aspects of Brazilian law. The bundles exceed 30 in number, and run to many thousands of pages. I wish to express my gratitude to Leading Counsel and instructing Attorneys on both sides, for the extraordinary level of preparation and cooperation, and for the thorough and helpful nature of the submissions,

both written and oral. I also thank Leading Counsel and the parties for the patience they have exhibited in awaiting this judgment.

3. So complicated and unusual have the facts and circumstances been, that none of the cases cited come close to covering the kaleidoscope of issues involved. Indeed, if I may be pardoned an aeroplane analogy, I imagine that arriving at this judgment may not be too dissimilar from a pilot trying to safely land an aircraft where there is no existing runway.

4. As a result of the wide-ranging issues that have required determination, the judgment has of necessity been long, and so I apologise in advance. I trust that the Index and Summary provided will go some way towards alleviating the task of reading.

Background

5. Toby is a Cayman Islands exempted Limited Liability Company. It was incorporated on 4 February 2008 and is wholly owned by another company Koba Investors ("**Koba**"). Koba is a BVI company and was incorporated on 1 February 2008. Koba also wholly owns another Cayman Islands company Cape Cold Investors ("**Cape Cold**'). Cape Cold was incorporated on 1 February 2008.

6. Toby, Koba and Cape Cold are beneficially owned by a Brazilian businessman, José Roberto Lamacchia ("**Mr. Lamacchia**"). Mr. Lamacchia is a well-known and wealthy businessman in Brazil, and is married to Leila Mejdalani Pereira ("**Ms. Pereira**"). Mr. Lamacchia's business interests include ownership of a large financial services group based in Brazil, Crefisa SA ("**Crefisa**") founded in 1964 and a private aircraft operating company, City Taxi Aereo Ltda ("**City Taxi**"). At all relevant times, Mr. Lamacchia and Ms. Pereira were the directors of Toby and also of Koba and Cape Cold. Mr. Lamacchia's son, Marcos Faria Lamacchia, was also a director of Toby until July 2009, and Koba until November 2009.

7. Crefisa offers short term loans to individuals in Brazil. The company has more than 400 service centres across Brazil, and over 1 million customers.

Allianz is a company incorporated under the laws of Illinois and is part of the Allianz Group of Companies. Its business includes providing insurance against aviation risks.

9. Toby's case is that, amongst other things, it at all relevant times carried on business providing financial and investment advice to entities affiliated to Toby. Allianz maintains that Toby was incorporated solely for the purpose of notionally holding possession of and operating the Aircraft.

10. Toby did not have any full-time employees. It did, however, maintain a registered office in the Cayman Islands at Trident Trust Company Limited ("**Trident Trust**") and engaged Bertha Soler ("**Ms. Soler**") of Trident Trust to assist, Toby asserts, with finding suitable investments and to represent it in the Cayman Islands.

11. Toby also engaged Alexandre Gonçalves Dos Santos ("**Mr. Gonçalves**") to represent it, Toby asserts, internationally, pursuant to a representation agreement dated 2 July 2010. Mr. Gonçalves travelled from time to time on the Aircraft with the directors. One of his responsibilities was to deal with the brokers when renewing the Aircraft's insurance.

12. Toby accounted for no income, and in fact made substantial losses prior to the seizure of the Aircraft in June 2012. Mr. Lamacchia personally invested approximately US$66.3 million in Koba. Koba invested approximately US$11.8 million in Toby in order to fund the leasing and operation of the Aircraft.

The Aircraft

13. The Aircraft is a Cessna 680 aeroplane. It can carry up to 12 passengers and 2 pilots. It is suitable for international travel. It was delivered by Cessna Finance Corporation ("**CFC**") to Toby on 6 May 2008 pursuant to a Finance Lease dated 18 March 2008 ("**the Finance Lease**").

The Finance Lease

14. By the Finance Lease, Toby agreed to lease/purchase the Aircraft from CFC for a total price (payable in instalments) of some US $17.1 million. Pursuant to its terms, CFC agreed

to lease the Aircraft to Toby for a period of 10 years commencing on 6 May 2008 in return for a down payment of US$4,300,270, being 25.15% of the agreed Total Aircraft Price and 120 monthly rental payments comprising of the balance of the agreed price and interest. Toby also paid CFC a structuring fee of US$160,000 and provided it with a security deposit of US$2.6 million. Mr. Lamacchia guaranteed Toby's performance of its obligations under the Finance Lease.

15. By Clause 6 of the Finance Lease, CFC granted Toby an option to purchase which could operate only if all amounts due under the Finance Lease had been paid on the defined Purchase Date and upon payment of the applicable Purchase Option Price.

16. By Clause 7 of the Finance Lease, Toby agreed to insure the Aircraft. Such insurance was to be in the name of both Toby and CFC and was to cover both loss and damage to the Aircraft and liability for bodily injury or death.

17. The Finance Lease also provided, amongst other things, that:-

    (1) The Aircraft was to be registered in the Cayman Islands;

    (2) The Aircraft was to be primarily based at Congonhas International Airport São Paulo, Brazil;

    (3) Toby would use the Aircraft for general corporate business and private carriage; and

    (4) The Aircraft would be enrolled and participate in CFC's Maintenance Monitoring System.

18. According to Toby's Written Opening Submissions (paragraph 21), the Finance Lease "*superseded*" an earlier agreement pursuant to which CFC agreed to sell the Aircraft to another of Mr. Lamacchia's companies, Crefipar Participações e Empreendimentos Ltda (**"Crefipar"**).

19. However, Allianz regards the transactions that occurred prior to the entry into the Finance Lease quite differently. See paragraphs 14-25 of Allianz's Written Opening Submissions.

20. It would appear that in June 2007 Cessna Aircraft Company ("**CAC**") and Crefipar signed a purchase agreement for the sale and purchase of a "*2nd Quarter 2008 Cessna Model 680 CITATION Sovereign*". The specifications of the Aircraft included that it should be certified in Brazil. The date of the agreement is referred to in a subsequent amendment to its terms and the terms of the agreement are apparent from Amendment No. 2 to the agreement.

21. Paragraph 17 of Allianz's Written Opening Submissions highlights the fact that documents that were recently obtained from CFC indicated that "*the initial deal was subsequently altered*" in a number of respects, including the following:

a) The purchaser of the Aircraft was changed from a Brazilian company (namely Crefipar) to Toby. Thus the purchase agreement was assigned from Crefipar to Toby. This was done by Amendment No. 3 and was effective February 27 2008.

b) The specification for the Aircraft was changed so that instead of it having a Brazilian Certification, it would have a Cayman Islands Certification. Thus the flag on the tail of the Aircraft was changed from the Brazilian flag to the flag of the Cayman Islands (see email dated 27 February 2008 from Toby's Aviation Manager to CFC).

22. At paragraph 18, Allianz asserts that, instead of paying for the Aircraft which he had wanted to purchase outright, Mr. Lamacchia wanted Toby to enter into an airline finance agreement, by which the Aircraft would be leased for 120 months, with an option to purchase at the expiry of that finance lease.

23. In a request made to it for financing, CFC in an internal Credit Presentation prepared by it dated 26 February 2008, recorded as follows:

"....

The lease source payment will be Mr. Lamacchia. He will be investing in Koba Investors Limited, through Central Bank, and Koba will capitalize Toby Limited to cover lease payments and aircraft expenses.

The aircraft will have Cayman registration and will be mostly based in Brazil. Since the customer will be travelling most of the time, customer decided to register the a/c [aircraft] *outside Brazil to avoid import taxes.*

The aircraft will be used to transport Mr. Lamacchia and his family on business and pleasure trips. Aircraft will have its main hangar in TAM's facility in Congonhas Airport..."

24. Allianz asserts that, in order to give effect to the arrangements, including the Finance Lease which CFC entered into with Toby on 18 March 2008, Toby assigned to CFC its rights under its purchase agreement with CAC. Thus, instead of CAC selling the Aircraft to Toby, CAC instead sold it to CFC, and CFC leased it to Toby.

25. It has been Toby's stance that the previous arrangements between Crefipar and CAC were not effective as they were never brought into operation or acted upon.

The Insurance

26. In accordance with the requirements of the Finance Lease, Toby insured the Aircraft from 6 May 2008 onwards pursuant to a series of annual policies.

27. The policies for the years 2008/2009, 2009/2010, and 2010/2011, were arranged by two companies, Lockton Brazil Corretora de Seguros, acting as the local producing broker, and Lockton International Limited, acting as the London placing broker. In each year, two policies were placed, the first providing Aircraft Hull, Liability and Personal Accident Insurance, and the second providing Aircraft Hull and Spares War and Allied Perils Insurance. Allianz Global Corporate and Specialty Limited (which is a UK company, belonging to the same Group of Companies as the present Defendant), was the lead

underwriter of the Aircraft Hull, Liability and Personal Accident Insurance Policies in each of these three years.

28. In 2011 Toby changed its insurance brokers, instructing Good Winds Corretora Seguros ("**Good Winds**") to act as its local producing broker. Good Winds then instructed United Insurance Brokers Limited ("**UIB**") as London placing brokers. Ana Mercante was the person principally responsible for dealing with Toby's insurance at Good Winds. Andrew Pollen ("**Mr. Pollen**") was the person principally responsible for dealing with Toby's insurance requirements at UIB.

29. The cover arranged by Good Winds and UIB for the 2010/2011 year took the form of a single policy, divided into two parts, the first of which corresponded to the Aircraft Hull, Liability and Personal Accident Policies for the previous years and the second of which corresponded to the Aircraft Hull and Spares War and Allied Risks Policies for the earlier year. Both parts of the Policy were insured 100% by Star Underwriting Agents Limited, acting on behalf of Lloyd's Syndicate CVS 1919 in the case of the first part of the cover, and on behalf of Lloyd's Syndicate Liberty 4472 in the case of the second part of the cover.

30. The Policy the subject of the instant dispute is the Policy arranged by Good Winds and UIB for the 2012/2013 year. Like the policy for the preceding year, it was divided into two parts, both of which were insured 100% with Allianz.

31. The relevant policy was issued by Allianz on 10 August 2012 ("**the Policy**") and provided cover from 6 May 2012 to 6 May 2013 in respect of various risks defined in the Policy documents. The agreed value of the Aircraft for the purpose of the Policy was US$14 million. The Policy included cover for "*confiscation, nationalization, seizure, restraint, detention, appropriation, requisition for title or use by or under the order of any government*" for which Toby paid an additional premium.

32. The Policy contained an Airline Finance/Lease Contract Endorsement (AVN67B) ("**the Endorsement**"). The effect of the Endorsement was to add CFC as an additional insured and it provided amongst other things that, in the event that a claim was payable on the basis of a Total Loss, then settlement should be made to, or to the order of, CFC.

The Temporary Admission Regime

33. Brazil operates a temporary admission regime permitting foreign aircraft to enter Brazil and remain in Brazil for a specified period (usually no more than 60 days, although this can be extended) and not pay certain customs and import duties ("**the TAR**").

34. The TAR is based upon the following three documents:

(1) A Temporary Entry and Admission Permit or *Termo de Entrada e Admissao Temporaria* ("**TEAT**"), which has to be obtained from the Secretaria de Receita Federal of Brazil or Brazilian Federal Revenue Service ("**FRS**") prior to each flight entering Brazil and which, amongst other things, sets out a time limit for the aircraft's visit to Brazil;

(2) A declaration ("**General Declaration**") dealing with the identity of the passengers and crew on the aircraft, which has to be filed with the FRS; and

(3) An Authorisation for flying within Brazilian Airspace or *Autorizacao de Voo da Agencia Nacional de Aviacao Civil* ("**AVANAC**"), which has to be obtained from the National Agency of Civil Aviation ("**ANAC**") and which will also specify the period of time during which the Aircraft is permitted to remain within Brazil.

35. The Aircraft regularly flew into and out of Brazil. On each occasion it entered Brazil, it obtained the appropriate TEAT and AVANAC and filed the necessary General Declaration. On each occasion, it left Brazil prior to the date specified in the relevant TEAT and AVANAC.

The Seizure and Confiscation of the Aircraft

36. On 19 June 2012, the FRS issued a temporary permit of admission to Toby in respect of the Aircraft. On that date the Aircraft flew into São Paulo Congonhas Airport from Orlando Florida. Prior to doing so, it had as previously, complied with all the necessary formalities required under the TAR.

On 20 June 2012, Mr. Celso Nardi ("**Mr. Nardi**"), one of the pilots of the Aircraft was served by an officer of the FRS with a notification of seizure of the Aircraft, headed "*Start of Extraordinary Proceeding, Retention and Service of Process*". At that point the Aircraft was detained pending the outcome of an FRS investigation.

Operation Forced Landing

38. The Aircraft was one of a number of Aircraft which were seized by the FRS as part of a coordinated enforcement exercise, known as "*Operation Forced Landing*". This was a step taken by the Brazilian authorities to put a stop to what it saw as the illegitimate use of the TAR by Brazilian residents such as Mr. Lamacchia.

39. In the course of the FRS's investigation, Toby and the pilots dealt with numerous information requests from the FRS, sending it documents and information.

40. In the interim, on 29 August 2012, Toby wrote to Allianz and informed them of the seizure of the Aircraft. However, Toby has indicated that at that time, it was believed (on the advice of their lawyer Marco Franco), that the Aircraft would be returned in relatively short order once the FRS had completed its investigation.

41. However, on 29 January 2013, Mr. Lamacchia received a "*Notice of Tax Assessment*", dated 15 January 2013, from the FRS. This stated that the FRS's assessment was that he had breached Brazilian Customs Law and that the appropriate penalty for such breaches was the confiscation of the Aircraft and giving him 20 days to challenge the assessment.

42. On 14 February 2013, Mr. Lamacchia filed a challenge to the FRS's assessment and its confiscation of the Aircraft with the Superintendent of the FRS.

43. On 24 September 2013, the Superintendent of the FRS upheld the FRS's assessment and its confiscation of the Aircraft.

44. On or around 6 November 2013, the Federal Court of São Paulo granted Mr. Lamacchia and Toby an injunction preventing the FRS from selling the Aircraft at auction pending the outcome of a proposed claim by Toby in the Brazilian civil courts.

45. On 21 November 2013, Mr. Lamacchia appealed that part of the injunction which prevented him from using the Aircraft pending the conclusion of the (at that time) proposed proceedings.

46. On 6 December 2013, Mr. Lamacchia and Toby commenced a civil action before the Brazilian Federal Court ("**the Civil Proceedings**") seeking an order overturning or quashing the administrative decision of the FRS to permanently confiscate the Aircraft and compensation for the wrongful seizure of the Aircraft.

47. Also on 6 December 2013, the FRS filed an interlocutory appeal requesting that the injunction be lifted.

48. Prior to reaching a formal decision, the Federal Court gave an indication that it would only consider the appeal by Mr. Lamacchia and Toby, and allow them to use the Aircraft, if they paid into Court, an amount equal to the total value of the Aircraft by way of security. In the circumstances, Mr. Lamacchia and Toby decided not to pursue their appeal.

49. On 11 June 2015, the Aircraft was sold by the FRS at a public auction.

50. On 25 August 2017, not long before the trial herein commenced, the first instance judge issued a judgment dismissing Mr. Lamacchia's and Toby's claim against the FRS in the Civil Proceedings.

Other Proceedings in Brazil

51. On 21 May 2013, the Federal Public Prosecutor's Office filed a criminal complaint against Mr. Lamacchia in connection with his alleged use of the Aircraft ("**the Criminal Proceedings**").

52. On or around 9 June 2015, the Court directed that the Criminal Proceedings be stayed for a period of 2 years on condition that Mr. Lamacchia make a specified donation to charity. Mr. Lamacchia subsequently did so.

53. In September 2016, Toby commenced another claim in the Brazilian civil courts against CFC, seeking the return of the security deposit paid under the Finance Lease and certain other sums ("the **Collection Proceedings**").

54. In June 2017 the Criminal Proceedings were discharged. This was on the basis that two years had passed since the stay and Mr. Lamacchia had not committed any criminal offence in the interim.

55. On 26 August 2017, also not long before the trial herein commenced, Toby's claim against CFC in the Collection Proceedings was dismissed on jurisdictional grounds, the court holding that a jurisdiction clause in the Finance Lease required the dispute to be adjudicated in the courts of Kansas, United States of America.

Toby's claim under the Policy

56. On 26 February 2013, Toby forwarded to Allianz the FRS's Notice of Assessment and gave formal notice of a claim under the Policy in respect of the loss of the Aircraft.

57. On 22 April 2013, Allianz responded to Toby's letter of 26 February 2013, denying cover and relying on certain exclusions to the Policy which it claimed precluded recovery by Toby ("the **Declinature Letter**").

58. On 5 December 2013, Toby issued the present proceedings.

59. By a letter dated 12 March 2014 from Allianz's Attorneys, Allianz purported to avoid the Policy ("the **Avoidance Letter**").

Key Documents

60. It may be useful to refer here to a number of Key Documents that will be referred to continuously throughout the judgment. This is of course in addition to references to the terms of the Policy and the Finance Lease. These are (a) the email from Mr. Pollen to Mr. Bodkin dated 27 April 2012; (b) the Declinature Letter; (c) the Avoidance Letter.

61. The material parts of the email of 27 April 2012, read as follows:-

"Dear Brian,

In answer to your request for more information about the company I can confirm that Toby are stockbrokers and have existed for 30 years. The individual who owns the company is called Alexandre Gonçalves dos Santos.

Toby operate the aircraft and they contract their own pilots. Toby is the name of the stockbroking company and the name of the operator. It is a corporate jet.

Follows the pilot qualification:

Pilot	*Total Hours*	*Hours in Jets*	*Hours in Model*
CELSO NARDI	*14.000h*	*12.000h*	*300h*
RICARDO CARDOSO DE MEIRA LEITE	*19.350h*	*17.350h*	*300h*

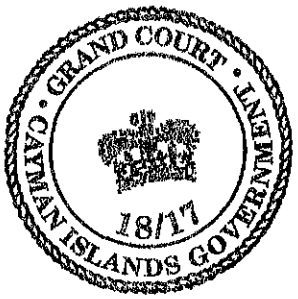
There's not an awful lot else to tell. They don't have their own website. This is very much a private corporate set up.

Kind regards,
Andrew

Andrew Pollen
Associate Director" [UIB]

62. The material parts of the Declinature Letter read as follows:-

"Dear Sr. Lamacchia,



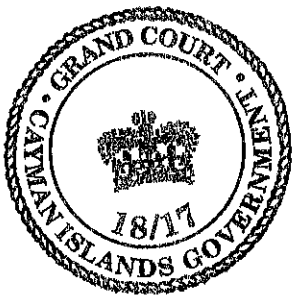
We are in receipt of your letter dated 26 February 2013 regarding the captioned aircraft. We have investigated the circumstances surrounding the action of the government of Brazil in detaining the aircraft. We have also reviewed the policy of insurance issued by Allianz, being #A5GA000588412AM ("the policy") to Toby Ltd of Grand Cayman.

The aircraft has been detained by order of the Tax Auditor of the Income Revenue Service of the government of Brazil because it believes that the owner/operator of the aircraft has violated four sections of the Decree Law, claiming the following illegal actions:

1) *Falsifying or tampering with shipping documents of foreign goods;*
2) *Forging or tampering with foreign goods title documents;*
3) *Failure to pay full taxes due on foreign goods through "intentional artifice";*
4) *Fraudulent interposition of a third party in importation of goods.*

The Policy provides "Aviation Hul [sic] *War and Allied Perils" coverage for the insured aircraft. As such, it provides coverage for a number of Perils, including "confiscation, nationalization, seizure, restraint, detention etc". ... However, Section Three, General Exclusions excludes Loss, damage or expense caused by one or any combinations of any of the following:-*

a) [not relevant]
b) *Confiscation, nationalization, seizure, restraint, detention, appropriation, requisition for title or use by or under the authority of the Government(s) stated in the schedule, or any public or local authority under its jurisdiction,*
c) [not relevant]



d) *Any debt, failure to provide bond or security or any other financial cause under court order or otherwise. It is our view that the claimed "confiscation" by the Government of Brazil due to a failure to properly register the aircraft in Brazil and pay required taxes places this matter within the scope of Exclusion (b) and/or (d) mentioned above. Furthermore, the allegations of illegal activities including forgery, tampering with documents, and fraud, assert that intentional, illegal actions by the insured caused the acdtions* [sic] *by the insured caused the action taken by the Government of Brazil, and would also bar coverage for any of the matters set forth in your letter of 26 February.*

We have learned that the insured may recover the aircraft by paying the taxes and properly registering the aircrafdf [sic].

Therefore, and for all these reasons, we are constrained to decline your request for coverage. Please feel free to contact the undersigned if there is additional information you wish us to consider.

Yours truly,

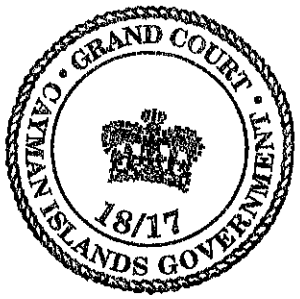
W.T. McSwain"

63. The material parts of the Avoidance Letter read as follows:-

"Dear Sirs,

We refer to the above policy of Insurance, which related to a Cessna C680 Aircraft (with Registration Marks VP-CAV), and for which the period of insurance was 6th May 2012 to 6th May 2013 ("the Policy").

The Policy was a contract of utmost good faith. Prior to the inception of the Policy you were obliged to disclose to us all material circumstances which

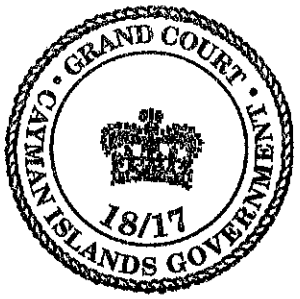


were either known to you or were deemed to be known to you (in that in the ordinary course of business they ought to have been known to you).

It has now come to our attention that there were a number of material circumstances which were known or deemed to be known to you, but which you failed to disclose to us prior to the inception of the Policy. In particular:-

a) *TOBY Limited was incorporated with the sole purpose of notionally holding possession of and operating the Aircraft.*
b) *The real purchaser of the Aircraft was a company called CREFIPAR Participacoes e Empreendimentos Ltda, which was owned by a Brazilian resident, Mr. Lamacchia.*
c) *The Aircraft was being used in Brazil to serve the personal interests of Mr. Lamacchia and not for the legitimate interests of TOBY Limited.*
d) *The Aircraft had been performing flights to Brazil improperly using a temporary admission authorisation and benefitting from full exemption of import tax/duties.*
e) *Mr. Lamacchia filed false declarations with Customs when he and/or his pilot requested temporary flight permits.*
f) *TOBY Limited misrepresented to the Brazilian authorities the purpose of the entry of the Aircraft into Brazil, because it remained in the Brazilian territory most of the time and was used almost exclusively for domestic flights, rather than for transportation of TOBY's directors and officers from/to abroad.*
g) *Inappropriate and unlawful advantage was being taken of the exemptions established in Decree 97,464 as a means to avoid the imposition of import taxes and duties.*
h) *As a result of the way in which the Aircraft had been and was being operated, there was a risk of proceedings being commenced in Brazil, with the relief sought in those proceedings being the forfeiture of the Aircraft.*

This information has come to light following the investigations and proceedings made and commenced by the Federal Revenue Service in



Brazil. We reserve our right to rely upon the non-disclosure of further material circumstances if we become aware of the same in the future.

If we had been aware of the circumstances set out above, then we would not have agreed to write the Policy. We were induced to write the Policy by your failure to disclose the material circumstances set out above. It follows that we have the right to avoid the Policy ab initio, and were [sic] *hereby do so.*

As a consequence (1) you are not entitled to make any claim under the Policy, and (2) you are entitled to the return of the premium you paid to us. We hereby tender the return of the premium, and ask you to provide the details of the bank account to which you would like us to transfer the premium...

Lili Beneda Rubenstein

Allianz Global Corporate & Specialty"

The Proceedings

64. In December 2013, Toby commenced these proceedings.

65. In July 2014, CFC also commenced proceedings in the Grand Court of the Cayman Islands (action FSD 72 of 2014) against Allianz, claiming the Agreed Value of the Aircraft, namely US$14,000,000. CFC asserted that it was entitled to receive payment of that sum pursuant to the Airline Finance/Lease Contract Endorsement in the Policy.

66. In October 2014, Jones J (the Judge of the Financial Services Division to whom these proceedings were originally assigned), directed that both claims should be tried together. On 5 December 2014 he gave directions in both sets of proceedings. As well as making directions regarding discovery and witness statements, Jones J gave the parties leave to adduce expert evidence in respect of (a) Brazilian law and (b) civil aviation insurance practice. The trial was listed for 30 November 2015.

67. In May 2015 CFC's claim against Allianz was stayed, and those proceedings were subsequently settled, with Allianz making a payment to CFC of US$3,630,476.64.

68. The trial of Toby's claim listed for 30 November 2015 before Jones J was unable to proceed on that occasion and was adjourned shortly before the start of the trial.

69. The trial was subsequently re-listed for September 2017 for ten days, by which time I had been reassigned the matter and thus the trial proceeded before me, commencing on 20 September 2017.

70. The trial lasted ten days. At the end of the Oral Closing Submissions, leave was sought by Allianz to amend the Re-Amended Defence and Counterclaim. This amendment had to do with Allianz changing the details of its assertion that Toby was in breach of the Claims Procedure Condition in the Policy by reason of delay. I ordered that the Re-Amended Defence and Counterclaim be amended and filed and served by the 13 October 2018, and the Re-Amended Reply and Defence to Counterclaim be amended by the 20 October 2018. The Re-Amended Reply and Defence to Counterclaim seems to have been filed on 23 October 2017, but no point was taken by the Defendant about that slightly late filing, and the amended pleading is therefore allowed to stand.

The Parties' positions

Toby's Claim

71. Toby contends that Allianz has failed and refused to perform its obligation promptly to pay Toby's valid claim under the Policy when made. That in the premises, Allianz is liable under the Policy to pay Toby damages in the amount of the Agreed Value of the Aircraft, namely US$14 million, less the sum Allianz has already paid CFC. This balance on the Agreed Value amounts to some US$10,396,523.96. Toby also claims interest after 26 February 2013, this being the date when Toby made a formal claim under the Policy (having it says, previously notified Allianz of the seizure of the Aircraft and possibility of a claim in August 2012), together with costs.

72. As discussed previously, the Policy is divided into two parts, referred to as Part A and Part B.

73. Part A provides *"Hull All Risks Cover"*, which is cover in respect of loss or damage to the Aircraft, legal liability to third parties and legal liability to passengers. However General Exclusion 10 to Part A of the policy states that cover is not provided in respect of *"claims excluded by the attached, War, Hi-jacking and Other Perils Exclusion Clause AVN48B"*. The matters excluded by AVN48B include claims caused by *"Confiscation, Nationalisation, seizure, restraint, detention, appropriation, requisition for title or use by or under the order of any Government (whether civil, military or de facto) or public or local authority."*

74. The risks excluded from Part A of the Policy by Clause AVN48B are then written back into the Policy under Part B, which provides cover in respect of:-

> *"SECTION ONE: LOSS OR DAMAGE TO THE AIRCRAFT*
>
> *Subject to the terms, conditions and limitations set out below, this Policy covers loss of or damage to* [the Aircraft] *against claims excluded from* [Part A] *as caused by:-*
>
> ....
>
> *(e) Confiscation, nationalization, seizure, restraint, detention, appropriation, requisition for title or use by or under the order of any Government (whether civil, military or de facto) or public or local authority."*

75. Both parts of the Policy specified that the Agreed Value of the Aircraft was US$14 million and incorporated an *"Agreed Value Clause"* (AVN61). In essence, the effect of this provision is to relieve the insured of any need to establish the amount of its insured interest in cases of a total loss of the insured aircraft.

76. When it commenced these proceedings, Toby pursued a claim against Allianz under both Parts A and B of the Policy. However, it subsequently abandoned its claim under Part A of the Policy.

77. Toby makes claim under sub-paragraph (e) of Section One of Part B of the Policy. Its case is that the confiscation of the Aircraft by the FRS falls within the cover provided by that sub-paragraph and that, as a result of its confiscation, the Aircraft is a total loss. Toby accordingly claims the agreed value of the Aircraft of US$14 million less the sum of US$3,630,476.64 paid by Allianz to CFC in settlement of its claim under the Policy, i.e. the sum of US$10,396,523.96, together with interest and costs.

Allianz's Defences

78. Allianz denies the claim and asserts that the Policy has been avoided. Allianz's grounds for avoiding the Policy relate to:

a. The stated nature and business of Toby,

b. The stated length of time for which Toby had been incorporated,

c. The stated ownership of Toby,

d. The stated operation of the Aircraft,

e. The stated use of the Aircraft within Brazil,

f. Failure to disclose that the intended use of the Aircraft would involve breaches of Brazilian customs law.

79. Further, Allianz also alleges that:

a. The Aircraft was not "*confiscated*" by the Brazilian authorities within the meaning of the Policy;

b. The Aircraft is not a total loss within the meaning of the Policy;

c. The Aircraft was not lost during the period of the Policy;

d. Any loss of the Aircraft that occurred was not caused by an insured peril;

e. Any loss of the Aircraft that occurred was caused by Toby's failure to pay Brazilian taxes and/or customs duty; and

f. Proper notice of an event likely to give rise to a claim under the Policy was not given.

Issues of Fact, Law and Construction

Avoidance Issues

80. Is Allianz entitled to avoid the Policy? In particular:-

a. Did Toby make material misrepresentations or fail to disclose material facts of which it was or ought to have been aware in the ordinary course of business and that were not already known by Allianz in connection with the placing of the insurance?

b. Was Allianz induced to provide cover on the terms of the Policy by any such misrepresentation or non-disclosure?

c. Has Allianz affirmed the Policy and/or waived any right which it might otherwise have to avoid the Policy?

Construction Issues

81. Was there a loss of the Aircraft, and a total loss, within the meaning of the Policy? If so:-

a. When did that occur?

b. Was that a result of an insured event?

82. Was any loss of the Aircraft caused by or the result of-

a. (As Toby alleges) the confiscation, seizure, detention, or appropriation of the Aircraft by the Brazilian authorities: or

b. (As Allianz alleges) punishment lawfully inflicted upon Toby under Brazilian law for Toby's failure to comply with Brazilian tax or customs laws?

83. If loss of the Aircraft was caused by Toby's failure to comply with Brazilian tax or customs laws, does the Policy nonetheless provide cover in respect of the loss, confiscation, seizure, detention or appropriation as a result of a failure to comply with Brazilian customs laws, provided that Toby had made all reasonable efforts to comply with those laws?

84. Did Toby use all reasonable efforts to ensure that it complied and continued to comply with the laws of Brazil and to obtain all permits necessary for the lawful operation of the Aircraft?

85. Is Allianz entitled to rely on any of the pleaded exclusions and/or conditions in the Policy to avoid Toby's claim? In particular;

a. Did the loss occur outside the Policy period?

b. Did Toby fail to exercise due diligence to avoid the occurrence of the loss in breach of Part B, section 4, Clause 1 of the Policy by:

i. Misrepresenting to the Brazilian authorities the purpose for which the Aircraft entered Brazil;

ii. Making false declarations to the Brazilian authorities when requesting temporary flight permits;

iii. Using the exemptions in Brazilian law: decree No. 97464/89 inappropriately and unlawfully in order to avoid paying import taxes and duty;

iv. Failing to pay import taxes and duty properly due to the Brazilian authorities.

c. Did Toby fail to give Allianz sufficiently prompt notification of an event likely to give rise to a claim in breach of Part B, Section 4, Clause 1 of the Policy?

d. Is Toby's claim excluded by Part B, Section 4, Clause 1 of the Policy because the loss occurred while the Aircraft was being used for an illegal purpose?

e. Is Toby's claim excluded by Part B, Section 3 of the Policy because any loss of the Aircraft was caused by "*Any Other Financial Cause*"?

f. Is Toby's claim barred by the doctrine of illegality?

86. What sum (if any) is Toby entitled to recover from Allianz in the light of:-

a. The agreed value of US$14 million;

b. The Airline Finance/Lease Contract Endorsement in the Policy;

c. The settlement reached between Allianz and CFC; and

d. Toby's ongoing claim for compensation in Brazil.

The Evidence

Witnesses of Fact

87. Toby called the following persons as witnesses of fact:

a. Mr. Lamacchia, Director and ultimate beneficial owner of Toby.

b. Mario Junquiera Franco Junior ("**Mr. Franco**"), a Brazilian Attorney-at-Law who advised Mr. Lamacchia on certain tax matters.

c. Ms. Pereira, Director of Toby and wife of Mr. Lamacchia.

Ricardo Cardoso De Meira Leite ("**Mr. Leite**"), one of the 2 pilots that flew the Aircraft;

e. Celita Rosenthal ("**Ms. Rosenthal**"), Chief Legal Officer of the Group of Companies owned by Mr. Lamacchia, including Toby.

88. Allianz called the following witnesses as witnesses of fact:

a. Brian Bodkin ("**Mr. Bodkin**"), who was the Aviation Practice Leader at Allianz at the time of placement of the Policy.

b. Carmen Milagros Ojeda ("**Ms. Ojeda**"), an Underwriter who assisted Mr. Bodkin at Allianz.

c. Erin Isaac Rivera ("**Mr. Rivera**"), Claims Manager at Allianz September 2014 – September 2016.

89. Allianz also served a Witness Statement by Julio Cezar de Cruz Costa, an Attorney-at-Law practicing in Brazil. However, Mr. Costa was not called to give oral evidence. Mr. Elkington QC, who appeared for Allianz, submitted that it was a matter for the Court to decide what relevance and weight should be attached to the redacted statement of Mr. Costa. Mr. Weitzman QC who appeared for Toby, on the other hand submitted that the Witness Statement of Mr. Costa, whilst not being objected to, has no relevance as Mr. Costa had no personal knowledge about the matters, largely documents, about which he speaks. I have decided to allow Mr. Costa's Witness Statement to stand, mainly because other witnesses have referred to it. However, I effectively attach little or no weight to it since it mainly deals with documents which speak for themselves, and has also been overtaken by the fact that there is now expert evidence before the Court in relation to Brazilian law.

Expert Witnesses

90. Mr Adolpho Bergamini ("**Mr. Bergamini**") was called to give evidence as an expert on behalf of Toby in relation to Brazilian law, tax law. Ms. Philippa Rowe ("**Ms. Rowe**") was called on behalf of Toby to give evidence as to the relevant aviation insurance practice.

91. Ms. Nadia de Araujo ("**Ms. de Araujo**") was called on behalf of Allianz to give evidence as to Brazilian law, tax law. Mr. Olie Jolstad ("**Mr. Jolstad**") was called by Allianz to give evidence as to aviation insurance practice.

The Evidence of the Witnesses

Mr. Franco

92. Mr. Mario Franco was the first witness called by Toby. He gave two Witness Statements, the first dated 30 September 2015, and the Supplemental statement dated 21 July 2017.

93. Mr. Franco indicated that he is a lawyer and a partner in the firm of Natanael Martins, Mario Franco e Gustavo Teixeira Advocacia Tributaria, a specialist firm of tax lawyers based in São Paulo. He has been practicing tax law in Brazil for more than 30 years and has advised numerous local and international companies on Brazilian tax issues.

94. He has known Mr. Lamacchia since 2008, when the latter engaged Mr. Franco's firm to handle a tax matter which involved the FRS in respect of one of his companies. Mr. Franco says that he had primary conduct of that matter and during the course of those proceedings he interacted with Mr. Lamacchia on a fairly regular basis. Mr. Franco's firm obtained a favourable outcome in those proceedings. Since then Mr. Lamacchia has continued to engage his firm on a regular basis to advise on matters concerning tax returns and compliance issues in relation to his companies that arise from time to time, as well as in relation to Brazilian tax issues concerning any company restructurings that have taken place.

95. Mr. Franco indicated that he had been a passenger on the Aircraft on a number of flights which it made into and out of Brazil, which were always for business.

96. On 20 June 2012, Mr. Lamacchia telephoned and informed him that the Aircraft had been seized by the FRS. They later learned that the purported basis for seizing the Aircraft was allegations that the TEATs had been wrongfully obtained and that Toby had failed to pay the 10% customs duty on the *de facto* importation of the Aircraft, based on the value of the Aircraft as at June 2012.

97. Mr. Franco advised Mr. Lamacchia to answer all of the FRS questions. He mainly dealt with Mr. Lamacchia and Ms. Rosenthal. He also advised the pilots on the preparation of their responses to the FRS's information requests.

98. Mr. Franco also gave some background information as to the FRS procedures. He explained that FRS proceedings in Brazil are administrative proceedings and are distinguishable from a normal tax assessment.

99. Mr. Franco discussed the claim made by the FRS against Toby. Importantly, he indicates that, prior to the FRS seizing the Aircraft in June 2012, he is not aware of any aircraft having been seized by the FRS on a similar basis to that used in this case. He continues that, since he started working as a tax specialist in 1995, the only instances of which he is aware in which the FRS has seized aircraft were where the aircraft was carrying illegal cargo or other undeclared goods into Brazil.

100. In the circumstances, he was very surprised that the Aircraft was seized in June 2012 because the Aircraft had been flying into and out of Brazil for more than four years, and on each occasion, the FRS had issued a TEAT permitting the Aircraft to enter and remain in Brazil for up to 60 days.

101. At paragraphs 20-26 of his First Witness Statement, Mr. Franco gives evidence about *"Operation Forced Landing"*. He states that in June 2012 the FRS suddenly decided to check all aircraft entering Brazil. In the space of one week the FRS tried to seize about 14 privately owned aircraft and, he believes they were successful in about 8 cases (the other aircraft were outside Brazil at the time). Some of the aircraft are still in the FRS's possession and others have been released or sold. Although the proceedings are held in private, he has learnt that the FRS's ground for releasing some aircraft was subjective

criteria it applied and its analysis of comparing overseas operational activities versus financial investments.

102. The factors that the FRS apparently took into account when determining whether or not the owner of aircraft is seeking to import it into Brazil are not prescriptive. It was Mr. Franco's view that there is no legal basis for them or any rules or precedent for how such factors should be applied. The FRS has included matters such as the number of flights made into Brazil in comparison to the number of international flights made, the reasons for the aircraft travelling outside of Brazil and the kind of business conducted by the company which owns the aircraft outside Brazil.

103. Some 4 to 6 months after the Aircraft was seized, Toby received the initial decision of the FRS. The decision was based solely on the documents which Toby and the pilots provided to the FRS in response to its information requests. Applying the factors which the FRS was apparently taking into account, he believes that the documents and information which was supplied by Toby and the pilots of the Aircraft to the FRS demonstrated that the owner of the Aircraft, Toby, was not seeking to import it into Brazil.

104. He opined that it is important to understand that they had not been given any opportunity to make any submissions to the FRS at all before it made its decision, not even in writing. The FRS subjectively decided that the Aircraft had made too many flights into Brazil and it had spent too much time in Brazil and therefore the Aircraft should have been imported into Brazil. The FRS therefore concluded that the Aircraft should be permanently confiscated. However, because a foreign aircraft has the right to enter Brazil and stay for the time authorized by the ANAC and FRS, Mr. Franco believes that this decision was incorrect. Toby had no obligation to import the Aircraft into Brazil as far as he is concerned.

105. He assisted Toby to pursue an appeal against the FRS's decision. Because the Aircraft had been seized, the appeal was to the Head of Customs for São Paulo. He prepared the appeal notice and the written arguments that were submitted on behalf of Toby.

106. In September 2013 the appeal was rejected by the Head of Customs. By that stage, Mr. Franco declared that he was not surprised by the decision, because the Head of Customs in

São Paulo was in fact responsible for devising the FRS's "*Operation Forced Landing*" from the outset, and he believes he was therefore inclined to reject the appeal.

107. Following the dismissal by the Head of Customs of Toby's appeal, he advised Mr. Lamacchia that Toby should pursue a court action in the Brazilian Federal Court to try to overturn the FRS's administrative determination. Other lawyers were instructed to handle that case, as he does not practice civil proceedings.

108. Like Mr. Lamacchia, Mr. Franco also gave a Supplemental Witness Statement, on 21 July 2017.

109. One of the matters addressed by the witness in this Supplemental statement was advice he purportedly gave to Mr. Lamacchia in 2008 regarding the acquisition of the Aircraft. Mr. Franco states that he recalls that in 2008 Mr. Lamacchia explained to him that he had acquired an aircraft for travel to international locations for business. Further, that he had a number of investments and relationships with Banks outside Brazil and wished to travel in order to manage and maintain them. In addition, he wanted to undertake a campaign to try to attract international investment into businesses in Brazil, and wanted to acquire an aircraft to facilitate that campaign.

110. As Mr. Franco understood Mr. Lamacchia at the time, the purpose of acquiring the Aircraft was specifically to enable travel to and from international locations and Brazil, rather than locations within Brazil. For domestic travel within Brazil, he and his business associates had the use of other aircraft or used commercial airlines.

111. Mr. Franco claims that consequently, Mr. Lamacchia asked his advice on the tax and customs rules relating to aircraft travelling into and out of Brazil.

112. At paragraphs 8-11 of the Supplemental Witness Statement, Mr. Franco gives evidence as follows:

> *"8. While I did not give Jose Roberto or Toby any written legal opinion, I recall that my advice to him was in essence that:*

(a) *As Jose Roberto had significant investments and other business interests outside of Brazil, it was legitimate for him to acquire an aircraft through a foreign company to be used for international flights. That company was Toby, which I understood was incorporated with a dual purpose: first, it was to be used (together with Copa and Cape Cold, the other companies in the group) as a vehicle for attracting investment into Jose Roberto's Brazilian businesses; second, it would own the Aircraft which was to be used by Toby's directors to pursue potential investors.*

(b) *While I understood that Jose Roberto's purpose in acquiring the Aircraft was largely a business one, assuming Toby obtained permits from the relevant authorities (which I now know, based on my involvement in the Administrative Proceedings, are called TEATs and are obtained from* [FRS] *and ANAC) and complied with any conditions imposed by the authorities in connection with each permit (for example, the Aircraft stayed in Brazil no longer than the time stipulated on each permit, whether 60 days or less), there was no requirement for every flight to have business as its exclusive purpose.*

(c) *In addition, there were other reasons for holding the Aircraft through a company in this way for tax efficiency.*

9. *As Jose Roberto had investments and other business interests overseas which gave rise to a need for him to travel, in my view he was entitled to use a foreign-registered aircraft to enter and exit Brazil in this manner.*

10. *That advice was based on an interpretation of the relevant legislation at the time which I understood to be the prevailing interpretation, since no specific challenge or assessment had ever been raised by any authority. I was not aware at the time of any litigation that had taken place that was relevant to this issue, nor was I aware thereafter of any such litigation prior to the confiscation of the Aircraft in 2012.*

11. *I understand that it has been suggested by the Defendant that the incorporation of Toby and the lease of the Aircraft by it was a "sham",*

designed and intended to deceive the Brazilian authorities and hide Jose Roberto's connection with the aircraft. This is quite wrong:

(a) The existence of the group structure of which Toby was a part, Jose Roberto's status as ultimate beneficial owner of that Group, and his capital contributions to Koba, the parent company in the Group, which were ultimately used to finance the acquisition of the Aircraft from CFC, were fully disclosed to the Brazilian tax authorities at the time in Jose Roberto's tax returns. Jose Roberto always disclosed all of his assets overseas, as is required.

(b) As the acquisition also required the exporting of funds from Brazil, the transaction was also disclosed to the Brazilian central bank (the Banco Central do Brazil).

