Neutral Citation Number: [2019] EWCA Civ 805

Case No: A4/2018/2700

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
Mrs Justice Moulder
[2018] EWHC 2737 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/05/2019

Before :

LORD JUSTICE DAVIS
LORD JUSTICE LEWISON
and
LORD JUSTICE MALES

- -

Between :

AIRBUS S.A.S.	**Respondent (Claimant)**
- and -	
(1) GENERALI ITALIA S.p.A. **(2) AXA CORPORATE SOLUTIONS ASSURANCE** **(3) ALLIANZ GLOBAL CORPORATE & SPECIALITY SE REPRESENTATION FOR ITALY**	**Appellants (Defendants)**

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Angus Rodger (of **Steptoe & Johnson UK LLP**) for the **Appellants**
Akhil Shah QC (instructed by **DLA Piper UK LLP**) for the **Respondent**

Hearing date : 16th April 2019

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Approved Judgment

Lord Justice Males :

Introduction

1. The claimant in this action and the respondent to this appeal ("Airbus") claims declarations (1) that it is not liable to the defendant insurers for losses incurred in relation to an incident which occurred on 29 September 2013 in which an aircraft which it had manufactured sustained damage when landing in Rome and (2) that proceedings commenced against it by the defendants in Italy have been commenced contrary to the terms of an English exclusive jurisdiction clause. The clause in question is contained in an Airframe Warranties Agreement dated 8 July 2010 ("the Warranties Agreement") concluded between (among others) Airbus and the defendants' insured, the Italian airline company Alitalia. The issue on this appeal is whether the English court has jurisdiction over these claims by virtue of the jurisdiction clause. Moulder J held that it does and the defendant insurers (henceforth "the appellants") now appeal.

2. The appellants contend, in outline, that the jurisdiction clause is of limited scope and does not extend to Airbus's claims in this action, that the claim for a negative declaration falls within an arbitration clause in a different agreement, a Purchase Agreement dated 31 October 2005 which provides for ICC arbitration in Geneva, and that their own proceedings in Italy under articles of the Italian Civil Code are not within the scope of either clause. They say in addition that they cannot be in breach of an exclusive jurisdiction clause to which, as insurers, they were never parties and that, regardless of the true construction of the clause, there is no basis on which the English court can make a declaration against them.

Background

3. Airbus S.A.S., a French company, is the manufacturer of an A320-200 aircraft with serial number 4249 (the "Aircraft"). It sold the Aircraft pursuant to an agreement (the "Purchase Agreement") dated 31 October 2005 between Airbus and Air One S.p.A. ("Air One", an Italian company). The Aircraft was operated by Alitalia Compagnia Aerea Italiana S.p.A. ("Alitalia").

4. On 29 September 2013 the Aircraft was forced to make an emergency landing at Rome's Fiumicino Airport with the landing gear partially retracted, causing significant damage. Italian accident investigators identified a defect in the right hand main landing gear door actuator as the cause of this incident. Airbus subsequently performed a fleet wide retrofit of Alitalia's landing gear door actuators without charge.

5. The appellants (together with another insurance company which is now insolvent and has played no part in this action), all Italian companies, are insurers of Alitalia and have indemnified Alitalia in respect of over US $11 million worth of damage caused by the incident.

6. On 24 July 2017 the appellants commenced proceedings against Airbus in Italy. They claim damages under Article 2043 of the Italian Civil Code for negligence. The claim was initially brought by way of subrogation but in the appellants' own name as permitted by Italian law, although since the hearing before Moulder J a further claim

has been added which is described as an independent claim not made by way of subrogation. The basis of both claims is that Airbus failed to take preventative action it should have taken in the light of earlier incidents involving other Airbus 320 aircraft and directives from the European Air Safety Agency.

7. Airbus commenced the present action on 9 January 2018. It seeks declarations that it has no liability to the appellants, that the Italian action falls within the scope of the exclusive English jurisdiction clause agreed by Alitalia and that the appellants acted in breach of that clause by starting the Italian proceedings.

8. After issuing its claim in England, Airbus then responded in the Italian action, objecting to the jurisdiction of the Italian court and, as required by Italian procedure, also setting out its substantive defences. Airbus has two defences to the appellants' claim. It denies all liability in respect of the emergency landing, saying that its conduct has been highly diligent at all times; and it contends that any liability is excluded by contract, relying on clause 12.5 of the Purchase Agreement by which it sold the Aircraft to Air One. This judgment does not address the merits of the parties' dispute.

The background contracts

9. The contractual process by which Alitalia became the operator of the Aircraft was as follows.

The Purchase Agreement

10. The Purchase Agreement dated 31 October 2005 was between Airbus as Seller and Air One as Buyer. It provided for Air One to purchase 30 (subsequently increased to 70) Airbus A320-200 aircraft of which the Aircraft (not yet built) was one.

11. Clause 12 of the Purchase Agreement set out the warranties to be given by Airbus on delivery of the aircraft. In essence these provided that each aircraft and all warranted parts as defined would at delivery to the Buyer be free from defects in material, workmanship and design and from defects due to failure to conform to the specification. The warranties were limited to those defects which became apparent within 48 months after delivery of the affected aircraft and provided also (in very brief summary) that in the event of a breach of warranty, the Buyer's remedy and the Seller's obligation and liability were limited to the repair, replacement or correction of the defective part to