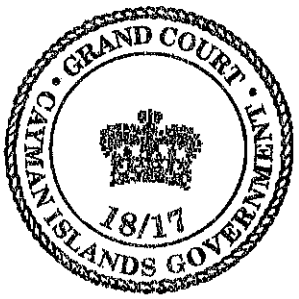
(c) Through the process of obtaining the TEATs and AVANACs, it would have been apparent to the Brazilian authorities who the owner of the aircraft was (i.e. Toby) and who was operating and using it on behalf of Toby (i.e. Jose Roberto as a director of Toby."

113. Mr. Franco was cross-examined by Mr. Elkington on behalf of Allianz. One of the main attacks on this witness' evidence was whether he did in fact give oral advice to Mr. Lamacchia in 2008 as set out in paragraphs 5 to 10 of his Supplemental Witness Statement. In effect, Allianz suggests that both Mr. Franco and Mr. Lamacchia are not speaking the truth on this matter. Mr. Elkington made the point, which the witness conceded, that there was a failure to refer to this advice in (a) the Brazilian administrative proceedings commenced by the FRS in respect of the Aircraft ("**the Administrative Proceedings**"); (b) the Criminal Proceedings; (c) Mr. Franco's and Mr. Lamacchia's First Witness Statements and (d) the pleadings in these proceedings. During the cross-examination, the following question and answer ensued:

"Q. Isn't the truth that you didn't, in fact, give any such advice 9 years ago?

A. No."

114. Mr. Franco also denied that the Brazilian authorities would have been less likely to confiscate if they knew that Mr. Lamacchia had acted on legal advice. The following interchange took place:



"Q. Wouldn't it make the authorities less likely to confiscate the aircraft if they knew Mr. Lamacchia had taken legal advice?

A. No, absolutely not. It wouldn't convince them at all. In Brazil, it's either to enter a Petition [their position] *or ours. Whether I gave him advice or not wouldn't change the position of the authorities in any .. an inch."*

115. Mr. Franco was also cross-examined about the 2007 Purchase Agreement signed by CAC and Mr. Lamacchia on behalf of Crefipar. Mr. Franco admitted that in 2008, when he claims that he gave Mr. Lamacchia advice, Mr. Lamacchia had not told him or shown him this 2007 Agreement.

116. Questions were aimed at some of the contents of the "*Motion to Deny*", the Appeal document, which he prepared on behalf of Toby. Mr. Franco indicated that, in relation to the Crefipar Purchase Agreement, the denial of the existence of that document was based not on the fact that there had never been such a contract, but on the basis that he was told by Mr. Lamacchia and others "*that this agreement didn't come into effect because the parties decided to do otherwise on a lease to overcome this agreement*".

117. As to the practice and procedure in Brazil, Mr. Franco stated that in Brazil one looks to the written law. So:

> *".... step-by-step operation and business purposes or some other kinds of considerations or interpretation of the real subjects and facts wasn't, at that time, very present in the courts of Brazil."*

He continued:

> *"...so, this sort of ...well, what you doing is not really a temporary admission, wasn't present at that time, in my opinion. And that's because 14 airplanes at once were grounded because of this change of interpretation, in my opinion."*

Asked about the portions of his Witness Statements in which he said that when he travelled on the Aircraft it was always for international business purposes, the witness responded that the business related to Mr. Lamacchia's personal business.

119. For the most part, I found Mr. Franco to be a straight-forward and knowledgeable witness. However, I did not find him to be reliable and I did not believe him when he claims to have advised Mr. Lamacchia orally in 2008. That aspect of his evidence appears to have been advanced simply to assist his long-standing client Mr. Lamacchia.

Mr. Lamacchia

120. In his First Witness Statement of 30 September 2015, which stood as part of his examination-in-chief, Mr. Lamacchia indicated that both he and his wife Ms. Pereira are directors of Toby, having been appointed since 8 February 2008. His son Marcos was a director from 8 February 2008 until 13 July 2009. Mr. Lamacchia says that Toby was established for the purpose of providing financial and investment advice to its parent company Koba and Cape Cold. Koba was incorporated in the British Virgin Islands ("**BVI**") on 1 February 2008, and Cape Cold was incorporated in the Cayman Islands on 10 March 2008.

121. Mr. Lamacchia said that such advice from Toby included securities brokerage services, as shown by clause 1 of the service agreements between Toby and Koba and Cape Cold both dated 5 May 2008.

122. Mr. Lamacchia and Ms. Pereira were the directors of Koba, and Mr. Lamacchia was the sole shareholder. According to Mr. Lamacchia, Koba was incorporated as a vehicle through which he could make investments outside of Brazil and as a holding company for Toby and Cape Cold. He said that in Brazil, group companies are usually set up in this way, with a holding company. According to Mr. Lamacchia, Koba was funded by him personally. Between 2008 and 2012 he invested approximately US$66.3 million in Koba and in turn Koba invested approximately US $11.8 million in Toby.

123. Cape Cold was a wholly owned subsidiary of Koba. Mr. Lamacchia and Ms. Pereira were its directors. Cape Cold was dissolved in December 2013.

124. When the companies were formed, the idea was that Toby would look for suitable investment opportunities outside Brazil and submit them to Cape Cold and Koba for consideration. On 5 May 2008 Toby signed service agreements with Koba and Cape Cold, which were in similar terms. The service agreement provided that Toby would, amongst other things, negotiate, acquire and dispose of shares, debentures and securities for each of Koba and Cape Cold. Koba and Cape Cold would pay for such services "*on a case by case basis*".

125. Toby hired Ms. Soler at Trident Trust to assist with finding suitable investments and to represent it in the Cayman Islands. Toby also had a representation agreement with Mr. Gonçalves. Mr. Gonçalves was hired because of his administration and financial expertise and because he worked for the group of companies for some time, according to the witness.

126. As regards the acquisition of the Aircraft, Mr. Lamacchia's evidence is that in 2008 he decided that Toby needed to acquire a private aircraft to transport its board members and officers for international business purposes. He approached the other members of the board of directors at the time and it was agreed that Toby should acquire a private aircraft to transport its directors and officers on business trips outside Brazil, to facilitate and speed their journeys to meetings, in that it would not be necessary for them to travel by scheduled air services and to be limited to the routes and times of such services.

127. Mr. Lamacchia says that he and his companies already owned two other private aircraft in Brazil. One of the aircraft was owned by him personally and the other was owned by a company of which he was a shareholder, City Taxi. They were both registered and based in Brazil. The aircraft that was owned by Mr. Lamacchia was used to carry him for his appointments and business in Brazil. The aircraft that was owned by City Taxi was used for transportation for that company's purposes.

128. According to the witness, it would have been easier for Toby to use one of these aircraft rather than to acquire and operate its own aircraft, because it is time-consuming to obtain a

TEAT, which foreign aircraft need prior to each flight into and out of Brazil. In addition, airport fees and charges are much more expensive for foreign aircraft than Brazilian ones, and must be paid immediately whereas Brazilian aircraft are given time to pay. The logbook for Toby's Aircraft indicates that it landed at airports within Brazil upon 390 occasions. According to Mr. Lamacchia, each time it did so, the landing fee and other charges it would have to pay would be greater than if it was registered in Brazil. It was therefore more expensive and bureaucratic to use a foreign aircraft in comparison to a Brazilian registered aircraft. However, Toby's directors decided that Toby should have its own aircraft for conducting its business rather than using the other aircraft owned directly or indirectly by Mr. Lamacchia. This was because the other aircraft were not really suitable for international flights, as they were too small and their range was limited. Mr. Lamacchia continued that in addition, having a separate aircraft for Toby ensured that the business and interests of himself and the other companies were kept independent and separate from Toby's business interests. It also ensured that control and management of the financial resources of each company could be ascertained at all times.

129. Mr. Lamacchia indicates that in or about early 2008, Toby approached CFC, an aircraft financing specialist which provides financing options for Cessna aircraft and other products, with a view to leasing a private aircraft, with an option to purchase. Mr. Lamacchia says that he represented Toby in the negotiations with CFC. His evidence continues that on 18 March 2008, Toby and CFC agreed the terms for a finance lease in relation to the Aircraft, over a period of ten years, with a down-payment of US$4,300,270 payable at the commencement of the term and the balance payable in 120 monthly rental instalments.

130. Toby took delivery of the Aircraft on 6 May 2008 under the terms of the Finance Lease.

131. Toby took out a series of insurance policies from 6 May 2008 to 5 May 2013. It would seem that Toby and Mr. Lamacchia, were, at least at the time of the signing of this Witness Statement, of the view that Allianz had first been its insurer from as far back as 2008. See paragraphs 26-51 of the Witness Statement. It has however since been conceded that

Allianz first insured the Aircraft in 2012 and that it is a separate legal entity from Allianz UK.

132. As regards the insurance for the period 6 May 2012 to 6 May 2013, at paragraphs 63-71 (inclusive), Mr. Lamacchia states as follows:

> *"63. We contacted Ana Mercante ("Ana") at Good Winds on 26 March 2012 regarding the renewal of Toby's insurance for the Aircraft... Ana liaised with UIB on Toby's behalf to obtain a quote for the renewal.*
>
> *64. On 11 April 2012 Mr. Pollen emailed Mr. Brian Bodkin at Allianz to see if Allianz would be interested in quoting for the renewal of Toby's insurance. The proposal form attached to the email confirmed that the details were the same as in previous years save that the nominated pilots would be Mr. Celso Nardi ("**Mr. Nardi**") and Mr. Ricardo Cardoso De Meira Leite ("**Mr. Leite**"). In other words, the information regarding Toby which had been supplied to Allianz back in 2008 remained unchanged. The proposal form also confirmed that Toby had made no claims in the previous 5 years.*
>
> *65. On 19 April 2012 Mr. Bodkin emailed Mr. Pollen to provide Allianz's proposal for insuring the Aircraft and asked for a detailed description of Toby's business and any website details.... The proposal stated that the covered use was "industrial aid". ...*
>
> *66. On 24 April 2012 Ana forwarded to us a copy of the proposal received from Allianz...*
>
> *67. On 27 April 2012 Alexandre provided details of Toby's business to Ana... He stated that Toby was an investment company based in Cayman, and that it had more than 30 years of trading. The second point was correct in relation to the group of companies owned by me in Brazil, of which Toby is part. In the circumstances I believe that*

Alexandre must have been referring to the group of companies that I own, which have been in existence and doing business for over 30 years. I believe that Allianz was well aware from our previous dealings with it in earlier years that Toby itself was incorporated in February 2008.

68. *On 27 April 2012 Mr. Pollen provided Mr. Bodkin with details of Toby's business. He stated that Toby was a stock broker, it had existed for 30 years and that the owner was Alexandre. Mr. Pollen also stated that Toby did not have a website, and that it was "very much a private corporate set-up". The email did not reflect the information which was supplied to Mr. Pollen by Toby: we did not state that Toby was owned by Alexandre. I believe that Allianz was aware that Toby was represented by Leila and me, and that it was owned by Koba; a company in which Leila and I were the shareholders as Allianz had insured the Aircraft during the period 2008 to 2011 and such information had been provided to Allianz in 2008. Furthermore, Allianz had a copy of the Finance Lease from which it was clear I was the director signing on Toby's behalf. Mr. Pollen's email provided additional information about the pilots and indicated that Toby operated the Aircraft and contracted its own pilots. Mr. Pollen also stated that the Aircraft is a corporate jet... I am not aware that Mr. Bodkin responded to this email or that there was any further communication between Allianz and UIB regarding Toby's business and operations, ownership or directors and officers.*

69. *I do not believe that the information provided to Allianz by Mr. Bodkin adversely affected Allianz's consideration of the insurance risk. I note that the premium amount previously stated by Allianz was not adjusted following receipt of Mr. Bodkin's* (Pollen's?) *email and that no reference to Toby's business and operations or its owner was ever*

made in the insurance slips which form the basis of the contract of insurance, or the other contractual documentation, namely the evidence of cover dated 28 May 2012 and the certificates of insurance dated 30 April 2012 and 31 May 2012...

70. *On 30 April 2012 Mr. Pollen emailed Mr. Bodkin to confirm that Toby had advised him that we were happy to place an order for the insurance based upon the quote that Allianz had provided... Mr. Pollen emailed Mr. Bodkin on the same date to ask if a certificate could be issued by the end of that day and to request Allianz put the quote on the slip attached, which had all of the terms and conditions of the expiring policy...*

71. *Later on 30 April 2012, Ms. Carmen Ojeda, an underwriting specialist at Allianz, emailed Mr. Pollen to provide him with a copy of the Aviation Policy Binder Confirmation, a certificate of insurance and the signed slip... Copies of these documents were forwarded by Ana to us on the same day..."*

133. With regards to the use of the Aircraft, it was Mr. Lamacchia's evidence that between 18 March 2008 and 20 June 2012 the Aircraft was used without incident. The flights taken by the Aircraft were for business purposes, although sometimes family and friends would travel with Ms. Pereira and/or himself, especially when the flights were for essential maintenance. It was further the witness' position that, because the Finance Lease required the Aircraft to be "*permanently based*" in São Paulo, and also because Toby's directors and officers were based there, the Aircraft flew in and out of Brazil regularly.

134. Mr. Lamacchia then described the process and circumstances surrounding the 20 June 2012 service of notice by the FRS regarding confiscation and the investigative procedure. He indicates that he was informed of the confiscation of the Aircraft by Mr. Nardi, the pilot who telephoned indicating that there was someone present who wanted to arrest the

Aircraft, which was in the hangar and passed on the information provided to him by the FRS Tax Auditor regarding their intention to investigate.

135. Mr. Lamacchia then indicates that he, immediately after the call with Mr. Nardi, contacted Mr. Franco. Toby subsequently engaged Mr. Franco to act on its behalf in relation to Administrative Proceedings commenced by the FRS. Mr. Lamacchia also called Ms. Rosenthal, who is a lawyer employed as Chief Legal Officer to provide legal services to all of Mr. Lamacchia's companies, including Toby.

136. After seeking and obtaining an extension of time, Mr. Nardi provided detailed answers to the FRS's request for information on 17 August 2012. Ms. Rosenthal, Mr. Gonçalves and Mr. Lamacchia, assisted Mr. Nardi in collating the information. The information requested included detailed information about the aircraft and Toby, the movement of the aircraft within and outside Brazil, the passengers, and the Finance Lease.

137. Mr. Lamacchia indicates that following the FRS's action, in July 2012 at his request, he met with the President of CFC in USA at CFC's office in São Paulo, along with Ms. Rosenthal. The purpose of the meeting was to discuss how Toby and CFC could cooperate in order to try to recover the Aircraft. CFC initially indicated that it would assist, but subsequently refused to cooperate with Toby unless Toby agreed to give a guarantee.

138. On 29 August 2012, Toby wrote to Allianz to inform it of the confiscation of the Aircraft, in order, the witness testifies, to comply with its obligation under the policy to do so. However, Mr. Lamacchia continues, at the time he did not seriously believe that there was likely to be a claim under the Policy. He indicates that Toby had been advised by Mr. Franco that it was highly likely that the Aircraft would be returned by the FRS once they had reviewed all the documents sent by Toby and Mr. Nardi. Allianz did not respond to Toby's letter.

139. On 17 September 2012, the FRS made further requests for information from Toby, Mr. Nardi and Mr. Leite, the second pilot employed by Toby. Mr. Nardi and Mr. Leite responded separately to these further requests on 15 October 2012, assisted by Mr. Franco.

140. On or about 23 October 2012, Toby requested an extension of time of 30 days, and Toby responded on 14 November 2012.

141. Mr. Lamacchia indicates that on 29 January 2013 Toby received the decision of the FRS dated 15 January 2013 (JRL 2/745-749).

142. Mr. Lamacchia indicates that he was shocked at this decision, which was made without an opportunity for Toby to be heard on the substantive allegations made against it. On 14 February 2013, Natanael Martins, Mr. Franco and Gustavia Tributaria, as Toby's Brazilian lawyers, submitted an answer and notice of appeal to the FRS. Mr. Lamacchia indicates that the defence was (amongst other things) that:

(1) The FRS had ignored the fact that the aircraft was owned by CFC, an American company;

(2) The FRS ignored the fact that it was leased by Toby, a Cayman company and therefore a foreign company;

(3) The Aircraft carried Toby's directors and representatives as well as people related to the company's activities, and no flight was taken without at least one of Toby's representatives on board (with the exception of flights made for the purpose of the Aircraft's maintenance); and

(4) All flights were unpaid and in the main to the benefit of the operator Toby. None who flew on the aircraft paid to do so.

143. On 26 February 2013 Toby wrote to Allianz enclosing a copy of the material parts of the decision of the FRS and making a claim under the policy.

144. On or around the 3 October 2013 Toby received the decision of the FRS dated 24 September in respect of Toby's appeal (JRL2/82-8908). The decision was made administratively, by the FRS, based upon the answer and appeal notice submitted by Toby's lawyers, and the other documents previously provided by Toby and Mr. Nardi.

145. In summary, the FRS's decision stated that:

a) The appeal was rejected;

b) Confiscation of the aircraft was justified; and

c) The FRS could decide how to deal with the aircraft.

146. Mr. Lamacchia explained that as the administrative process conducted by the FRS ends with the appeal, in order to challenge the decision Toby had to commence proceedings in the Federal Court of São Paulo. Toby did so via the firm of Dinamarco.

147. Mr. Lamacchia indicates that Allianz only responded to the letter dated 26 February 2013 on 22 April 2013 and that Toby did not receive that letter until after Toby's letter of 30 April 2013 was sent to Allianz, UIB and Good Winds requesting payment under the Policy for the loss of the Aircraft.

148. In its response of 22 April 2013, Allianz cited General Exclusions (b) and (d) under Part B of the Policy as a reason not to pay Toby's claim and referred to the existence of "*allegations of illegal activities including forgery, tampering with documents and fraud*" that had been made against Toby, which it said prevented Toby from recovering under the Policy.

149. Toby then retained Maples and Calder ("**Maples**") to act for it in pursuing a claim under the Policy. On 17 July 2013 Maples wrote to Allianz refuting the arguments made by Allianz and also putting Allianz on notice of a claim under Part A of the Policy, which arises out of the same facts as the claim under Part B.

150. In response to that letter, Allianz stated in an email dated 18 July 2013 that:

> "*The issue is whether the seizure of an aircraft for either illegal activity or failure to pay taxes is a covered loss. It is our view that it is not.*"

151. Mr. Lamacchia states that Allianz also stated that they would review coverage of the Aircraft if Toby could provide full details of the underlying assessment procedure by the FRS and suggesting it would be helpful to have a teleconference to discuss this further.

152. On 25 July 2013 Maples chaired a conference call between representatives of Toby and Allianz and followed up on that call with further letters to Allianz dated 5 August and 8 November 2013. Mr. Lamacchia says that no response was received from Allianz to either letter.

153. The letter of 8 November 2013 updated Allianz on the FRS's decision rejecting the appeal. It also informed Allianz that:

a) The FRS was now claiming an entitlement to determine how to deal with the aircraft: and
b) Toby intended to challenge this decision in the Brazilian Courts.

154. On 6 December 2013 Toby issued the Civil Proceedings in the Brazilian Federal Court and sent a copy of the court papers to Allianz, together with an indication that Toby had been granted an injunction from the federal Court preventing the FRS from taking steps to sell the aircraft and requiring the FRS to maintain the Aircraft pending completion of the proceedings.

155. Mr. Lamacchia indicates that no further correspondence was exchanged between Toby (or Maples on Toby's behalf) and Allianz until a letter from Allianz to Toby dated 12 March 2014, in which Allianz now sought to avoid the Policy on the grounds of alleged non-disclosure of information or disclosure of incorrect information (JRL 2/925-927).

156. On 15 April 2014 Maples replied to Allianz to the effect that such matters as were raised were no more than allegations which are to be considered by the Federal Court. In addition, that the information provided to Allianz was not false. Further, Allianz had participated in insuring the aircraft since 2008 and cannot claim that in 2012 it did not know about Toby, its activities, its owners and its representatives. Mr. Lamacchia maintains that the contractual insurance documentation, make no reference to the alleged false representations. Further, that Toby paid Allianz an additional amount to cover the risk of seizure, kidnapping and arrest of the Aircraft.

On 8 May 2014 Allianz responded to Maples' letter dated 15 April 2014, and on 15 May 2014 Maples served sealed copies of the Amended Writ of Summons and Statement of Claim together with other court documents on Allianz's registered agent.

158. At the time of his First Witness Statement of 30 September 2015, Mr. Lamacchia stated that from 26 July 2013 until January 2015 CFC wrote to Toby each month giving notice that CFC believes that Toby is in default under the terms of the Finance Lease and to demand payment in full of all amounts due under the Finance Lease less the security deposit.

159. Toby says that it each time responded that it was not in default, and claims that in fact, it has paid every lease payment due to CFC under the terms of the Finance Lease. Further, that at no time has CFC rejected any of the lease payments nor has it taken any legal steps to recover the sums it alleges are due under the terms of the Finance Lease.

160. Mr. Lamacchia also gave evidence of the Criminal Proceedings that were issued against him personally in Brazil for alleged importation of the Aircraft with a view to evading payment of due taxes by fraudulent means. Mr. Lamacchia hired lawyers to represent him.

161. Mr. Lamacchia filed a Second Witness Statement, sometime later, in July 2017. Mr. Lamacchia described the payments under the Financial Lease. Further that Toby had received a letter from CFC, which confirmed that because of an insurance payment from Allianz, Toby was no longer required to make payments under the Finance Lease.

162. Mr. Lamacchia also addressed the topic of the acquisition of the Aircraft in 2008. He says that around the time that Toby was incorporated, he proposed to make a number of international trips in order to attract investment from foreign investors into businesses which he owned and operated in Brazil. His plan was that, if successful, he would channel investment through Koba and Cape Cold, two of the other entities within the Group of which Toby was a part, into Brazilian businesses.

163. For the first time, the witness indicates that at around that time, he had engaged Mr. Franco's law firm to assist one of his other companies in relation to a tax dispute.

164. Mr. Lamacchia says that he spoke to Mr. Franco about the acquisition of the Aircraft and his intended international travel. In particular, he says he spoke to Mr. Franco about how best to go about acquiring the Aircraft in a tax-efficient way. He explained that he proposed to undertake some international travel for business interests overseas (including existing investments that he had made) and that he had negotiated the acquisition of the aircraft with FC. None of the existing aircraft which he had were suitable for that kind of international travel, and he was at a stage in his life when commercial air travel was not attractive to him, so he felt he needed to acquire a new, more suitable aircraft so he could continue to travel for business purposes. So, he asked Mr. Franco's advice on the tax and customs rules relating to aircraft travelling into and out of Brazil.

165. Mr. Lamacchia's evidence is that Mr. Franco did not give him or Toby any written legal opinion about the acquisition and use of the aircraft. However, he recalls that Mr. Franco told him that:

a) since he proposed to use the Aircraft for international travel, and he had business interests overseas which he proposed to further by using the Aircraft, a legitimate and legal way to acquire the aircraft would be through Toby, a foreign company.
b) In those circumstances, and in order to fly into and out of Brazil, that foreign company would need to obtain entry permits from the relevant Brazilian aviation authorities. The permits would allow the Aircraft to remain in Brazil on each visit for a certain period. He also told me that since the Aircraft would be travelling overseas for business, that it was permissible under Brazilian law for Toby to use the Aircraft this way.
c) Not every business trip made by the Aircraft would need to be for an exclusive business purpose, maintenance trips were of course permitted, and even on business trips it was permissible for family members or friends to accompany us.

166. Mr. Lamacchia says that following Mr. Franco's advice, they incorporated Toby in the Cayman Islands. He indicated that they incorporated Toby in the Cayman Islands for the

dual purposes of being the entity through which he sought foreign investment, and also to lease the Aircraft to be used by Toby's directors and representatives.

167. Mr. Lamacchia also responded to Allianz's stance that Toby did not carry on any business at all, that the Aircraft was not in fact used as a corporate jet, and was used by Mr. Lamacchia for private purposes. At paragraphs 21 and 22 of his Supplemental Witness Statement, Mr. Lamacchia gives evidence as follows:

"21. I have already explained above our plans for Toby's business and how it came to be incorporated. We pursued those plans in the following way:

(a) From 2008 onwards until the Aircraft was confiscated in 2012, we undertook what may be described as "roadshows", the aim of which was to raise awareness of Brazilian business and the opportunities that existed for overseas investors to invest in Brazilian companies.

(b) Of course, as I have already explained, an important part of that was trying to solicit investment in businesses with which I was involved in Brazil. This was intended to be a long-term initiative and we did not expect immediate results. We had been given contacts overseas by various financial advisors within Brazil, but we believed it would take time to build the kinds of new relationships overseas that would be needed to attract significant levels of investment.

(c) Among other places, we travelled to France, Spain and the USA (often Miami/Palm Beach) as part of that exercise. I would travel with Ms. Pereira in her capacity as a director of Toby, and from time to time with Mr. Gonçalves.

(d) At least until 2012, though we did not obtain any concrete, significant new investment from overseas investors, the initial signs were promising. However, of course, once the Aircraft was confiscated in 2012, as it was the only aircraft available to me that was capable of international travel, the "roadshows" were halted.

(e) Fortunately, however, at that time we were already in discussions about the acquisition of another aircraft for international travel. Consequently, around 7 or 8 months

after the Aircraft was confiscated, we re-commenced the "roadshow".

(f) In spite of that, unfortunately, we were largely unsuccessful in attracting overseas investment. I ascribe a large part of this to a climate in Brazil which is not attractive to international investors; corruption in Brazil is an enormous problem. The "roadshows" came to a natural end, and in any case, over time, I had less and less of an appetite for long international journeys.

22. In addition to the trips on "roadshows", the Aircraft was used for other business trips that I had cause to make overseas. For example, from time to time I would travel to Miami or New York to discuss existing investments with my bankers, and also to discuss other possible investments I might make through my companies (Toby, Koba and Cape Cold). On these occasions, sometimes Mr. Franco would accompany me if I thought that the business I was conducting might give rise to Brazilian tax issues, about which he could advise me."

168. At the trial, I allowed Mr. Lamacchia to make a brief statement about himself before cross-examination. He stated that he is a Brazilian businessman, owner of Crefisa, the largest financial firm in Brazil. Crefisa has a thousand branches, more than 20,000 employees, and more than 5 million clients. He is also the owner of the Faculty of the Americas, an educational institution that offers about 50 courses to over 50,000 students. Mr. Lamacchia indicated that he has never been convicted of anything in Brazil in 74 years. He is a qualified attorney, but has never practiced. Outside of Brazil, he also has a residence in Italy.

169. Mr. Lamacchia was cross-examined extensively. There was assistance from a qualified translator, and from time to time assistance was obtained by a Brazilian lawyer on Toby's team, particularly when dealing with business or legal terminology.

170. Mr. Lamacchia was cross-examined in relation to the appeal prepared on his behalf by Mr. Franco. He indicated that the appeal document was prepared by Mr. Franco on his factual instructions.

171. As regards the CAC and Crefipar document, he says that they sent the wrong contract by mistake, because this contract was never an effective contract; it was null. He said that the mistake consisted in the fact that he did not want this contract to be for Crefipar. He admitted that if Crefipar had purchased the Aircraft, import duty would be payable, but said that they did not in the event make the purchase. He agreed that the Purchase Agreement was transferred to Toby. The second time he signed a document relating to Crefipar it was an amendment. The third document was signed on a different day. The witness denied a suggestion that it was he who needed the aircraft, and not Toby. He said that if he had wanted to purchase the aircraft personally, he could have done so, as he is one of the richest men in Brazil.

172. He claimed that it was on CFC's insistence that the Aircraft came to be based primarily in Brazil at TAM taxi facility, this even though he agrees that CFC has offices all over the world.

173. Mr. Lamacchia agrees that when he was asked by the Judge in the Criminal Proceedings why the aircraft was in the name of Toby in the Cayman Islands instead of one of Mr. Lamacchia's companies, he told the Judge that CFC felt that it was safer in the Cayman Islands as an investment. He also claimed that it was CFC that suggested the registration in the Cayman Islands.

174. Mr. Elkington asked Mr. Lamacchia the following question:

"Q- Of all the airports around the world, it should be complete coincidence that Cessna wanted the aircraft stored in your hometown airport?

A- What's not right is that Allianz is not complying with the policy that I paid for."

175. Mr. Lamacchia indicated that as a director, he received no salary from Toby. Ms. Soler was employed by a company that performed corporate services for Toby. Mr. Lamacchia insisted that there was a need for Toby to exist in order to provide advice to Koba and Cape Cold. It was Mr. Lamacchia who signed the service agreement between Koba and Toby on behalf of Koba and Ms. Pereira, his wife, signed on behalf of Toby. It was suggested to Mr. Lamacchia that stating different addresses for each of them was intentional to make the transactions appear at arm's length, whereas Mr. Lamacchia said it is true that they have different addresses.

176. Mr. Lamacchia was taken to Toby's Financial Statements. They show that Toby made considerable losses: $1.8 m in 2008, $2.69 m in 2009, $2.6 m loss in 2010, 2011 was similar. This represented a loss of over $8 million up to the time of the seizure in 2012. There was no investment into Koba or Cape Cold from third parties during three and a half years.

177. It was put to Mr. Lamacchia, that despite the statements he has made about Allianz and previous insuring of the aircraft, Toby's legal team accepts that the first time that Allianz, the Defendant, insured the aircraft was in 2012.

178. Mr. Lamacchia said that if he had given the Aircraft back to CFC, he would have had to pay CFC funds. Further, he agreed that if import taxes had been paid, the Aircraft would not have been confiscated.

179. In response to learned Queen's Counsel's suggestion that he could have given Allianz notice in January 2013 that the aircraft had been confiscated, the witness accepts that he could have, but did not. He said that 30 days was not much time, there were holidays, he was still trying to get the Aircraft decision reversed, and he said that 10 days before or after, the result would be the same.

180. Mr. Lamacchia accepted that the first time it was mentioned that he had received advice from Mr. Franco was in July 2017. However, he claimed that he told the Judge that, although that is not reflected in the transcript of the Brazilian hearing.

181. The Court notes that in his Supplemental Witness Statement Mr. Lamacchia for the first time states that one of the reasons for incorporating Toby was to own the Aircraft, and he also for the first time claims that he had received oral advice from Mr. Franco in 2008.

182. I gave due allowance for the fact that Mr. Lamacchia may have had some difficulty with the translation, and his memory may not be as good as it was during earlier years. However, I did not find him to be a straightforward or honest witness when it came in particular to his responses about the 2007 Purchase Agreement. His denial of its existence and effect I found incredible and disingenuous, at the very least, and I do not believe he was speaking the truth when he said for the first time in his Supplemental Witness Statement that Mr. Franco had given him oral advice in 2008. I also did not believe him when he said that Toby carried on financial advice business.

Ms. Pereira

183. Mr. Lamacchia's wife Ms. Pereira also provided a Witness Statement. Ms. Pereira was a director of Toby, along with her husband from 2008. She indicated that she and Mr. Lamacchia were also directors of Koba, the sole shareholder of Toby, and of Cape Cold. Her evidence essentially supported what Mr. Lamacchia stated. In relation to the Finance Lease, she indicated that it required, amongst other things, that:

(a) The Aircraft had to be registered with the Cayman Islands Civil Aviation Authority; Toby was not permitted to deregister it or register it anywhere else without CFC's approval: and

(b) The Aircraft had to have a permanent base at Congonhas International Airport, São Paulo, where CFC's Brazilian offices are located.

184. Ms. Pereira was also cross-examined, particularly about the relationship between Koba, Toby and Cape Cold. She also gave evidence with the assistance of an interpreter, at certain points. She insisted that the different companies had different purposes. She also said that she saw no relevance of referring to the 2007 Crefipar Purchase Agreement with CAC because it was Toby that acquired the aircraft from CFC, and that was in 2008.

185. I found that Ms. Pereira's evidence pretty much mirrored that of her husband's. She too gave evidence which I found incapable of belief in relation to the 2007 Agreement and the business carried out by Toby.

Mr. Leite

186. The next witness who gave evidence was Ricardo Cardoso De Meira Leite. He gave a Witness Statement dated 30 September 2015. Mr. Leite indicates that he is a Brazilian citizen, and works as a pilot employed to City Taxi. He has been so employed since May 2010.

187. The witness indicates that from 2008 when Toby leased the Aircraft from CFC, City Taxi was contracted by Toby to provide pilots to fly the Aircraft. He says that his understanding is that the reason for this is that Toby is a foreign company incorporated in the Cayman Islands and so in order for him to protect his employment rights under Brazilian law, it was better for him to remain employed by City Taxi, rather than being employed directly by Toby. Mr. Leite started looking after, and flying the Aircraft for Toby in May 2010.

188. The witness indicates that the flight logbooks for the Aircraft set out details of all the flights taken. The details of each flight are entered in the logbook by the pilots at the time each flight was made. The Aircraft was sold at auction by the FRS and so he assumes that all of the original logbooks will have been transferred to the new owner and are no longer available.

189. Mr. Leite states that he was the pilot-in-command or second-in-command on the Aircraft, with Mr. Celso Nardi, on about 220 flights which it made during the period 29 May 2010 to 19 June 2012. He states that the logbooks indicate that about 107 of the flights for that period were international. It was the witness's evidence that, with the exception of flights which were for maintenance purposes, Mr. Lamacchia and/or Ms. Pereira and/ or Mr. Gonçalves were on all the flights he piloted with Mr. Nardi.

190. Mr. Leite indicates, that as far as he is aware, all the Aircraft's entries into and departures out of Brazil were authorized by ANAC and the FRS and there was full compliance with Brazilian law.

191. On 19 June 2012, he and Mr. Nardi were the pilots of the Aircraft. The Aircraft was flying from Orlando to Congonhas International airport in São Paulo, via Boa Vista International Airport (in Brazil). The only passenger on board was Mr. Gonçalves. A TEAT permitting the Aircraft to enter Brazilian territory had been applied for by the pilots and obtained on 19 June 2012.

192. Mr. Leite describes how they returned to the Congonhas airport on 20 June 2012 to check the Aircraft, and at that time Mr. Nardi was served with the notice of confiscation of the Aircraft, starting the FRS's investigative process.

193. Mr. Leite indicated that he answered the FRS's information requests, with the assistance of Mr. Franco, and Ms. Rosenthal.

194. Mr. Leite was cross-examined. He indicated that only he and Mr. Nardi piloted the Aircraft between June 2010 and June 2012. They received their flight instructions from Mr. Gonçalves when the flight was scheduled. In response to questions regarding the logbook, Mr. Leite indicated that there was only one flight to the Cayman Islands just before Christmas in December 2008. Mr. Leite agreed with Mr. Elkington that in terms of sheer numbers of flights taken by the Aircraft, the majority were within Brazil, but that the Aircraft routinely left and flew out of Brazil before the time limits on the TEAT had expired. One example that Mr. Leite was questioned about was his first flight which was to Uruguay. The witness indicated that the flight was crew only, where as far as he knew, Toby did not have any business, and none of the Directors were on board. The flight was made because the 60-day TEAT limit was about to expire. The witness agreed that there was a pattern of the Aircraft having a number of flights within Brazil, and then just before the permission period expired, which would be not more than 60 days, the Aircraft would be flown out of Brazil.

195. I found Mr. Leite to be a straight-forward witness who was honest with the Court and stated what he knew of the relevant matters.

Ms. Rosenthal

196. The last factual witness called on behalf of Toby was Ms. Celita Rosenthal. Ms. Rosenthal is the Chief Legal Officer of the group of companies, including Toby, owned by Mr. Lamacchia. She is responsible for providing legal services to all the companies owned by Mr. Lamacchia. Ms. Rosenthal up to the time of her Witness Statement dated 30 September 2015, had practiced law for 15 years. She specialises in corporate legal department management and civil litigation.

197. Ms. Rosethal has worked for Mr. Lamacchia's group of companies since May 2004. She reports directly to Mr. Lamacchia and Ms. Pereira. Her duties include the supervision and direction of the legal work performed by the internal and external attorneys hired to provide legal services to the companies. As far as Toby is concerned, she guides and inspects the work done by the lawyers it engages.

198. Her evidence was substantially the same as Mr. Lamacchia's and other witnesses regarding the confiscation of the Aircraft and process leading up to the Administrative Proceedings.

199. Ms. Rosenthal then described the course of the Civil Proceedings. This is not in issue, and is dealt with elsewhere in this judgment. Ms. Rosenthal then described the correspondence with Allianz and the eventual filing of the claim by Toby against Allianz.

200. Ms. Rosenthal was cross-examined extensively about the "*Motion to Deny*". She denied that it was misleading to say that the 2007 Agreement never existed, since what they were saying was that it was never brought into effect; it was cancelled. She denied that there should have been included a statement that the 2007 Agreement with Crefipar was transferred. She also denied that it was misleading to say also in that document that Mr. Lamacchia had no need for a third aircraft since he already had two aircraft, without saying that in fact those two other aircraft were unsuitable for international travel. She said this was the position because he decided to start companies and business outside Brazil and so

he wouldn't have the need to transact business on his own behalf; it would be for his company.

201. Ms. Rosenthal also denied that it was untrue to say, as was said at paragraph 164, that: "*Mr. Lamacchia did not send all the funds to pay for the transaction with the aircraft.*" This is because, although she agrees that all the money used to pay for the Aircraft originally came from Mr. Lamacchia, it was funds he sent to Koba and Koba then paid the expenses of the Aircraft by sending money to Toby. She denied that it was misleading because all the document was trying to say was that Koba exists, and Toby exists, and that the FRS were wrong to ignore the existence of these separate legal entities.

202. Ms. Rosenthal also agreed that Mr. Lamacchia had tried to argue that he was, or could be considered an Italian citizen too, as well as a Brazilian citizen, as there were some alternatives in the Decree that said that the Aircraft could also be used by a foreign person.

203. She accepted that the FRS's conclusion was that Mr. Lamacchia had concurred in the practice of fraud, although she and Toby and its representatives do not agree with that.

204. The following interesting exchange took place between learned Counsel and Ms. Rosenthal during the cross-examination about the pleadings in the Civil Proceedings:

"Q- Could we look at page 679, what was said there.

A- Okay.

Q- The third full paragraph says, "Finally, it must be added that JOSE ROBERTO is also an Italian citizen and resides in Italy. He's a true citizen of the world who makes constant use of the airplane for his trips and in no moment did he want to bring the VP-CAV aircraft into Brazil in a definitive character. This throws cold water on the seizure decree."

Do you see that?

A.....

Yes, it's true.

Q- And that represented his instructions, I imagine?

A- Yes.

Q- He was the one who wanted the aircraft?

A- No. Was not him. He was using it in his business, and he had business outside Brazil. He had a lot of companies that wanted-- that needed the aircraft to--as a way to transport the executives in their business.

Q- He had lots of companies who used the aircraft to transport their executives, did you say?

A.- No. In this case, this aircraft specifically from this case, only for Toby.

Q- But there weren't other aircraft that were used for the international travel of other directors of his companies?

A– No. International, no.

Q- This was the only one?

A- Yes, for Toby's interests."

205. Ms. Rosenthal was then questioned about Toby's answer Question 12 (b) of the Interrogatories. Mr. Weitzman, in his Closing Submissions, with admirable candour, accepted that Ms. Rosenthal had difficulty in explaining Toby's answer. Her evidence goes back and forth for a number of pages in the transcript.

206. The Answer to the Interrogatories, 12 (b), was as follows:

"12 Toby was incorporated in the Cayman Islands in February 2008 and its objectives were unrestricted by its Memorandum and Articles of Association. Further:

(a)...

(b) Toby acquired the Aircraft from CFC under a finance lease. The Cayman Islands were chosen as Toby's place of incorporation, in part because as a foreign incorporated company it was able

to minimise the taxes/duty payable upon entry of the Aircraft into Brazil."

207. Ms. Rosenthal did say quite frankly, when taken to this answer that: *"Yes. Everybody knows that. There's no other reason to-to have a company in this country."* (Cayman)

208. I found Ms. Rosenthal to be a witness who was trying her best to be straightforward with the Court, but ended up giving some incredulous and contradictory answers, particularly when responding to questions about the appeal documents and Toby's purpose.

Allianz's factual witness

Mr. Bodkin

209. The factual witnesses for Allianz then gave evidence.

210. Mr. Bodkin provided a 28 page Witness Statement, dated 10 February 2015. In the Witness Statement, he indicated that he is the Aviation practice leader at Allianz. By the time Mr. Bodkin came to give evidence at the trial, he had retired from his position at Allianz. It is fair to say that a number of matters stated in the Witness Statement have been modified or altered by Mr. Bodkin in cross-examination.

211. In 2008, Mr. Bodkin states, he was employed by Allianz initially, as a regional Vice President, and now as the Aviation Practice Leader. At Allianz he was responsible for underwriting Non U.S. owned general aviation insurance whether the aircraft is United States registered or registered outside the United States. In this role, he reviewed submissions, declined or offered proposals, bound coverage, and managed the issuance of policies, certificates and endorsements.

212. Mr. Bodkin discusses the role of the underwriting department and the relationship with brokers. He states that the main function of the underwriting department is to review submissions (applications) for insurance, determine the acceptability of submitted risks, establish terms and conditions of coverage, provide offering quotations, and determine

whether to accept or decline to write business and to service post-binding orders and the renewal process of in-force policies.

213. It was Mr. Bodkin's evidence that Allianz receives the majority of its applications from insurance or reinsurance brokers who are looking to secure the best terms, conditions and overall insurance programmes for their clients. All correspondence between the underwriter and the client is through the broker. This can generally involve underwriting information, contractual obligations, discussion of policy wording, claims advices, premium collection, issuing certificates of insurance, policy issuance and subsequent endorsements.

214. The witness indicates that accordingly, the Broker is the source of information upon which his company relied in deciding whether or not to provide coverage or take a risk. At paragraph 20 of his Witness Statement, Mr. Bodkin states that: "*...Allianz looks to the broker to provide accurate information about the applicant for insurance and it is based on the information provided by the broker that Allianz decides whether or not to pursue a particular account.*"

215. Reference was made to Allianz Global Corporate and Specialty Rules and Principles ("**the Rules and Principles**") which were established and updated to assure compliance with company policy and guidelines, as well as to allow for consistency of underwriting. The Rules and Principles set out the basis on which risk should be written. It also discusses general underwriting standards and describes internal reporting structures.

216. It was Mr. Bodkin's evidence that, in practice, in underwriting a risk, he looks at a range of factors. He stated that every situation and risk is different and may, depending on its nature, require more or less information. Generally, some of the matters he would look at are:

(1) the name of the applicant;
(2) the identity of the ultimate beneficial owner of the applicant;
(3) the nature of the applicant's business;
(4) where the applicant is based;
(5) where the aircraft is based;
(6) the loss history for the past five years;

(7) how the aircraft is going to be operated and by whom;

(8) who the pilots are (their names, hours flown for the relevant aircraft, ratings, the training received and where and when they last attended the manufacturer's approved simulator based ground and flight school;

(9) how they are contracted (i.e. whether the applicants are employed by the applicant or a third party);

(10) the expected hours per year that the aircraft will be used for;

(11) whether the aircraft is hangared; and

(12) whether the operator operates any other aircraft.

217. Mr. Bodkin states that further questions may arise depending upon the answers received. Each of these factors individually and/or cumulatively can have a bearing on the assessment of the risk, the terms offered (if any) and indeed, whether or not the risk is taken or declined.

218. At paragraphs 24-31 of the Witness Statement, an "*Executive Summary*" provides as follows in relation to the business transacted with Toby:

> "***Executive Summary***
>
> *24. The risk as presented to Allianz was materially false and inaccurate in key respects relating to (i) the identity of the applicant in terms of its business and activities; (ii) how the Cessna C680 aircraft with Registration Number VP-CAV (the* ***"Aircraft"****) was going to be operated; and (iii) the intended use of the Aircraft. All of these matters were addressed by the Plaintiff's Broker and Allianz properly relied upon the information that was provided as being accurate. These are all individually key matters in determining the risk.*
>
> *25. In this regard, (i) the business of the company leasing the Aircraft (the Plaintiff) was falsely misrepresented; (ii) the period over which the Plaintiff had conducted business was falsely misrepresented; (iii) the method by which the Aircraft was operated was falsely*

misrepresented; (iv) the owner of the Aircraft was falsely misrepresented: and (v) the intended use of the Aircraft was falsely misrepresented.

26. *The above-mentioned misrepresentations and non-disclosures are also connected to the true ultimate ownership of the Plaintiff (which was not disclosed to Allianz prior to entry into the Allianz Policy) and the actual use of the Aircraft itself.*

27. *Over and above this, it is fundamental that prior to entry into the insurance contract, there is full disclosure of all material facts. In addition, it is implicit in seeking coverage that the Aircraft is being operated properly and lawfully in the country within which it is based, and indeed in all countries which the Aircraft travels to and from.*

28. *In this instance, I note from the Witness Statement of Mr. Julio Costa dated 30 September 2015 ("**Julio Costa's Statement**") that the Aircraft was originally impounded by the Brazilian Customs Authorities (in conjunction with the Brazilian Federal Police) and then ultimately forfeit following decisions by ... the* [FRS] *and the* [FRS] *Superintendency that the Aircraft was being operated in Brazil unlawfully, that import duties had been wrongfully not paid as part of a fraudulent Tax Evasion Scheme and that declarations made to the Brazilian authorities had been completed fraudulently both prior to and after the commencement of the Policy in May 2012. Mr. Costa's statement also addresses Civil and Criminal Proceedings relating to the Aircraft in Brazil.*

29. *In Underwriting any risk that is presented to Allianz, it is implicit that the aircraft subject to the proposal for insurance had been, was being and would continue to be operated legally in all jurisdictions to which it was subject and that the applicant was paying all required taxes and duties. The presentation of the risk is on the basis*

that the Aircraft had been operated in accordance with the law of those jurisdictions to which it had been subject and would continue to do so.

30. *Accordingly, in underwriting the Aircraft, I understood that the Aircraft had been properly "based' in Brazil in accordance with Brazilian law. However, it is clear, from a review of Julio Costa's Statement that the Brazilian Tax Authorities have concluded that the Aircraft was being used improperly for years, as has been affirmed upon appeal to the* [FRS] *Superintendency, and that the Aircraft continued to be improperly and unlawfully used after the Policy was entered into resulting in its seizure. It was the non-payment of such duties that therefore led to the Aircraft being seized.*

31. *At the time of underwriting the risk, the Tax Evasion Scheme, which the above-mentioned Brazilian authorities have concluded was in place, and the consequent risk of the Aircraft being impounded and then forfeit was not disclosed. If I had known that the Aircraft was being operated in contravention of the payment of taxes and/or duties due, I simply would not have provided insurance."*

219. Mr. Bodkin also gave evidence with regards to Allianz London. He indicated that Allianz London is the London branch of Allianz Global Corporate & Specialty SE, a subsidiary of AGSC Germany. He indicates that he has been informed by Allianz London that it provided Hull All Risk, Third Party, Passenger and General Liability and Crew Personal Accident Insurance as per London Aircraft Policy AVN1C and Lloyd's Accident and Illness Policy NMA2989 to the Plaintiff prior to 2012 when Allianz undertook the risk underwrote the risk. Allianz London was on risk during the periods 6 May 2008 to 5 May 2009, 6 May 2009 to 5 May 2010, and 6 May 2010 to 5 May 2011. Allianz London was not on risk in the year proceeding May 2012 when Mr. Bodkin was told by UIB that the market was 100% CV Starr London.

220. Mr. Bodkin sought to make it clear that he had no knowledge that Allianz London had previously underwritten the risk when he underwrote the risk in 2012. As far as he was aware, there had been no prior business with Toby and indeed that was his understanding following an express request to London in that regard. He only learnt that Allianz London had previously underwritten the risk after these proceedings had commenced.

221. In cross-examination, Mr. Bodkin agreed that he made no notes, other than perhaps a manuscript note on the document, and that would indicate that it was a fairly straight-forward risk. He indicated that UIB came to him as Toby's existing Broker, not as a new broker.

222. The following is a summary of the things that Mr. Bodkin accepted during cross-examination, that he was aware of:

(a) The details of the Aircraft; that it was a Cessna 680 aircraft.
(b) That it had been manufactured in 2008.
(c) Maximum of 2 crew and 9 passengers.
(d) Maximum take-off weight 30,300 lbs.
(e) Insured Toby, was a Cayman Islands company.
(f) Aircraft registered in the Cayman Islands (VP-CAV so indicates).
(g) Aircraft had been leased by Toby from CFC.
(h) Aircraft's hangar of maintenance was Cessna Orlando.
(i) Aircraft intended for private use with professional pilots-hours flown and training qualifications.
(j) Airport with highest frequency Congonhas International airport in Brazil.
(k) Aircraft based in Brazil at Congonhas airport.
(l) Based in hangar belonging to entity known as TAM.
(m) Geographical area for which cover was sought was North, South and Central America.
(n) Told no claims in last 5 years.

Mr. Bodkin indicated that, when in his email he asked for and said "*we would appreciate if you would provide a thorough description of the business of the insured and/ or perhaps a website*", he was not saying that his quote was conditional. He further said that it is correct that at that stage he had already made his underwriting decision as to matters, including the terms of the offer.

224. As regards the reference to Mr. Gonçalves in Mr. Pollen's email, Mr. Bodkin admits that he had no idea who Mr. Gonçalves was. He agreed that the reference to Mr. Gonçalves could not assist him in assessing whether there was legal reputation risk.

225. The Court notes that Mr. Bodkin also went so far as to agree with Mr. Weitzman that, based on the information he had before, he had determined no legal or reputational risk prior to sending the email request of April 19, so on that basis, and in that order, paragraph 55 of his Witness Statement was untrue.

226. As regards the Internal Allianz Underwriting Sign-Off Form, the witness again agreed with learned Queen's Counsel that the Form does not focus specifically on the information relied on in making the underwriting decision; it focuses on the information Allianz had at the point that this document is completed.

227. Mr. Bodkin agreed that it is in the nature of speculation to say that he would have looked at the 27 April 2012 email on the weekend. He therefore agreed that the assertion in paragraph 64 of his Witness Statement where he states as a certainty that he reviewed his email of 27 April 2012 and that he relied on it in making an underwriting decision is untrue.

228. I also note that Mr. Bodkin agreed with Mr. Weitzman's suggestion that paragraph 64 was put in his Witness Statement, which he signed, simply to support Allianz's case even though it was untrue.

229. Mr. Bodkin said that the statement that Toby was a stockbroker and which had existed for 30 years were important factors on which he relied in underwriting the risk and were both factors which induced him in taking on the risk, was untrue because he had quoted before

his. He also agreed that there was no difference in risk between a stockbroker and a company carrying on an investment business, a company in the financial services industry.

230. He also agreed that paragraph 71 of his Witness Statement was incorrect.

231. Mr. Bodkin agreed that it was untrue (paragraph 75 of his Witness Statement), that the contract statement induced him on behalf of Allianz, to take on the risk. Provided the pilots were appropriately qualified, that was an end of Mr. Bodkin's interest in the matter.

232. The witness agreed that it is common knowledge that the Cayman Islands are an offshore financial centre, with a benign tax regime and many persons establish companies in the Cayman Islands in order to take advantage of that tax regime. Mr. Bodkin accepted that he knew that the Aircraft was registered in Cayman Islands and leased by a Cayman Company, although based in Brazil, and was intended to be tax efficient. He agreed that he asked no questions about these tax matters.

233. Mr. Bodkin agreed with Mr. Weitzman that, if he had been told that Mr. Lamacchia is one of the richest men in Brazil, and such matters, and that he is the owner of Toby through a holding company, that he has interests and businesses described, that Toby was simply there to lease the Aircraft and that the Aircraft will be used as Mr. Lamacchia directed, that would have been a better risk than was presented to him.

234. The witness indicated that if he had been told at the time that the account was submitted to him that Toby was owned by Koba, and Koba was in turn owned by Mr. Lamacchia, who owned City Taxi and TAM, it would have all been part of Mr. Bodkin's underwriting package, and none of those matters would have caused him concern when he underwrote the risk.

235. Mr. Bodkin was also questioned about other Allianz personnel. He indicated that Brian Hogan is a Senior Claims Adjuster based out of the Chicago office. He worked with Tim McSwain on adjusting the claim. He had 40 years' experience in the business, so Mr. Bodkin assumes he would be familiar with the concept of avoidance, for misrepresentation or material non-disclosure.

236. Tim McSwain was Director of the Fields Office Claims Department. Generally speaking, it is a general aviation claims department. Mr. McSwain is an attorney and also an accomplished pilot and certified flight instructor. He is retired. He too would be very aware of the concept of avoidance. Mr. Bodkin agreed that there have been several changes in personnel, and Mr. Erin Rivera is now the Claims Attorney.

237. The email from Mr. McSwain to Mr. Dampier dated 10 September 2012, represents the lead comments. Mr. McSwain's response was that the problem can be resolved by "*completing the required paperwork and perhaps paying a fine.*"

238. Mr. Bodkin was then referred by Queen's Counsel to the letter from Mr. McSwain to Mr. Lamacchia — the Declinature Letter. He said that the claims department is separate from underwriting and he may not necessarily have been consulted; he may have been, but it was more Mr. McSwain advising what he was doing, rather than consulting. The claims department would have carried out investigation, reviewed the policy, and would also have reviewed the underwriting file.

239. Reference was made to the telephone conference on 25 July 2013 between Allianz and representatives of Toby. On the Allianz side there was Mr. McSwain, Mr. Kevin Murphy — a Claims attorney based in the Atlanta office. Mr. Bodkin did not recall specifically being there; if he was it would have been more as an observer.

240. Mr. Bodkin was also referred to the letter to Toby from Lili Rubenstein, an aviation attorney employed by Allianz. Mr. Bodkin says that this may have been the first time that he was aware that Allianz had decided to avoid the Policy. His evidence was, that as underwriter, if anyone was induced to write the Policy, it would have been him. Mr. Bodkin does not recall Allianz seeking his views as to inducement, before it decided to avoid the Policy. It was also noted that the letter contains no reference to the email of 27 April 2012 or the alleged misrepresentations in that letter.

241. At the end of this extensive cross-examination, Mr. Bodkin agreed and accepted that a large number of the statements made in his Witness Statement are untrue. He said that

while a good bit of it was drafted for him, he does not agree that it was drafted to support Allianz, without any regard for the actual circumstances of this placement.

242. Mr. Bodkin was then re-examined by Mr. Elkington Mr. Bodkin confirmed that he is not in the habit of deleting emails without reading them. He also indicated that, if the pilots are not employed by the insured, but are employed instead by a third party, this makes the liability exposure less attractive. He claimed that he would have acted differently if he had known that they had to fly in and out of the country in order to satisfy the temporary permit. He indicated that if the avoidance of import taxes in Brazil was a matter of evasion, thus illegal, that would have been of interest to him. If told the purpose of the whole arrangement was avoidance of tax and paying import duties in Brazil, he would not have written the account.

243. Mr. Bodkin said that he could not recall a specific meeting where all underwriters summarised what had transpired immediately prior to the Avoidance Letter being sent. However, he assumed that over the period between notification of confiscation and the Avoidance Letter, there would have been discussions.

244. With the Court's permission, Mr. Weitzman asked one further question in cross-examination, as follows:

> *"Q- There was no liability to a pilot in respect of injury occurring while pilot engaged in operation of aircraft?*
>
> *A- In this policy wording, apparently not. But referring to Section III, pilots are passengers."*

245. I found that Mr. Bodkin was a frank and honest witness when giving his oral evidence. He made reasonable concessions when put to him, and admitted when he had made mistakes. However, it was obvious that his Witness Statement had been drafted for him, he signed it and either had not read it carefully, or was now recanting a number of important matters that were therein stated.

Ms. Ojeda

246. The next witness called by the Defence was Ms. Carmen Ojeda. She gave a Witness Statement dated 2 October 2015. Ms. Ojeda stated in her Witness Statement that she is an underwriting specialist at Allianz. She had been an Aviation Underwriter for approximately 17 years. Prior to working with Allianz she had worked with USAIG for 18 years. She always specialised in the non US market. She was hired at USAIG as an Assistant Underwriter, working for Mr. Bodkin in the International Department, handling the administrative work. After 10 years, she was promoted to Aviation Underwriter. Then, two years prior to leaving USAIG, she was promoted to Assistant Vice President in the International Department.

247. Ms. Ojeda moved to Allianz in July 2008. She states that she is currently an Underwriting Specialist, who had worked with Mr. Bodkin in the Non US Book.

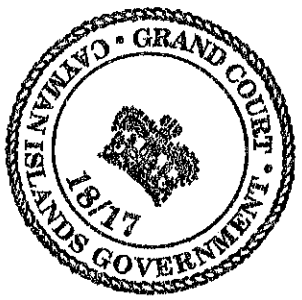
248. She indicates that in connection with entering into the Policy, she assisted Mr. Bodkin administratively in connection with the Aircraft. In that regard, she was copied into email correspondence between Mr. Bodkin and Andrew Pollen of UIB relating to the Aircraft. In addition, she says that she reviewed the first Proposal sent by Mr. Bodkin to Mr. Pollen (and copied to her) on 19 April 2012 ("the **First Proposal**") and Mr. Bodkin's request that UIB provide a thorough description of the business of the applicant so as to be able to evaluate the risk. She said that in this respect, obtaining information about the insured and its business is crucial in order to be able to assess the risk and "*for the reasons set out in Mr. Bodkin's Statement of 2 October 2015, with which I agree*".

249. The witness indicates that she also reviewed the Second Proposal sent by Mr. Bodkin to Andrew Pollen (and again copied to her) on 25 April 2012 ("the **Second Proposal**").

250. In respect of her review of both Proposals, these were only quotations and her role was essentially administrative, to effectively "*proof read*" both documents. She therefore checked the Proposals in order to ensure that there were no small errors and to make sure that the documents were ready to be sent out. Having checked the proposals, she then recorded that by signing and dating each of them.

251. The witness states that Mr. Pollen sent to both herself and Mr. Bodkin the email dated 27 April 2012, with information about the Plaintiff's business operations.

252. Ms. Ojeda states that it can be seen from the email that Mr. Pollen expressly confirmed:



(i) The business that Toby was engaged in;

(ii) That it had been in business for 30 years;

(iii) The name of the individual who owned the company;

(iv) That the Plaintiff *"operate the aircraft and contract their own pilots"*; and

(v) That it was a "*corporate jet*".

253. Ms. Ojeda stated that these facts, relating to whom the applicant for insurance is and the type of business that the applicant is engaged in, are extremely important in assessing the risk. She said that she, on behalf of Allianz, relies and expects the information provided by the Broker to be fully accurate in all respects. She would trust that the information provided by the Broker about the applicant for insurance is accurate; once reviewed, the risk is underwritten only on the basis that the information, previously submitted, is accurate.

254. She states that Mr. Pollen's email was followed by another email from him dated 30 April 2012, which stated:

> *"We have now received a firm order based on the quote provided by you".*

255. By way of the same email, Mr. Pollen specifically asked:

> *"Please can you just confirm that the information we have provided you is sufficient enough for you to accept this order?"*

256. Ms. Ojeda says that, because Mr. Bodkin was out of the office on 30 April 2012, and after she had carefully considered the information provided by Mr. Pollen, she replied to Mr. Pollen's email in the following terms:

> *"Good Morning,*
>
> *Please note that Brian is not in office today.*

Thank you very much for the firm order.
To answer your question, yes the information provided with respect to business of the Insured is sufficient.
Our records indicate that we had quoted two different Insured Values for this aircraft ($17.1+ M and $14M), please advise which value Insured has opted for.
Thank you and await your response."

257. Ms. Ojeda's evidence is that having reviewed the file, she expressly confirmed to Mr. Pollen that she had reviewed the information and concluded that it was "*sufficient*" (in response to his specific request).

258. She continued that it is necessary that she, on behalf of Allianz, has the information relating to the applicant for insurance before being able to move forward with the process to bind coverage. Having reviewed the information and the file, it was clear that the questions which had been raised by Mr. Bodkin had been answered and did not give rise to any concerns which would warrant further enquiries. She stated that without the information, it would not be possible to complete the "*Underwriting Sign-Off*".

259. On 30 April 2012, Mr. Pollen replied to her email and confirmed that the order was based on the US$14 million value.

260. After binding coverage and adhering to Allianz's procedures, she completed the internal *"Underwriting Sign-Off"* Form. In the box entitled "*Underwriting Rationale"*, she confirmed that:

> *"Underwriting Rationale:*
>
> *Industrial Aid. Corporate Jet for a Stockbroker (in business 30 yrs). Aircraft based in Brazil but Cayman Island Registered and address. Pilots with adequate hours and annual training (cleared with our offices in Brazil and London)."*

261. Ms. Ojeda's evidence is that the information contained in the *"Underwriting Rationale"* section was derived from Mr. Pollen's email of 27 April 2012.

262. Since Mr. Bodkin was not in the office, Ms. Ojeda completed the form as submitting underwriter and requested Mr. Maher, Aviation Practice Leader, to provide the second required signature.

263. Ms. Ojeda on 30 April 2012 sent to Mr. Pollen the Aviation Policy Binder Confirmation, Placing Slip and Certificate of Insurance.

264. Ms. Ojeda states that "*if she had any reason to suspect that the Aircraft was being used unlawfully, including in the way that has been found by the Brazilian Tax Authorities*", she would not have proceeded to bind the risk, and instead would have raised her concerns with Mr. Bodkin.

265. In cross-examination, Ms. Ojeda said that learned Counsel was right in thinking that her role in relation to the Policy was essentially administrative and that it was Mr. Bodkin who took the underwriting decisions.

266. She said that the fact that she handled this so early in the morning suggests that she definitely spoke to Mr. Bodkin. She doesn't recall exactly when, but she is sure it took place. She said manuscript note records the conversation she had with Mr. Bodkin that day. She denied that as regards the email with information, she would, if she had had a conversation with Mr. Bodkin, have made a note. She says not necessarily — she did not make a note of every conversation.

267. She says that she is also an authorised underwriter. Although originally her role was administrative, when it comes to the point that she signs a binder, she would read the information provided. She said she was thinking if it was enough information for her to insure the risk, bearing in mind that she was binding coverage; she reviewed the information to see if it was sufficient.

268. The witness indicated that she would defer to Mr. Bodkin's views in most cases, as to what was and what was not important from an underwriting perspective. She said that if it had said *"investment company"*, she would have asked more questions, but that would be if it had differed from any information provided previously, which it did not.

269. If she had any doubts about the sufficiency of the information, she would have consulted with Mr. Bodkin, because it was his risk and he was the person she would look to in order to make the underwriting decision.

270. In re-examination, Ms. Ojeda said that she would want to know about losses of business as distinct from aircraft, if for example, loss was due to neglect. If she had been told that Toby did no business at all, other than leasing the Aircraft, then that would have set off an alarm. If UIB had said Toby existed for 4 years, instead of 30, that would have an effect, because then it would be still considered a start-up operation. It would not have been an attractive risk.

271. My impression of Ms. Ojeda is that she was an honest and hard-working person, but who had at times overstated the role that she played in the placement with Toby before stating in cross-examination that her role was mainly administrative, and that it was Mr. Bodkin who took the underwriting decisions in relation to the Policy.

Mr. Rivera

272. The next witness called by the Defence was Erin Rivera. Mr. Rivera indicated that he joined Allianz in September 2014 and in the same month began assisting it in respect of these proceedings.

273. Prior to being employed by Allianz, he was an Aviation Claims Specialist with American International Group for 7 years. He is also admitted as an Attorney-at-Law to the New York State Bar and he holds a Bachelor of Science in Professional Aeronautics. He has also served in the United States Air Force as a Helicopter Flight Engineer.

274. In 2012 and 2013, Mr. Rivera states, the Claims Manager with principal responsibility for Toby's claim was Mr. Tim McSwain, Allianz's Chief Claims Officer (Aviation) for the Americas. However, he indicated that Mr. McSwain was no longer employed by Allianz, but that he, Mr. Rivera, was fully familiar with the claims file relating to the Aircraft.

275. Mr. Rivera indicated that although he understands that the Aircraft was impounded by the Brazilian Authorities on 20 June 2012, Allianz was not informed that the Aircraft had been impounded for a considerable time.

276. In that regard, he stated that he believes that the first contact received directly from Toby as to the Aircraft being impounded was by letter dated 29 August 2012.

277. The letter of 29 August 2012 reads as follows:

> *"Subject: Citation 680-VP-CAV*
> *Confiscation by Brazilian Government*
>
> *TOBY LLC, legal company based at One Capital Place, post office box #847, Georgetown, Grand Cayman, Cayman Island, was notified by the Brazilian Government about the confiscation of the aircraft VP-CAV, Citation 680 Sovering . This aircraft is insured by Allianz under policy number 12A675242184, period from May 6th, 2012 to May 6th, 2013, issued by UIB.*
> *Considering that under the above mentioned policy number there is a clause mentioning that all obstacle related to the insured must be informed to its Insurers, we would like to inform Allianz that the Aircraft under this insurance policy was confiscated."*

278. Mr. Rivera's evidence is that the notification from Toby contained virtually no information relating to the circumstances why the Aircraft had been impounded and the nature of the claims which had been made by the Brazilian authorities.

279. Mr. Rivera went on to note that on the same day, Toby also sent a letter again to UIB and to Allianz, as well as to UIB in Brazil and Good Winds stating:

"Ref. Airplane confiscation

Toby LLC, placed at One Capital Place, Caixa Postal 847, Georgetown, Grand Cayman, Ilhas Cayman, represented by its legal representative, notify the companies mentioned above, regarding the happenings that toke [sic] *place at 06.20.2012:*

1. *Toby LLC, is the owner of an airplane, which is secured by Allianz Global Corporate & Specialty, policy number 12A676242184-valid from 6th May 2012 to 6th May 2012 -, the insurance negotiations were intermediated by United Insurance Brokers Limited.*
2. *In 06.20.2012, the airplane VPCAV, Citatiore 680 Sovereing* [sic], *insured by Policy Number 12A675242184 was arbitrarily confiscated.*
3. *Regarding the terms of the policy, in which there is the contractual provision that any disturbance in the possession of the insured airplane should be brought to your knowledge we are notifying the companies that the airplane insured in the policy number 12A67542184 was confiscated.*
4. *Best regards,*

TOBY LLC

José Roberto Lamacchia"

280. Mr. Rivera points out that this letter also does not contain any explanation as to why the Aircraft had been impounded.

281. Mr. Rivera then indicated, that to the best of his knowledge, and from a review of the correspondence between the parties, Allianz heard nothing further from Toby until 26 February 2013, when it received a letter in the following terms:

"Object: Citation 680-VP-CAV

Immediate Notice of Claim-Confiscation decreed by Brazilian Government

TOBY, legal company based at Fourth Floor, One Capital Place, PO Box 847, Grand Cayman, Cayman Island, was notified by the Brazilian Government about the confiscation of the aircraft VP-CAV, Citation 680 Sovering as copy attached. This aircraft is insured by Allianz [sic] *under policy number 12A675242184, period from May 6th 2012 to May 6th 2013, issued by UIB, and was hired coverage against "Aviation Hull" "War and Allied Perils", including confiscation by order of any government or public or local authority.*

Therefore, this serves to inform about the claim and that should pay the amount agreed by the total loss directly to Toby, beneficiary of the insurance. Toby does not recognize the existence of any other contractor or additional beneficiary."

282. Mr. Rivera indicates that Allianz therefore only received notification of a claim some 8 months after the Aircraft had been impounded by the Brazilian Customs Authorities; the letter dated 26 February 2013 constituting the first actual notification of a claim by Toby on the basis that the Aircraft was allegedly a "*total loss*". Again, Mr. Rivera says, virtually no information was provided to Allianz by Toby.

283. The witness says that it would appear from the file that the letter annexed to it a translation of an Assessment produced by the FRS (the "*Assessment*"), but not with any supporting or related documents. There was also no explanation of the Assessment or any commentary on it.

284. On 22 April 2013, Allianz responded to Toby's claim of 26 February 2013, in which they stated their understanding that the Aircraft had been detained by the Brazilian Government on the basis of the following illegal actions:

" (i) falsifying or tampering with shipping documents of foreign goods;
(ii) forging or tampering with foreign goods title documents;
(iii) failure to pay full taxes due on foreign goods through "intentional artifice";
(iv) fraudulent interposition of a third party in importation of goods."

285. Mr. Rivera states that it is clear from a review of the Assessment that each of the grounds relied upon by Allianz, for declining cover mirror the complaint set out in the Assessment itself.

286. Mr. Rivera states that, at this stage, to the best of his information and belief, Allianz remained unaware that the representations and non-disclosures relating to (i) the ownership of the company; (ii) the nature of the Plaintiff's business; and (iii) how the Aircraft was operated, were false.

287. He indicates that although very little information had been provided by Toby, the Assessment confirmed that the Aircraft had been impounded for the non-payment of import duties. In those circumstances and given the exclusion in the Policy that related to loss arising as a result of *"Any Other Financial Cause"* and, he says, given further that the Aircraft had been confiscated due to Toby's illegal and/ or unlawful activity, Allianz declined the request for coverage.

288. On 30 April 2013, Toby sent a further demand to Allianz, seeking payment under the Policy, on a total loss basis. The letter states as follows:

"Object: Citation 680-VP CAV
Payment of Insurance

TOBY, a legal company based at Fourth Floor, One Capital Place, PO Box 847, Grand Cayman, Cayman Island, exposes and requires the following:

TOBY has announced Allianz on August 30th, 2012, about the confiscation of the aircraft VP-CAV Sovering Citation 680 (8 months ago), and asked to pay the insured on February 28th, 2013, when was

notified by the Brazilian Government about the confiscation of the aircraft.
This aircraft is insured by Allianz under policy number 12A675242184, issued by UIB, and was hired coverage against "Aviation Hull "War and Allied Perils", including confiscation by order of any government or public or local authority.

However, so far TOBY not received any response from Allianz with the date on which will occur the insurance payment [sic].

Toby has had a lot of expenses due to the delay in providing the response by the Insurer, including costs of using another aircraft to continue its operations, and these expenses, and all other by Toby incurred, including legal fees, will, according to the insurance policy, be charged directly to the insurer.

Therefore, we hereby request, again, that Allianz pay the amount agreed upon by the total loss with the utmost urgency directly to Toby, beneficiary of the insurance. Toby does not recognize the existence of any other contractor or additional beneficiary.

As a lawyer of Toby, comes to NOTIFY that if payment is not made within five (5) days of receipt of this, Toby will take legal action to receive the amount due.

Regards,

TOBY
Celita Rosenthal Boraks
Lawyer"

289. Mr. Rivera states that it was at least a year before Toby, through its then Cayman Attorneys, began to provide any substantive information at all.

290. He explains that there was further correspondence with Toby's Attorneys. Also, at the same time, the Administrative Proceedings took time to complete. Whilst the FRS Superintendency decision was rendered in late September 2013, it was some months later, in November 2013 that a copy of this decision was provided to Allianz under cover of a letter dated 8 November 2013.

291. Mr. Rivera indicates that Allianz was also told that Toby intended to challenge that decision before the Civil Courts in Brazil. Further, that whilst Toby threatened proceedings under the Policy, it did not serve proceedings which it had commenced in the Courts of the Cayman Islands until May 2014. In the circumstances, he says, Allianz instructed Brazilian Counsel and investigated further the Proceedings that were on-going in Brazil.

292. Mr. Rivera closes his Witness Statement by saying that, as a result of those investigations, and an analysis of the findings in the Administrative Proceedings, the extent of Toby's Tax Evasion Scheme became clear. He says that it was in that context, that Allianz wrote to Toby to formally avoid the Policy for material non-disclosure and misrepresentation and tendered the return of premium.

293. In cross-examination, Mr. Rivera indicated that he is no longer employed to Allianz. He left Allianz in September 2016. At the time when he joined Allianz in September 2014, it had already been served with the proceedings, it had purported to avoid cover in March 2014, and served its initial defence in July 2014, all before Mr. Rivera joined Allianz. Mr. McSwain was replaced before Mr. Rivera joined.

294. Mr. Weitzman asked Mr. Rivera whether he was called to give evidence for Allianz despite the fact that he no longer works there, and others with greater involvement than him, who also no longer work there, were not called? Mr. Rivera said he didn't know whether they had more involvement but that, admittedly, Mr. McSwain had been involved from the start. Mr. Rivera conceded that his evidence in so far as it is based on events prior to September 2014 is based upon hearsay and upon documents.

295. Mr. Rivera indicated that Allianz does claim privilege regarding its internal notes concerning the decision to deny coverage and avoidance of the Policy. He says that Allianz had external legal advice at a very early stage, but advice from Cayman Counsel did not come until later.

296. Allianz was aware of Operation Forced Landing shortly after it occurred on 20 June 2012. Mr. Weitzman then indicated that he is asking the Judge to find that Allianz was aware of Operation Forced Landing for some time before 29 August 2012 and it had identified a list of persons insured by it which had been subjects of the Operation.

297. Mr. Rivera was questioned about the Declinature Letter. He said that it may not have been apparent to Allianz that delay gave it a defence, at the time it sent out that letter. He also indicated that, had Allianz known the information available to deny the Policy by avoiding it, then it could have done it at that time.

298. As regards the Avoidance Letter, it is Mr. Rivera's evidence that Allianz checked with the underwriter before writing that letter, but this is subject to the claim of privilege. Mr. Weitzman suggested to Mr. Rivera that in the Avoidance Letter, no allegation of misrepresentation is made.

299. It was put to the witness that Allianz essentially relies upon two matters in order to avoid, one being the email of 27 April 2012, and the other being the alleged illegal acts in breaching Brazilian law in relation to import duty. Mr. Rivera does not agree that in light of Mr. Bodkin's evidence, that defence is opportunistic, in that the email played no part in Mr. Bodkin's underwriting decision. Mr. Rivera also did not agree that Allianz's defence that there was no loss within the Policy period was opportunistic, because loss depends upon what is ultimately decided.

300. Mr. Rivera did not agree that Allianz, having entered into a settlement with CFC for US$3.6 million and now saying the effect of that settlement is that it is not now obliged to pay anything, (although it had agreed to total loss of US$14 million), is opportunistic.

301. Mr. Rivera was then re-examined. He indicated that Allianz only received advice from Cayman lawyers in January 2014.

302. He was asked questions about Toby's Motion to Deny. He indicated that if Allianz had known that a claim for indemnity was going to be made, it would have wanted to have input into that document. It would have wanted to be able to assist, in the event that they could have helped in getting the Aircraft returned, so as to avoid a claim in general.

303. In general, I found Mr. Rivera to be a careful witness, but whose evidence suffered from the fact that he had not been at Allianz until September 2014 and therefore a considerable portion of his evidence simply came from going through the file and was not based upon his first-hand knowledge.

The Brazilian Law Experts

304. It may be useful for me to set out some of the areas of agreement and disagreement between the Brazilian law experts. These were helpfully set out in a Joint Memorandum dated 25 July 2017 prepared by Mr. Bergamini and Ms. de Araujo.

305. The experts agreed that the Brazilian Federal Constitution extends to participants in Administrative Proceedings the same ensemble of fundamental rights to which participants in judicial proceedings are entitled.

306. They also agreed that the judicial branch of the Brazilian government may review decisions made by the administrative branch. However administrative decisions remain valid and binding unless overruled by the Court.

307. However, the experts disagreed on the question of impartiality/partiality of Administrative Authorities and about how the Code of Conduct applicable to Public Agents in practice takes effect.

308. Mr. Bergamini expressed the view that, although the administrative authorities' duty is to be impartial, practice shows that they favour the National Treasury. According to a study conducted by the FRS, the rate at which tax liabilities were upheld in all administrative

levels in the year 2013 was 86.03% and, particularly, at the 2nd Instance-Administrative Council of Tax Appeals ("**CARF**") - 97.67% of the CARF's decisions on the cases heard were decided in favour of the National Treasury.

309. Ms. de Araujo on the other hand, opined that, pursuant to article 37 of the Brazilian Federal Constitution, the administrative authorities are bound by the principles of legality, impersonality, morality, publicity and efficiency. They have a duty to be impartial and act independently. The FRS's agents are further bound by the Code of Conduct of the Public Agents of the FRS, according to which the agents in charge of administrative proceedings of any kind must be impartial, diligent and work in a timely manner, always seeking the truth from facts. Further, that there is nothing in the Administrative Proceedings that implies that they applied a biased treatment to Toby or Mr. Lamacchia.

The Temporary Admission Regime

310. The experts were agreed that the TAR is governed by the FRS's Normative Instruction 285/2003 ("**the Normative Instruction**") and Decree 97,464/1989 ("**the Decree**"). It was also common ground that Article 75 of the Decree 37/1966 regulates import tax.

311. The experts disagree on the meaning and effect of the declaration signed on completing a TEAT. Mr. Bergamini opined that an aircraft can be admitted under the TAR simply by submitting a form (i.e. a TEAT) filled in by the aircraft's commandant, who does not have technical knowledge about the tax laws in force. Therefore, the main information to be considered for the purposes of the customs regime is provided by someone (i.e. the pilot) who does not know the tax consequences to which the interested party (i.e. Toby) may be subject if there is a mistake in the filling in of the form. Accordingly, the tax authorities should have considered whether a mistake was made, before serving a notice of assessment on Toby and Mr. Lamacchia. Any mistake while filling in a TEAT can be subject to voluntary correction by the FRS, as is the case with other ancillary tax liabilities.

312. Ms. de Araujo on the other hand, takes the view that each TEAT embodies a declaration for the interested party to sign in which he/she acknowledges the tax obligations arising from the entry of the aircraft described in this document into the country, as well as of their

equipment and accessories, and assumes full responsibility for compliance with the applicable customs legislation, undertaking to re-export them or give them any other destination in accordance with the laws within the deadline set by the customs authority and specified in box 6, undertaking, as appropriate, to pay any taxes and liens and to bear the penalties applicable to breaches resulting from events of default. Thus, the meaning of this declaration is that the taxpayer acknowledges being responsible for the information that he/she provides to the customs authorities and is thus subject to the liabilities resulting from the non-compliance with customs regulation.

313. The experts disagree on whether there is a requirement for the aircraft to be admitted on a temporary basis. Mr. Bergamini states that, in general, the requirements for any aircraft to be granted temporary admission are set out in the Decree and the Normative Instruction. In particular, according to the Decree and the Normative Instruction for the granting of a temporary admission permit to foreign aircrafts it suffices that (i) the flights are irregular; (ii) they are not paid; (iii) that all required authorisations issued by ANAC and the FRS be granted; and (iv) the admitted aircraft does not stay in Brazil for longer than the period specified in the permit. That was precisely what happened every time that the VP-CAV, Citation 680 Sovereign, serial number 680-0202 aircraft (i.e. the Aircraft) entered the Brazilian territory. Considering that the requirement for "*additional unpaid flights*" mentioned in sub item "*e*" of Item IV of article 2 of the Decree, is not associated with any other condition, the nature of the trip, if on business or tourism or passengers' qualifications are irrelevant factors. According to this provision, he argues, all trips by the Aircraft qualified for the benefit of temporary admission, as the flights were irregular and unpaid.

314. Ms. de Araujo on the other hand, states that according to Article 9 of the Decree, the initial term for a foreign aircraft not engaged in regular international services to stay in the territory is of sixty (60) days, being permitted by an extension thereof for equal terms of forty five (45) days, upon request to the aeronautics and customs authorities.

315. The experts also disagree on whether there is a requirement for admission of an aircraft to be "*Temporary*" when admission is permitted in accordance with Article 2, Section IV, paragraph "*e*" of Item IV of the Decree.

316. Mr. Bergamini is of the view that the Temporary Admissions granted to Toby would have been justified solely and exclusively on sub-item *"e"* of Item IV of article 2 of the Decree, covering the existence of "*other unpaid flights*". Said "*other unpaid flights*" means several of those detailed in sub-items (a) through (d) of the same item, which cover, for example, tourism or business trips, when the owner is an individual or if it is the trip of an officer or representative of the company when the aircraft is his/her own. Therefore, to qualify for temporary admission, it would have been sufficient to identify the flights "*purpose*" in the TEAT as "*other provenly unpaid flights*" (one of the options in the TEAT), as per Annex V of the Normative Instruction.

317. Ms. de Araujo, on the other hand, opines that the requirements for admission of an aircraft to the TAR apply to any and all foreign aircraft entering or flying over Brazilian territory pursuant to the Decree. Therefore, foreign aircraft entering the territory under Article 2, Section IV, paragraph "*e*" of the Decree are also required to stay in the country only for the time necessary to fulfill the purpose of the flight (which purpose must be informed to the Customs authorities in the TEATs). Those aircraft are also bound by the 60 day period of stay, extendable to equal periods of 45 days.

318. The experts expressed differing views as to the effect on eligibility for the TAR of Toby having a Permanent Base for the Aircraft in Brazil.

319. It was Mr. Bergamini's view that as the Aircraft had several entries in Brazil before its seizure, the FRS has always been aware of the admission conditions (unpaid and non-regular flights; and the aircraft was not in the country for more than 60 days, renewable for an additional period of 45 days) of the aircraft in the country and, up to Operation Forced Landing, it has never challenged or questioned Toby for noncompliance with any requirement. Consequently, the conditions to qualify for the special customs system were met. In addition, Mr. Bergamini opines that Toby never had a permanent base in Brazil.

Pursuant to Clause 3.a of the Finance Lease entered into with CFC, Toby was obligated to contract hangar with TAM, its official representative in Brazil, for the term of the Finance Lease. It was not, therefore, a negotiable clause. The existence of leasing depended on the acceptance of this clause.

320. Ms. de Araujo maintains that having a permanent base in Brazil is inconsistent with the application to enter the country on a temporary basis, for it implies that the aircraft is intended to stay or at least go back and forth indefinitely. It is also inconsistent with the purpose of the TAR, which is to suspend taxation exactly because the presence of the asset in question in Brazil is brief, strictly to enable a specific end.

321. The experts also disagreed on the meaning of "*foreign civil aircraft*" in the Decree.

322. Mr. Bergamini agrees that the meaning of the "*origin*" of an aircraft can be determined by reference to the Chicago Convention ("**the Convention**") (the origin is the State in which the aircraft is registered). However, there is nothing in the Convention stating that that definition, or indeed the Convention itself generally, is applicable or relevant to situations concerning tax liabilities. In addition, there is nothing in domestic Brazilian law (whether in statute or case law) which defines the phrase "*foreign civil aircraft*" for these purposes.

323. Ms. de Araujo states Brazil is a signatory party to the Chicago Convention, according to which "*Aircraft have the nationality of the State in which they are registered*" and "*An aircraft cannot be validly registered in more than one State, but its registration may be changed from one State to another*" (articles 17 and 18). The idea of nationality of an aircraft serves aviation purposes. For tax purposes, however, the nationality of an aircraft per se (that is, the registration of an aircraft in a country other than Brazil), does not determine whether the aircraft is actually entitled to take part in the TAR. When the FRS evaluated whether the Aircraft was entitled to the TAR, it looked first at the rationale behind the TAR itself. The TAR was designed to enable people to use in Brazil an asset that they do not intend to keep there or use there on a recurring basis, as a result of which it would be unreasonable to request payment of the importation tax. The Decree was enacted in order to comply with the Chicago Convention, by permitting foreign civil aircraft

registered in a member State to fly over the territory of other member States. Since the Decree deals with foreign aircraft only passing through, it made sense for the legislation establishing the TAR to refer to the Decree. What the FRS contends is that the TAR ceases to make sense if a foreign aircraft enters the territory pursuant to the Decree but ends up staying in the country, continuously or intermittently, far much longer than the very regime would account for. According to the Court decision that authorised the seizure of the Aircraft: *"If the intention was use in national territory, regular import of the assets should be made, with the due statement to the Tax Authorities and collection of all taxes eventually due. The case of Decree 97.469/89 is an exception, and as such within the rationale of the tax law, may only be construed restrictively. Thus, it is clear that the Decree regime - which is traffic - cannot be applied to an aircraft which operates in most part of the time in the national territory, even if formally registered abroad and formally and apparently at the service of a foreign company."*

324. The experts disagree as to whether aircraft that are beneficially owned by Brazilian nationals are eligible for the TAR. Mr. Bergamini disagreed firstly with the premise of this question. His instructions were that it is not correct to say that the Aircraft was "*beneficially owned*" by Mr. Lamacchia. Rather, Toby, a company incorporated in the Cayman Islands, held an interest as lessee of the Aircraft from CFC (the lessor). Toby in turn was owned by Koba, a company incorporated in the BVI, and Koba in turn was owned by Mr. Lamacchia.

325. Second, and in any event, he repeats that the TAR is a regime ruled by the following specific norms: Normative Instruction n.285/03 and Decree 97.464/89. Said norms provide clearly that the TAR is applicable to foreign aircraft on irregular and unpaid flights and, on the other hand, they are silent about the nationality of the traveller. The suggestion that aircraft owned (or used) by Brazilian nationals do not qualify for temporary admission is without foundation in Brazilian law (whether in statute or case law).

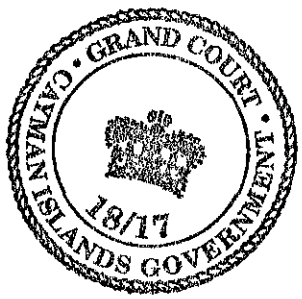
326. Ms. de Araujo expressed the view that although there is no express provision in the Normative Instruction setting forth that aircraft beneficially owned by Brazilian nationals

are not eligible for the TAR, this construction, which was favoured by the FRS, is in her opinion, in accordance with the essence and purpose of the TAR.

327. She said that it is possible to infer from the TEAT itself that the TAR was not thought to apply to Brazilian nationals, at least not to Brazilian nationals residing in Brazil. The first box of the TEAT is dedicated to the identification of the "*traveler in charge*". The form offers two options of who may be considered traveler in charge other than the pilot: foreigner or Brazilian national residing abroad. No reference is made to the traveler in charge being a Brazilian national residing in the country.

328. The experts have different views as to whether the AVANACs and TEATs were completed incorrectly.

329. Mr. Bergamini states as follows;



"As I explained in my responses to items 2-h, 2-i and 2-i, any foreign aircraft which are in the country on a temporary basis may benefit from the temporary admissions regime, provided that the flight is unpaid and irregular. In my opinion, I then assume that it is possible that the AVANACs and TEATs have been filled in incorrectly. Both tourism and business trips qualify for this regime, as both of them may fall under the classification "additional unpaid flights" set forth in item (e) of item IV, of article 2 of Decree n. 97.464/89. And there is an option in TEAT to show the reason for the entry of the aircraft, which is the existence of "additional unpaid flights". If the pilot had marked this option in the form, chances are that there would be no reason to enquire into whether the trip was for a business purpose or not.

Despite not being mentioned in Toby's or Mr. Lamacchia's defence in the Administrative Proceedings, the possible mistake in filling in the information about the entry of the aircraft in the form - by the pilot - should not disqualify Toby from obtaining Temporary Admission Permit."

330. Ms. de Araujo indicates:

> *"Such an assertion was never made by Toby, by Mr. Lamacchia or by the pilots themselves in the course of the Administrative Proceedings or in the course of the Administrative or of the Civil Proceedings.*
>
> *To the contrary, as expressly stated by Mr. Lamacchia in his Motion to Deny the* [FRS's] *findings, "the aircraft was used on business, for unpaid flights, which falls into the cases allowed by Decree #97.464/89. All operations were made in conformity with the law in the sole interest of the company.(...).Therefore, the aircraft carried Toby's executives on business overseas" (excerpt from Mr. Lamacchia's motion to deny (paragraphs 108 - 109) in the Administrative Proceedings). Mr. Lamacchia also expressly stated in his motion to deny that "all of the TEATs submitted are, therefore, perfectly accurate, as the trips aimed to transport a representative of the company Toby" (excerpt from Mr. Lamacchia's Motion to Deny (paragraph 210) in the Administrative Proceedings). As also expressly sustained by Toby, "Toby is the lessee of the aircraft VP CAV and uses such aircraft to transport its directors, which, in the last four years, have travelled on business" (excerpt from Toby's Petition (p.2) in the Administrative Proceedings dated 14 November 2012). Finally, the pilot Mr. Celso Nardi declared that "all trips were made in accordance with the purposes of the company lessee of the aircraft (Toby LLC), which uses the aircraft to transport its directors" (excerpt from Mr. Celso Nardi's petition (p.3) in the Administrative Proceedings dated 17 August 2012"*

Supplemental Expert Reports of Ms. de Araujo and Mr. Bergamini

331. There have been a number of developments which occurred since the original reports of both Witnesses, as well as since their Joint Report and Supplemental Expert Reports, filed respectively in November 2017, July 2017, and August 2017.

332. Thus, on 11 September 2017, Ms. de Araujo issued a Further Supplemental Report. In that Report, she addressed:-

(i) Procedural developments that have taken place in the Civil Proceedings before the Brazilian Courts since her Supplemental Report;

(ii) A decision of the appellate Third Federal Regional Court relating to Operation Forced Landing;

(iii) A decision at First Instance of the Court of Justice of São Paulo dismissing Toby's claim against CFC on jurisdictional grounds.

333. In this Further Report, she indicates that in relation to the Civil Proceedings, on 25 August 2017, the first instance judge issued a judgment on the merits and found against Toby and Mr. Lamacchia. She opines that the Judgment on the Merits means that the FRS's Decision on the merits of the Administrative Proceedings, issued on 24 September 2013, was upheld by the Judicial Branch. However, she continues, although the Judgment on the Merits is a final decision, Toby and Mr. Lamacchia may file an appeal to the 3rd Federal Regional Court.

334. Ms. de Araujo also made detailed reference to the decision relating to Operation Forced Landing arrived at in respect of another case, being ***Milton Cardoso dos Santos Filho et al vs. Uniao Federal.***

335. Ms. de Araujo stated that, given the similarity of the ***Cardoso*** case with the instant one, in so far as they relate to the eligibility of the TAR, she has summarised the decisions. She describes in some detail the appeals process.

336. By way of factual background, the witness summarised that Globalcyr S.A. (**"Globalcyr"**), a company incorporated in Uruguay and wholly owned by the Brazilian Group Vulcabras/Azalea acquired a BEECH 400 aircraft with registration number N48PL. Mr. Milton Cardoso Dos Santos Filho (**"Mr. Cardoso"**) is the Chief Executive Officer of both Globalcyr and the Vulcabras/Azalea group. The aircraft's ownership was subsequently transferred to a US-based company, with Globalcyr keeping possession of it, allegedly for business purposes. Upon numerous occasions the aircraft entered Brazilian territory under

the Decree, making use of the TAR on the basis that a foreign company (Globalcyr) was transporting its director Mr. Cardoso.

337. The aircraft was subsequently seized by the FRS in Operation Forced Landing. The application of the TAR was contested by the FRS on the ground that the aircraft was in use by the Brazilian Group Vilcabras/Azalea, not by a foreign company. The FRS based its decision upon the following key findings:

(i) The passenger that was transported by the aircraft was not only CEO of a foreign company, but of a Brazilian company as well;
(ii) Globalcyr was a shell company, and had no independent financial means to maintain the aircraft;
(iii) The aircraft was financially maintained by a Brazilian corporation, which had even entered into a hangar agreement on behalf of the aircraft; and
(iv) The aircraft stayed within the Brazilian territory for most of the time.

338. Mr. Cardoso and Globalcyr filed a suit against the Federal Government of Brazil ("**the Union**"), seeking damages. The First Instance Judge overturned the decision of the FRS that deemed the aircraft not entitled to utilize the TAR. The Union then appealed to the Third Federal Regional Court.

339. The majority of the Chamber to which the appeal was first assigned overturned the decision of the Judge at First Instance which means that the Union's appeal was successful.

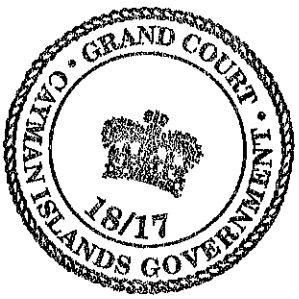
340. In the first appeal to the Chamber, the dissenting vote argued that the applicable legislation (the Decree 97.464/89 and Normative Instruction 1.361.2013 — which superseded the Normative Instruction), does not expressly mandate that a foreign aircraft could not be owned by a Brazilian national nor did it limit the number of times that the aircraft would be able to enter the country in order to benefit from the TAR.

341. However, the majority of the Chamber in the 3rd Regional Court, set aside this construction of the TAR, (in that the Decree does not expressly provide that a foreign aircraft could not be owned by a Brazilian national nor does it expressly limit the number of times that the

aircraft would be able to enter the country) favouring a construction of the Decree which is consistent with the Court's conclusion in respect of the spirit of the TAR. Ms. de Araujo's evidence is that the spirit of the TAR is to set out limited circumstances in which the import of goods is exempted from import duties and taxation.

342. Reference was made to certain excerpts from the Syllabus of the Judgment issued by the Chamber majority opinion as follows:

"...



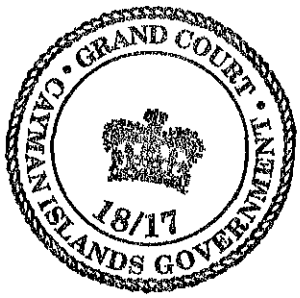
4. The proof contained in the record indicates that the aircraft is being kept within Brazilian territory, through repeated ingresses under instruments of Ingress and Temporary Admission (TEATs) grounded on Decree N0. 97.464/89, at the disposal of the business interests of national executives from a Brazilian corporate group for their displacements throughout the country, serving the economic purposes of the group, which characterizes true misleading of the customs inspection, in view of its clear intent of not paying the taxes due.

5. The temporary admission regime, thus, is destined only to the cases in which the aircraft enters the national territory on a temporary basis, for a short period of time, without the intention of remaining there on a permanent basis. It is a special customs regime, as it allows the permanence, in the country of goods with tax exemption.

6. Appellees do not meet the presuppositions of Decree No. 97.464/89 to enjoy the special customs regime of temporary admission. The aircraft is being used to make trips of national executives, remarkably of the chairman of the corporate group, which does not meet the hypothesis provided for in article 2, subitem IV, letter "c" of Decree No. 97.464/89, which allows the temporary admission of the aircraft when it is a trip of a director or representative of a company or firm that owns the aircraft, which is not the case. Let us not forget that such regulatory provision seeks the temporary ingress of a foreign aircraft. Hence, if the company

that uses it is a Brazilian one, it is evidenced, in this light, the deviation in calling upon such permission, as in the case of the record, in which its utilization is restricted to the directors of the company Vulcalbrás. The institutional use by directors of the legal entity, in their corporate/statutory purposes, shall not be disregarded by the regulatory provision, except if there are other evidence. Besides, the proof in the record shows the economic utilization of the aircraft in the interests of the corporate group, which causes the application, in this case, of article 6 of IN SRF No. 285/2003."

343. Reference was also made to the following passages from the vote of the Judgment issues buy the Chamber majority opinion:



"All such facts, backed by the proof contained in the record, indicate that the mentioned aircraft was being kept in the Brazilian territory, through repeated ingresses under...TEATS, grounded on Decree No. 97.464/89, at the disposal of the business interests of the Brazilian group Vulcabrás/ Azaleia and, also, of the private interests of its chairman, appellee Milton, for his displacements within the country, which characterizes true misleading of the customs inspection, in view of its clear intent to not pay the taxes due.

The modus operandi of plaintiffs consisted in introducing the aircraft in the national territory, through the utilization of the Instrument of Ingress and Temporary Admission, valid for sixty days, extendable for another forty-five days. Prior to the expiration of the TEATs, the aircraft made a new flight abroad, usually of short duration and to a nearby location,... and, upon returning to Brazil, obtained a new TEAT to ground its stay in the country for some time longer.

Throughout his procedure, the foreign aircraft remained in Brazil indefinitely, without paying the taxes due, in evident deviation of purpose of

the temporary admission regime, which, in reality, is destined to the mere transit of the aircraft in the country, without the intention to remain here permanently."

344. Ms. de Araujo points out that the plaintiffs appealed to the whole Section of the Court, but the Section upheld the decision of the Chamber. Ten Judges that were involved in the judgment of the Section voted in favour of reinforcing the decision of the FRS and the Chamber (on appeal).

345. As Ms. de Araujo accurately summarizes, the 3rd Regional Court found, on further appeal to the Section, that despite being registered abroad and being in possession of a foreign company, the aircraft was actually maintained and used by a Brazilian company/individual and spent the majority of the time in Brazil. In the Court's view, the aircraft was used in a way that was not consistent with the transitory character of the TAR.

346. Reference was made by Ms. de Araujo to the following extracts:

> *"The conflict lies in determining whether the intended ingress would be sheltered by the Convention on International Aviation, internalized by Decree No. 21.713/46, and by Decree No. 97.464/89, or if there was fraud, engineered to mislead the customs legislation, with deviation of purpose of the temporary admission regime.*
>
> *The elements of the record evidence the existence of hoax, destined to keep the aircraft in the national territory at the disposal of the Brazilian Group Vulcabrás/ Azaléia and of its chairman, appellant.. Cardoso..., through repeated ingresses under Instruments of Ingress and Temporary Admission, characterizing misleading of the customs legislation in view of its clear purpose of not paying the taxes due."*

347. Ms. de Araujo opines that the judgment of the 3rd Federal Regional Court in this case is inconsistent with the views expressed by Mr. Bergamini in his Expert Report, particularly with his theory that any foreign aircraft not engaged in remunerated flights would be

automatically entitled to the TAR simply by the sole application of letter "*e*" of Article 2 of the Decree to apply as a "*green light*" provision to all foreign aircraft not engaged in remunerated flights to benefit from the TAR — as Mr. Bergamini contends — the court would not have considered how and to what end was the aircraft in question really used.

348. Ms. de Araujo is not aware whether the plaintiffs have filed any appeal in relation to the ***Cardoso*** decision.

349. Ms. de Araujo also expresses her views as to the impact of the 3rd Regional Court's decision on any future appeal by Toby and Mr. Lamacchia. She notes that the three chambers of the 3rd Federal Regional Court specialise in cases relating to the nullity of administrative acts. These three chambers together comprise the specific section which adjudicates all appeals against decisions of any of these three chambers. Thus, while an appeal brought by Toby and Mr. Lamacchia against the Judgment on the Merits may fall to a different Chamber within the 3rd Federal Regional Court, any further appeal against the decision of the Chamber that eventually adjudicates any appeal of the Judgment on the merits will fall to the same Section that adjudicated the ***Cardoso*** case. The witness also points out that most of the Judges who decided that case are also the Judges who decide in Chambers.

350. Ms. de Araujo therefore expresses the opinion that, taking into account how the Section ruled, with ten Judges finding a violation of the TAR, it is reasonable to conclude that the Judgment on the merits will be likely to be maintained at the level of the 3rd Regional Court.

351. She does, however, acknowledge that nonetheless, if that were to occur, Toby and Mr. Lamacchia would still be able to appeal to the Superior Tribunal de Justiça or Superior Court of Justice ("**the STJ**").

352. Mr. Bergamini has also filed a Further Supplemental Report on 25 September 2017. In that Report, Mr. Bergamini opined that the recent decision in the Civil Proceedings is to be considered wrong, because, given that the National Treasury was considered to be in default, the regional Court determined the removal of its defence and of all documents

attaching to it. This being so, the judge could never have had access to such elements in order to determine her reasons for deciding.

353. Mr. Bergamini also says that the decision can be attacked on the basis of its wrongful consideration of the concept of "*property*" as opposed to the concept of "*possession*". Mr. Bergamini maintains that whereas CFC was the owner of the Aircraft, Toby was a mere possessor in the period of the effectiveness of the Lease Agreement. This conclusion, he says, derives from the fact that Toby, as a lessee, was authorised to use and benefit from the Aircraft, but could never dispose of it and could not transfer it. This is his reason for sustaining in his report that there was clear illegality / unconstitutionality in the confiscation of the Aircraft without CFC participating in the process.

354. Mr. Bergamini states that these issues were presented by Toby in an appeal called "*Motion for Clarification*", which shall be judged by a Judge of First Instance.

355. However, if it is not accepted, Toby can still appeal for reversal of the entire decision (and not only on these points) appealing to the Court of the 3rd Region, and, subsequently, to the higher courts, namely the STJ or the Supremo Tribunal Federal or Supreme Federal Court ("**the STF**").

356. Mr. Bergamini also offers his opinion with regard to the relevance of the ***Cardoso*** decision. He says that in addition to the matters pointed out by Ms. de Araujo, this Court must have regard to the fact that the Judge at First Instance stated that the Viracopos Customs Authority denied the issuance of the TEAT on the ground that "*there is no legal provision for a Brazilian who is established abroad pursuant to Article 363 of Decree No. 6.759/09.*" Mr. Bergamini says, however, that this legal provision (Article 363 of the Customs regulations) was never used by FRS as grounds for accusation against Toby.

357. Mr. Bergamini also expresses the view that the facts of the two cases are distinguishable. For example, he says that in the ***Cardoso*** case, the Court understood that there was existence of fraud in the importation due to the fact that the aircraft was leased by the Uruguayan company named Globalcyr, however it was used by executives of another company Vulcabras/ Azaleia. He said stress should be placed on the fact that, despite Mr.

Cardoso being an executive of Globalcyr and of Volcabras/ Axaleia, he himself admitted, in his deposition, that the trips occurred in the interest of the businesses of Vulcabras/Azaleia and not of Globalcyr.

358. Considering such facts, Mr. Bergamini continues, the decision of the Court of the Third Region based itself on sub item "*c*", IV, Article 2 of Decree NO. 97.464/89. In order to support this view, the witness referred to the following section of the decision of Appeal, which was the cause for the Motions for Rehearing:

> "*6. The appellees do not comply with the assumptions required by Decree No. 97.464/89 to benefit from the special customs system of Temporary Admission. The aircraft is being used for travel of local executives, most notably the President of the business group, which does not coadunate with the assumption provided in Article 2, IV, subitem "c" of Decree 97.464/89, which permits the Temporary Admission when travelling as executive officer or representative of a company or firm that is owner of the aircraft, which is not the case at hand."*

359. Mr. Bergamini goes on to state that, however, as he has opined in his Reports, Toby's case fits into sub-item "*e*". He is of the view that this provision represents a complete disconnection from the other assumptions for temporary admission provided in the other letters of item IV.

360. At paragraph 24 of his Further Supplemental Report, Mr. Bergamini refers to a decision of the Federal Regional Court of the 1st Region which he says granted validity to subitem "*e*" of item IV of Article 2 of Decree No. 97,464/89 when recognizing the legality of temporary admission of other aircraft used in "*other non-remunerated flights*." This was the judgment in Interlocutory Appeal No. 0026190-44.2014.4.01.0000/DF.

361. Mr. Bergamini rounds off his point by summarising that it is for all these reasons, that he takes the view that the ***Cardoso*** case cannot be taken "*as a reference to the judgment of the Toby case*", by which I take Mr. Bergamini to mean it is distinguishable, as there is no exact match between the facts that gave rise to the accusations, and between the legal

grounds that supported them. Mr. Bergamini also placed reliance upon the dissenting judgment of Judge Delgado.

362. Where necessary, and so far as there has been a material difference between the experts Mr. Bergamini and Ms. de Araujo, I have preferred the evidence of Ms. de Araujo. This is because I found her reasoning and opinions on the law pertaining to the circumstances of this case, the more persuasive and logical of the two. In addition, her views are weightily supported by the decisions in the Brazilian Courts.

The Civil Aviation Insurance Practice Experts

363. A Joint Memorandum of the civil aviation insurance practice experts Ms. Rowe, instructed by Toby, and Mr. Jolstad, instructed by Allianz was prepared dated 18 November 2015. Points of difference referred to in the Joint Memorandum and clarification were fleshed out in respective Supplemental Reports issued in 2017.

364. The Joint memorandum indicated that the experts agreed on the following matters:

a) The ownership, identity and business of the owners of the Aircraft are material facts.
b) The identity of the pilots, and their qualification and experience are material facts.
c) The intended purpose or use of the Aircraft is a material fact.
d) The statement that Mr. Gonçalves was the owner of Toby was a misrepresentation, and was materially in error.
e) The distinction between "*stockbroking*" and "*financial services*" is not material in the context of aviation insurance.

365. The experts disagreed upon a number of matters. In his Supplemental Report Mr. Jolstad indicated that the following representations made by Mr. Pollen in the email of 27 April 2012 were material:

a) Toby was a stockbroking company that had existed for 30 years;
b) Mr. Gonçalves was the owner of Toby;

c) Toby operated the Aircraft and contracted its own pilots;

d) The aircraft was a corporate jet.

366. Of these matters, the only one considered by Ms. Rowe to be a misrepresentation was the ownership information. However she did not consider it to be material in nature because neither Mr. Gonçalves nor Mr. Lamacchia were known to Allianz, and if they had known who they were, given that Mr. Lamacchia is said to be a man of far greater financial standing than Mr. Gonçalves, then that would have meant that the presentation made was less favourable to Toby than was the true position.

367. Mr. Jolstad qualified his agreement contained in the Joint memorandum, that the distinction between "*stockbroking*" and "*financial services*" was not material to an aviation risk.

368. He indicated that what in his view would, however be material to the insurer, regardless of whether Toby was held out to be a stockbroking or financial services company, would be if Toby, as Allianz contends, was in fact a company effectively in name only that had been incorporated to enter into the lease of the Aircraft on behalf of a third party. He opines that that is materially different because it affects the risk. It affects the risk because the representation, on Allianz's case, created the illusion that there was in fact a corporation of substance and not instead just a holding company (on Allianz's case, for a tax scheme that related to the very Aircraft itself).

369. Additionally, said he, this also directly impacts upon the risk because the Aircraft was itself at risk of confiscation, forfeiture or being impounded depending upon Brazilian Tax Law and the actual usage of the Aircraft and whether it was properly or improperly taking advantage of the TAR, as explained in paragraphs 44-61 of Ms. de Araujo's Expert Report dated 30 October 2015.

370. Mr. Jolstad was of the view that the length of time that Toby was in existence and the lack of an insurance history of 5 years or more is material to the underwriting analysis and would give rise to further enquiry.

371. As regards the representation as to Mr. Gonçalves, Mr. Jolstad said that it is important in itself that this was false. He expresses the view that if an underwriter knew that the representation that had been made was false, then, on that basis alone, which affects the integrity of the relationship with the insured, a reasonable underwriter would decline the risk.

372. In Mr. Jolstad's view it was also not accurate to say that Toby operated the Aircraft or contracted its own pilots.

373. Mr. Jolstad stated that it was not just the individual misrepresentations that mattered, but also the cumulative effect on the risk. At paragraph 81 of his Supplemental Report, he states:

> *"...If the information provided by Mr. Pollen to Mr. Bodkin is found to have been false, then it manifestly obscured the true ownership and the interrelationship of the chain of companies ultimately owned and operated by Mr. Lamacchia, and the incorrect and false representations set-up road blocks to the Defendant to collect the truth."*

374. In her Supplemental Report dated 4 August 2017, Ms. Rowe comments on Mr. Jolstad's opinion as to the material difference if Toby was just a holding company set up to carry out a tax scheme. She indicated that in her view it would be both normal and legitimate for ownership of an aircraft to be structured in a tax efficient way. This is something that would be expected by any prudent insurer, if it was considered at all, and thus, she did not consider that this would amount to a material misrepresentation.

375. As to the length of time that Toby had been in existence, it was Ms. Rowe's view that Toby's loss and insurance history were matters likely to influence the judgment of a prudent underwriter. However, she does not agree that the statement as to Toby's age constituted any representation as to Toby's insurance/loss history. She states that if there had been such a representation, it would have revealed that Toby's experience up to the time of placing of the policy in issue was loss-free. In her experience and opinion there is no necessary correlation between a business' age and its loss history, but in any event, she

thinks that Toby's record would have been regarded as a favourable factor by a prudent underwriter.

376. Ms. Rowe also disagreed that the statements that Toby operated the Aircraft or contracted their own pilots were materially misrepresented. She also felt that the characterisation of the Aircraft as a corporate jet was not a misrepresentation, let alone a material misrepresentation.

377. Where there has been a material difference between the experts Ms. Rowe and Mr. Jolstad, I have preferred, in so far as necessary, the evidence of Ms. Rowe. However, ultimately where conclusions on materiality turn on my findings of fact, the outcome on materiality does not depend on this expert evidence, although it has provided a necessary commercial backdrop. By and large, where I have preferred Ms. Rowe it is because I found her answers more reasonable and logical. She gave reasonable concessions where she ought. Mr. Jolstad, on the other hand came across at times as holding very rigid, sometimes illogical positions, for example when he insisted that the Aircraft was operated by the pilot.

The Issues of Fact that arise for Determination

378. It is not always easy to separate the issues of fact and law, and some of the issues in this case are mixed questions of fact and law. The main factual issues for resolution appear to me to be as follows:

(A) What was the process by which Toby came to acquire the Aircraft? Was the 2007 Purchase Agreement between CAC and Crefipar a mistake or of no effect?

(B) Was Toby incorporated for the sole purpose of leasing the Aircraft, or was it incorporated for dual purposes, the other purpose being for the provision of financial advice, and the entity through which Mr. Lamacchia would seek investment in Koba and Cape Cold from foreign investors?

(C) Was Toby made the lessee of the aircraft in order to avoid the payment of import duties that would have been otherwise applicable if it had

been leased/bought by Mr. Lamacchia or one of his other Brazilian registered companies?

(D) How was the Aircraft actually used?

(E) Did Mr. Lamacchia receive oral legal advice from Mr. Franco in 2008 regarding the ownership and proposed use of the aircraft?

(F) What is the relevant Brazilian law?

378A. Arising from my finding of fact on the relevant Brazilian law, I will then have to apply the law to the circumstances and facts to decide whether the use of the TAR was lawful or unlawful, and whether the confiscation of the Aircraft was lawful or unlawful.

(A) The Acquisition of the Aircraft

379. Toby's case as maintained by its Witnesses Mr. Lamacchia and Ms. Pereira has been that Toby made a decision in 2008 to purchase the Aircraft to assist it in carrying out its business activities. At paragraphs 9 and 12 of his First Witness Statement, Mr. Lamacchia gave evidence that it was Toby that approached CFC in 2008 to lease the Aircraft. However, in my judgment, the existence of the 2007 Purchase Agreement is inconsistent with Toby's case. This is because it demonstrates that in fact Mr. Lamacchia, through Crefipar, contracted to purchase the Aircraft long before Toby was incorporated in February 2008.

380. The evidence is that prior to 2007 Mr. Lamacchia owned 2 aircraft. However, they were not suitable for international flights. In her evidence, Ms. Pereira indicated that at the time when the 2007 Purchase Agreement was signed, no firm or company needed an aircraft for international travel. This demonstrates that it was indeed Mr. Lamacchia that wanted the Aircraft for international travel, and thus he signed the 2007 Agreement.

381. Mr. Lamacchia insisted in evidence that the 2007 Agreement was a mistake, was null, and did not generate any transactions. Ms. Pereira also testified that the 2007 Agreement was cancelled right away.

382. However, the evidence that the 2007 Agreement was a mistake or was cancelled right away is not credible, and is rendered even less so because of the contemporaneous documentation. So, for example, the following matters, which were highlighted in Allianz's Written Closing Submissions, at paragraph 22, are relevant:

a) Mr. Lamacchia himself signed the 2007 Agreement, along with a number of Amendments, on behalf of Crefipar;

b) Mr. Lamacchia after the 2007 Agreement later signed Amendment No.1;

c) Mr. Lamacchia signed Amendment No. 2, which was made on 27 February 2008. Significantly, by this amendment, the specification for the Aircraft was changed from one certified in Brazil, to one certified in the Cayman Islands;

d) Mr. Lamacchia also signed Amendment No. 3 to the 2007 Agreement, which was effective 27 February 2008. Importantly, the effect of this amendment was to assign the right to buy the Aircraft from Crefipar to Toby. Therefore, instead of the 2007 Agreement being annulled as Mr. Lamacchia claimed in evidence, it was in fact performed, and was the means by which the Aircraft was sold by CAC to CFC, which then leased it to Toby;

e) Mr. Lamacchia also signed Amendment No. 4, and Amendment No. 6. By the latter the right to buy the Aircraft was assigned from Toby to CFC;

f) Toby passed a resolution by which it ratified the assumption of the 2007 Agreement.

383. In all of the circumstances, I am satisfied that the acquisition of the Aircraft took place through the series of transactions described above, commencing with the 2007 Agreement, and culminating with Toby leasing the Aircraft from CFC and insuring it in accordance with the terms of the Finance Lease, as opposed to the 2007 Agreement being a mistake and Toby simply approaching CFC to lease the Aircraft, devoid of that background.

(B) <u>Was Toby incorporated for the sole purpose of leasing the Aircraft, or was it incorporated for dual purposes, the other purpose being for the provision of financial advice, and the entity through which Mr. Lamacchia would seek investment in Koba and Cape Cold from foreign investors?</u>

384. In his First Witness Statement Mr. Lamacchia had asserted that Toby's only purpose was to provide financial and investment advice to Koba and Cape Cold. However, in his Second Witness Statement Mr. Lamacchia (and Allianz allege that this follows only after they had obtained documents from CFC and disclosed these to Toby), asserted that Toby had a dual purpose: (i) first, to be the entity through which he sought investment in Koba and Cape Cold from foreign investors, and (ii) second, to be the entity that owned the Aircraft.

385. It is therefore now common ground that Toby was incorporated to lease the Aircraft. The issue for the Court is whether that was its only purpose, or was it one of two purposes.

386. Toby was incorporated on 5 February 2008. One of the first things that the directors did was to sign resolutions in writing on 19 February 2018. These resolutions recorded at Clause 9.1 that:

> *"the Company was established for the purpose of owning and operating a Cessna Sovereign C680-0202 aircraft."*

387. This resolution was signed by Mr. Lamacchia, Ms. Pereira and Mr. Marcos Lamacchia. It is noteworthy that there is no mention of Toby having any purpose beyond leasing the Aircraft.

388. It is also not without importance, as Mr. Elkington pointed out, to look at Ogier's Risk Assessment Form. Toby was incorporated by Ogier. Since Toby would need a representative in Cayman, through Ogier, Toby approached Ogier Fiduciary Services (Cayman Limited) ("**OGFSCL**") to act as its registered office and as a corporate service provider. OFSCL completed a Business Take-On Risk Assessment Form which recorded details about Toby as a potential new customer. This document mentions nothing about Toby being incorporated to give financial advice. The document contained the following completed questions and answers, completed by OGFSCL:

"Purpose business activities of Proposed Entity, i.e. what will the proposed entity be doing?
Company set up to help finance and purchase Aircraft.
Is the nature of the business appropriate for the firm? O.K. Purchase of Aircraft."

389. I accept learned Counsel for Allianz's submission that, if either Ogier or OFSCL had been told that Toby was to give financial advice, then both or one of these entities would have likely advised Toby of the need to register with the Cayman Islands Monetary Authority. However, there is no record of such advice ever having been given. There is no evidence to suggest that Toby ever registered with CIMA. Further, OFSCL's Form also contained the following further question and answer:

> *"The Applicant is registered by the Cayman Islands Monetary Authority or is a broker member of the Cayman Islands Stock Exchange? -No."*

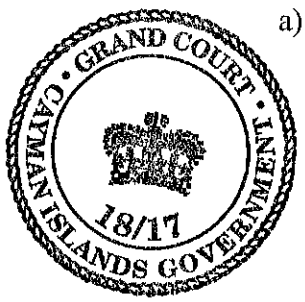
390. Toby's Financial Statements are also a matter to which I attach considerable importance. The financial statements for the years 2008 to 2011 indicate that during that period it engaged in no activity beyond holding the Aircraft as an asset. As Allianz's Written Closing Submissions aptly summarize at paragraph 44, the financial statements on their face indicate that:

a) The Plaintiff had a negative net income in each of the four years for which the Financial Statements are disclosed;
b) There is no revenue generated on assets of US$17 m. (i.e. the Aircraft) other than nominal interest;
c) Toby has made only losses in each fiscal year;
d) The Statements record no director or employee remuneration;
e) There is no indication of profits;
f) The only source of funding on the face of the accounts is Koba;
g) The expenses appear to be consistent with the Lease payments for the Aircraft together with related costs.

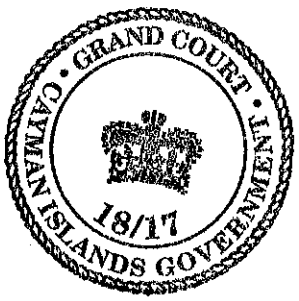
391. In other words, nothing in the Financial Statements suggests, or is consistent with Toby carrying out any other activity but holding and dealing with related aspects of acquiring and holding the Aircraft.

392. In my judgment, another aspect of this case that suggests that Toby was not engaged in the business of giving advice is the absence of any documents in support of such activity. It does seem strange and incredulous, that there are no documents whatsoever recording or evidencing, or for example copies or duplicates, of any written advice. This after Toby had allegedly spent over 4 years giving such advice. There is some evidence from Toby about destroying documents after 5 years (around which there is a credibility issue which to my mind, I do not need to resolve). However, at the time when Mr. Franco was preparing Toby's appeal, which was still within 5 years of Toby's incorporation, Toby knew that the FRS was saying that Toby was a sham, yet was unable to produce such documents evidencing the business of giving advice.

393. It is true that Toby produced two agreements which it alleges support its case, namely purported "*Service Agreements*" between Toby and Koba and Cape Cold respectively. However, I accept Mr. Elkington's submission that these documents do not appear to represent genuine arrangements, and are designed to clothe Toby with the appearance of a genuine trading company. Some of the factors which point to such a finding are as follows:



a) Each of the agreements was signed separately by each of Mr. Lamacchia and Ms. Pereira, with them each stating different addresses, when either of them could have signed the agreements on behalf of both parties to the agreements. Even if, although man and wife, they do each have separate addresses, in combination with the fact that they both signed, it does seem an obvious attempt to give the appearance that there were "*arms' length*" agreements, when there were not. It is a case it seems to me, of trying too hard to erect a wall of separateness, with the consequence that it has had the opposite effect on the Court, wearing its jury hat.



b) The agreements envisage (at clause 2.1(c)) that the amount to be paid by Koba and Cape Cold to Toby "*the Contractor*", would be subject to an addendum to each agreement, but, although there have been repeated requests by Allianz for such disclosure, no such addendums have been disclosed.

c) Toby has not given any discovery of any document that demonstrates or records or evidences that it gave advice to either Koba or Cape Cold, again, despite Allianz's repeated requests.

d) At the end of the day, as Mr. Lamacchia accepted during cross-examination, Toby never rendered any invoice to Koba or Cape Cold for services it had provided to either of them.

394. Further, given the lack of supporting evidence, and the fact that Toby had no employees, no telephone number, no offices, and did not pay its directors, and the fact that its directors were the same in common with Koba and Cape Cold, namely Mr. Lamacchia and Ms. Pereira, it does seem implausible that there would be a need for Toby to act as advisor to Koba and Cape Cold. It would in essence mean that Mr. Lamacchia and Ms. Pereira were advising none other than themselves.

395. I also take into account the somewhat elusive description of what exactly Toby's business was. It is quite true that, as Mr. Elkington characterises it, Mr. Lamacchia's evidence as to Toby's purpose varied considerably. For example:

a) In November 2014 Mr. Lamacchia told the Judge in the Brazil Court that Toby *"takes investments and invests them similarly to a fund that exists in Brazil but it's over there (Cayman Islands)..."*

b) In its Statement of Claim in these proceedings, in its several forms, original and amended, Toby alleges that it at all material times carried on business *"providing financial and investment advice to entities affiliated to the Plaintiff."* So it appears that it was no longer being said that Toby made investments, and instead it was now asserted that Toby advised its affiliated

entities. Similarly, in his Witness Statements he stated that Toby was established for the purpose of providing financial advice to Koba and Cape Cold. So, oddly, the Brazilian Court was being told one thing, and the Cayman Court another.

c) In addition, in oral evidence Mr. Lamacchia said that Toby was constituted to make investments and that it was created to make investments and funds. He also said it was giving advice to other investors and providing stockbroking services for free to many investors that Toby was trying to attract.

396. I also think that the identity and role of the 4 non-fulltime employees Toby said it had, if anything, more supports Toby having the sole purpose of leasing the Aircraft, rather than dual purposes.

397. Firstly, there are Mr. Lamacchia and Ms. Pereira. Since they were both the only Directors of Cape Cold and Koba for most of the material time, if Toby was giving advice, it would mean they were giving advice to their own selves.

398. Then there is Mr. Gonçalves. It was Mr. Lamacchia's evidence that Mr. Gonçalves had worked for another company within the group of companies owned by Mr. Lamacchia, and Mr. Gonçalves had been in charge of Aviation. Mr. Leite said that Mr. Gonçalves had 15 years' experience in aviation. It is true that Toby produced an International Representation Agreement between itself and Mr. Gonçalves. By that Agreement, Mr. Gonçalves was to carry out 2 activities:-

(1) to prepare detailed reports, and

(2) to negotiate papers and perform investments in accordance with written standards supplied by him. However, Allianz points out that no such reports have been disclosed, and Mr. Lamacchia said in cross-examination that no such reports were prepared. Further, that no such standards have been disclosed.

399. Then there is Ms. Soler. She was an employee of Trident Trust, which is a provider of corporate services in the Cayman Islands and was Toby's registered agent. I accept that in that capacity she would have performed purely administrative tasks and would not have been an appropriate person to give financial advice or help with finding investments. In any event, Allianz has made repeated requests for disclosure of any document that suggests that Ms. Soler ever engaged in such activities, and no such documents have been disclosed.

400. When the evidence is looked at in its totality, in my judgment it is plain that Toby did not have dual purposes, and that its only purpose in reality was to lease and hold the Aircraft.

(C) <u>Was Toby made the lessee of the Aircraft in order to avoid the payment of import duties that would have been otherwise applicable if it had been leased/bought by Mr. Lamacchia or one of his other Brazilian registered companies?</u>

401. If the Aircraft had been purchased by Mr. Lamacchia or by one of his Brazilian companies, then import tax would have been payable. This was accepted by Toby, in cross-examination of Mr. Lamacchia, Ms. Pereira and Ms. Rosenthal. According to the First Report of Ms. de Araujo, the amount payable in taxes would have been around US $2.4 million. Mr. Lamacchia plainly knew that if the Aircraft was imported into Brazil, import tax would have been payable.

402. It is important to note Toby's statement in its answer to interrogatories at paragraph 12(b), as follows:

> *"Toby acquired the Aircraft from CFC under a finance lease. The Cayman Islands were chosen as Toby's place of incorporation, in part because as a foreign incorporated company it was able to minimise the taxes/duty payable upon entry of the Aircraft into Brazil."*

403. The answers to interrogatories were served with an affidavit sworn to by Ms. Rosenthal. When taken to this answer during her cross-examination, Ms. Rosenthal stated candidly:

> *"Yes. Everyone knows that. There's no other reason to-to have a company in this country."*

404. After some extensive back and forth, in cross-examination Ms. Rosenthal accepted that the taxes referred to in the answer were those payable when the Aircraft entered Brazil and that the only tax which was levied upon entry of the Aircraft into Brazil was import tax.

405. In addition, there are contemporary documents that show that Toby was the lessee of the Aircraft, in order to avoid Brazilian Import Tax. In his First Witness Statement, at paragraph 12, Mr. Lamacchia confirmed that it was he who had conduct of the negotiations with CFC. In cross-examination he also stated that it was he who provided information to CFC about himself and Toby.

406. The internal Credit Presentations prepared by CFC dated respectively 26 February, and 4th March 2008 both state that the Aircraft will have Cayman registration and will be based mostly in Brazil, and that the customer decided to register the Aircraft outside Brazil in order to avoid import taxes.

407. I am satisfied that Toby was a special purpose vehicle ("**SPV**") formed for the purpose of leasing the Aircraft. The contemporary documents also demonstrate that the Aircraft was to be mostly in Brazil, and that the Aircraft was to be leased by Toby, as opposed to Crefipar or Mr. Lamacchia, in order to avoid Brazilian import tax.

(D) <u>How was the Aircraft actually used?</u>

408. There are a number of facts which in my judgment make it plain that the Aircraft was not temporarily admitted into Brazil. This issue is expanded upon in the discussion under my findings applying Brazilian law.

409. First, an analysis of the flights taken into and out of Brazil between 2008 and 2012, which was carried out by the Brazilian authorities revealed that the Aircraft remained in Brazil for 79% of the time. The Schedule of Aircraft movements prepared from the Aircraft's logbook reveals the following:

a) The majority of the flights taken by the Aircraft were within Brazil;
b) The Aircraft was flown out of the country every 60 days, often by the crew alone;

c) The Aircraft travelled internationally, to tourist destinations;

d) The Aircraft often travelled to tourist destinations carrying members of Mr. Lamacchia's family and friends;

e) The Aircraft only flew to Cayman once, which was just before Christmas 2008.

410. Another fact is that the Aircraft had a fixed hangar in São Paulo, Brazil, where it was guaranteed a place. In May 2009 Toby entered into an agreement with a Brazilian company, for a 3 year term. By that agreement Toby agreed to pay monthly payments and in return TAM undertook to provide, amongst other things, Aircraft hangarage, monthly cleaning, a client lounge, a private room, at Congonhas Airport. These facts indicate that the Aircraft was permanently based in Brazil.

411. The pilots were Brazilian citizens who lived in Brazil. They were employed by a Brazilian company City Taxi, owned by Mr. Lamacchia.

412. The Aircraft was operated this way between 2008 and 2012, apparently without incident. However, the evidence is that it was not until 2011 that the Brazilian authorities developed computerised systems which enabled them to determine whether, and if so, which Aircraft had been entering the country without paying import tax, when that should have been paid. The improved ability of the Brazilian authorities to collate, process and monitor their records, and consequently their ability to determine who was unlawfully benefitting from the TAR is set out in the FRS's 15 January 2013 document as follows:

> *"The Siavanac system developed by ANAC (Brazilian Civil Aviation Agency) in conjunction with the Brazilian FRS was implemented in January 2011. It brought about a great deal of improvement to customs control under Temporary Entry and Admission Permits (TEAT) for foreign aircraft. At the same time, the data base created thereby, together with the Brazilian FRS systems, allowed a deeper analysis of the ownership and exploration relations of such aircraft, as well as its movement patterns. This created*

some doubts about the actual entitlement of some aircraft to Decree #97,464/89 and the tax benefits guaranteed thereby."

(E) <u>Did Mr. Lamacchia receive oral legal advice from Mr. Franco in 2008 regarding the ownership and proposed use of the Aircraft?</u>

413. This issue will be relevant to the question of whether Toby is correct in its contention that it used all reasonable efforts to ensure that it complied with the Laws of Brazil, as required under the Law Compliance Provision of the Policy.

414. It is alleged on Toby's behalf that Mr. Lamacchia received oral advice from Mr. Franco in 2008 regarding the ownership and proposed use of the Aircraft. However, this contention on Toby's behalf was raised very late in the proceedings, and in my judgment must be rejected for a number of reasons, when the history, surrounding circumstances and events are taken all together.

415. In looking at Mr. Lamacchia's evidence, I have made due allowance for possible language translation problems, his advancing age and unfortunate illness. However, having made those allowances I do not accept that he was speaking the truth when he said in his Supplemental Witness Statement, that he received such advice. I also reject that aspect of Mr. Franco's evidence, also set out in a Supplemental Witness Statement. In my view, this evidence has been put before the Court to try to support Toby's case that it used all reasonable efforts, and in an attempt to counteract some of the revealing statements in documents obtained by Allianz in relation to discovery received from CFC, particularly the express record of events by CFC that Toby had decided to register the Aircraft outside of Brazil in order to avoid import tax.

416. When asked in cross-examination whether he could recollect receiving any advice from Mr. Franco about buying the Aircraft, Mr. Lamacchia said that he could not.

417. Mr. Franco in cross-examination agreed that it is important to have a record of any advice he gave, and the instructions upon which the advice was based. However, he conceded that he had no such notes.

418. The history of this matter and the documents filed belie this late assertion by Toby. I do not regard as persuasive or credible, Toby's excuse, proffered in its Closing Submissions that the failure to refer to the advice was because Allianz had mounted a plethora of defences, (with the Law Compliance Condition being far down the batting order), and therefore this caused both parties to be focusing on the use of the Aircraft and whether it had breached the TAR, rather than compliance with the Condition.

419. In February 2013, Mr. Franco prepared a long and detailed appeal on Mr. Lamacchia's behalf in which he attempted to explain and justify Mr. Lamacchia's actions and conduct. It does seem to me that if Mr. Lamacchia was acting in accordance with advice provided to him by Mr. Franco himself, that that would have been mentioned in the Motion to Deny appeal document. Mr. Franco's statement that if he said that Mr. Lamacchia was so acting would have made no difference, does not provide any sufficient justification in my view, for such a statement plausibly being left out if such advice had in fact been given.

420. Indeed, Mr. Lamacchia was in November 2014 expressly asked by a Judge in Brazil whether he had received such legal advice. At that time, I accept, Mr. Lamacchia's recollection would have been clearer than it is now. I am of the view that if he did receive such advice, he would have said so. Instead, he gave a response that on the face of it seems not to be answering the question, and was confusing. Whilst of course it is possible that he may have said to the Judge that he received such advice, even though the transcript does not record him saying so, it seems to me that the far more probable explanation is that he never told the Judge in Brazil anything about having been advised. Mr. Lamacchia's failure then to refer to having received advice from Mr. Franco is cogent evidence that he did not in truth receive such advice.

421. In its Defence in these proceedings, Allianz alleged that Toby had acted unlawfully and was in breach of the Law Compliance Condition. When Toby filed its Reply and Defence to Counterclaim, it made no mention at that stage of having received legal advice in 2008. It would have been logical to raise this if indeed that was the fact.

422. In September 2015 Mr. Lamacchia signed a long and detailed Witness Statement. Indeed, this Witness Statement included reference to legal advice that Mr. Lamacchia had received from Mr. Franco in 2012. However, oddly, there is no mention whatsoever of having received legal advice from Mr. Franco in 2008.

423. Similarly, in September 2015 Mr. Franco, a trained and experienced lawyer, signed a Witness Statement in which he referred to legal advice which he had given to Mr. Lamacchia, but he made no mention of having given any advice to Mr. Lamacchia about the ownership or use of the Aircraft in 2008.

424. So too in September 2015, Ms. Rosenthal, whose role is to guide and inspect the legal work performed by attorneys engaged by Toby, made no mention of this alleged advice.

425. In July 2016 when Toby prepared and filed an Amended Reply and Defence to Counterclaim it made no mention of the alleged advice.

426. Further, I accept in its entirety, the sequence of events set out at paragraph 205 of Allianz's Written Closing Submissions. That is, that it is after Allianz obtained disclosure on 30th June 2017 from CFC that Toby carried out what amounts to a striking change of position, as follows:

a) First, on 5 July 2017 it served a Re-Amended Reply and Defence to Counterclaim in which it asserted for the very first time that it had received legal advice at or around the time of the acquisition of the Aircraft (see paragraphs 10.4 and 10.11);
b) Second, in July 2017 Mr. Lamacchia signed a Supplemental Witness Statement in which he admitted, for the very first time, that one of the reasons for incorporating Toby was to own the Aircraft. He also asserted for the first time that in 2008 he received oral legal advice from Mr. Franco;
c) Third, on 21 July 2017 Mr. Franco signed a Supplemental Witness Statement in which he too suggested for the first time that he had given legal advice to Mr. Lamacchia in 2008.

427. In addition to this history of events, Mr. Lamacchia and Mr. Franco's evidence is in any event contradictory. It was Mr. Lamacchia's evidence that the advice was given, following which Toby was incorporated. However, in his oral evidence Mr. Franco claimed that the oral advice was given after Toby had been formed and leased the Aircraft but before the Aircraft had first flown to Brazil.

428. For all of these various reasons, I find as a fact that no oral legal advice was given to Mr. Lamacchia by Mr. Franco in 2008 regarding the ownership and proposed use of the Aircraft.

(F) <u>What is the relevant Brazilian law?</u>

Applying the facts as to Brazilian law, was the use of the TAR lawful or unlawful, was the Confiscation of the Aircraft lawful or unlawful?

429. Under this head, the Court notes, that whilst it is an important plank of Toby's case that it says that the FRS's decision to confiscate the Aircraft was not legally correct, Toby goes on to maintain that that would not defeat its claim under the policy as its case is that the Policy provides cover in those circumstances. This will be dealt with in this Judgment at a later point.

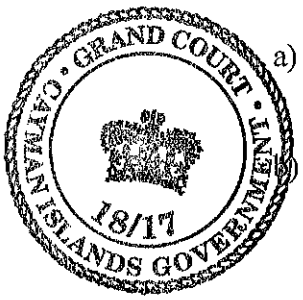
The Relevant Brazilian Legislation

430. It was common ground between the parties' experts that the relevant legal provisions setting out the TAR are the Normative Instruction and the Decree 97,464/1989. The experts also agreed that Article 75 of the Decree 37/1966 ("**Article 75**") regulates import tax.

431. The general position is that if goods are imported into Brazil, then import tax is payable on them. That applies to an aircraft, just as it does to other goods, and it applies whether the Aircraft is owned by a foreign company and/or is registered abroad.

432. By Article 75, import duty may be suspended pursuant to the TAR. The application of the TAR is subject to a number of conditions, including that there is *"use of the assets within the concession period and exclusively for the purposes provided therein."*

433. Article 105 sets out 21 grounds on which the penalty of confiscation shall be applied to goods. Included amongst those grounds, are the following:



a) If any document necessary for customs clearance has been falsified or adulterated (Article 105(VI)).

b) If foreign goods have already been cleared, but taxes were only partially paid by wilful deception (Article 105(XI)).

434. The penalty of confiscation is also provided for by Article 23 of Decree Law 1455/76. This provides (by section 1) that "*the penalty of loss of the goods*" shall be applied:

a) If any of the 21 grounds set out in Decree 37/1966 Article 105 apply (Article 23(IV)).

b) Where the receiving party, buyer or person responsible for the operation "*is hidden by means of fraud or simulation, including the fraudulent use of third parties*" (Article 23(V)).

435. Brazil has a National Tax Code ("**NTC**"). Articles 116 and 149 provide that:

a) The administrative authority may disregard acts or transactions which were carried out with the purpose of concealing (i) the occurrence of a tax triggering event, or (ii) elements which would give rise to tax liability.

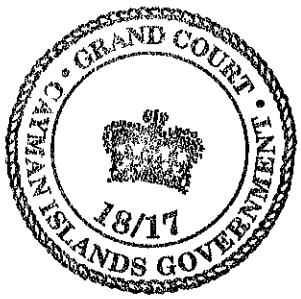
b) If simulation has taken place, then the formal legal transaction is disregarded in favour of the hidden one, so that the hidden one may produce the effects it should produce if it had not been masked.

c) One of the grounds on which tax may be assessed is where the tax payer or a third party beneficiary acted in wilful misconduct, fraud or simulation.

436. At the relevant time, the TAR was governed by the Normative Instruction, which provides as follows:

a) Article 1 expresses that the TAR is a special customs regime for "*temporary admission*".

b) Article 2 states that the TAR is applicable to goods which satisfy 3 conditions, including that:



i. The goods are imported "*on a temporary nature*" (Article 2(I));

ii. The goods are appropriate "*for the purpose for which they were imported*" (Article 2(II)); and

iii. The goods are usable "*for the purposes contained in the granting instrument*". (Article 2(III)).

437. Article 5 lists various types of goods which are automatically subject to the regime referred to in Article 4, viz. the TAR with total suspension of import tax. By Article 5 (VIII) those types of goods include "*foreign civil aircraft not in regular international air service, according to the terms of Decree no. 97.464 of January 20, 1989.*"

438. Article 5, paragraph 6 provides that the TEATs should be used when an aircraft was being temporarily admitted into Brazil. A model TEAT is exhibited to the Decree at Exhibit V.

Toby's position

439. In cross-examination, Ms. de Araujo accepted that both her own views and those of the FRS, in which they concluded that the Aircraft was not entitled to the benefit of the TAR was based on the view that the TAR was subject to further limitations which were not expressly set out in the Normative Instruction or Decree. She also accepted that the FRS's finding that Mr. Lamacchia had been guilty of "*falsification*" and "*simulation*" was based on its view that the TAR would not apply to an aircraft owned by a Brazilian and that Toby was a simulation intended to conceal the fact that the Aircraft was in reality owned by Mr. Lamacchia and used by him for his own personal purposes rather than the purposes of Toby. Her evidence was further that she, like the FRS, considered that the TAR was subject to what Mr. Weitzman termed "*non-express*" limitations, including that the aircraft were not entitled to make repeated use of the TAR.

440. In its Written Closing Submissions (see paragraphs 49-53), Toby acknowledges that the Brazilian Courts to date have upheld the approach of the FRS and the views expressed by Ms. de Araujo in treating the TAR as being subject to further non-express/implied limitations preventing repeated use being made of the regime, at least where the aircraft's ultimate owner is Brazilian and/or it is being used for the purposes of a Brazilian entity. However, it was advanced that, as Ms. de Araujo accepted, Brazil does not have a concept of precedent in the same way as a common law jurisdiction and only the decisions of the two superior courts, the STJ and the STF, are binding on other courts. Even in relation to these two Courts, their decisions are only binding when they expressly elect that this should be the case. It is common ground that to date there has been no final and binding decision in relation to the scope of the TAR and whether it is subject to the kind of implied limitations contended for by the FRS and Ms. de Araujo.

441. Reference was also made to the decision in the ***Cardoso*** case. Toby acknowledges that Allianz will of course place heavy reliance on the 10-0 decision, but Toby places emphasis on the dissenting judgment of Judge Delgado and his view that the scope of the TAR was set out in the express provisions of the Normative Instruction and Decree, that no further restrictions were to be implied, and that insofar as repeated use of the TAR was made, then this was a matter for Brazil through proper agencies to monitor.

442. In cross-examination Mr. Bergamini explained that the "*disregard*" doctrine applies to cases where there is no fraud or malicious intent. However, both he and Mr. Franco maintained that this doctrine, as set out in Article 116 of the NTC, has not been formally brought into effect, is the subject of legal controversy, and has not been approved by either of the two superior courts. When asked about this Ms. de Araujo was unable to express an opinion, as she had only recently seen Mr. Bergamini's most recent Report where he dealt with this and she did not think she agreed, but would have had to look into the matter further.

443. In all of the above circumstances, it was Mr. Weitzman's submission that this Court is entitled to reach its own decision as to what is the correct position under the TAR. As to this, Toby suggests that the correct answer is obvious, namely that in relation to the scope

of the TAR, one can look only at the express provisions of the Normative Instruction and Decree and that to seek to impose further non-express or implied restrictions is improper, particularly where, as in the present case, this act of "*moving the goalposts*" has resulted in the tax payer being held to have been guilty of falsification.

Allianz's position

444. Allianz argues that on a proper application of the Law, import tax was payable and the Aircraft was properly confiscated.

445. I note that at paragraph 56A of its Re-Amended Defence, and subsequently its Re-Re-Amended Defence and Counterclaim, Allianz had pleaded that the various decisions of the FRS give rise to an estoppel preventing Toby from (a) disputing that the Aircraft was forfeit for the non-payment of import duties that were due and payable, and (b) from disputing the facts which resulted in the sanction of forfeiture being imposed.

446. However, this was not referred to in Allianz's Written Opening Submissions, and at paragraph 151 of its Closing Submissions, Allianz has indicated that it is content to proceed on the basis that the findings made and the decisions reached in Brazil do not give rise to any issue estoppel or res judicata against Toby. I therefore have not sought to address this issue in what has proven to be a complex matter, requiring resolution of a host of other issues.

447. Allianz does suggest however, that as a matter of judicial comity (and common sense), the Court should be hesitant before reaching a conclusion that the tax authorities and the Court in Brazil have reached the wrong result in relation to the application of the law of Brazil to the facts of this case. In particular, they urge the Court to have regard to the consistent conclusions reached in each of the Administrative, Criminal and Civil Proceedings.

448. Allianz also address Mr. Bergamini's, what it described as, "*novel arguments*" and advanced reasons for rejecting them.

Resolution of the Issues

449. Since the parties have been content to argue this case without a determination about issue estoppel in relation to the various decisions of the FRS and the Brazilian Courts, I will not go down that road. I have therefore examined the issues for myself and made my own findings of fact as to the relevant Brazilian law.

450. However, I do accept the reasoning and consistent conclusions in the Administrative, Criminal and Civil Proceedings as being highly persuasive and logical. Although not a decisive factor, I also hesitate without good reason, as a matter of judicial comity, and in all the circumstances, to differ from the consistent findings.

451. These consistent conclusions were reached in the Proceedings as follows:

(1) The decision of Mr. Barbosa, a tax auditor of the FRS dated 15th January 2013. His conclusion was that the Aircraft ought to be confiscated (pursuant to the Decree Article 23 and Decree 37/1966 Article 105).

(2) The decision of Filipe e Silva and Janete Camara (respectively the Head and Deputy Head) of SACAT, *Secao de Controle e Acompanhamento Tributario* – which I understand roughly translates to Tax Control and Follow Up Section.

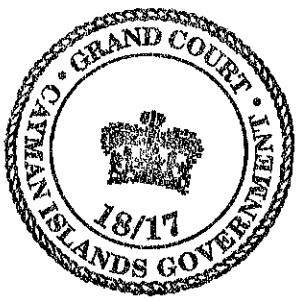
(3) The decision of Jose Balaguer (the Head Inspector of the FRS) to apply the penalty of confiscation.

(4) The decision of the Federal Judge Jorge De Araújo to admit the accusation that Mr. Lamacchia had breached article 304 of the Criminal Code. In his decision the Judge recorded that:

> *"It is obvious, in view of the circumstances described by the Federal Prosecutors' Office, that the accused used a sophisticated scheme to trick the customs inspection, by incorporating a foreign company and, as such, escaping from the payment of the tax levied upon an import amount of some million Reais* [sic]..."

(5) The decision of the Federal Judge to reject Mr. Lamacchia's application for summary acquittal of the Criminal Proceedings against him.

(6) The decision of the Federal Judge to dismiss Toby's claim in the Civil Proceedings. The Federal Judge ruled that:



> *"..the conclusion is that there has been an understatement regarding the one who is truly liable, the owner of the aircraft, Mr. José Roberto Lamacchia, Brazilian citizen resident in Brazil, substantiating the simulation of a legal business. Once again it is worthy to highlight that the aircraft remains primarily in operation in Brazil, with sporadic and short trips abroad and that its purpose is to meet a wide range of needs of the Lamacchia family, namely, among others, the transportation of the family members in national and international tourist trips. We therefore construe that accepting the arguments stated by the Plaintiffs, whereby annulling the present administrative proceedings, would be to dissolve the decision on the merit as rendered, considering the proceedings concluded there has been a fraud in the use of the aircraft as if there was no intent to use if for a long period within the national territory, simulating a leasing agreement executed by a foreign company, thus evading the applicable payment of importing an asset for personal use."*

452. I have also found the unanimous decision (10-0) of the Federal Regional Court that heard and rejected the appeal in the ***Cardoso*** case quite useful. The facts do seem to me to be quite similar. I also note that, as Mr. Bergamini accepted, any appeal that Toby makes in the Civil Proceedings will likely be heard by some or all of the Judges who decided the ***Cardoso*** case.

453. There are also no red flags that jump out in respect of these decisions or how they were arrived at, to suggest that there has been any breach of natural justice or anything that would offend the public policy of the Cayman Islands.

<u>This Court's Findings</u>

454. I accept Allianz's position that foreign civil aircraft are not subject to import tax if (a) the terms of the Decree are complied with and (b) they are imported on a temporary basis. So that, as indeed Mr. Bergamini agreed in cross-examination, compliance with the terms of the Decree is a necessary, but not sufficient requirement, for an aircraft to be exempt from import tax. I find that foreign civil aircraft will only be able to fall within the TAR if they are imported on a temporary basis.

455. The TAR is an exception to the general rule that import tax is payable.

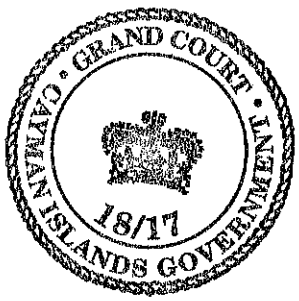
456. As Mr. Elkington puts it in his Written Closing Submissions, it acknowledges that it would be unreasonable to require the payment of import tax if someone brings goods into Brazil which they do not intend to keep there. The TAR only applies where there is a commitment that the goods will be re-exported.

457. I also find that, even if both of those requirements listed at paragraph 454 above are satisfied, the aircraft will still be subject to confiscation (pursuant to Articles 23 and 105 referred to above) if (a) the identity of the true owner, importer or operator of the aircraft is hidden by means of fraud, simulation or the fraudulent use of third parties, and/or (b) any document required for the importation of the aircraft has been forged or tampered with.

458. I note that the Decree was passed to give effect to the Convention on International Civil Aviation. This Decree does not address the issue of when import tax is or is not payable. Article 2 (IV) of the Decree simply lists 5 categories of aircraft that shall be treated as ones engaged in non-remunerated air transportation.

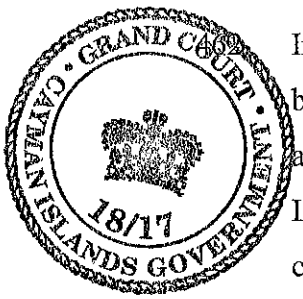
459. I have accepted that Toby was incorporated solely for the purpose of leasing the Aircraft and avoiding import tax. The true beneficial owner and operator of the Aircraft was Mr. Lamacchia, a Brazilian national who lived in Brazil, and who operated the Aircraft principally in Brazil. He was the one who funded the Aircraft's operation. The background of the 2007 Crefipar Purchase Agreement and all the subsequent amendments and chain of documents previously discussed amply support that conclusion.

460. In ***Shroud's Judicial Dictionary of Words and Phrases***, 7th Edition, at pages 2725 – 2727, cited by Allianz, there is a useful discussion of the terms "*temporarily*" and "*temporary*". I found the following useful in suggesting that one should look at both the length of periods of time as well as the entire history and circumstances surrounding the matter that is said to be temporary:-



> "*A person was a temporary resident in the United Kingdom for the purposes of the National Service Act 1948 (c.64), S.34(4), if paying a visit, for social or business reasons, and merely making a short stay....*
>
> *In considering whether the gaps in the employment of applicants for redundancy payments constituted mere "temporary cessations of work", within the meaning of [a paragraph in the relevant Act], it was wrong simply to carry out the mathematical exercise of comparing lay-off periods with periods of employment. The correct approach was to look at the entire history of each applicant's employment and the circumstances surrounding it ....(Flack v Kodak [1987] 1 WLR 310."*

461. The Aircraft had a permanent hangar in Brazil. In fact, the Aircraft was not temporarily inside Brazil, but was instead temporarily outside Brazil, making brief trips abroad. Thus, the Aircraft could not lawfully take advantage of the TAR, because there was no "*temporary admission*" as required by the Normative Instruction. Import tax therefore properly was due. Since it was not paid, the Aircraft fell to be confiscated pursuant to Decree 37/1966 Article 105 (XI) and Decree 1455/76 Article 23(IV). In my view the concept of "*temporary*" falls to be given its ordinary and natural meaning. However, the word falls within the phrase "*imported on a temporary basis*". The requirement is therefore not met simply because an aircraft flies in and out of the country in compliance with the time period permitted by the TEATs. In my judgment, the Aircraft, which had a permanent base in Brazil, and was operated at the order of a Brazilian national, resident in Brazil (for over 4 years), and which was operated principally in Brazil, cannot properly be said to be "*imported on a temporary basis*".



In addition, there were the documents that Toby provided each time the Aircraft was brought into Brazil, i.e. the General Declarations, AVANACs, and TEATs. Since Toby was a SPV company without any business of its own, and the Aircraft was really used by Mr. Lamacchia for his own purposes, those documents were false. Therefore the penalty of confiscation was appropriate (pursuant to Decree 37/1966 Article 105(vi) and the Decree Article 23(IV). Indeed, this has now been confirmed by the Federal Court in the Civil Proceedings.

463. Further, since the identity of the true receiving party, buyer and person responsible for the operation of the Aircraft was hidden by means of simulation, the punishment of loss of the goods was applicable (pursuant to Decree 1,455/76 Article 23(V)).

464. It was Mr. Bergamini's view that Toby could have relied on the Decree Article 2(IV) (e), instead of Article 2(IV)(c). However, in my judgment it cannot be ignored that it was Article 2(IV)(c) that was filled out in the TEAT, and relied upon rather than Article 2(IV)(e). However, more importantly the grounds on which the Aircraft was confiscated would still have been applicable even if the TEATs had relied upon Article 2 (IV)(e), rather than any other sub-paragraph. This is because the TAR only applies to "*temporary admission*" and the Aircraft was not temporarily admitted, spending as it did the majority of its time in Brazil. Also, the true owner and operator would still have been hidden and the General declarations and AVANACs would still have included false information.

465. Toby and Mr. Bergamini have also sought to rely upon the dissenting judgment of Judge Delgado in the ***Cardoso*** case (in the first appeal at the Chamber level of the Federal Court). However, in my view, there is no merit in that reliance, and I prefer the views expressed in the unanimous 10-0 decision of the Section, that upheld the majority decision of the Chamber (on appeal).

466. It is important to note that Toby has argued that Allianz's case depends to a large extent on the lifting (piercing) of the corporate veil. Mr. Weitzman argued that companies frequently make use of corporate structures such as those in this case. However, in my judgment this ignores the fact that Brazilian law allows for the authorities to examine "*simulation*" and to

have regard to the identity of the true beneficial owner or operator. This is not completely dissimilar to Revenue Laws or Codes in some common law countries that analyze whether transactions are arms' length transactions.

467. On the facts of this case, and based on the Brazilian law as I find it, Toby was a simulation which hid the fact that Mr. Lamacchia was the true beneficial owner of the Aircraft, which Aircraft was not temporarily based or temporarily imported into Brazil.

468. I also find that the interpretation of the Law by the Brazilian Courts does not amount to a "*moving of the goalposts*", as Toby alleges. It is instead the result of a purposive, contextual approach to construction of the entire applicable legislative scheme. As Ms. de Araujo puts it, the decisions of the Brazilian authorities thus far are in keeping with the spirit, essence and purpose of the legislation.

469. I wish to make it clear that even if I am wrong in my analysis as to true beneficial ownership, or if the simulation finding of the Brazilian authorities and how I have interpreted that aspect of the law is incorrect, I think that an important feature of the TAR is that it applies to temporary admission of Aircraft, and it cannot properly be taken to apply to the Aircraft when the Aircraft could not truly be said to be admitted temporarily.

470. In all of the circumstances, I hold that the use of the TAR was unlawful, and that the Brazilian authorities lawfully confiscated the Aircraft.

Avoidance

471. It is logical to consider Allianz's avoidance defences at an early stage, because, if the Policy was validly avoided by Allianz, then the Policy is treated as never having existed, and the defences based on the Policy's terms and conditions do not arise. It is useful to deal with these Avoidance defences under the following main sub-heads:

(1) The law.

(2) The alleged misrepresentations.

(3) The alleged non-disclosures.

(4) Affirmation.

The Applicable Law

472. Endorsement 1 of the Policy provides that:-

> *"This Insurance shall be governed by and construed in accordance with the law of the Cayman Islands and each party agrees to submit to the exclusive jurisdiction of the Cayman Islands."*

Avoidance – Law and Principles from Case Law

473. Sections 22 to 26 of ***The (West Indies) Insurance Act 1959*** (***"the 1959 Act"***) set out the circumstances in which a contract of marine insurance may be avoided (and section 3 of that Act expressly provides that it applies to the Cayman Islands).

474. The above sections are in identical terms to (and are taken from) sections 17 to 21 of the English ***Marine Insurance Act 1906 ("the 1906 Act").***

475. The Policy is not a contract of marine insurance (and general condition 6 of the Policy expressly provides that *"This Policy is not and the Parties hereto expressly agree that it shall not be construed as a policy of marine insurance").*

476. However, the English Courts have held that sections 17 to 21 of ***the 1906 Act*** simply codified the existing common law, and accordingly, that their provisions, as interpreted from time to time by the Courts, apply equally to contracts of non-marine insurance.

477. In the circumstances, it is common ground that the law to be applied in relation to Allianz's purported avoidance is the common law as codified in the 1906 and 1959 Acts, and as interpreted by the Courts of England and the Cayman Islands. Sections 17-20 of ***the 1906 Act*** provide as follows:

> ***"Disclosure and Representations***

Insurance is uberrimae fidei

17. A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party.

Disclosure by assured

18(1) Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract.

(2) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

(3) In the absence of inquiry the following circumstances need not be disclosed, namely:-

(a) Any circumstance which diminishes the risk;

(b) Any circumstance which is known or presumed to be known to the insurer. The insured is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business as such, ought to know;

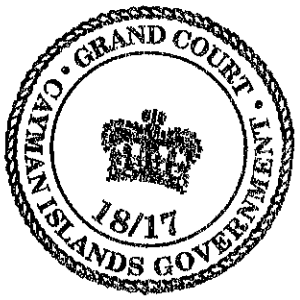
(c) Any circumstances as to which information is waived by the insurer;

(d) Any circumstance which it is superfluous to disclose by reason of any express or implied warranty.

(4) Whether any particular circumstance, which is not disclosed, be material or not is, in each case, a question of fact.

(5) The term "circumstance" includes any communication made to, or information received by, the assured.

Discharge by agent effecting insurance



19. Subject to the provisions of the preceding section as to circumstances which need not be disclosed, where an insurance is effected for the assured by an agent, the agent must disclose to the insurer-

(a) Every material circumstance which is known to himself, and an agent is deemed to know every circumstance which in the ordinary course of business ought to be known by, or to have been communicated to, him; and

(b) Every material circumstance which the assured is bound to disclose, unless it comes to his knowledge too late to communicate it to the agent.

Representations pending negotiation of contract

20(1) Every material representation made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true. If it be untrue the insurer may avoid the contract.

(2) A representation is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

(3) A representation may be either a representation as to a matter of fact, or as to a matter of expectation or belief.

(4) A representation as to a matter of fact is true, if it be substantially correct, that is to say, if the difference between what is represented and what is actually correct would not be considered material by a prudent insurer.

(5) A representation as to a matter of expectation or belief is true if it be made in good faith.

(6) A representation may be withdrawn or corrected before the contract is concluded.

(7) Whether a particular representation be material or not is, in each case, a question of fact."

478. The principles relating to avoidance for non-disclosure were recently reviewed and applied by the Cayman Islands Court of Appeal in ***Banks v The Insurance Company of the West Indies (Cayman) Limited*** 2016 (2) CILR 442. See in particular paragraphs 61-80 of the Judgment of Morrison J.A.

479. When considering what representation is made, the test is an objective one: how would the prudent underwriter understand the statement complained of- see the decision of Toulson J (as he then was) in ***IFE Fund SA v. Goldman Sachs International*** [2006] 2 CLC 1043 at paragraph 50 (cited with approval by Carr J in ***Brit UW Ltd. v F & B Trenchless Solutions Ltd.*** [2015] EWHC 2237 (Comm) at paragraph 109):

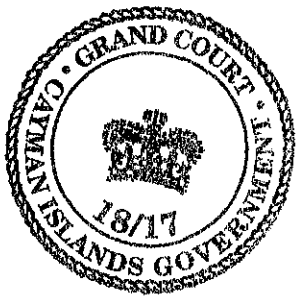
> *"In determining whether there has been an express representation, and to what effect, the court has to consider what a reasonable person would have understood from the words used in the context in which they were used. In determining what, if any, implied representation has been made, the court has to perform a similar task, except that it has to consider what a reasonable person would have inferred was being implicitly represented by the representer's words and conduct in their context."*

480. In considering what is material, it is necessary to put oneself in the position of the actual underwriter with his or her knowledge of the relevant facts at the time of the placement: see in this respect, the following dicta of Mance LJ (as he then was) in ***Brotherton and ors v. Aseguradora Colsegura S.A. and onor*** [2003] EWCA Civ 705 (cited by the Cayman Islands Court of Appeal in ***Banks v ICWI*** at paragraph 49, Per Morrison J.A):

> *"Materiality falls to be considered as at the date of placing, by reference to the circumstances (which may include no more than intelligence) within an insured's knowledge as at that date."*

481. It is for the Court to decide whether a circumstance is or is not material. In reaching that decision, the Court may be assisted by evidence from the underwriter in question or from expert underwriters, but ultimately the Court must make its own evaluation as to what is

prudent. See paragraph 53 of ***Banks v ICWI***. See also in this respect paragraph 98 of the judgment of Leggatt J in ***Involnert v Aprilgrange*** [2015] EWHC 2225 which states:

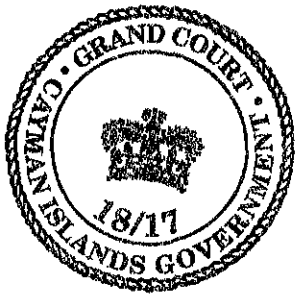


> *"Although a question of fact as opposed to law, the question whether a particular circumstance is material requires the court to make a value judgment. In deciding whether a circumstance would affect the thinking of a prudent insurer, evidence of how reputable insurers experienced in the relevant class of business exercise their underwriting judgment, and what matters do in fact influence such insurers, is generally helpful and important to ensure that the court's findings are grounded in commercial reality. But such evidence cannot be conclusive of what the notional prudent insurer would regard as material. That can only be determined by forming a view about whether or not it is rational to take a particular matter into account. As stated in MacGillivray on Insurance Law (12th Edn, 2012) at para 17-041):*
>
> > *"The decision rests on the judge's own appraisal of the relevance of the disputed fact to the subject-matter of the insurance; it is not something which is settled automatically by the current practice or opinion of insurers."*

482. In the absence of enquiry, an insured is not obligated to disclose to an insurer *"any circumstances which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business as such, ought to know."* See section 18(3)(b) of ***the 1906 Act*** and section 23(3)(b) of ***the 1959 Act***.

483. In the absence of enquiry, an insured is not obliged to disclose to an insurer *"any circumstance as to which information is waived by the insurer."* See section 18(3)(c) of ***the 1906 Act*** and section 23(3)(c) of ***the 1959 Act***.

484. It is necessary in order for an insurer to affirm that the insurer be aware of its legal right to avoid. However, this requirement is mitigated by a presumption that a party which had a legal adviser at the relevant time received appropriate legal advice: see ***Involnert*** at paragraph 160:



"The need for knowledge of the legal right, although established by authority, is difficult to justify in principle. The requirement is inconsistent both with the principle that ignorance of the law is no defence and with the principle that in the field of commerce the existence and exercise of legal rights should depend on objective manifestations of intent and not on a party's private understanding. It is also potentially extremely difficult for the other party to prove such knowledge – all the more so since any relevant legal advice which may have been received will be protected from disclosure by legal professional privilege. The unfairness of the rule is mitigated, however, by a presumption that a party which had a legal adviser at the relevant time received appropriate advice. That presumption can only be rebutted by waiving privilege and proving otherwise: see Moore Large & Co. Ltd. v Hermes Credit & Guarantee plc [2003] Lloyd's Rep. IR 315, 334-6, paras 92-100."

485. Avoidance is a draconian remedy and should not be granted lightly. This is expressed in the following passage from the decision of Staughton LJ in ***Kausar v Eagle Star*** [2000] Lloyd's Rep IR 154, cited with approval in the ***Brit*** decision at paragraph 118:

> *"Finally, avoidance is a draconian remedy...:*
>
> > *...It enables the insurer to disclaim liability after, and not before, he has discovered that the risk turns out to be a bad one; it leaves the insured without the protection which he thought he had contracted and paid for. Of course there are occasions where a dishonest insured meets his just desserts if his insurance is avoided; and the insurer is justly relieved of liability. I do not say that non-disclosure operates only in cases of dishonesty. But I do consider that there should be some restraint in the operation of the doctrine. Avoidance for honest non-disclosure should be confined to plain cases."*

486. A policy of insurance may be avoided (i.e. treated as if it never existed) on the basis of either material misrepresentation or material non-disclosure.

487. The only area where the parties seem to be in dispute relates to what is necessary in order for Allianz to establish inducement. This of course arises only in the event that Allianz has already established that a misrepresentation was made to it that was materially incorrect. In those circumstances, Allianz contends that "*the relevant question is: "would the insurer have entered into the policy on the terms that it did if the misrepresentation had not been made?"* (See paragraph 136(a) of Allianz's Written Opening Submissions and paragraph 227(a) of its Written Closing Submissions.)

488. Allianz relies in support of this assertion on the decision of Leggatt J in ***Involnert*** at paragraphs 210 to 217, and in particular what is said in paragraphs 214 and 217:

"*214. ...there is still in the insurance context a conceptual distinction between a claim based on non-disclosure and a claim based on misrepresentation. The former is governed by section 18 of the Act and the latter by section 20. The relevant principles, although similar, are not the same. Plainly, where the claim is based on non-disclosure of a material fact, the relevant question when considering inducement is what the insurer would have done if told that fact. In so far, however, as the claim is based on a misrepresentation, then in the insurance context, just as in any other context it is what was actually said to the insurer-rather than what was not said- which is the foundation of the claim, and the relevant test is therefore what the insurer would have done in the absence of that representation.*

.....

217. I conclude that in considering, as I am at present, a defence of misrepresentation based on section 20 of the Act the question of inducement depends on whether Insurers would still have accepted the proposal form as satisfactory if it had not contained a representation that A1 believed the market value of the Yacht to be €13m."

489. Toby does not accept that the above analysis is correct:

(1) First, Toby says that the remedy of avoidance is a remedy arising out of the duty of good faith which is a duty peculiar to contracts of insurance. As section 17 of ***the 1906 Act*** (and section 22 of ***the 1959 Act***) expressly state, that duty is a mutual duty. While the law as to contents of the insured's duty of good faith in relation to the placement of a policy is clear, the nature and scope of the insurer's mutual duty of good faith has yet to be fully worked out. In this respect, there is a helpful discussion in the Cayman Islands Court of Appeal decision of ***Banks v ICWI*** of all the recent decisions concerning insurers' mutual duty of good faith. However, no definite conclusion was arrived at on this point. Toby says that in the present case Allianz's duty of good faith prevents it from avoiding on the basis that it has been induced by a representation in circumstances where if, instead of the misrepresentation, the correct position had been disclosed, it would still have underwritten the risk on the same terms.

(2) Second, Toby says that on the facts of the present case, the analysis in the ***Involnert*** case is inapplicable. This is because, at the time the original representations were made, Allianz only required the relevant information for "*box-ticking*" purposes. While it may be that in such circumstances that, if misrepresentations had not been made, it would not have written the risk, it does not follow that it can argue that it was induced to do so applying the test set out in the ***Involnert*** case. This is because, in such circumstances, Allianz would not have refused the risk if the alleged misrepresentation had not been made but would instead simply have insisted on the relevant information being provided. On this hypothesis, the correct information would have been provided. As a result, the correct test is whether, if the misrepresentation had not been made and Allianz had instead been provided with the correct information, Allianz would have written the risk on the same terms.

The Alleged Misrepresentations

490. I accept as correct, the submission of Mr. Weitzman (paragraph 86 of Toby's Written Closing Submissions), that Allianz's allegation that it is entitled to avoid by reason of material misrepresentations by reason of the email of 27 April 2012 needs to be considered in the following three stages:

(1) Was the statement complained of factually incorrect?

(2) If the statement was factually incorrect, was the difference between that statement and the true position material?

(3) If the difference between the position as represented and the correct position was material, was Allianz induced by the statement in question?

491. Toby submitted also, which I accept, that the statements made in the email of 27 April 2012, in respect of which Allianz complains, need to be considered in context. The context was suggested to include the following:

(1) The placement information provided by UIB to Allianz in Mr. Pollen's email of 11 April 2012 and the attached proposal. Such information included the following:

a. The details of the Aircraft. It was a Cessna C680 aircraft manufactured in 2008 which could carry a maximum crew of 2 and 9 passengers with a maximum take-off weight of 30,300 lbs.

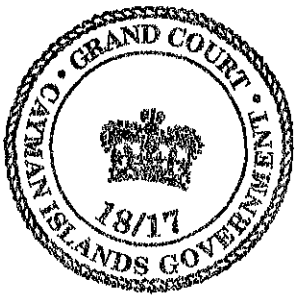
b. The insured, Toby, was a Cayman Islands company.

c. The Aircraft was registered in the Cayman Islands.

d. The Aircraft was leased from CFC.

e. The Aircraft's hangar for maintenance was Cessna's maintenance base in Orlando.

f. The use of the Aircraft would be "*private*".



g. The Aircraft's pilots would be Mr. Nardi and Mr. Leite, including details of their qualifications (hours flown etc) and of their flight safety training programme.

h. The Aircraft was based at Congonhas airport, and this was its airport of "*biggest frequency*".

i. The Aircraft used a hangar at Congonhas airport belonging to TAM.

j. The geographical area for which cover was sought was North, South and Central Americas.

k. There had been no claim in the last 5 years.

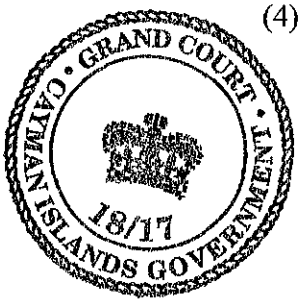
l. The other information contained in the email of 27 April 2012 about which Allianz makes no complaint. This included the statement that:

> *"There's not an awful lot more we can tell you. They don't have their own website. This is very much a private corporate setup."* Mr. Bodkin and Ms. Ojeda both accepted that they would have understood from this that the Aircraft would be used in accordance with the wishes of Toby's owner (wrongly identified in the email as Mr. Gonçalves). Mr. Jolstad conceded that this was something that a prudent underwriter would understand.

(2) The terms of the cover being sought. This cover sought was for the use of the Aircraft for either private pleasure or business, and with an "*Open Pilot Clause*"; that is, a clause allowing any appropriately qualified pilot approved by the insured to fly the Aircraft (which in fact reflects the definition of "*industrial aid*", the category of cover selected by Mr. Bodkin and on which he based the premium rates quoted).

(3) The fact that the Aircraft was leased from CFC and that before granting such a lease CFC would have satisfied itself as to the ability of Toby (or the person behind Toby) to fund the requisite rental payments. Mr. Bodkin

accepted that he would have understood this, and Mr. Jolstad accepted that this would have been understood by a prudent underwriter.



(4) The fact that CFC would also impose as a term of its lease strict requirements as to the maintenance of the Aircraft (including in the present case that the Aircraft be maintained at its Orlando base). Again, Mr. Bodkin accepted that he would have been aware of this, and Mr. Jolstad accepted that a prudent underwriter would have appreciated that this was the case.

(5) Although based in Brazil, the Aircraft was registered in the Cayman Islands and leased to a Cayman Islands company in order to obtain a tax advantage. Mr. Bodkin accepted that this would have been obvious to him. Mr. Jolstad accepted that this would have been appreciated by a prudent underwriter.

Was the Statement complained of factually incorrect?

492. Allianz allege that the email of 27 April 2012 contained the following incorrect statements:

> *"(i) Toby "are stockbrokers" (ii) Toby had existed for 30 years; (iii) Mr. Gonçalves was the owner of Toby; (iv) Toby operated the Aircraft; (v) Toby contracted its own pilots; and (vi) the Aircraft was a corporate jet."*

493. In its Written Closing Submissions, Toby indicates that it accepts that (i) it was incorporated in 2008 and had only existed for 4 years; and (ii) its owner was Mr. Lamacchia, and not Mr. Gonçalves. Those two matters were plainly factually incorrect.

(i) Toby "are stockbrokers"

494. It would seem that Allianz's complaint under this head is not that Toby was a stockbroker rather than an investment company or financial advisor, but rather that it was an SPV set up for the leasing of the Aircraft. Toby did not in fact carry on the business of stockbrokers. I have also found that Toby did not carry on any business of its own, and so it follows that I find that the statement that Toby was a stockbroker was factually incorrect.

18(ii) Toby "*contracted its own pilots*"

495. Allianz's pleaded case is that this statement was incorrect because Toby did not employ its own pilots, rather that Mr. Nardi and Mr. Leite were employed by City Taxi.

496. Toby says that the factual position was as follows: Mr. Nardi and Mr. Leite were indeed employed by City Taxi; Toby arranged with City Taxi for Mr. Nardi and Mr. Leite to provide their services as pilots of the Aircraft; that arrangement was that Mr. Nardi and Mr. Leite would provide their services exclusively to Toby, so that they were the only pilots who flew the Aircraft and they flew no other Aircraft.

497. It is Toby's case that, in the circumstances, the statement that Toby contracted its own pilots was factually correct. Mr. Weitzman submitted that the term "*contract*" is not equated with the term "*employed*". It also covers the types of arrangement of the kind involved here, where Toby had arranged with a third party to have the exclusive benefit of those pilots' services.

498. Toby points out that in cross-examination, Mr. Bodkin accepted that this was correct, that the term "*contract*" covered both the situation where Toby itself employed the pilots and where it arranged with a third party for the provision of the pilots' services and that accordingly, if the facts were as described, Toby did indeed "*contract*" its own pilots. It was suggested that Mr. Jolstad also accepted that the statement "*contracted its own pilots*" did not require that Toby itself employed the pilots; it would be sufficient that Toby contracted with a third party for the pilots' services. His only objection, was seemingly that there appeared to be no formal contract setting out the terms on which Toby contracted with City Taxi for Mr. Nardi's and Mr. Leite's services. No formal contract has been disclosed, and Toby cannot say that any formal contract was entered into.

499. In my judgment, the term "*contract*" also covers the types of arrangement of the kind involved here, where Toby had arranged with a third party to have the exclusive benefit of those pilots' services. The fact that there was no formal contract does not render the statement incorrect. This is because it was clear that City Taxi did provide Mr. Nardi and

Mr. Leite's services to Toby and that Toby had the exclusive benefit of those services. Thus while the arrangement may not have been "*formal*", it could still be described as one where Toby "*contracted*" its own pilots.

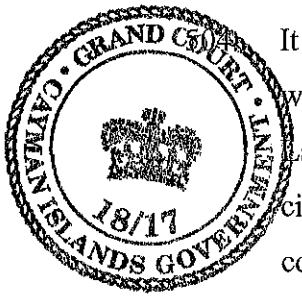
(iii) Toby "*operated*" the Aircraft

500. Mr. Weitzman, in Closing Submissions, indicated that prior to the start of the trial, Toby's understanding was that Allianz's case was that this statement was incorrect because the Aircraft was operated by third parties: City Taxi who employed the pilots; and TAM who provided hangarage.

501. It was submitted by Toby that this allegation was obviously misconceived. The placement material expressly referred to the fact that hangarage was provided by TAM, and the statement that Toby contracted its own pilots did not mean that Toby employed its own pilots. Further, that it was self-evident, on any view, that Toby was not a company whose business was the operation of an aircraft. It was argued that therefore, it was inevitable that Toby would use third parties to provide relevant services.

502. It was pointed out that Mr. Bodkin accepted, (Mr. Weitzman says, rightly), that the statement that Toby operated the Aircraft was correct, even though the pilots were employed by City Taxi and hangarage was provided by TAM.

503. However, Mr. Jolstad on the other hand took a different position entirely. His evidence as it developed during cross-examination, (but not so stated in his report) was that the statement that Toby operated the Aircraft was untrue because the Aircraft was in fact operated by the pilots. That view does not commend itself to me, since, as a company, Toby obviously could not itself fly the Aircraft but would have to operate through human beings. Further, the fact that Mr. Nardi and Mr. Leite were the pilots was expressly stated in the email of 27 April 2012. The Policy expressly provided that any appropriately qualified pilot who was approved by Toby might fly the Aircraft, without any requirement that the Pilot in question be employed by Toby.



It does appear to be accepted that Toby paid all the expenses in relation to the Aircraft and was the lessee of the Aircraft. Indeed, as Toby points out, it is Allianz's own case that Mr. Lamacchia who was a director of Toby directed how the Aircraft was used. In those circumstances, I find that the statement that Toby "*operated*" the aircraft was factually correct.

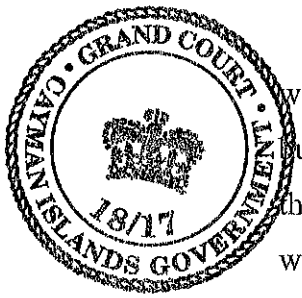
(iv) The Aircraft was "*a corporate jet*"

505. Allianz's case is that this statement was incorrect because the jet was not used for the purposes of Toby's business, but was instead used for Mr. Lamacchia's private purposes. Toby has maintained that the Aircraft was used by Mr. Lamacchia and Ms. Pereira for the purposes of Toby's financial business. However, I have found that this was not so. Toby posit that, even if the Court were to find against Toby on the issue regarding whether it carried on a financial business, the statement that the Aircraft was a "*corporate jet*' is still factually correct.

506. It is noted that in cross-examination Mr. Bodkin accepted that this statement was factually correct and that this was the case whether Toby did or did not carry on its own business.

507. In his oral evidence Mr. Jolstad seemed to be contending that the statement that the Aircraft was a corporate jet was incorrect because that statement in some way implied that the Aircraft would be used only or predominantly for business purposes. However this was in my view misconceived because the statement in question does not say anything about how the Aircraft was to be used. The only statement made as to the use of the Aircraft in the presentation was the statement in the proposal that said *"use: private."* Further, use for non-business purposes was expressly acknowledged by the terms of the Policy, which allowed the Aircraft to be used for "*private pleasure*".

508. It is common ground that Toby, a corporation, was the lessee of the Aircraft. It is also common ground that Mr. Lamacchia and Ms. Pereira were directors of Toby, and as such were persons entitled to, on behalf of Toby, give instructions as to how the jet was to be used. In those circumstances, I accept and find as a fact that the statement that the Aircraft



was a "*corporate jet*" was factually correct, irrespective of whether Toby carried on any business of its own, and irrespective of whether Mr. Lamacchia and Ms. Pereira directed that it be used for their own personal purposes rather than business. Any other conclusion, would require this Court to ignore Toby's existence as a company

If the statement complained of was factually incorrect, was the difference between that statement and the true position material?

Toby *"are stockbrokers"*

509. Allianz accepts that any difference between Toby carrying on business as a stockbroker, and Toby carrying on business as an investment company or financial advisor, is immaterial. Instead, its case is that the correct position is that Toby was a SPV whose sole purpose was to lease the Aircraft.

510. In all of the circumstances, in my view there was no material difference between:-

(1) The position as represented, namely, that Toby was a private company carrying on a financial services business and that the use made of the Aircraft would be decided by Toby's owner, and

(2) What is the correct position, namely that Toby carried on no business of its own and that the use of the Aircraft was dictated by Toby's owner who himself carried on a financial services business.

Toby has existed *"for 30 years"*

511. Allianz has advanced three main reasons why the difference is, it says, material: (i) it is relevant to the "*legal and reputational risk*"; (ii) it is related to Toby's ability to fund the operation of the Aircraft; and (iii) it is relevant to the "*maturity*" of the risk.

512. Although in Mr. Bodkin's Witness Statement he had appeared to advance this point originally, this was abandoned by him in cross-examination. Mr. Weitzman submits that it is self-evident that an entity which has been in existence for 30 years may pose legal and

reputational risks that an entity which has been in existence for 4 years may not. Further, it was posited that everything turns on the nature of the entity and its history and Allianz had no information about these matters.

513. As regards the matter of whether the statement as to how long it had existed was relevant to the ability of Toby to fund the Aircraft, Mr. Bodkin had originally made that point in his Witness Statement, but he did not persist with it in his cross-examination. It was submitted by Mr. Weitzman that no prudent underwriter would draw any inference as to Toby's ability to fund the operation of the Aircraft from the length of time it had been in business, and that instead, any prudent underwriter in the position of Allianz, and which was concerned about the ability of Toby to fund the Aircraft would have enquired as to Toby's financial abilities and/or carried out a credit check. It was submitted that Mr. Bodkin did neither of these things, because he, as a prudent underwriter, appreciated that CFC would have carried out its own financial checks as to Toby's financial abilities before entering into the Finance Lease.

514. As to maturity of the risk, this was a point made by Mr. Jolstad, and was not a matter mentioned by Mr. Bodkin. However, after being cross-examined at length on this issue, Mr. Jolstad accepted that: (a) the risk in question was aviation insurance (as opposed to any other type of insurance which a company like Toby might have, for example, property, liability and such); (b) the statement that Toby had existed for 30 years told the prudent underwriter nothing as to the maturity of the risk because it did not tell one how long Toby had operated an aircraft and had the benefit of aviation insurance.

515. Toby suggests that the only information in fact provided to Allianz as to the maturity of the risk was the statement that *"there is no claims in the last 5 years."* It was Ms. Rowe's evidence that this was a standard statement, and was not to be taken as representing that Toby had had aviation insurance for the last 5 years. Both Ms. Ojeda and Mr. Jolstad agreed with that.

516. In my judgment, the correct position is that the prudent underwriter, in the position of Allianz, who was concerned to know about the maturity of the risk, would not draw any

nference on that matter from the statement that Toby had been in existence for 30 years. Such an underwriter would have asked specific questions about the period during which Toby operated an aircraft and had insurance.

517. In the circumstances, I take the view and so find that, whilst the statement that Toby had been in existence for 30 years was incorrect, it was not materially incorrect, and accordingly, is to be treated as true in accordance with section 20(4) of ***the 1906 Act***. It is an obvious matter of common sense, that there are 30 year-old companies that cannot afford to fund the operation of an Aircraft, and many 4 year old companies that can.

The owner of Toby was "*Alexandre Gonçalves Dos Santos*".

518. It is common ground, that at the time when the Policy was placed, neither Mr. Bodkin nor Ms. Ojeda knew who either Mr. Lamacchia or Mr. Gonçalves was. In these circumstances, Toby submits that the difference between the position as represented, and the correct position cannot have been material. This is because a prudent underwriter in the position of Mr. Bodkin or Ms. Ojeda could have placed no reliance on the statement that Mr. Gonçalves was the owner. Mr. Bodkin accepted this point when put to him. However, Mr. Jolstad took a very different position.

519. In his Supplementary Report, at paragraphs 43 and 48, Mr. Jolstad asserted that the very fact a false representation had been made was, of itself, material. In cross-examination, he initially qualified this evidence by asserting that the fact that a misrepresentation had been made would only of itself be material if that misrepresentation was a deliberate lie. However, he subsequently resiled from that position and appeared to suggest that the fact that any misrepresentation had been made would itself be material irrespective of the matter misrepresented. It is noted that Mr. Jolstad even asserted that the statement that Mr. Gonçalves was the owner was a deliberate lie, even though this was not even an allegation made by Allianz. In my view it is clear that Mr. Jolstad had no factual basis for making that assertion.

520. I accept the position as advanced by Toby and find that the difference between the position as represented on this score and the correct position was not material.

Toby "*contracted its own pilots*"

521. I have found that this statement was factually correct. However, even if I am wrong on that I find that the difference between what was said and the correct position would not have been considered material by a prudent insurer. It is clear from Mr. Leite's evidence that Toby had the exclusive benefit of his and Mr. Nardi's services. Therefore, the fact that there may be the absence of a formal contract, and the fact that they were not directly employed by Toby, cannot as a matter of common sense be material. Toby was entitled to call upon them to serve as and when it wished. Further, it is not insignificant that Mr. Lamacchia was the beneficial owner of City Taxi as well as Toby.

522. Further, and in any event, the only requirement contained in the Policy as to the pilots was the "*Open Pilot Clause*", which entitled Toby to use any pilot it approved of who was appropriately qualified. It follows, that even if Toby had employed Mr. Nardi and Mr. Leite itself at the time of the placement, it would have been entitled to use pilots which it did not employ and it would still have been insured. For this additional reason the statement that Toby "*contracted its own pilots*" cannot have been material.

Toby "*operated*" the Aircraft

523. I have found that this statement was factually correct. However, even if I am not correct in that finding, then the difference between the correct position and that which was represented was not material.

The Aircraft was "*a corporate jet*"

524. I have held that this statement was factually correct. However, if this statement was incorrect because Toby was an SPV, then the difference between the statement and the correct position was not material. In circumstances where the insured is a "*private corporate set up*" where the use of the Aircraft will be determined by the owner, then, in

my judgment, there is no material difference between the company leasing the Aircraft being an SPV and that company carrying on a financial services business.

525. Further, if this statement was incorrect because the Aircraft was used for pleasure and/or was in Brazil, then the difference between the position as represented and the correct position would not be material. This is because (as indeed, was conceded by Mr. Jolstad), the placement information stated that the Aircraft was based in Brazil, and the prudent underwriter would accordingly have understood that it would be used in Brazil. Further, the use for which Toby sought cover and for which it was insured under the Policy included private pleasure.

Materiality as a whole

526. Taking Mr. Pollen's email of 27 April 2012 as a whole, and reasonably interpreted, I am satisfied that it did not convey a false impression of the relevant facts — See ***MacGillivray on Insurance*** 13th Edition, paragraph 16-020, cited by Allianz.

If the difference between the position as represented and the correct position was material, was Allianz induced by the statement in question?

527. The burden of proof on the matter of inducement, which is included in the elements that ground avoidance, rests upon Allianz. Allianz's Witness Statements suggest that it was Mr. Bodkin who was induced by the contents of the email of 27 April 2012 and that Ms. Ojeda's involvement was purely administrative. In evidence, however, Mr. Bodkin accepted that he had no recollection of reviewing or relying on that email prior to the risk being bound. While he and Ms. Ojeda were both certain that they would have spoken about the email of 27 April 2012 on the telephone, neither had any actual recollection of doing so and there is no record of any such conversation. In the above circumstances, I find that Allianz is simply unable to satisfying the burden of proof that rests upon it to establish inducement.

528. However, even if I were to attach some weight to the evidence of Mr. Bodkin and Ms. Ojeda that they would have discussed the email of 27 April 2012, and Ms. Ojeda's evidence that she carried out some kind of limited underwriting assessment based on a

partial review of the documents before binding cover, then the evidence is plain that if Ms. Ojeda had any concern, she would have consulted Mr. Bodkin and deferred to his views, given that this was his risk, that he had provided the relevant quotations and he was the more experienced underwriter. I formed the clear impression in listening and observing Mr. Bodkin in cross-examination, that in agreeing to provide cover, he was not at all induced by any representations in the email of 27 April 2012.

Toby "*operated the Aircraft and it contracted its own pilots*"; "*it is a corporate jet*"

529. In this regard, reference was made to Mr. Bodkin's request for *"a thorough description of the business of the insured and or perhaps a website"* and for *"complete underwriting information with respect to this insured and their business"*. The point made here on behalf of Toby was that Mr. Bodkin was not seeking further information as to the operation of the Aircraft, and the contracting of pilots. Ms. Ojeda ultimately accepted that this was the case when she confirmed that the information contained in the email of 27 April 2012 was sufficient, and that she was looking at the information provided in relation to the insured and its business, and not the information provided in relation to the operation of the Aircraft. In the course of her cross-examination, Ms. Ojeda accepted that the omission of the statements as to the pilots and the operation of the Aircraft would not have affected her view that the information provided was sufficient.

530. In the circumstances, it is in my view clear that Allianz was not induced by the statements in that email as to Toby operating the Aircraft, contracting its own pilots or as to the Aircraft being a corporate jet.

Toby "*are stock brokers*"

531. I have found that Toby carried on no business of its own. However, Mr. Bodkin's evidence indicates that he would still have been willing to underwrite the risk on the same terms, his view being that there was no significant difference between Toby carrying on a financial services business and Toby's owner carrying on such a business, and using the Aircraft for the purposes of that business.

Toby has existed "*for 30 years*"

532. So far as the statement that Toby had existed for 30 years is concerned, Toby says that Allianz would still have written the risk on the same terms if that statement had been omitted. This was disputed by Ms. Ojeda. However, learned Queen's Counsel Mr. Weitzman points out that Mr. Bodkin, who Ms. Ojeda accepted she would have consulted, had been willing to underwrite and issue an unqualified quote without this information.

533. Reference was also made again to the fact that the proposal had also stated that there had been no claims in the last 5 years. This was the standard information that Allianz required in order to underwrite the risk. In this respect, Toby emphasizes that section 6.2.3. of the AGCS Rules and Principles to which Mr. Elkington referred Ms. Ojeda in re-examination and which stated that *"The claims history (of at least the most recent 5-year period) is a major element of the risk evaluation process"* forms part of the section of those Rules and Principles dealing with property risks, the relevant section of those Rules and Principles for Aviation business being section 6.7.5 which identified the minimum information required being*" losses for 5 years with details on any major losses".*

534. It was further pointed out that Ms. Ojeda accepted in cross-examination that the statement in the proposal that there had been no claims in the last 5 years was a standard statement. While she also said that if that statement had appeared alone she would have asked *"how long they'd been in business just to reconfirm"* it is, it was submitted by Toby, clear from her subsequent answer *"there have been cases...they've had the aircraft for 3 years and they say no losses in the past 5 years"* that her enquiry would have been directed to the period during which Toby had had aviation insurance, rather than the period during which Toby had existed.

535. I accept that if the information as to Toby having been in business for 30 years had been omitted from the email of 27 April 2012, the most probable outcome was that Ms. Ojeda would simply have proceeded to bind cover. If she had been concerned by the absence of that information she would have consulted with Mr. Bodkin, and he would have told her to go ahead with the underwriting of the risk. If, instead of consulting with Mr. Bodkin, she

had chosen to make enquiries, then those enquiries would have been directed to the period during which Toby had had aviation insurance, and not the period for which Toby had existed. The answer to such an enquiry would have been "*4 years*". In my view this would either have been acceptable to Ms. Ojeda or would again have caused her to consult Mr. Bodkin. If she had consulted Mr. Bodkin, the fact that Toby had only had aviation insurance for 4 years would not have caused him to change his underwriting decision. Cover would still have been provided on the same terms under the Policy.

The owner of Toby was *"Alexandre Gonçalves dos Santos"*

536. In all of the circumstances, including that neither Mr. Bodkin nor Ms. Ojeda had enquired as to who Mr. Gonçalves was, it is clear that they had no interest in the identity of Toby's owner. Accordingly, if the statement that Mr. Gonçalves was the owner had been omitted from the email of 27 April 2012, it would in my view have made no difference to them (and equally if that email had identified Mr. Lamacchia as the owner of Toby, this also would have made no difference to them). In the circumstances, whatever test one applies, it is clear that Allianz was not induced by this statement.

Good Faith Argument Advanced by Toby

537. In my judgment, although the insurer's duty of good faith and the remedy of avoidance, has been the topic of some controversy, as stated by Morrison JA in ***Banks v ICWI***, paragraph 75 citing ***MacGillivray on Insurance Law***, paragraph 17-098, on the present state of the common law, it seems accurate to say that the insurer's right to avoid the contract of insurance on the ground of non-disclosure is not conditional on the insurer acting in good faith. I take the view, based upon my finding that Allianz has failed to discharge its burden of proving that the insured's misrepresentation has induced it to enter into the contract of insurance, that it is not necessary for me to attempt to resolve this difficult point raised by Toby in relation to inducement and misrepresentation.

538. In relation to the issue of inducement, I have noted that in its original letter of 12 March 2014 seeking to avoid, Allianz did not rely on Mr. Pollen's email of 27 April 2012. However, I accept that as Mr. Elkington argues, there is no rule that if a Policy is avoided on one ground, the insurer cannot subsequently rely upon that ground as well as others. Indeed, in its letter of avoidance Allianz expressly reserved the right to rely on the non-disclosure of further material circumstances (though no mention was made of misrepresentations) if they came to light. The misrepresentations alleged in relation to Mr. Pollen's email were relied upon by Allianz in its Defence and Counterclaim filed in July 2014.

The alleged Non-Disclosures

539. Allianz's allegations as to non-disclosure can be grouped under four main categories:-

(1) Non-disclosure of the circumstance that misrepresentations had been made in the email of 27 April 2012.

(2) Non-disclosure of the circumstance that Toby was an SPV incorporated with the sole purpose of leasing the Aircraft.

(3) Non-disclosure of the circumstance that the Aircraft was being used in Brazil to serve the personal interests of Mr. Lamacchia.

(4) Non-disclosure of the circumstance that the Aircraft was being used in contravention of Brazilian law so as to unlawfully avoid Brazilian import duties.

540. I have found the approach taken by Toby's lead Counsel in paragraph 145 of the Written Closing Submissions to be very useful. He there suggests that these allegations be considered under the following six-stage test:-

(1) Was the circumstance in question a circumstance which was known to Toby or which Toby was deemed to know, in that it was a circumstance which Toby ought to have been aware of in the ordinary course of its business?

(2) Was the circumstance disclosed by Toby to Allianz?

(3) Was the circumstance in question a circumstance which was known to Allianz or which Allianz is presumed to know by reason of it being a matter of common knowledge or a matter which an insurer such as Allianz ought to know in the ordinary course of its business?

(4) Was it a circumstance as to which information was waived by Allianz?

(5) Was the circumstance material?

(6) Did the non-disclosure of the circumstance induce Allianz to agree to provide cover on the terms of the Policy?

(1) Non-disclosure of the circumstance that misrepresentations had been made in the email of 27 April 2012.

541. I must confess that this point seems legally misconceived, as Mr. Weitzman has convincingly argued. If material misrepresentations were made by the email of 27 April 2012, and such misrepresentations induced Allianz to provide cover on the terms of the Policy, then Allianz would have been entitled to avoid and its allegation of non-disclosure would in truth add nothing to its case.

542. I have also considered if instead, what Allianz is saying is that the very fact that misrepresentations had been made was a material circumstance which Toby was obliged to disclose, even if the misrepresentations were not themselves material, that it would be enough for an insurer to prove that a misrepresentation had been made but not disclosed. However, that would be contrary to the Scheme of **the 1959** and **1906 Acts**, which both require that a misrepresentation be material in order for the insurer to be entitled to avoid.

543. I turn to, in any event, analyse the case under the 6 stage test identified above.

544. The circumstance that misrepresentations had been made in the email of 27 April 2012 was not known to Toby and it was not a matter in my view which Toby was deemed aware of, since it was not a matter of which Toby ought to be aware in the ordinary course of its business. Such misrepresentations as were made were plainly not intentional and were the

result of an error on the part of the broker. The situation would be different if the representations came about as a result of deliberate lies. However, that is not what is alleged here.

545. Toby does not allege that it disclosed to Allianz that misrepresentations had been made in the email of 27 April 2012.

546. Allianz was not aware that the email of 27 April 2012 contained misrepresentations.

547. Allianz did not waive disclosure of the circumstance that misrepresentations were made.

548. I am satisfied that the fact that misrepresentations had been made was not itself material in the circumstances.

549. In my judgment Allianz was not in any event induced by any non-disclosure of the misrepresentations made. It is clear from Mr. Bodkin's evidence that if the broker had explained to him that it had made an error in transmitting the information to him, and if he had been informed of all the matters which Allianz contends renders the information in the email incorrect, he would still have written the risk on the same terms.

550. In the circumstances this basis is not made out.

(2) Non-disclosure of the circumstance that Toby was an SPV incorporated with the sole purpose of leasing the Aircraft.

551. I have found as a fact that Toby was an SPV set up with the sole purpose of leasing the Aircraft. In my view this was plainly a matter which was known to Toby.

552. Toby did not disclose to Allianz that it was so set up.

553. That this was not a circumstance which was known to Allianz or which Allianz is deemed to know.

554. This was not a matter in respect of which Allianz waived disclosure.

555. As regards this aspect of the matter, it seems to me that this head requires that the Court look at materiality in the context of the placement as a whole. Mr. Bodkin's evidence was that as a prudent underwriter he would have understood from the statement that Toby was *"very much a private corporate set up"* that Toby's owner would decide the use of the Aircraft. As stated previously, he also accepted that there was no significant difference from his perspective between (a) a private company carrying on a financial services business where the use of the Aircraft would be decided by the owner of that company; and (b) an SPV whose owner carried on a financial business and who decided the use of the Aircraft. In my view there was not much of a difference between these two scenarios. In the circumstances, Toby being an SPV would not have influenced the prudent underwriter. I am of that view, although Ms. Rowe did say that if she had known that Toby was set up solely to lease the Aircraft this would have set off alarm bells for her.

556. I am satisfied that the non-disclosure of the circumstance that Toby was an SPV set up with the sole purpose of leasing the Aircraft did not induce Allianz to provide cover on the terms of the Policy, given the state of the evidence after cross-examination of Mr. Bodkin and Ms. Ojeda.

(3) Non-disclosure of the circumstance that the Aircraft was being used in Brazil to serve the personal interests of Mr. Lamacchia.

557. I have found that the Aircraft was being used in Brazil to serve the personal interests of Mr. Lamacchia. This was then obviously a matter which was known to Toby.

558. It was disclosed to Allianz that the Aircraft was based in Brazil and it would plainly be used there. It was also disclosed that Toby was a "*private corporate set up*".

559. Allianz was aware of the matters set out at sub-paragraph (2) above. Further, the Policy expressly covered use for private pleasure and business. Allianz therefore agreed for it to be used for both private pleasure and business.

560. Allianz therefore had the information referred to above. Allianz asked no questions as to the use to be made of the Aircraft and then instead expressly confirmed to UIB that the

"information provided with respect to the business is sufficient." In those circumstances, I accept Toby's submission that Allianz would have therefore waived any further disclosure as to the use to be made of the Aircraft.

561. In my view, in so far as it was not disclosed that the Aircraft was being used in Brazil to serve the personal interest of Mr. Lamacchia, then the difference between the actual position and that which was disclosed is not material, given Mr. Bodkin's evidence.

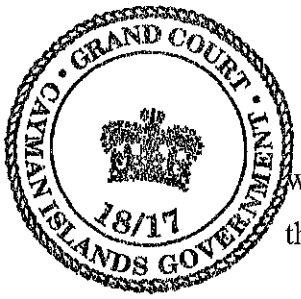
562. Any non-disclosure of this circumstance did not induce Allianz to provide cover on the terms of the Policy. I have already referred to the evidence of Mr. Bodkin and Ms. Ojeda. To the extent that Mr. Bodkin did not formally bind the risk, Ms. Ojeda's evidence is that she would have consulted with him and deferred to him in relation to any matter of concern.

(4) Non-disclosure of the circumstance that the Aircraft was being used in contravention of Brazilian law so as to avoid Brazilian import duties.

563. Toby was set up to lease the Aircraft and to avoid import duties. Following its incorporation and leasing of the Aircraft, it made repeated use of the TAR. Obviously Toby was aware of these matters at the time of the placement of the Policy. I have found that the Aircraft was being used in contravention of Brazilian law and in a way that constituted an unlawful evasion of import tax. However at the time of the placement of the Policy the Brazilian authorities had granted repeated permission for the Aircraft, and indeed others, which were subsequently made the subject of Operation Forced Landing, to enter Brazil under the TAR.

564. It is common ground that Toby did disclose to Allianz that (a) the Aircraft was registered in the Cayman Islands; (b) Toby was incorporated in the Cayman Islands; and (c) the Aircraft was based in Brazil.

565. Allianz was aware that the Aircraft while based in Brazil was registered in the Cayman Islands and leased by a Cayman company. Mr. Bodkin's evidence in cross-examination



was that in those circumstances he would have assumed that the Aircraft was registered in the Cayman Islands in order to gain a tax advantage.

566. Allianz did not waive disclosure on this issue in my view.

567. However, in all the circumstances, the fact that the Aircraft was taking advantage of the TAR was not a material circumstance, given the express wording of the Policy. The Law Compliance Condition in the Policy required expressly that the insured use all reasonable efforts to comply with any applicable law. As Mr. Bodkin remarked, exclusion (d) to Part B excluded from cover loss caused by the non-payment of a sum due. In the circumstances, Allianz was only exposed to loss under the Policy in the event that the insured had used all reasonable efforts to comply with the applicable law, but the Aircraft was confiscated and that such confiscation could not be reversed by the payment of the tax due. I therefore accept Mr. Weitzman's submission that as a result, the fact that an insured such as Toby had sought to arrange its affairs in what it thought was a tax efficient manner, in my view recklessly, was not a circumstance which would have influenced a prudent underwriter writing cover on the terms of this particular Policy.

568. In all the circumstances, the express disclosure of the fact of tax advantage arrangement of affairs would not have altered Mr. Bodkin's underwriting decision. Similarly, I do not accept that his decision would have been altered by any more detailed disclosure of the successful use made by the Aircraft of the TAR made up to that time. In the circumstances, although I think this is the most difficult non-disclosure issue, I find that this non-disclosure ground is not made out.

569. I note that in its Closing Submissions, Toby has indicated (at paragraph 151) that, for the avoidance of doubt, Toby accepts that the position would be different if it had knowingly engaged in a dishonest scheme to evade rather than to avoid import duty. However, it points out that in those circumstances, Toby would not in any event be able to recover because it would be in breach of the Law Compliance Condition, and this is the reason that it maintains that the avoidance defence adds nothing to Allianz's allegation of breach of that condition.

570. I have found that Allianz is not entitled to avail itself of the remedy of avoidance. However, in the event that I am not correct in so finding, I have gone on to consider the question of whether, notwithstanding its entitlement to avoid, that Allianz has become disentitled to avoid as a result of affirmation.

571. In order to show that there has been such affirmation, the burden of proof rests on the insured to establish that the insurer has made an unequivocal election by words or conduct to keep the Policy in force.

572. Further, that for affirmation to apply, the insurer must, at the time of communication of the conduct in question, have had knowledge of both (i) the facts giving rise to its right to avoid the policy; and (ii) its legal right to avoid.

573. Toby has pleaded the matter as follows, at paragraph 4 of the Re-Re Amended Reply and Defence to Counterclaim that Allianz:

> *"has elected to affirm the Policy and has thereby waived or lost such right by reason of its conduct and communications since becoming aware of the claim, including in particular a letter dated 22 April 2013 to Jose Roberto Lamacchia."*

574. The question of whether an insurer's words or conduct amount to an affirmation of the Policy was considered in the case of ***Brit UW Ltd.v F& B Trenchless Solutions Limited*** [2015] EWHC 2237 (Comm.) At para. 116, Carr J indicated that this *"depends on how a reasonable person in the position of the assured would interpret the insurer's words or conduct."*

Allianz's Position

575. It is Allianz's position that there was no affirmation of the Policy because (a) it did not make an unequivocal election by words or conduct to keep the Policy in force, and (b) at

the time of any conduct in question, Allianz did not have knowledge of (i) the facts giving rise to its right to avoid; and/or (ii) its legal right to avoid the Policy.

Toby's Position

576. I adopt Mr. Elkington's characterization of Toby's pleading as being vague. However, in its Written Closing Submissions, Toby relies upon the following conduct on the part of Allianz as constituting an affirmation of the Policy and as waiving any rights Allianz would otherwise have had at the dates of such conduct to avoid:

(1) The Declinature letter dated 22 April 2013. In that letter Allianz declined cover pursuant to exclusions (b) and (d) to Part B of the Policy and on the basis that the allegations made by the FRS of illegal activities would "*bar coverage*". Toby in their Written Closing Submissions (paragraph 153) assert that the Declinature Letter treated the Policy as then continuing and accordingly constitutes an election to this effect, affirming cover under the Policy and waiving avoidance on the grounds of any matter then known to Allianz.

(2) Allianz's conduct following the Declinature Letter dated 22 April 2013 in not seeking to avoid the Policy until the Avoidance Letter dated 12 March 2014. Toby accepts that silence will not generally amount to an election. However, it is argued that on the facts of this case, where Allianz had expressly declined cover pursuant to the terms of the Policy and where there had been a telephone conversation on 25 July 2013 during which the full position in relation to Mr. Lamacchia's ownership of Toby had been communicated to Allianz, such silence was reasonably to be understood as indicating that Allianz was continuing to treat the Policy as being in effect.

577. As to (b)(ii) of these grounds, Toby points out that Mr. Bodkin confirmed that all the claims handlers involved in this matter, starting with Mr. McSwain and ending with Ms. Beneda-Rubenstein were both experienced and legally qualified. He also confirmed that Mr. McSwain (who is of course the claims handler up to at least 25 July 2013 and who Mr.

Boulkin – unlike Mr. Rivera – knew personally) would have been well aware of the concept of avoidance and the legal requirements in order to avoid. Mr. Weitzman referred to the presumption that an insurer who had a legal adviser received the relevant legal advice. That presumption can only be rebutted by the insurer choosing to waive privilege in relation to the relevant advice, something which Allianz in the present case, he asserts, has chosen not to do.

578. Toby also submitted that Allianz's emphasis on the fact that the Policy is governed by Cayman Islands law is a non-point because the law of the Cayman Islands in relation to insurance law is in all material respects identical to the law of England & Wales, and it is not suggested that US law in relation to avoidance differs significantly from the law of the Cayman Islands and England & Wales.

579. As to the ground (b)(i), Allianz's knowledge of the underlying facts which it now relies on to avoid, Toby's position is that Allianz has deliberately sought to prevent this question being investigated by calling Mr. Rivera as the representative of its claims handling department. Mr. Rivera had no actual involvement in this matter prior to September 2014 (which was after the service of Allianz's Defence). His evidence was as a result, it was argued, necessarily based solely on his reading of the claims file. Toby says that in such circumstances the Court is entitled to draw an adverse inference against Allianz; that is to assume that insofar that Mr. Rivera had properly acquainted himself with the contents of the claims file and properly answered the questions put to him, his evidence would have been adverse to Allianz's case as to the issue of affirmation.

580. It was argued that what Mr. Rivera did accept was that Allianz understood at some time in the course of 2012 that Toby had been acting illegally. His evidence was as follows:

> "*Q. And what did Allianz discover as a result of those investigations?*
>
> *A. Ultimately, they discovered that the aircraft were being used illegally in Brazil.*
>
> *Q. What did Allianz discover in the course of 2012 as a result of those investigations?*

A. That the aircraft were being used illegally in Brazil.

Q. Allianz was aware of that in 2012?

A. That the aircraft were being used illegally in Brazil, that fact."

581. In the circumstances, Toby says that Allianz by the Declinature Letter waived any right to avoid it might otherwise have had to avoid on the basis that Toby had been acting illegally; i.e. taking advantage of the TAR in a way that was illegal.

582. Further, the Declinature Letter itself refers to Allianz having reviewed the Policy. Mr. Bodkin's evidence was that Allianz would, at the same time, have reviewed the underwriting file, which would have included the email of 27 April 2012. While Mr. Rivera was either unwilling or unable to confirm that this was the case, Toby's submission is that it is obvious that any properly run insurer in the position of Allianz would have reviewed the underwriting file before sending out a letter in the terms of the Declinature Letter.

583. It was argued that while the basis for Allianz's understanding in 2012 that Toby had acted illegally is unclear, the *modus operandi* of those taking advantage of the TAR, the circumstances surrounding Operation Forced Landing, and the nature of the FRS's challenge to the use of the TAR by those involved in that operation were well known in Brazil. Although Mr. Rivera was not willing to give any details of Allianz's investigations in Brazil, he did accept that those investigations did involve the instruction of Brazilian lawyers as well as investigations by Allianz's Brazilian office. In the circumstances, Mr. Weitzman posited that it can properly be inferred that Allianz would have been aware in 2012 that the aircraft seized in Operation Forced Landing had made repeated use of the TAR and were, through intermediaries, owned by Brazilian companies and nationals.

584. Further, the notifications of 29 August 2012 and 26 February 2013 were both signed by Mr. Lamacchia on behalf of Toby and the FRS notice of confiscation was clear as to its accusations.

585. Having regard to the terms of Toby's notifications and the attached FRS notice of confiscation, Toby asks the Court to infer that Allianz was aware by at least the start of March 2013 that Mr. Lamacchia was the ultimate owner of Toby and that one of the

grounds on which the Aircraft had been confiscated was that Toby had been interposed as the lessee of the Aircraft to hide the fact that Mr. Lamacchia was in reality the person who owned the Aircraft.

586. In any event, while the Declinature Letter did not expressly state that Allianz considered the FRS's allegations of illegality etc to be correct, it declined cover on the basis that they were. And, as stated above, that declinature was based on the terms of the Policy. Significantly, the Declinature Letter made no reference to avoidance and, in particular, did not assert that on the hypothesis that the FRS allegations were correct, that Allianz would be entitled to and/or would avoid the Policy. Instead, that letter stated that in those circumstances Allianz would consider coverage to be barred; i.e. there would be no cover under the terms of its Policy. Accordingly, Toby argues, that the Declinature Letter is properly to be read as indicating that Allianz would rely on the terms of the Policy to deny cover to the extent that it was established that the FRS allegations were correct, rather than avoiding the Policy. As a result, the Declinature Letter is to be treated as an election, affirming the Policy in the event that the FRS's allegations were established and waiving any right which Allianz would otherwise have had to avoid on the basis of those allegations. In a nutshell, it was an election on an assumed basis.

587. Reference was also made to the telephone conference on 25 July 2013. As set out above, the precise nature of Mr. Lamacchia's ownership of Toby was explained to Allianz in the course of that telephone conference. Allianz did not respond or make any complaint in relation to this. Instead, it first alleged that the representation that Mr. Gonçalves was the owner of Toby was untrue in its Defence served in July 2014. In the circumstances, if Allianz had not previously waived any right to avoid by reason of Mr. Lamacchia being the owner of Toby, then, runs the argument, it did so by its conduct in saying and doing nothing following that telephone conference.

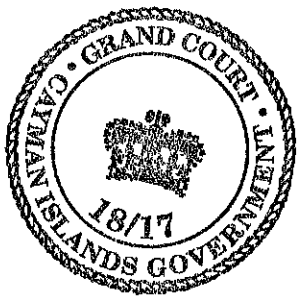
Allianz in Response

588. Mr. Elkington referred to the letter of 22 April 2013, which has been referred to as "the Declinature Letter". He submits that if, for example, Allianz had in that letter said to Toby

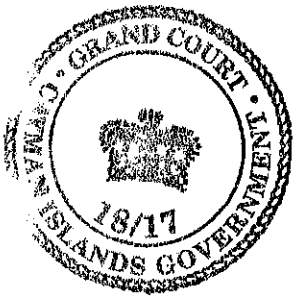
— *"We realize we can avoid the Policy, but we are not going to do so, and instead are going to decline the claim based on the Policy terms*", then that would be one thing, and would amount to an election. However, Allianz did no such thing. It was submitted that Allianz did not do anything which would lead a reasonable person in the position of Toby to interpret Allianz's conduct as amounting to a decision not to avoid the Policy and instead to rely on its terms and conditions. It was further argued that the mere reliance on policy terms does not amount to an unequivocal demonstration that the insurer has chosen to affirm the policy.

589. Reference was also made to ***Involnert*** in which Leggatt J held at paragraph 179 that an insurer's conduct in serving a defence (which relied on policy terms and in which no point on avoidance was taken) did not amount to an affirmation of the policy. It was a year later that the insurers avoided the policy, and an amended defence was filed alleging that the policy was avoided.

590. I found paragraphs 178 and 179 of ***Involnert*** useful. There Leggatt J stated as follows:



> *"178. Turning to the present case, the provision in the R.12 clauses which gives insurers a right to examine agents of the insured on oath and to require documents to be produced for examination serves a useful purpose in assisting the insurers to decide at an early stage and without having resort to litigation whether they are liable to pay a claim. The clause is no longer needed for this purpose, however, after the insurers have decided to avoid the policy. Still less is there any basis for inferring that the clause is intended to establish a contract separate from the rest of the insurance contract and which is therefore capable of surviving its avoidance. It follows that the express invocation, without reservation, of a right to examine documents pursuant to this clause would in my view be inconsistent with treating the contract as having been avoided. Such conduct is therefore capable of constituting an election to affirm the contract. For the reasons which I have stated at some length, I therefore disagree with the contrary*



view put forward in The Grecia Express and believe that the Iron Trades case illustrates the true principle.

Service of the Defence

179. All that said, I have pointed out earlier that throughout the correspondence in which the solicitors were pursuing requests for documents, all the Insurers' rights (including any right to avoid the policy for non-disclosure) were expressly reserved. In the face of this obstacle to finding an unequivocal communication of a decision to affirm the policy, counsel for the claimant sought to found their waiver argument on service of the Defence, which did not contain any express reservation of rights. Service of the Defence did not itself involve the invocation of the contractual right to require documents to be produced for examination. What the Defence did was to deny liability to pay the claim on the ground (amongst others) that the claimant had failed to comply with that requirement and other requirements of the policy. I do not accept that pleading a defence to the claim which could only operate if the contract was not avoided of itself demonstrated unequivocally that Insurers had chosen to affirm the contract. That is illustrated by the fact that Insurers could still have relied on that defence as one ground for resisting the claim if they had purported to avoid the policy- as they subsequently have. The only point to be made about the Defence is that it did not itself give notice that Insurers had decided to avoid the policy. That, however, was consistent with a belief that they did not at that stage have sufficient grounds to do so. Indeed, it seems to me that a reasonable person in the claimant's position would have drawn this inference given the background that Insurers had been pursuing (under a reservation of rights) requests for information relevant to issues of potential misrepresentation and non-disclosure which were outstanding when the Defence was served and which they continued to pursue thereafter."

591. Allianz says that in the summer of 2012, it became aware of Operation Forced Landing and the seizure of the Aircraft. However, all that had occurred at that point was the seizure of the Aircraft, and the start of an investigation. All that Allianz could have known, it claims, was that the Aircraft had been seized and matters were being investigated. There can be no suggestion that Allianz could have obtained access to the confidential investigations of the FRS.

592. In January 2013 the FRS decided to confiscate the Aircraft. However, the only information that Toby provided to Allianz, on 26 February 2013, was the 4 page Notice of Assessment. Mr. Elkington argues that this provided no information of the facts on which the confiscation was based. Toby chose not to provide to Allianz a copy of the 50 page decision, Allianz alleges.

593. Allianz's reaction to the Notice of Assessment was to decline the claim on the basis that it fell outside the cover afforded by the Policy, as it did on 22 April 2013. The declinature, it was submitted, was squarely and exclusively based on information set out in the 4 page Notice of Assessment. When it sent that letter, Allianz was unaware of the facts which entitled it to avoid the Policy. This is confirmed, the argument continues, by Mr. McSwain's email of 18 July 2013 in which he stated:

> "*We do not have anything from the IRS except the original assessment. We do not know what has transpired since the airplane was originally impounded... We would be interested in a further review of this coverage matter if the Insured will provide a complete record of the underlying assessment procedure brought by the IRS of Brazil.*"

594. Despite Mr. McSwain's request for "*a complete record of the underlying assessment procedure*" Toby chose to provide him with no further documents. It did not send him the 50 page 15 January 2013 decision, nor any of the documents on which that decision was based. Toby was, Allianz alleges, keeping secret from Allianz what had actually occurred.

595. During 2013, Toby's appeal was being considered. That appeal was rejected on 24 September 2013. However, a copy of that decision was only provided to Allianz on 8

November 2013, under cover of a letter from Maples to Allianz. It was the contents of that decision that finally provided Allianz, it asserts, with the facts which underpinned the confiscation of the Aircraft, and which formed the basis of Allianz's decision to avoid the Policy.

596. Therefore, it was not until 8 November 2013 that Allianz first had knowledge of the facts giving rise to the right to avoid the Policy.

597. Mr. Elkington reminded the court that Allianz is an American company. The Policy is governed by Cayman Islands law, and therefore whether or not Allianz had the legal right to avoid the policy is a matter of Cayman Islands law. There is no basis, he submitted, for presuming that Allianz had knowledge of Cayman Islands law, and how it applied on the facts of this case, prior to the date when Allianz first sought advice from Cayman Islands lawyers.

598. Mr Rivera explained how Allianz initially obtained external advice from lawyers in Brazil about what was happening in Brazil. It was submitted that that was understandable, because Allianz's first query would be whether there had been any loss of the Aircraft at all. Those enquiries prompted Mr. McSwain's email of 10 September 2012 in which he correctly stated that no claim existed. That statement was correct, Allianz says, because, as Toby agrees, the decision to confiscate the Aircraft (made in January 2013) had not yet been made, and there was at this point no loss of the Aircraft.

599. Advice from counsel in the Cayman Islands did not come until later. Mr. Rivera said that such advice was obtained around the time of the commencement of the action in the Cayman Islands, i.e. in December 2013 or January 2014.

600. Thus Allianz's case is that it did not know that it had the right to avoid the Policy until it received legal advice from Cayman Islands counsel, and therefore it cannot have affirmed the Policy at any time prior to that date. Having received such advice, it promptly avoided the Policy in March 2014.

Determination on Affirmation

601. In my judgment, this case is close to the borderline. On the one hand, in his email of 18 July 2013, Mr. McSwain requested "*a complete record of the underlying assessment procedure*", without any express reservation of any right to avoid. However, he did say that Allianz did not know fully what had transpired since the Aircraft was impounded. Further, the Declinature Letter does seem to have been squarely and exclusively based on the information set out in the four-page Notice of Assessment. In all of the circumstances it seems to me that a reasonable person in Toby's position, given its own lack of provision of specific details to Allianz, would not have interpreted Allianz's Declinature Letter or Allianz's subsequent conduct, including the telephone conversation on 25 July 2013, as an election to affirm the Policy. In my judgment, none of these matters alone or together amount to an unequivocal election.

602. However, as regards the question of requisite knowledge, I do think that Allianz would, with the experienced claims handlers and legally qualified persons involved in this matter, starting with Mr. McSwain, and ending with Ms. Beneda-Rubenstein, have been well-aware of the legal right to avoid the Policy. As Toby has argued, there is a presumption that an insurer that has a legal adviser received the relevant legal advice, and that presumption has not been rebutted here.

603. I also do not think that anything properly turns on the fact that Allianz was an American Company and that the Policy was governed by Cayman Islands law. Even if Allianz only received advice from Cayman attorneys in December 2013 or January 2014, I do not accept that Allianz was not aware of its right to avoid long before that. I do not accept that Allianz was not aware of its rights until they received advice from Cayman lawyers because the Policy was subject to the law of the Cayman Islands.

604. As to when Allianz first had knowledge of the facts giving rise to its right to avoid, Mr. Bodkin's evidence is that Allianz would, at the time of writing the Declinature Letter, have reviewed the underwriting file, which would have included the email of 27 April 2012. They also would, I infer have been aware in 2012 that the aircraft that were seized in Operation Forced Landing had made repeated use of the TAR and were, through intermediaries, allegedly owned by Brazilian nationals. They also would have received the

notifications of 29 August 2012 and 26 February 2013, which were both signed by Mr. Lamacchia on behalf of Toby. The FRS notice of confiscation, which was attached to the latter notification (and quoted by Allianz in the Declinature Letter), was addressed to Mr. Lamacchia, and accused him of "*fraudulent interposition in imports*" which was explained as being "*Foreign goods, on imports, in case of concealment of the taxpayer, the real seller, the buyer or the person responsible for the operation, by fraud or deception, including fraudulent interposition of third party...*".

605. However, in any event, as I have stated above, a reasonable person in Toby's position would not have interpreted Allianz as having unequivocally affirmed.

The Doctrine of Illegality

606. Logically, Allianz says, this is the first matter that the Court should consider because, if the claim is barred by the doctrine of illegality, then all Allianz's other defences are unnecessary.

607. The doctrine of illegality is a matter of public policy. It operates to prevent an insured from enforcing a contract of insurance if enforcing it would conflict with public policy. This case, Allianz posits, is a good illustration of why the doctrine exists.

608. The argument continues along these lines that follow. If Toby's claim were not barred by the doctrine of illegality, then Toby would be put in a win/win situation. Either its failure to pay import tax would go undetected (in which case it would save US$2.4 million in tax), or its failure would be detected and the Aircraft would be confiscated (in which case it would have a claim on its insurance for that loss, and still not have to pay the US$2.4 million in import duty). The doctrine of illegality prevents a party from buying insurance which allows it to act unlawfully and say: "*Heads I win, tails I do not lose.*"

609. The rationale of the doctrine lies behind one of the reasons why the Federal Judge dismissed Toby's claim for damages in the Civil Proceedings. The Federal Judge stated one of his reasons for dismissing the claim as follows:

"Furthermore, accepting the claim filed [by] *the Plaintiff would be the same as making the evident fraud lawful, once the fraudulent act to import the asset has been provenly occurred. Such practice is not acceptable, considering no one is allowed to benefit for one's own turpitude."*

610. The doctrine of illegality would not have been a bar to CFC's claim against Allianz, since CFC was not involved in the illegal conduct. The defence has only become relevant, Allianz expands, because Toby contends that it can ignore the Loss Payee Clause and recover under the Policy directly. Therefore, learned Counsel submits, Toby cannot say that if the doctrine is found to be applicable, it frustrates the purpose of the Policy, or inappropriately restricts the scope of cover it provides.

611. Allianz refers to the decision in ***Geismar v Sun Alliance and London Insurance Ltd*** [1978] 1 QB 383. In that case the plaintiff's jewels were stolen and he made a claim on his property insurance. However, he had imported those jewels without declaring them to the customs and excise authorities and without paying duty on them, contrary to the ***Customs and Excise Act 1952*** (***"the 1952 Act"***). It was held that public policy required the court to assist the enforcement of ***the 1952 Act*** by denying the plaintiff the benefit of insurance upon goods deliberately imported in contravention of the statute. Thus the claim failed.

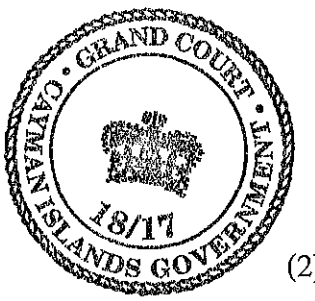
612. The facts of the instant case, Allianz says, are rather stronger than the facts in ***Geismar***. In ***Geismar*** the insured goods were simply stolen. In this case, the insured goods were confiscated, owing to the non-payment of import tax. Thus there is a direct connection between the failure to pay import tax and the loss of the goods.

613. The Plaintiff has not referred to any case, Mr. Elkington points out, where an insured was found to be entitled to receive an insurance payment in respect of the loss of goods, where those goods were confiscated as a result of the insured's failure to pay tax on those goods.

614. The fact that the illegal conduct in question was a breach of a Brazilian revenue law is irrelevant. As a matter of comity, while the Cayman courts may not enforce a foreign revenue law, they will not assist in the breach of foreign revenue law (see ***Euro-Diam v Bathurst*** [1990] QB 1 at 40C-F).

615. In its Opening Toby put forward the following reasons for asserting that its claim was not barred by the doctrine of illegality

(1) First, the confiscation of the Aircraft was not a punishment imposed on Toby, and the FRS has not found that Toby committed a crime. That is wrong, Allianz submits, as Ms. Rosenthal confirmed: "*the decision of the FRS was against both of them*" (i.e. Mr. Lamacchia and Toby). As she confirmed, that is why the claim for an injunction and the Civil Proceedings were both commenced in the joint names of Mr. Lamacchia and Toby.



(2) Secondly the confiscation of the Aircraft was a punishment imposed on Mr. Lamacchia. That is not right. The punishment was the confiscation of the goods. If that punishment caused any loss, then that loss was suffered by the owner and/or lessee of the Aircraft, rather than by Mr. Lamacchia personally.

(3) Third, neither Toby nor Mr. Lamacchia has been convicted of any criminal offence. That is true, but a prior conviction is not required for the doctrine of illegality to be applicable.

616. It is not correct, Allianz says, that the doctrine of illegality adds nothing to the defence based on the Law Compliance Condition. That is because the doctrine of illegality is strictly applied where there has been illegal conduct, whereas the Law Compliance Condition incorporates a "*reasonable efforts*" test. Where it applies, the doctrine of illegality bars a claim, regardless of the terms of the contract.

617. The doctrine of illegality has recently been reviewed by the Supreme Court. Reference was made to the well-known case of ***Patel v Mirza*** [2016] UKSC 42. In that case Lord Toulson (with whom the majority agreed) stated as follows:

> *"The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or possibly certain aspects of public morality, the boundaries of which have never been made entirely clear and which do*

not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary (a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim,(b)to consider any other relevant public policy upon which the denial of the claim may have an impact and (c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather than by the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate."

618. Allianz argues that if Toby's claim succeeds, then Toby would recover compensation for a loss which was the sanction imposed upon it by the Brazilian authorities for its own misconduct. Allianz submits that when Lord Toulson's 3-stage test is applied, it is plain that Toby's claim should be dismissed on the grounds of illegality.

Toby's Arguments on the Doctrine of Illegality

619. Toby also refers to the Supreme Court's decision in ***Patel v Mirza***. However, Mr. Weitzman's take on that decision is that it provides for a proportionate approach to the old mechanistic rules as to the application of the doctrine of illegality, such that the older cases including the decisions in ***Geismar*** and ***Euro-Diam*** cited by Allianz, are of no or little assistance to the Court.

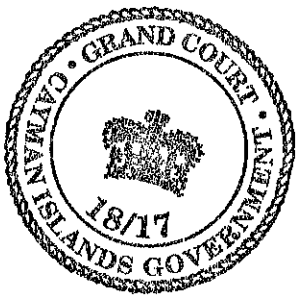
620. Toby has also applied Lord Toulson's 3-stage test, and submits that when applied, it can be seen that the doctrine of illegality should not be applied in the present case.

Resolution of the Issue of whether the Claim is Barred by the Doctrine of Illegality

621. Toby and Allianz have very helpfully each set out their cases in relation to the application of what they have termed the 3-stage test, and which forms part of the framework within which ***Patel v Mirza*** has spelled out a proportionate approach to the doctrine of illegality. As with all the other issues in this case, leading Counsel and their teams have done a very high level analysis of their cases and the relevant legal principles. In relation to this, as in others, I have found it useful to juxtapose the analyses put forward, and decide which I find to be the correct one in the circumstances of the case (See paragraphs 149-156 of Toby's Written Opening Submissions, and paragraphs 189-196 of its Written Closing Submissions. See paragraphs 180-183 of Allianz's Written Opening Submissions and 209-222 of its Written Closing Submissions). This is the exercise that I have engaged in below.

The First Stage

622. So far as the first stage is concerned, i.e. the stage where the Court considers the underlying purpose of the prohibition which has been transgressed and whether the purpose will be enhanced by a denial of the claim:



(1) Toby's case is that the relevant prohibition is that against the provision of an indemnity in respect of punishment for a crime. The underlying purpose of that prohibition is self-evident. It is against public policy that a punishment imposed upon an offender partly or wholly as a deterrent against further offences should be shifted onto the shoulders of another.

(2) For its part, Allianz contends that the prohibition that was transgressed by Toby was a prohibition against importing the Aircraft without paying the appropriate import duties. The underlying purpose of that prohibition is to ensure appropriate import duties were paid on imported goods. That purpose will be enhanced by a denial of Toby's claim.

623. In my judgment, Toby's analysis is the correct one. I am of the view that the issue in this case is whether Toby's right to indemnity under the Policy should be enforced and not whether Brazilian import duties should be enforced.

The Second Stage

624. The second stage calls for a consideration of whether there is any other relevant public policy on which the denial of the claim may have an impact. As to this, the contending views are as follows:

(1) Toby says that there is a countervailing public interest, this being the desirability of holding parties to their bargains and not allowing them to escape their contractual obligations. In the present case, the Law Compliance Condition sets out Toby's obligations in relation to Brazilian customs law and requires Toby to use all reasonable efforts to comply with such laws. It is implicit in the Law Compliance Condition that cover will be provided under the Policy where, despite its having used all such reasonable efforts, Toby has acted in breach of Brazilian customs law and this has resulted in the confiscation of the Aircraft.

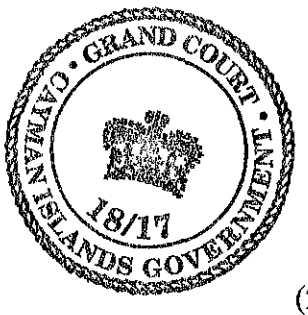
(2) In contrast, Allianz asserts that there is no relevant public policy that would be impacted by the denial of Toby's claim.

625. In my judgment, Toby's analysis is the correct one. There is clearly a public policy interest in holding parties to their bargains. In this case, based upon the terms of the Policy, Allianz had agreed to provide an indemnity in respect of the confiscation of the Aircraft in circumstances where Toby has complied with the Law Compliance Condition even if Toby has also acted unlawfully.

The Third Stage

626. Lord Toulson's third stage calls for a consideration of whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. In this regard, the parties' respective positions are as follows:

(1) Toby's case is that it would not be proportionate to deny Toby's claim to an indemnity in respect of the confiscation of the Aircraft, provided always that Toby is not in breach of the Law Compliance Condition. Such an indemnity



would not undermine the deterrent effect of the confiscation of the Aircraft, since it would only be available in circumstances where the relevant insured (in this case, Toby) had used all reasonable efforts to comply with Brazilian customs law. To deny Toby an indemnity in such circumstances would be to allow Allianz to ignore the terms of its own Policy and escape liability for a loss which it had agreed to insure.

(2) Allianz, on the other hand, asserts that a denial of Toby's claim is a proportionate response to the illegality. Just as in the ***Geismar*** case, public policy requires the Court to assist in the enforcement of Brazilian customs law by denying Toby the benefit of insurance upon goods (i.e. the Aircraft) imported in contravention of those laws.

627. In my judgment, Toby is correct on this issue also. The relevant purpose supporting the denial of the claim because of the prohibition on the provision of an indemnity in respect of punishment of a crime is outweighed in the present case by the public interest in enforcing contractual obligations. Toby can only recover under the Policy in circumstances where it has used all reasonable efforts to comply with Brazilian law. There is no public policy interest in denying indemnity to an insured who has used such efforts. In effect, I accept, that Allianz has agreed by its Policy not to rely on the prohibition on the provision of an indemnity in respect of punishment of a crime, in circumstances where the insured has used all reasonable efforts to comply with the applicable laws. In my judgment, it would be disproportionate and contrary to public policy to allow Allianz to now resile from that agreement.

628. In all of the circumstances, I am satisfied that the doctrine of illegality should not be applied in the present case so as to defeat Toby's claim.

Was Loss During the Period of the Policy?

629. It is common ground that the burden is on the insured Toby to prove that there was a "*loss*" of the Aircraft during the Policy period (i.e. 6 May 2012 — 6 May 2013).

630. Whilst in its Written Closing Submissions, Allianz did not seem to make heavy weather of this point, in its Re-Re-Amended Defence and Counterclaim, at paragraph 50, Allianz denied that the Aircraft was lost during the Policy period. At paragraph 34(c) it appears to take the position that the Aircraft was not lost when it was seized by the FRS on 20 June 2012 or when it was confiscated pursuant to the FRS assessment of 15 January 2013 and that instead, it was only lost after Toby *"surrendered its rights"* under the Injunction in late 2013 or on the sale of the Aircraft at a public auction on 11 June 2015.

631. As Allianz points out in its Written Opening Submissions, at paragraph 149, Toby's case regarding the date when the Aircraft was *"lost"* has evolved over the time. However, it is fair to say that the facts involved in this matter are quite convoluted and complicated, and that may account for the evolution of Toby's case. Indeed, there has been evolution on both sides.

632. As I understand the position it is this. Toby's *"primary case"* (to quote paragraph 197 of its Written Closing Submissions), is that the Aircraft was lost on 15 January 2013 when the FRS decided to confiscate it. This is because on that date ownership of the Aircraft was transferred from Toby to the Brazilian State (albeit that this was subject to Toby's right to challenge the FRS decision).

633. If, Toby says, the loss did not occur on 15 January 2013, then it occurred on 24 September 2013 when the FRS Superintendent upheld the decision to confiscate. However, Toby says that this did not affect the position that ownership of the Aircraft was transferred to the FRS as against the world.

634. If this is wrong, and the Aircraft was not lost on 24 September 2013, then Toby says that it was lost when it was sold on 11 June 2015. Its position then is that although these matters occurred outside the period of the Policy that would not prevent Toby from recovering under the Policy. Mr. Weitzman's position was that this is because the law treats the loss as occurring during the Policy period when it was the result of a sequence of events starting within the Policy period and following in the ordinary course on the peril insured.

Reference was made to ***MacGillivray on Insurance Law*** (13th ed), paragraphs 6-024, 6-026 and ***Arnould's Law of Marine Insurance and Average***, (17th ed) paragraph 28-05.

Resolution of the Issue of Whether the Aircraft was Lost during the Period of the Policy

635. In my judgment, this is not an easy question. However, in all of the circumstances, I am of the view that the Aircraft was lost on 15 January 2013 for the reasons advanced by Toby. However, even if this is wrong, and the loss occurred on one of the later dates discussed above, culminating when the Aircraft was sold on 11 June 2015, the loss should be treated as occurring during the Policy period. In my judgment, the following passages cited by Toby from ***MacGillivray*** provide ample support for this finding. At paragraphs 6-024, 6-026, the learned author opines as follows:

"6-024

...The general rule is that, in the absence of express terms to the contrary, [in order to be compensated] *the insured must suffer a loss from a peril insured against during the currency of the risk.*

...

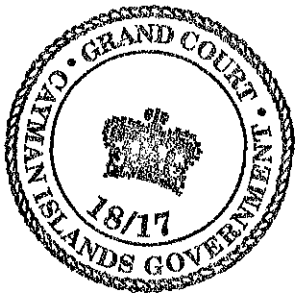
6-026

A loss may be said to occur when the insured peril operates upon the subject matter of the insurance, and the fact that the full extent of the loss is not discovered until after the expiration of the policy is immaterial."

636. Paragraph 28-05 of the Arnould's Text provides as follows:

"*28-05*

...Similarly, if the assured is deprived of possession or control of insured property prior to expiry of the risk by an insured peril, the fact that at the date when the policy expired it could not be said that the assured was irretrievably deprived of his ship or goods, or that their recovery was



unlikely, will not prevent him from afterwards claiming for an actual total loss if as the result of a sequence of events following in the ordinary course upon the peril insured against the loss develops into an actual total loss."

The Law Compliance Condition, the Due Diligence Condition and the Illegal Purpose Exclusion

637. Allianz has advanced at least 6 separate defences arising out of the confiscation of the Aircraft. The defence in relation to the Law Compliance Condition only arises in the event that the Court finds that the Aircraft's utilisation of the TAR was unlawful. I have so found.

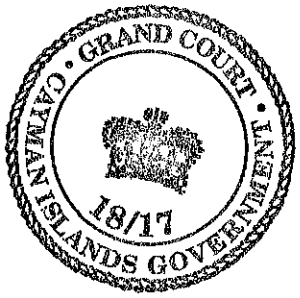
638. Toby explains in both its Written Opening and Closing Submissions, that in its view, the question of whether it was or was not compliant with the Law Compliance Condition is determinative in relation to all the defences raised by Allianz arising out of the alleged unlawful use of the TAR. Thus, Toby accepts that if it was in breach of the Condition, then it is not entitled to recover under the Policy. However, Toby asserts that if, on the other hand, it has complied with that Condition, then it is entitled to recover under the Policy, and that the other Defences advanced by Allianz add nothing to the analysis, and are, in many instances, misconceived.

639. Be that as it may, in any event, it may in my view be convenient to deal with the defences having to do with the Law Compliance Condition, the Due Diligence Condition and the Illegal Purpose Exclusion together, since they all are raised by Allianz as arising out of Toby's failure to act lawfully and to pay the import tax.

The Law Compliance Condition

640. It is convenient at this juncture to set out the Law Compliance Condition, Part B, General Condition 3:-

> *"3. The due observance and fulfillment of the terms, provisions, conditions and endorsements of this Policy shall be conditions precedent to any liability of Insurers to make any payment under this Policy: in particular the Insured should use all reasonable efforts to ensure that he complies and*



continues to comply with the laws (local or otherwise) of any country within whose jurisdiction the aircraft may be, and to obtain all permits necessary for the lawful operation of the aircraft."

(My emphasis)

Allianz's Arguments

641. Allianz refers to the findings of the FRS as to the formation of Toby and the lease of the Aircraft as all being part of a sophisticated sham designed to hide the fact that Mr. Lamacchia was the real beneficial owner of the Aircraft. It was submitted that Mr. Lamacchia plainly appreciated that import tax ought to have been paid.

642. Mr. Elkington offered that the best test of whether Toby genuinely thought that it was complying with the law (and genuinely believed that import tax was not payable), is to look at its contemporaneous response to the confiscation of the Aircraft. He suggests that if Toby genuinely thought that no import tax was payable then, following the confiscation of the Aircraft (i) it would have been full and frank with the authorities about what occurred in relation to the formation and nature of Toby and the lease and use of the Aircraft; and (ii) it would have referred to the legal advice allegedly given by Mr. Franco in 2008 (which at no point in time did it do in the Administrative, Civil or Criminal Proceedings).

643. The argument continues, that if Toby had believed it had done nothing wrong and had nothing to hide, why would it not tell the truth to the Brazilian authorities about the existence of the 2007 Agreement, the purpose of Toby, the funding and the use of the Aircraft?

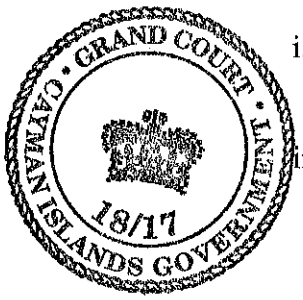
644. Allianz goes on to allege that what in fact happened is that Mr. Lamacchia and Toby told a series of lies to the authorities in Brazil and indeed, Allianz continues, have told a series of lies in these proceedings.

645. Allianz invites the Court to find that Mr. Lamacchia was a party to a sham, the purpose of which was to avoid paying the customs duties that he well knew would otherwise be payable. It follows, it continues, that Toby was in breach of the Law Compliance

Condition, because it did not use all reasonable efforts to ensure that it complied with the laws of Brazil.

The Lies in the February 2013 Appeal Document

646. Allianz in its Written Closing Submissions has taken the approach of referring to what it says are lies in a number of proceedings. Numbered amongst those which it alleges in relation to the appeal document are the following:



i. The appeal denied the existence of the 2007 Agreement, which was demonstrably untrue;

ii. The appeal asserted that there was no reason for Mr. Lamacchia to use the Aircraft, because he had two other aircraft to use. That was untrue because those two aircraft were not suitable for international travel, so there *was* a reason for Mr. Lamacchia to use the Aircraft;

iii. The appeal asserted that the Aircraft entered Brazil to enable Toby's directors to do the business of Toby in Brazil. However, that was not true because Toby did not have any business in Brazil or elsewhere, as is apparent from its Financial Statements and the absence of any record of any business activities;

iv. The appeal denied that Mr. Lamacchia was the source of the funds used to pay for the Aircraft. That was not true, because Mr. Lamacchia was the source of those funds;

v. The appeal stated that the money sent by Mr. Lamacchia to Koba was not forwarded to Toby. That was not true, because the money sent by Mr. Lamacchia to Koba was forwarded on to Toby to pay for the Aircraft;

vi. Mr. Lamacchia attempted to avoid liability by asserting that he was an Italian citizen and was not resident in Brazil. That assertion was repeated in the Civil Proceedings where it was stated "*Mr. Jose Roberto is also an Italian citizen and resides in Italy.*" The assertion that he was not resident in Brazil was not true.

Mr. Lamacchia's Lies to the Judge in November 2014

647. Allianz asserts that Mr. Lamacchia told a series of lies to the Judge when he was questioned in the Criminal Proceedings in November 2014, in an attempt to cover up what had occurred. This, it alleges, was because he knew that what had occurred and the failure to pay import tax were illegal. Amongst the matters which Allianz refer to are the following:

i. Mr. Lamacchia said that Toby operated out of the Cayman Islands, carrying out prospecting of investments and investors. In truth, Toby did no such thing.

ii. He said Toby had around four employees. In truth (as is common ground) Toby had no employees.

iii. Mr. Lamacchia claimed he had flown in the Aircraft to the Cayman Islands "*many times*". In fact, the Aircraft only flew to the Cayman Islands on one occasion, and that was just before Christmas.

iv. Mr. Lamacchia said that the Aircraft flew more abroad than in Brazil, which was not true. He also said that "*the aircraft only flew abroad. Because as I said also, I have other aircraft in Brazil.*" That was also not true.

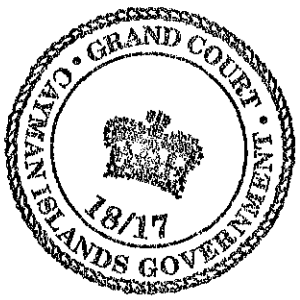
v. When asked whether it had ever happened that the deadline was expiring and the pilot needed to leave Brazil and to come back to renew the application, Mr. Lamacchia answered "*No*". In fact, as the flight records show, that was a routine occurrence, which Allianz aver must have been known to Mr. Lamacchia.

vi. Mr. Lamacchia said that the Aircraft was registered in the Cayman Islands because "*Cessna felt it was safer in the Cayman Islands...they required it. They asked for it.*"

648. Allianz also relies upon what it alleges has been Toby's lack of candour in the instant proceedings. By way of example, Allianz refers to the following:

i. Toby's Statement of Claim asserts (at paragraph 2) that at all material times "*it carried on business providing financial and investment advice to entities affiliated to the Plaintiff.*" In truth, Toby gave no such advice.

ii. Toby's Statement of Claim asserts (at paragraph 4) that it approached CFC with a view to purchasing an Aircraft. However, in truth, an agreement to purchase the Aircraft had already been reached, long before Toby was even incorporated. This has now been conceded by Toby.



iii. In his first statement (at paragraph 4) Mr. Lamacchia stated that Toby was established "*for the purpose of providing financial and investment advice.*" to Koba and Cape Cold. He failed to say then (as he now admits) that Toby was established (at least in part) in order to avoid import duty.

iv. Ms. Pereira's first statement states (at paragraph 7) that she was present "*at the meeting of Toby's Executive Board that occurred in early 2008 when we agreed that Toby should acquire a private aircraft.*" Allianz contends that this was thoroughly misleading, given that a contract to buy the Aircraft was concluded long before Toby was even incorporated.

v. Neither Mr. Lamacchia or Ms. Pereira (or any of Toby's other witnesses) referred to the 2007 Agreement, which presents Allianz says, such a difficulty for Toby's case, since it plainly links Mr. Lamacchia to the Aircraft.

649. Allianz asks the Court to find that Toby was in breach of Brazilian law, it knew it was in breach of Brazilian law, and it failed to use all reasonable efforts to ensure that it complied with the laws of Brazil. It invited the Court to reject the notion that Mr. Lamacchia received oral legal advice from Mr. Franco in 2008 regarding the ownership and proposed use of the Aircraft. Further, it asks the Court to find that, even if it were accepted that there was some oral exchange between Mr. Lamacchia and Mr. Franco about the Aircraft in 2008, this did not amount to the use of "*all reasonable efforts*" or the exercise of "*due diligence*" by Toby.

Toby's arguments

650. At paragraph 172 of its Written Closing Submissions, Toby raises 12 points that it says go towards substantiating that on 20 June 2012 (and at any other relevant date), it had used all reasonable efforts to comply with the TAR. The first 5 points have to do with allegedly obtaining and relying on Mr. Franco's legal advice. I have, as discussed elsewhere, rejected that assertion and thus I will just refer here to the other 7 points, which are as follows:

"...

(6) Toby had no reason prior to Operation Forced Landing to suspect that the FRS did not accept that the Aircraft was entitled to take advantage of the TAR in the way that it did. To the contrary, on each occasion when the Aircraft entered Brazil, a TEAT was issued without objection. While it appears that the FRS improved its data systems in early 2011 and was as a result better able to monitor the use made by Aircraft of the TAR, Toby was entitled to assume that the FRS would previously have monitored the Aircraft's use of that regime and would have been aware that the Aircraft had made repeated use of that regime.

(7) Toby was not alone in making use of the TAR. To the contrary, it appears that a number of other companies and aircraft used that regime in a way that was very similar to Toby and, again, this was not the subject of any objection from the FRS prior to Operation Forced Landing.

(8) The declaration on the TEAT of 19 June 2012 was correct. Toby as lessee of the Aircraft fell to be described as its owner for the purposes of the TEAT. Mr. Lamacchia and Ms. Pereira were both directors of Toby. The Aircraft entered Brazil on 19 June 2012 in order that they could travel on it. Accordingly, sub-paragraph (c) of Article 2(IV) of the Decree applied to the Aircraft's entry into Brazil on 19 June 2012.

(9) Further, even if this was incorrect and the Aircraft's entry into Brazil on 19 June 2012 did not fall within sub-paragraph (c), it would

necessarily have fallen within sub-paragraph (e) of Article 2(IV) since all flights the Aircraft made whether internal to Brazil or internationally were always "non-remunerated".

(10) In any event, Toby used reasonable efforts to ensure that the TEATs were properly completed by employing a specialist third party, CAVOK, to deal with all necessary paperwork.

(11) There was no intention that the Aircraft would overstay. To the contrary, it is believed that it is common ground that the Aircraft had never overstayed in the past and would, if it had not been seized on 20 June 2012, [have] *left Brazil within the permitted period of 59 days.*

(12) Operation Forced Landing and the seizure of the Aircraft came as a complete surprise to Toby (and also it appears to the owners and operators of other aircraft making a similar use of the TAR).

651. In its Written Opening Submissions, Allianz had posed the question "*Was Toby aware that it was failing to comply with the laws of Brazil?*" and it answers it in paragraph 167 as follows:

> "*167. The finding of the FRS was that the formation of Toby, and Toby's lease of the Aircraft, was all part of a sophisticated sham designed to hide the fact that Mr. Lamacchia was the real beneficiary of the Aircraft and (as a Brazilian resident) should therefore have paid tax on the Aircraft when it had first entered Brazil in 2008.*"

652. Toby has made a multi-pronged response to this assertion by Allianz. Toby's position is that even if Toby was incorporated with the sole purpose of leasing the Aircraft, this does not mean that Toby was a sham. To the contrary, it is common practice, it maintains, for a company to be incorporated to hold and/or operate a specific asset such as the Aircraft. It submits that what Allianz is really seeking to do is to tear aside the corporate veil. Further,

Mr. Weitzman contends that Allianz has identified no ground upon which it would be entitled to do so as a matter of Cayman Islands law, being Toby's place of incorporation.

653. Toby had no reason to consider that the TAR was subject to any of the implied requirements or limitations which the FRS, and the Brazilian Courts, have concluded that it has. In this respect, Toby places emphasis on Mr. Franco's and Mr. Bergamini's evidence to the effect that in Brazil, as a civil law jurisdiction, laws have traditionally been given a literal effect, the approach being that what is not prohibited by an express provision of law is permitted (albeit that, Toby concedes, may be changing in recent years).

654. In the circumstances, Toby asserts, there was no act of conscious "*falsification*" or "*simulation*" on the part of Mr. Lamacchia or Toby. Instead, Mr. Lamacchia and Toby believed that they were at all times complying with the law applicable to the TAR, and that what has happened is that the "*goalposts have been moved*", in that the FRS, having previously made no objection to Toby's repeated use of the TAR, then in June 2012 asserted that the TAR was subject to a number of implied limitations.

655. Toby acknowledges that the interposition of Koba as holding company between Mr. Lamacchia and Toby had the consequence that no reference was made to Toby in Mr. Lamacchia's tax returns. Whilst Allianz has treated this as suspicious, Toby says that the creation of a corporate structure consisting of a holding company and a number of subsidiary operating companies is commonplace.

656. In responding to Allianz's suggestion that Mr. Lamacchia's use of the Aircraft was in some way concealed from the authorities, it was Toby's position that it would have been obvious to anyone who bothered to enquire that the Aircraft was being used by Mr. Lamacchia and Ms. Pereira. They were identified on the General Declarations completed in relation to the international flights as passengers on the Aircraft. The TEATs issued at the same time identified the purpose of entry as being for travel by "*officers or representatives*" of the company owning the Aircraft. Toby reminds that it is not in dispute that Mr. Lamacchia is one of the richest men in Brazil, a matter of which the FRS would necessarily be well aware. Mr. Weitzman punctuated his argument on this score by declaring that the

suggestion that in these circumstances Mr. Lamacchia was seeking to conceal his use of the Aircraft by interposition of Koba and Toby between himself and the Aircraft is fanciful.

657. It was for those reasons, and in those circumstances, that Toby says that it was not in breach of the Law Compliance Condition and that to the contrary, it used all reasonable efforts to comply with the TAR.

The Due Diligence Condition

658. Part A, Section (B)(1) of section (IV) of the Policy ("**the Due Diligence Condition**"), provides as follows:

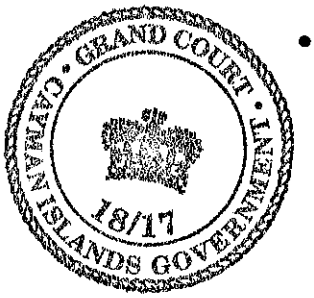
> ***"It is necessary that the Insured observes and fulfills the following Conditions before the Insurers have any liability to make any payment under this Policy.***
>
> *Due Diligence The insured shall at all times use due diligence and concur in doing everything reasonably practicable to avoid accidents and to avoid or diminish any loss hereon."*

Allianz's arguments

659. Allianz avers that this Condition was incorporated into Part B of the Policy by Part B, Section Four, General Condition 1. This is in the following terms:

> *"SECTION FOUR; GENERAL CONDITIONS*
>
> *1.This Policy is subject to the same warranties and conditions (except as regards the premium, the obligations to investigate and defend, the renewal agreement (if any), the amount of the deductible or self-insurance provision where applicable AND EXCEPT AS OTERWISE PROVIDED HEREIN) as are contained in or may be added to the Insured's hull "All Risk" Policy* [Part A of the Policy]".

660. Allianz asserts that Toby was in breach of the Due Diligence Condition because it did not at all times use due diligence and/or do or concur in doing everything reasonably practicable to avoid any loss. In particular the following acts and/or omissions are alleged to amount to a breach of that Condition:



- The misrepresentation to the Brazilian authorities of the purpose of the entry of the Aircraft into Brazil, because it remained in the Brazilian territory most of the time and was used almost exclusively for domestic flights, rather than for the transport of Toby's directors and officers from/to abroad for the purposes of Toby's business.
- The filing of false declarations with Customs when temporary flight permits were requested.
- The taking of inappropriate and unlawful advantage of the exemptions established in the Decree as a means to avoid the imposition of import taxes and duties.
- The failure to pay the import tax and duties which were properly due to the Brazilian authorities.

661. Allianz's position is that, as a result of Toby's failure to comply with the requirements of the Due Diligence Condition, Allianz has no liability to it under the Policy.

Toby's arguments

662. Toby says that Allianz's allegation that it has breached the Due Diligence Condition is misconceived for the following reasons:

- The breaches of the Due Diligence Condition alleged by Allianz all relate to Toby's compliance with the laws of Brazil and its obtaining of permits in relation to the lawful operation of the Aircraft;
- The Law Compliance Condition sets out what is required of the insured in respect of compliance with local laws and the obtaining of permits in order for there to be cover under Part B.

663. In the circumstances, the insured's obligations in relation to compliance with local laws and the obtaining of permits are matters which are "*OTHERWISE PROVIDED*" for within Part B and accordingly, fall outside the scope of General Condition 1 of Section 4 of Part B of the Policy.

664. Moreover, if and insofar as the Due Diligence Condition imposes any greater obligations on the insured in relation to compliance with local laws and the obtaining of permits than the Law Compliance Condition, then the former Condition is inconsistent with the latter and to this extent cannot apply to Part B of the Policy.

665. Toby's leading Counsel goes on to posit that, Allianz's allegation that Toby is in breach of the Due Diligence Condition in fact adds nothing to its allegation that Toby is in breach of the Law Compliance Condition. It is submitted that, if Toby used all reasonable efforts to comply with the laws of Brazil and obtain the necessary permits as required by the latter Condition, then it will necessarily also have used due diligence in these respects. In sum, Toby's position is that the Due Diligence Condition does not apply in the present case but, if it did, Toby would have complied with its requirements.

The Illegal Use Exclusion

666. Part A, Section IV of the Policy provides that the Policy does not apply: "*Whilst the Aircraft is being used for any illegal purpose or for any purpose other than those stated in Part 3 of the Schedule as defined in the Definitions*" (**"the Illegal Use Exclusion"**). This exclusion was Allianz says, incorporated into Part B of the Policy by Part B, Section Four, General Condition 1. Toby takes a different position, discussed below.

Allianz's Arguments

667. Allianz says that the Aircraft was being used illegally, in that it was imported into and based in Brazil without the appropriate import duty having been paid. Thus, it asserts, Toby's claim is barred by the Illegal Use Exclusion.

Toby's Arguments

668. Again, Toby's position is that this defence is legally misconceived. This is because:

- The Illegal Use Exclusion is contained in Part A of the Policy and not Part B (the latter being part of the Policy under which Toby makes claim).

- Accordingly, the Illegal Use Exclusion can only apply in the present case if it is properly to be imported into Part B of the Policy pursuant to General Condition of Section Four of Part B of the Policy.
- As set out regarding the Due Diligence Condition, General Condition of Section Four of Part B of the Policy will not import into Part B of the Policy any term in respect of a matter which is "*OTHERWISE PROVIDED*" for in Part B of the Policy.
- The use of the Aircraft for an illegal purpose is a matter otherwise provided for in Part B of the Policy. The Law Compliance Condition sets out the insured's obligations in this respect, in that it requires the insured to use all reasonable efforts to comply with all applicable laws.
- Moreover, the exclusion of the Aircraft from cover whilst being used for an illegal purpose would be inconsistent with the provisions of the Law Compliance Condition. As explained above, it is implicit in that Condition that cover will be provided where the insured uses its best efforts to comply with the applicable laws, even if as it turns out, it has failed to do so and acted illegally.
- In the circumstances, the Illegal Use Exclusion, at least insofar as it relates to use of the Aircraft for an illegal purpose, is not to be imported into and does not apply to Part B of the Policy and the claim made by Toby under that part of the Policy in the present case.

669. Toby also argues that, in any event, the Aircraft was not at the time it was seized (or at any relevant time) being used for an illegal purpose and this is the case irrespective of whether the FRS's decision to confiscate the Aircraft was legally correct. This is because, even if the Aircraft was being used by Mr. Lamacchia for his private purposes and not in his capacity as a Director of Toby, there was nothing illegal about that. The FRS's complaint did not relate to the purposes for which the Aircraft was used but instead to the utilisation of the TAR while the Aircraft was in Brazil.

Resolution of the Issue Regarding the Law Compliance Condition

670. Allianz has presented as part of their case, the assertion that Toby and Mr. Lamacchia did not genuinely believe that it was complying with the law and that Toby was not obliged to pay Import tax. In that regard, it relies upon a series of matters which it says demonstrate that Mr. Lamacchia and Toby lied in various documents and proceedings, and it also identifies ways in which it says Toby has not been candid with this Court.

671. I have looked at the matters raised with a great amount of anxiousness and care. After considerable thought, I regret to say that I do find that Mr. Lamacchia and Toby have been less than candid with the Court, and indeed, there have been a number of untruths and deceptive statements made, as alleged by Allianz, in the appeal documents, in Mr. Lamacchia's evidence to the Judge in 2014 in the Criminal Proceedings, and indeed, in these proceedings.

672. However, I remind myself that a person may lie or present a misleading account for many reasons. For example, people sometimes may lie to bolster a true defence, or to conceal some other impugnable conduct falling short of the offence or unlawful conduct in issue, or out of panic or confusion. In this case, there has been explanation for some of the inaccuracies, and untruths, but not all. For example, Toby and its witnesses have insisted that there was no need to mention the 2007 Agreement because it did not come into effect. That is plainly not right and is disingenuous. It was plainly calculated to avoid or deflect from the obvious link to Mr. Lamacchia and/or his Brazilian Company. The misleading statements in the appeal documents that implied that Mr. Lamacchia had other aircraft to use for international travel are of grave concern. Indeed, I was struck in a negative way, by the remarkable untruth that Mr. Lamacchia told the Judge in the Criminal Proceedings when he said he had travelled on the Aircraft to the Cayman Islands many times. Mr. Lamacchia also told the Judge that it was CFC that required the Aircraft to be registered in the Cayman Islands. I take into account that, as Mr. Weitzman points out, those matters were not specifically put to Mr. Lamacchia in cross-examination. However, in my judgment they did not need to be; those statements are demonstrably untrue. The flight records show that the Aircraft had only flown to Cayman once, something which I find Mr.

Lamacchia must have known. The CFC internal credit documents plainly show that it was Toby that brought this registration in Cayman to CFC as part of its package deal.

673. This is a very difficult question, given that Toby may have had no reason, prior to Operation Forced Landing, to suspect that the FRS did not accept that the Aircraft was entitled to take advantage of the TAR in the way that it did. To the contrary, on each occasion when the Aircraft entered Brazil, a TEAT was issued without objection. Further, Toby was not alone in making use of the TAR. In fact, it appears that a number of other companies and aircraft used that regime in a way that was similar to Toby and, again, this was not the subject of any objection from the FRS prior to Operation Forced Landing.

674. However, for Toby to be able to avoid, rather than evade import tax, it seems clear that the Aircraft could not have been expected to spend most of its time in Brazil. Further, Toby itself would have had to be conducting some genuine business, separate and apart from leasing the Aircraft and being set up to avoid import duties. In those circumstances, Toby and its directors well knew that there was no business being carried on and that the sole purpose of incorporating Toby, and having it take assignment of the Agreement between Crefipar and CAC, was aimed at not paying Import tax. In those circumstances, the directing minds of Toby, Mr. Lamacchia and Ms. Pereira well knew that if the real circumstances had been revealed to the authorities, import tax would have been payable. All of the untruths and deceptive smoke-screens erected by Mr. Lamacchia and Toby, at the various stages in the saga of this case, i.e. the appeal document, the Administrative Proceedings, the Criminal Proceedings, and the Civil Proceedings, in addition to those in the present trial, support and reinforce that conclusion. So the non-action by the FRS until 20 June 2012, would just have led Toby to believe that its activities were such as to pass under the radar.

675. The contemporary documents essentially have blown apart the case that Toby attempted to amount. Allianz referred to the fact, which I accept, that many of the significant key documents in this case were not disclosed by Toby, and were instead secured by Allianz through third parties, such as CFC. It does seem plain to me that without the revelation of certain of the key documents, such as the 2007 Agreement and the Amendments thereto,

the CFC Internal Credit Presentations, and other documents, the picture presented would have been very different, and less complete than that in respect of which this Court has now analysed. I understand that Toby says it did not have some of these documents, and that it cooperated in Allianz getting some of these documents last year. The fact of the matter is that these documents changed the landscape completely.

676. All told, I find that Toby did not genuinely believe that it was complying with the law and that import duty was not properly due. Alternatively, it was reckless as to whether import tax was properly due.

677. However, even if I am wrong on that and Toby genuinely believed its actions amounted to avoidance and not evasion, the question nevertheless remains whether Toby used "*all reasonable efforts*".

Legal Advice in 2008

678. In my view, in the circumstances of this case, it is plain that Toby and Mr. Lamacchia ought to have sought legal advice in order to ensure that it used all reasonable efforts to ensure that there was compliance with the laws of Brazil, and not just compliance, but continuous compliance. The use and operation of an aircraft is a relatively expensive and involved activity. It is plainly reasonable effort, to seek and obtain properly informed legal advice. Additionally, in my judgment, some import and significance has to be accorded to the word "*all*". It cannot be requiring extraordinary or unreasonable endeavours to expect proper legal advice to have been sought. This is even more so, given the facts as known to Mr. Lamacchia surrounding the pre-existing 2007 Agreement for the purchase of the very Aircraft by Crefipar from CAC. Mr. Lamacchia acknowledged in his evidence that import tax would have had had to be paid if either he or one of his Brazilian companies was the owner of the Aircraft. It behooved him to look and check before leaping. In my judgment, in the circumstances, Toby and Mr. Lamacchia not only fell short of using all reasonable efforts, but they were reckless in their approach to compliance with the laws of Brazil.

As outlined above under my findings of facts, I have rejected Toby's case that Mr. Lamacchia received legal advice from Mr. Franco in 2008. Further, even if I am wrong

about that, and that Mr. Lamacchia did receive such advice, or there was some oral exchange between Mr. Lamacchia and Mr. Franco in 2008, in my view this would not amount to the use of "*all reasonable efforts*" on Toby's part to ensure it complied with the laws of Brazil as required by the Law Compliance Condition. This is my view mainly because Mr. Lamacchia failed to provide essential factual information which was necessary for Mr. Franco to be able to advise properly and to form an informed well-considered opinion. During the cross-examination the following became clear:

(1) Mr. Lamacchia maintained to Mr. Franco that Toby would have the dual purpose, including the making of investments, and as I have indicated, I have rejected the existence of this dual purpose.

(2) Mr. Lamacchia did not tell Mr. Franco that he had signed the 2007 Purchase Agreement by which Crefipar agreed to purchase the Aircraft. Thus, any advice given by Mr. Franco would have failed to take the existence of that Agreement into account. Mr. Franco was not aware that Mr. Lamacchia had signed Amendments 1,2,3,5 and 6. He was unaware of the assignment of the 2007 Agreement.

(3) Mr. Lamacchia did not give Mr. Franco a copy of the Finance Lease, so Mr. Franco did not know that it contained a provision that the Aircraft be permanently based in São Paulo. He also did not know that the Aircraft would spend the majority of its time in Brazil.

680. Whilst at points in his cross-examination Mr. Franco gave evidence that in essence it would have made no difference to his advice if he had been told that Toby was simply a holding company, at other points he said that the dual purpose/and having investments and elements of connection overseas was crucial. Overall, I therefore find that it was in any event necessary for Mr. Franco to have been made aware of the true and complete picture, historically and otherwise.

681. It is the case that any advice received is only as good as the accuracy and thoroughness of the instructions upon which it is based. Mr. Lamacchia's failure to give Mr. Franco a

complete picture of what Toby would do and how it would use the Aircraft meant that his advice would plainly be wanting and rendered useless.

682. In all of the circumstances, I find that Toby was in breach of the Law Compliance Condition on 20 June 2012 and at all other relevant times.

Due Diligence Condition

683. In my judgment, Mr. Weitzman is correct that the Due Diligence Condition does not apply in the instant case. The Law Compliance Condition sets out what is required of Toby in respect of local laws and permits in order for there to be cover under part B.

684. The Due Diligence Condition forms part of Part A and not Part B. This is reflected in the language used, and in particular the reference to "*accidents*" which are insured under Part A and not Part B of the Policy.

685. In the circumstances, the insured's obligations in relation to compliance with local laws and the obtaining of permits are matters which are "*OTHERWISE PROVIDED*" for within Part B and accordingly, fall outside the scope of General Condition 1 of Section 4 of Part B of the Policy.

686. However, if I am wrong on that, I find that Toby would have been in breach of the Due Diligence Condition for the same reasons that I found that it was in breach of the Law Compliance Condition.

The Illegal Use Exclusion

687. Similarly to the Due Diligence Condition, General Condition of Section Four of Part B of the Policy will not import into Part B of the Policy any term in respect of a matter which is "*OTHERWISE PROVIDED*" for in Part B of the Policy.

688. In my judgment, the use of the Aircraft for an illegal purpose is a matter otherwise provided for in Part B of the Policy. The Law Compliance Condition sets out the insured's obligations in this respect, in that it requires the insured to use all reasonable efforts to comply with all applicable laws.

689. accept Toby's submission that the exclusion of the Aircraft from cover whilst being used for an illegal purpose would be inconsistent with the provisions of the Law Compliance Condition. As explained above, it is implicit in that condition that cover will be provided where the insured uses its best efforts to comply with the applicable laws, even if as it turns out, it has failed to do so and acted illegally.

690. Even if I am wrong on that, and Allianz is correct that this Exclusion is imported, in my view the Aircraft was not in any event, at the time it was seized (or at any relevant time) being used for an illegal purpose and this is the case irrespective of whether the FRS's decision to confiscate the Aircraft was legally correct. This is because, even if the Aircraft was being used by Mr. Lamacchia for his private purposes and not in his capacity as a Director of Toby, there was nothing illegal about that. The FRS's complaint did not relate to the purposes for which the Aircraft was used but instead to the utilisation of the TAR while the Aircraft was in Brazil (my emphasis).

Whether the Loss falls within Clause (e) of Section One of Part B of the Policy

691. Clause (e) of Section One of Part B of the Policy provides coverage in respect of loss of the Aircraft as a result of:-

> *"Confiscation, nationalization, seizure, restraint, detention, appropriation, requisition, for title or use by or under the order of any Government (whether civil, military, or de facto) or public or local authority."*

692. Allianz in its Re-Re-Amended Defence and Counterclaim, at paragraphs 28, 33, and 49, has denied that any loss of the Aircraft was caused by confiscation, detention or appropriation within the meaning of Part B, Section One, clause (e) of the Policy. It alleges that if there was a loss of the Aircraft, then the proximate cause of that loss was the Plaintiff's failure to comply with the Brazilian customs laws. Further, that any loss of the Aircraft was the punishment lawfully imposed by the Brazilian authorities on the Plaintiff for the Plaintiff's unlawful conduct. Allianz in its Written Opening and Closing Submissions alleges that such loss falls outside of the insuring clause upon which Toby relies.

693. This defence only arises in the event that I have concluded, as I have, that the Aircraft's utilisation of the TAR was unlawful and the confiscation lawful.

694. In its Written Closing Submissions, Allianz has sort of lumped this together with the following two other issues, whereas Toby's Written Closing Submissions treat with them separately:

a) Was there a loss within the Policy period (i.e. 6th May 2012 — 6th May 2013)?
b) Is the claim barred by the "*Any Other Financial Cause*" Exclusion?

I propose to deal with a) elsewhere, and to deal with b) after, or alongside the above issue of whether the loss falls outside of the insuring clause upon which Toby relies.

Toby's arguments on whether Loss Falling within Part B of the Policy

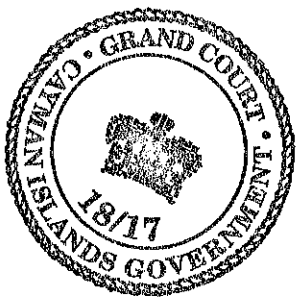
695. In their Re-Re-Amended Reply and Defence to Counterclaim, at paragraph 19 Toby avers that the proximate cause of the loss of the Aircraft was not any failure of Toby to comply with Brazilian customs laws but the unjustified confiscation of the Aircraft by the FRS as a result of its misapplication of Brazilian law, which was contrary to the practice that had been followed for the previous four years and which Toby is challenging in the Regional Federal Court of São Paulo.

696. In relation to this issue, Toby claims that Allianz's position is misconceived. This it says is because it proceeds on the basis that the insuring clause quoted above is subject to a limitation the effect of which is that cover will not be provided in respect of a punishment lawfully imposed for unlawful conduct. Toby says that no explanation has been given by Allianz as to why it contends that the coverage sought is subject to any such limitation.

697. Moreover, Toby argues that the Law Compliance Condition necessarily envisages cover will be provided in respect of a confiscation which is lawful and which results from unlawful conduct on the part of the insured.

The "*Any Other Financial Cause*" Exclusion

698. It is common ground that Part B, Section Three of the Policy contains a number of exclusion clauses. Exclusion Three (d) provides as follows:



"This policy excludes loss, damage or expense caused by one or any combinations of any of the following:

....

(d) any debt, failure to provide bond or security or any other financial cause under court order or otherwise;"

699. It is also common ground that this Exclusion will only apply where:

(1) The *"other financial cause"* in question (in this case, the failure to pay import tax), was the proximate cause of the loss.

(2) The phrase "*proximate cause*" does not mean the next in time or the next in the chain of events but means the effective and dominant cause of the loss.

(3) Where a loss has two proximate causes, one of which is excluded and one of which is not, the loss will nonetheless be excluded from cover.

Allianz's Arguments

700. Allianz describes this exclusion as being fairly standard in a War Risks policy. Its purpose is to exclude the insurer's liability to indemnify the insured for a loss which has arisen because the insured (or a third party) was either unwilling or unable to pay sums which ought to have been paid. It was submitted that the cover afforded by Part B is narrow, which is why the premium for that part of the Policy was only US$4,200.

701. Reference was made to Mr. Bodkin's evidence that the Policy was not intended to cover financial debt or someone not paying their bills, whether it be a bill for repair work, not paying the lease payments "*or not paying due taxes*".

702. Mr. Lamacchia accepted that if import duty had been paid, the Aircraft would not be confiscated. As he put it in his evidence, "*Any aircraft that pays income tax is not confiscated*".

703. Both Mr. Franco and Mr. Bergamini stated that the aircraft that were the subject of Operation Forced Landing were aircraft for which import duty had not been paid. Mr. Bergamini confirmed that Operation Forced Landing was concerned with import tax, and that aircraft on which import duty had been paid were not the subject of the Operation.

704. Allianz submits that one of the grounds on which the Aircraft was confiscated was Decree 37/1966 Article 105(XI), which applies where taxes have not been paid. Thus, the argument runs, the non-payment of tax (a financial cause), led to the confiscation of the Aircraft.

705. Mr. Elkington submits that in this case the loss was the confiscation of the Aircraft. The confiscation would not have occurred if the import tax had been paid. He makes the substantial argument that the failure to pay import tax was a proximate cause, even if the FRS's decision to confiscate the Aircraft in January 2013 was also a proximate cause.

706. Reference was made to the decision of the English Court of Appeal in ***The Wondrous*** [1992] 2 Lloyd's Report 566. In that case, the Court had for consideration a clause in a policy of marine insurance which excluded *"4.1 loss, damage, liability or expense arising from...4.1.6 the operation of ordinary judicial process, failure to provide security or to pay any fine or penalty or any financial cause*" (my emphasis). At page 573, Lloyd L.J discussed the meaning of *"financial cause*" as follows:

> *"We were not referred to any decided cases on the meaning of "financial cause". But I can see no reason to confine the words to causes for which the owners are responsible, as the Judge held. The words are not financial default, still less financial default on the part of the owners; but financial cause. The financial cause must, of course, affect the ship. Otherwise there would be no detainment. But assuming the ship is detained by a failure to pay money on the part of the cargo interests, it comes within the ordinary*

meaning of the words "financial cause". I accept that the ordinary meaning of the words is very wide. But they are the words which the parties have chosen. In the context of a War Risks policy the words can and should be given their ordinary meaning."

(My emphasis.)

707. Reference was also made to the English Court of Appeal's decision in ***The Aliza Glacial*** [2002] 2 Lloyd's Rep. 421. In that case the Court considered an exclusion of loss damage liability or expense arising from causes including the operation of ordinary judicial process, failure to provide security, *"or any financial cause"*. At page 432, Potter LJ cited from the judgment at first instance of Toulson J (as he then was), as follows:

> *"Wide as the words "any financial cause" are, it seems to me they must have some limitation. Suppose that a vessel was seized by a terrorist organization wanting to raise money, a ransom demand was made for a million pounds and the owner declined to pay the money: could it be said that the detention of the vessel thereafter was through a financial cause? In a literal sense, it could, but no one would suggest that such a conclusion would accord with the spirit of the policy. The perils insured against included seizure of vessels by terrorist organisations and a common major procedure would be to make a monetary demand. It is easy to say as a matter of instinct that the exclusion under 4.1.6 would not apply in those circumstances, but as a matter of construction, I ask the question why it would not? It seems to me that, in any given case, the court has to ask itself as a matter of fact whether the real or effective or dominant cause of the seizure and detention is a financial cause or something else. In the case of "The Wondrous", the reason for the deemed detainment was financial. In the present case, it seems to me that the dominant reason for the detainment of the vessel by the AFMA was that it had been caught fishing in the Australian Fishing Zone, and the fact that its release might have been procured by the payment of*

money should not lead to the conclusion that the cause of the detainment was financial."

(My emphasis.)

708. In its Written Opening Submissions (at paragraph 180 onwards) Toby has argued that Allianz's reliance on the Financial Cause Exclusion is misconceived for the following reasons:

a) First the exclusion only applies where the "*other financial cause*" was the proximate cause of the relevant loss. However, that ignores the fact that there may be 2 proximate causes of a loss, and if any one of them falls within the exclusion, then the exclusion applies.

b) Second, the proximate cause of the confiscation of the Aircraft was the FRS's conclusion that Mr. Lamacchia had been guilty of a "*simulation*". That may have been one of the causes of the loss, but it was not the only one – failure to pay import tax was also a proximate cause. The simulation practiced by Mr. Lamacchia, utilising Toby, was the means by which he sought to evade import tax, but it was the failure to pay import tax that lead to the seizure of the Aircraft in June 2012 and the FRS's investigations (which ultimately led to the revelation of the means by which Mr. Lamacchia had tried to evade import tax.)

709. Insofar as it attempts to do so, of course Toby cannot draw a distinction between its own actions and the actions of Mr. Lamacchia, since he was the director of Toby, its controlling mind and its beneficial owner.

710. Further, if Toby is right that the only proximate cause of the loss was the simulation undertaken by Mr. Lamacchia, then the loss falls outside the scope of cover afforded by Part B of the Policy. That is because the proximate cause would be "*Mr. Lamacchia's simulation*" rather than "*confiscation, nationalization, seizure, etc.*"

711. Standing back, there is no injustice in a finding that Toby's claim is barred by the Financial Cause Exclusion. An objective bystander would find nothing unfair about Toby being unable to claim on its insurance if its loss arose because it had failed to pay import tax

712. On the contrary, an objective bystander would find it odd if Toby's failure to pay import tax allowed it to receive a windfall from its insurer (none of which windfall it would have to pass on to the Brazilian authorities for the unpaid import tax.)

Toby's Arguments

713. Toby refers to the evidence of both Brazilian law experts that the FRS's confiscation of the Aircraft was based on its view that Mr. Lamacchia had been guilty of "*falsification*" and "*simulation*" and that, if the position had instead been that there had been a simple failure to pay the import duty due without any falsification or simulation, then the Aircraft would not have been confiscated. (Paras 69 to 70 of Mr. Bergamini Third Report, Ms. de Araujo's cross-examination at T7/988.9-988.18, and Mr Franco's cross-examination at T1/154.2-154.16).

714. In the above circumstances, Toby says that it is clear that the proximate cause of the loss of the Aircraft was the FRS's decision that Mr. Lamacchia had been guilty of falsification or simulation and not the non-payment of duty.

715. The correctness of the above analysis, Mr. Weitzman opines, is demonstrated by the decision in ***Coxe*** [1916] 2 K.B. 629. In that case, the policy was a life policy but excluded from cover death "*directly or indirectly cause by, arising from or traceable to...war*". The insured was a soldier and was killed when as part of his military duties during the First World War; he was required to walk alongside the rails of a railway for the purpose of visiting guards and sentries and was struck down by a train. Scrutton J held that the exclusion applied but only on the basis that it included the word "*indirectly*". Importantly for the present purposes, Scrutton J also held that if that word had been omitted and the test of proximate cause applied then the exclusion would not have applied, because the war was not the proximate cause of the accident, even though the deceased would not have been walking along the railway line but for the country being in a state of war.

716. In the present case, it is accepted that "*but for*" the failure to pay import duty, the Aircraft would not have been seized and its use of the TAR investigated by the FRS. But this does not make the failure to pay any import duty the proximate or effective cause of the Aircraft's confiscation. To the contrary, it is simply part of the chain of events which led to that confiscation; the effective and dominant cause of the confiscation being the FRS's finding that Mr. Lamacchia had been guilty of falsification or simulation.

Resolution of the Issue of Whether the Loss falls within Clause (e) of Section One of Part B of the Policy and Whether the *"Any Other Financial Cause"* Exclusion applies

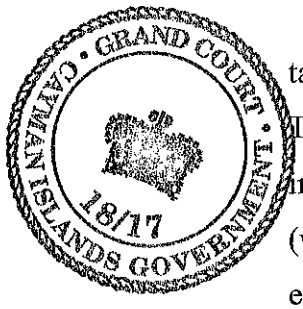
717. In my judgment, Toby is correct that Clause (e) of Section One of Part B of the Policy means what it says. It provides coverage in respect of the confiscation of the Aircraft irrespective of whether that confiscation is lawful or unlawful and irrespective of whether that confiscation is the result of lawful or unlawful conduct on the part of Toby.

718. The Law Compliance Condition necessarily envisages cover will be provided in respect of a confiscation which is lawful and which results from unlawful conduct on the part of the insured. That Condition requires the insured to use all reasonable efforts to comply with applicable laws. It is therefore implicit in that requirement that where the insured uses such reasonable efforts, cover will be provided. If Allianz was entitled to deny cover under the Policy on the basis that the insured had acted unlawfully, then, as Toby submits, the Law Compliance Clause would be otiose.

Resolution of the Issue of Whether the *"Any Other Financial Cause"* Exclusion applies

719. As discussed in ***The Wondrous*** and ***The Aliza Glacial***, the meaning of the phrase *"financial cause"* is wide. However, as Toulson J observed and as approved by Potter LJ in the latter, in any given case, the court has to ask itself as a matter of fact whether the real or effective or dominant cause of the seizure and detention is a financial cause or something else.

720. Toby says that the proximate cause of the confiscation of the Aircraft was the FRS's conclusion that Mr. Lamaccia had been guilty of a "*simulation*". That may have been one of the causes of the loss, but it was not the only one. In my judgment, failure to pay import



tax was also a proximate cause. The simulation practiced by Mr. Lamacchia, utilising Toby, was the means by which he sought to evade import tax, but it was the failure to pay import tax that led to the seizure of the Aircraft in June 2012 and the FRS's investigations (which ultimately led to the revelation of the means by which Mr. Lamacchia had tried to evade import tax.)

721. I agree with Mr. Elkington that insofar as it attempts to do so, (though I am not sure it really did), Toby cannot draw a distinction between its own actions and the actions of Mr. Lamacchia, since he was the director of Toby, its controlling mind and its beneficial owner.

722. Toby ought to have paid import duty on the Aircraft. As a result of its failure to do so, the Aircraft was forfeit. Consequently, Toby's failure to pay the appropriate import duty was either the sole proximate cause of Toby's loss of the Aircraft, or was one of the proximate causes of Toby's loss of the Aircraft. I accept Mr. Elkington's submission that it cannot be said that events were such as to eclipse the significance of the fact that Toby had not paid import duty.

723. Further or alternatively, that the failure to pay the necessary import duty was a "*financial cause*" is further demonstrated by the agreement between the Brazilian law experts in their Joint Report (discussing forfeiture pursuant to Article 105), that:

> *"It is important to take into account that the conversion of the penalty of forfeiture of ownership to a fine derives from necessity, when there is simply no good which ownership* [sic] *to forfeit. In the case at hand, there was no cause to convert the penalty of forfeiture of ownership to a fine, as the good in question (the Aircraft) was not missing. Also, Mr. Lamacchia had the option to keep the Aircraft and post a bond on behalf of the National Treasury in its stead. Mr. Lamacchia chose not to post such bond."*
>
> (My emphasis.)

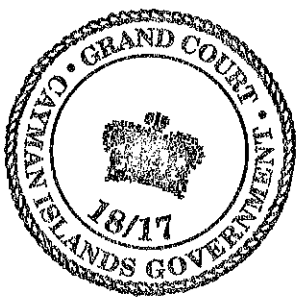
724. In conclusion therefore, I am satisfied that Toby's failure to pay the appropriate import duty was either the sole or one of the proximate causes of the loss of the Aircraft. This was

loss due to a financial cause, and therefore the loss is excluded from cover. It is important to note that where this Exclusion applies, it is not necessary for Toby to have known that it ought to have paid import tax. Therefore, even if I am wrong about whether Toby knew, or ought to have known of the need to pay import tax, if I am correct that this Exclusion applies, then that is also the end of Toby's case.

The Claims Procedure Condition

725. It is common ground that the Policy contained a Claims Procedure Condition. It is also common ground that Toby's compliance with that Condition was a condition precedent to Allianz's liability. It follows that if Toby was in breach of that Condition, then Allianz is not liable under the Policy, irrespective of whether Allianz suffered any prejudice as a result of the breach.

726. The Claims Procedure Condition was contained in Part A, Section IV(B), Condition Precedent 3 of the Policy, as incorporated into Part B of the Policy by Part B, Section Four, General Condition 1. The Claims Procedure Condition provided as follows:



"(B) CONDITIONS PRECEDENT APPLICABLE TO ALL SECTIONS

It is necessary that the insured observes and fulfils the following Conditions before the Insurers have any liability to make any payment under this Policy.

...

Claims Procedure 3. Immediate notice of any event likely to give rise to a claim under this Policy shall be given as stated in Part 8 of the Schedule. In all cases the Insured shall:

(a) furnish full particulars in writing of such event and forward immediately notice of any claim with any letters or documents relating thereto;
(b) give notice of any impending prosecution;
(c) render such further information and assistance as the Insurers may reasonably require;

(d) not act in any way to the detriment or prejudice to the interest of the Insurers.

..."

727. It may also be useful to just set out here the Claims Control Section. It states that:

> *"The Insurers shall be entitled (if they so elect) at any time and for so long as they desire to take absolute control of all negotiations and proceedings and in the name of the insured to settle, defend or pursue any claim*".

728. Part 8 of the Schedule specified UIB as the person to whom notice was to be given. Thus, whilst UIB was the agent of the insured Toby at all times, it was the agent of Allianz in relation to the giving of notice.

729. Originally when Allianz's Defence was pleaded, and indeed, right up until its Oral Opening at the start of the trial, its pleaded case was that the obligation to give notice pursuant to the above Condition was triggered by the seizure of the Aircraft on 20 June 2012. However, in its Oral Opening, its Written Closing Submissions, and ultimately in the Re-Re-Amended Defence and Counterclaim filed October 13 2017, paragraph 54, Allianz has now made plain that its case is that it is the decision of the FRS on 15 January 2013, received by Toby on 29 January 2013, that triggered Toby's obligation to give notice pursuant to the Claims Procedure Condition.

730. It is now therefore common ground that the Aircraft was not lost when it was seized on 20 June 2012, because the seizure was provisional and temporary. It is also common ground that the Aircraft was not lost at any time prior to 15 January 2013 (when Toby asserts it was lost).

731. Thus, it was submitted, the notice given by Toby to Allianz on 29 August 2012 was not the giving of notice of an event likely to give rise to a claim. Allianz submits that it follows, therefore, that Mr. McSwain was entirely correct to state in his email of 10 September 2012 that *"it does not appear that any claim exists"*.

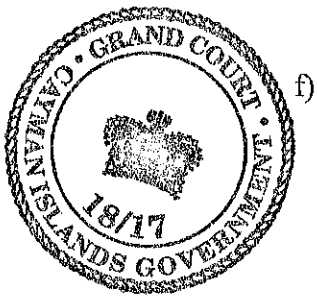
732. It was also posited that it is common ground that after Mr. McSwain had responded (correctly) to the notice given by Toby, Allianz heard nothing further from Toby for another 5 months, until 26 February 2013. Mr. Elkington makes the logical submission that during that time Allianz could not have found out that a decision to confiscate the Aircraft had been made, since that decision was not made until 15 January 2013.

733. It is averred that when the decision was received by Toby on 29 January 2013, at that point it was apparent to Toby that the confiscation was likely to give rise to a claim under the Policy. Accordingly, on 29 January 2013 Allianz says that Toby became obliged to give immediate notice in accordance with the Condition. In breach of this obligation, Toby failed to give any notice until 26 February 2013.

734. Allianz asserts that the giving of Notice on 26 February 2013 did not amount to the giving of immediate notice. Allianz referred to the decision in ***Aspen v Pectel Ltd*** [2009] 2 All E.R. (Comm) 873, where at paragraph 9, the word "*immediate*", in this context has been construed to mean "*with all reasonable speed considering the circumstances of the case.*"

735. Allianz asked the Court to have regard to the following matters in assessing whether Toby gave it "*immediate*" notice:

a) Mr. Lamacchia's evidence that Toby received the decision of the FRS on 29 January 2013. He was aware that the consequence of the FRS's conclusion would be the permanent confiscation of the Aircraft.
b) The timing of the notice to Allianz should be compared and contrasted with the timing of the notice and instruction that Toby gave to its own Brazilian lawyers (i.e. within days).
c) The Assessment Notice dated 15 January 2013 stated that it could be challenged within 20 days of acknowledgement.
d) Given that it was going to be asked to indemnify Toby in respect of the confiscation, Allianz had an obvious interest in any challenge to the Assessment Notice being as strong and as accurate as possible.



e) At all relevant times after the seizure of the Aircraft Toby had the benefit of legal advice.

f) Toby must have instructed its Brazilian lawyers straight away. That is apparent from the fact that on 14 February 2013 those lawyers filed a long and detailed appeal against the confiscation. The original (Portuguese) version of the appeal document ran to 107 pages and must have taken a long time to prepare.

g) Mr. Lamacchia in cross-examination accepted that he could have given notice to Allianz in January 2013.

736. Allianz also referred, by way of analogy, to the recent decision in ***Denso Manufacturing UK Ltd. v Great Lakes*** [2017] EWHC 391 (Comm) where a delay of 20 days was found to be a breach of a condition precedent requiring notice *"without delay"*. In that case the Judge stated (at paragraph 56):

> *"Nor do I consider that it was passed "without delay". This is a form of wording which would denote passing on within days or at most well under a month (14 days used to be considered an acceptable turnaround time for business correspondence, but even this may be regarded as unacceptably slow in the modern world)."*

737. Whilst it is common ground that it is not necessary for Allianz to show that Toby's delay caused it any prejudice, Allianz says that there plainly was, as a matter of fact, prejudice. That is because Toby's delay in giving notice deprived Allianz of the chance to exercise *"claims control"* rights, and to have any input into the appeal that was lodged on Toby's behalf on 14 February 2013. Allianz submits that that was particularly damaging because the appeal that was lodged contained serious falsehoods, and those falsehoods would have the effect of reducing the likelihood of success.

738. In his evidence, Mr. Rivera said that if it had been aware that a claim for indemnity was going to be made in respect of the confiscation, then Allianz would have wished to have input into the appeal against the confiscation.

739. Thus, Mr. Elkington submits, Toby was in breach of the claims condition, with the result that its claim fails.

Toby's Arguments

740. It is Toby's position that there was no breach of the Claims Procedure Condition in that the term *"immediate"* (like the term *"as soon as reasonably practicable"* which is also frequently used in notification clauses) is to be understood as allowing a reasonable but short period of time to consider the question of whether it is obliged to make a notification, such period of time being measured in weeks, or at most a few months.

741. Reference was made to the decision of the English Court of Appeal in ***HLB Kidsons*** [2009] 2 All ER 81 paragraph [54], being the judgment of Rix LJ. Mr. Weitzman asks the Court to note that in that case a series of presentations were made and that no objections were made in relation to a period of 4 weeks in the case of the first presentation and a delay of 7 weeks in the case of the second presentation.

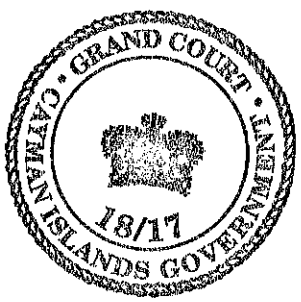
742. Toby asserts that the period of 4 weeks between its receipt of the FRS decision and its giving notice to Allianz was reasonable in the circumstances of the present case, and accordingly such notice is to be treated as being immediate in that:

a. The FRS decision was a complex legal document including many controversial assertions both as to the facts and as to the law, which Toby was entitled to take time to consider before making any notification;

b. Mr. Lamacchia had a right to challenge that decision and in any event had that challenge succeeded there would have been no claim;

c. Allianz had previously been notified of the seizure on 29 August 2012;

d. Allianz had not responded to that notification or expressed any interest in what was happening to the Aircraft or sought to exercise its rights under the Policy.



743. Further and in any event, as pleaded in its Re-Re-Amended Reply and Defence to Counterclaim, filed 23 October 2017, Toby says that Allianz is estopped from relying on any delay between Toby's receipt of the FRS decision on 29 January 2013 and Toby's giving notice on 26 February 2013 as a breach of the Claims Procedure Condition by its conduct in failing, when it received Toby's notification of 29 August 2012, to make any complaint as to any delay in giving that notification. On Allianz's own case, it is submitted, there was a delay of 10 weeks about which it made no complaint. In the circumstances, Toby continues, a reasonable insured in the position of Toby would have understood that such a delay was not of concern to Allianz. Reference was made to Ms. Rosenthal's evidence that had Allianz complained of delay following the receipt of the notification of 29 August 2012, she would have taken steps to ensure that the FRS decision was communicated to Allianz more speedily, she would have tried to do so earlier in 2013.

744. Even though it appears to be common ground that the triggering event was not the seizure of the Aircraft on 20 June 2012, I think it is convenient for completeness sake, to set out here what Toby says about this. Toby says it was not, because based upon the wording of the Claims Condition 3(a), there would have to be a more than 50% probability of a claim and also allows for a margin of judgment on the part of the insured. Reference was made to ***Zurich v Maccaferri*** [2016] EWCA Civ 1302 and ***HLB Kidsons***.

745. Toby says that if the triggering event was the seizure of the Aircraft, since the notice was notice of an *"event"*, as opposed to a claim itself, any insured could satisfy the notice requirements. CFC first notified UIB of the seizure of the Aircraft on 27 July 2012. CFC subsequently confirmed that notice on 6 August 2012.

746. Toby says that the notice given by CFC on 27 July 2012, satisfied the obligations of all insureds under the Policy, including Toby, and that notice, being 5 weeks and 2 days after the seizure, is to be treated as being immediate having regard to any uncertainties as to the nature and consequences of the seizure.

747. Toby further argues, that in the event that it is not entitled to rely upon the CFC notification, then its own notification of 29 August 2012, some 10 weeks after the seizure,

is to be treated as immediate having regard to the uncertainties surrounding the nature, scope and consequences of the seizure.

748. Finally, Toby states that Allianz's reliance on the Claims Procedure Condition in the present proceedings is opportunistic. In this respect, Toby says that Allianz's suggestion that if notified earlier it would have exercised its right to take over control of the Administrative Proceedings under that Clause is wholly unrealistic. It was submitted that Allianz made no response to either the notification of 29 August 2012 or the notification of 26 February 2013. It was submitted that Allianz had no interest in seeking to assist Toby in recovering the Aircraft; instead its efforts were focused on denying coverage.

Resolution of the Issue of whether there was breach of the Claims Procedure Condition by Toby?

If there was, are Allianz estopped from relying upon this breach?

749. In my judgment, and with great hesitation, I have arrived at the conclusion that Toby did not give immediate notice, as required by the Condition. It cannot be said that considering the circumstances of this case, it gave notice with all reasonable speed. Toby seems to have given notice with all reasonable speed to its own lawyers in Brazil. It did not do so with Allianz. Mr. Lamacchia accepts that he could have given notice in January 2013. I do think that the insurer's right to take control of proceedings is an important right that should not be allowed to be treated lightly or watered down by an Insured's conduct or delay in giving notice as required by the Policy. Claims in relation to confiscation of Aircrafts are substantial and relatively costly complicated claims and plainly notice should be given as required by the Policy. Given that it was going to be asked to indemnify Toby in respect of the confiscation, Allianz had an obvious interest in any challenge to the Assessment Notice being as strong and as accurate as possible and it was deprived of any input into that process as a result of Toby's failure to give it immediate notice, meaning notice with reasonable speed.

750. A more difficult question is whether Allianz could be said to be estopped from relying upon the delay between Toby's receipt of the FRS decision and it giving of notice to

Allianz. In my judgment, this argument should fail. I do not think that a reasonable insured could have thought that delay in notification would have been of no concern to Allianz. It is fair comment to say that Allianz made no complaint about the roughly 10 week timeline between the seizure of the Aircraft and notification from Toby. However, it is common ground that the seizure was not an event likely to give rise to a claim. Therefore, that situation was a different one from that which subsequently occurred when an event likely to give rise to a claim did occur, i.e. the FRS decision to confiscate the Aircraft. Whilst Ms. Rosenthal's evidence is that she would have sent notification earlier if Allianz had said something about the time period regarding the notice of seizure, in my view it cannot be said that there was any representation made to Toby upon which it could rely.

751. I note that Allianz did not rely upon this delay in the Declinature Letter. That, however, does not mean, in my view, that Allianz cannot rely upon the clause as it was a Condition Precedent and Allianz did not otherwise make any clear representations.

Defences Arising Out of the Involvement of CFC — The Loss Payee Clause — Whether no Sum is Recoverable by Toby from Allianz even if the Policy does Respond

Allianz's Arguments

752. Allianz has yet another argument in the event that the Policy does respond to the Loss. I have found upon a number of bases that the Policy does not respond. However, in the event that I am wrong on that, it would be necessary to consider this issue. Allianz says that even if the Policy responds to the loss, Toby is not entitled to recover any damages from it. This is because it says that it was not in breach of any obligation to Toby. If it had any obligation to make any payment, then Allianz says that its obligation was to make payment to CFC (Allianz's emphasis).

753. As Mr. Elkington points out, CFC leased the Aircraft, which it owned, to Toby, on the basis that Toby would arrange insurance for the loss or damage to the Aircraft, and that such insurance would contain a Loss Payee Clause in favour of CFC.

754. Toby duly arranged such insurance. The Endorsement contained a Loss Payee Clause which stated that, in the event of a Total Loss of the Aircraft, *"settlement (net of any relevant Policy Deductible) shall be made to, or to the order of the Contract party (ies)."*

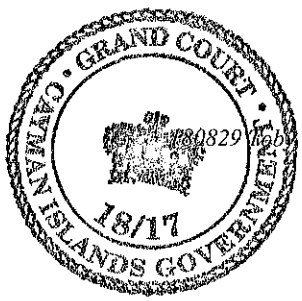
755. In the Endorsement, the "*Contract party/ies*" was defined as "*Cessna Finance Corporation (Lessor) and any Financier and Affiliates*". In its Amended Reply and Defence to Counterclaim, Toby admits that the endorsement required Allianz to pay any sums due under the Policy in respect of a total loss to (or to the order of) CFC. Thus, if as Toby asserts there was a Total Loss of the Aircraft, then Allianz was obliged to make payment to CFC, and not to Toby.

756. CFC brought proceedings against Allianz under the Policy, claiming the sum insured of US$14 million. Those proceedings were settled. Thus, Allianz says that it reached a settlement with the only party to which it had any obligation to make any payment.

757. Therefore, Allianz says that in not making any payment to Toby, it has not breached any term of the Policy.

758. Allianz referred to the terms of the Finance Lease Agreement between Toby and CFC, whereby CFC was entitled to receive all the insurance proceeds of US$14 million, but in certain circumstances CFC was obliged to pay some of those proceeds to Toby (to the extent that the US$14 million exceeded Toby's liability to CFC following the loss of the Aircraft). Therefore, says Allianz, in so far as Toby is dissatisfied with the fact that it has not received any insurance proceeds following the loss of the Aircraft, then its complaint is really with CFC and it should pursue a claim against CFC arising out of CFC's agreement to accept less than US$14 million.

759. Allianz asserts that in making a direct claim against Allianz, Toby is seeking in an impermissible way to cut across the carefully constructed contractual mechanism that was put in place between CFC/Toby/Allianz by way of the Finance Lease, the Policy and the Endorsement.



760. Further, Mr. Elkington argues, what Toby is trying to do is to take the benefit of the fact that the Policy is a valued Policy, while at the same time ignoring the clear terms of the Endorsement. That, he submits, is the route by which it is trying to secure a windfall which, on any analysis, greatly exceeds any loss it has suffered.

761. Allianz says that its position is entirely consistent with the fact that Toby has pursued proceedings against CFC, i.e. the Collection Proceedings. However, those proceedings were brought by Toby in Brazil, and have been dismissed on jurisdictional grounds. Interestingly, as Allianz points out, Toby had in those proceedings, criticised CFC for its conduct in reaching a settlement, and in the amount which it did, with Allianz.

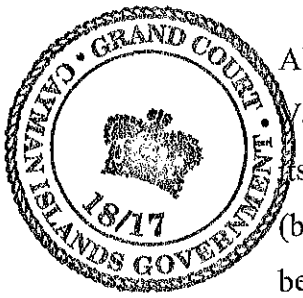
Toby's Arguments

762. It is Toby's position that Allianz's obligation to pay the Agreed Value in the event of a Total Loss was an obligation owed to both Toby in its capacity as principal insured, and CFC in its capacity as additional insured. Allianz has paid out US$3,630,476.64 to CFC. Accordingly, goes Toby's argument, the balance of the Agreed Value, some US$10,396,523.96, remains payable under the Agreed Value Clause by Allianz.

763. Toby takes the position that, while the Loss Payee Clause provided for payment to be made to or to the order of CFC in the case of a total loss, this was a procedural provision rather than a substantive provision; i.e. it set out how Allianz might satisfy its obligations rather than what those obligations were.

764. The argument continues that CFC by its settlement agreement with Allianz has released all its rights under the Policy including its rights under the Loss Payee Clause. Accordingly, the procedural provision of the Loss Payee Clause requiring payment to CFC is no longer of any effect and CFC, says Toby, has no further right to make a claim under the Policy. In the circumstances, Toby says that Allianz is now liable to pay to it the balance of the Aircraft's Agreed Value, i.e. US$10,396,523.96.

765. Toby argues in the alternative, that even if Allianz was only obliged to pay to Toby the value of its insurable interest (or such sums as CFC would have to account for to Toby),



Allianz will be liable to Toby for: (a) US$6,552,425 (the difference between the Agreed Value of the Aircraft and the sum of US$7,445,575which CFC required Toby to pay to it in its letter of 5 July 2012 purporting to give notice of default under the Finance Lease); plus (b) the US$2.6 million security deposit held by CFC; plus (c) the sum of US$3,100,574.79 being the rental payments paid by Toby to CFC pursuant to the Finance Lease following the seizure of the Aircraft. This results in a total sum of US$12,252,979.80 Toby says, which is about US$1.8 million more than the sum claimed by Toby.

766. Mr. Weitzman in his Written Closing Submissions under this head, helpfully, and in a bid to continue the comprehensive approach of the parties to this matter, referred to the fact that during the course of the Oral Opening Submissions the Court had expressed some interest as to whether either party was in essence seeking to obtain a windfall. So far as Allianz is concerned, Toby says that Allianz's liability was to pay the Agreed Value of US$14 million and is seeking to use its settlement with CFC to avoid paying that sum or anything more than the US$3,630,476.64 it has already paid to CFC. So far as Toby are concerned, Allianz has suggested that Toby is seeking to obtain a windfall in that the case is that Mr. Lamacchia was intending to return the Aircraft to CFC at the time when it was seized. It was Toby's submission that this is legally irrelevant in relation to Toby's claim because of Allianz's agreement to pay an agreed sum of US$14 million in the event of the total loss of the Aircraft (as opposes to a sum calculated by reference to the actual loss suffered by the insured). Mr. Weitzman also referred to the fact that during the trial Toby made an open offer (to my mind, a quite unusual occurrence), to accept US$5,700,544.79 (representing the sum of the security deposit and the rental payments made by Toby after the seizure of the Aircraft, amounting to US$3,100,554.79), together with interest and costs in satisfaction of its claim. That offer was rejected by Allianz. The point Toby makes here is that this demonstrates that it is not trying to obtain a windfall.

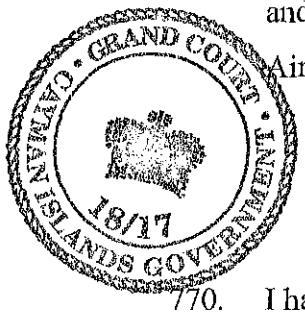
Resolution of the Loss Payee Clause Issue

767. In my judgment, Mr. Elkington is clearly correct that in the event of a Total Loss of the Aircraft, Allianz was obliged to pay CFC and not Toby. It is also clear that the parties had a carefully constructed contractual mechanism that was put in place by way of the Finance

Lease, the Policy and the Endorsement and this dealt with the parties' respective and relative bundle of rights. I do not accept that the Loss Payee Clause was simply a procedural rather than a substantive provision. However, even if it was procedural, I cannot see how Toby can properly rely upon Allianz's negotiated settlement with CFC to mean that, for every dollar by which Allianz was able to reduce CFC's claim in negotiations, it would thereby be increasing the corresponding amount of Toby's claim.

768. In my judgment, it is therefore clear that on this basis also Toby has no right to recover the balance of the Agreed Value, or any damages from Allianz, on any of its calculations referred to above.

769. To my mind, it does seem that if Toby has any issue about the settlement and its amount, and the fact that it has not received any insurance proceeds following the loss of the Aircraft, then its complaint should be directed to CFC.



SUMMARY

770. I have resolved a number of issues of fact. As regards the acquisition of the Aircraft, I have found that the acquisition of the Aircraft by Toby took place through a series of transactions commencing with the 2007 Agreement between CAC and Crefipar, and ultimately in the Finance Lease between CFC and Toby in March 2008. The 2007 Agreement was not a mistake; it and its amendments and the assignments of rights that took place, are an important part of the background to the acquisition.

771. As regards the purpose of Toby's incorporation, I am satisfied that Toby was an SPV, formed for the sole purpose of leasing and holding the Aircraft.

772. As regards the issue of whether Toby was made the Lessee of the Aircraft in order to avoid import duties, I have formed the view that Toby was an SPV set up for that purpose.

773. On the issue of how the Aircraft was actually used, I am satisfied and find that the Aircraft was not temporarily imported into Brazil.

774. On the issue of whether Mr. Lamacchia received oral advice from Mr. Franco in 2008 regarding the ownership and proposed use of the Aircraft, I find that he did not.

775. I have resolved the question of Brazilian law, which is a question of fact. Applying Brazilian law as I have determined it, I find that the use of the TAR by Toby was unlawful, and that the authorities in Brazil were entitled to, and did lawfully confiscate the Aircraft. I have found the decisions of the Brazilian authorities and Courts persuasive and well-reasoned.

776. **Avoidance**: I have found that Allianz is not entitled to avoid the Contract of Insurance on either the grounds of misrepresentation or non-disclosure. However, if I am wrong on that, and it was so entitled, Toby has not discharged its burden of showing that Allianz affirmed the Policy and therefore Allianz would be entitled to avoid. However, of course, my primary finding is that Allianz is not so entitled.

777. As regards the **Doctrine of Illegality**: I am satisfied that in the circumstances of the case, it would not be contrary to the public interest for Toby to be able to enforce its claim. Thus, the Doctrine of Illegality should not be applied to defeat Toby's claim.

778. **The issue of whether the loss falls within Clause (e) of Section One of Part B of the Policy.** In my judgment, Clause (e) of Section One of Part B of the Policy does provide coverage in respect of the confiscation of the Aircraft irrespective of whether that confiscation is lawful or unlawful and irrespective of whether that confiscation is the result of unlawful conduct on the part of Toby. To find, as Allianz argued, that it was entitled to deny cover under the Policy on the basis that the insured had acted unlawfully, would be to render the Law Compliance Condition otiose.

779. The ***"Any other Financial Cause"* Clause Exclusion**: In my judgment, Toby's failure to pay the appropriate import duty was either the sole proximate cause, or one of the proximate causes of loss of the Aircraft. This was a financial cause and the loss of the Aircraft is therefore on this basis excluded from cover.

780. **The Law Compliance Condition**: I have found that Toby did not genuinely believe that import tax was not properly due. However, even if I am wrong on that, I find that it did not use all reasonable efforts to ensure that there was compliance with the law of Brazil. Indeed it was reckless in its approach to compliance. I have already stated that I rejected the assertion that Mr. Lamacchia received oral advice on the subject from Mr. Franco in 2008. However, even if I am wrong on that, I am satisfied that this would not amount to all reasonable efforts because Mr. Franco was not given full and proper instructions upon which to provide full and reliable advice.

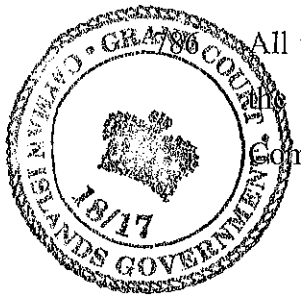
781. **The Due Diligence Condition:** I am satisfied that this Clause is not applicable in the instant case. However, if I am wrong on that, I, in any event find, for the reasons that I find that there was a breach of the Law Compliance Condition, that there was a breach of the Due Diligence Condition.

782. **The Illegal Use Exclusion:** I am satisfied that this clause in not applicable. The Aircraft was not being used for any illegal purpose. The FRS's complaint related not to the purpose of use of the Aircraft, but to the utilisation of the TAR while the Aircraft was in Brazil.

783. **Whether the loss falls within the period of the Policy:** I have found that the loss occurred on the 15 January 2013 when the FRS decided to confiscate the Aircraft. In that case the loss would plainly fall within the period of cover. However, even if the loss occurred at a later point discussed in this section of the judgment, the loss should still be treated as falling within the period of the Policy because it was as a result of a sequence of events starting during the Policy period and following in the ordinary course of the peril insured.

784. **The Claims Procedure Condition:** I have found that Toby did not give immediate notice as required under the Policy. I also find that Allianz are not estopped from relying on that condition.

785. **The Defences Arising out of the Involvement of CFC and the Loss Payee Clause:** Upon a number of bases, I have found that the Policy does not respond to the loss claimed by Toby. However, in the event that it does, I also find that Allianz had no liability to pay to Toby; it had an obligation to pay to CFC.



All told, I find that Allianz is not entitled to avoid cover. However, Toby's claim fails as the Policy does not respond. This is principally because Toby is in breach of the Law Compliance Condition, and further, the "*Any other Financial Cause*" Exclusion applies.

Judgment and Disposition

787. It was in all of these circumstances and based on these findings, that there will therefore be judgment for the Defendant on the claim.

788. Allianz's Counterclaim was concerned with the issue of Avoidance, and since that claim has failed, the Counterclaim stands to be dismissed.

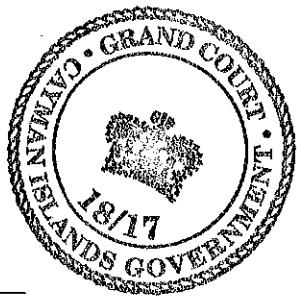
Costs

789. My sense of the matter is that the ordinary rule that costs should follow the success should obtain, and that costs should be awarded to Allianz to be taxed if not agreed. However, I appreciate that there have been numerous issues raised in this matter, on some of which Allianz has succeeded, and on some of which it has failed, particularly on the matter of avoidance. The parties are therefore at liberty to file brief written submissions, dealing with the issue of costs, within 14 days of the delivery of this judgment.

Joint Application of the Parties after receipt of draft Judgment

790. In accordance with Practice Direction 1/2004, the draft judgment was circulated to the parties on 1 August 2018, and the parties were given time to make, and did make, suggestions for changes. On 21 August 2018, the parties indicated that they had entered into advance settlement negotiations and sought that the Court not hand down or publish the judgment. After considering submissions, the Court exercised its discretion to dismiss

that application and decided that it was in the public interest to hand down and publish the judgment. The Court's Ruling is dated 28 August 2018.



HON. JUSTICE INGRID MANGATAL
JUDGE OF THE GRAND COURT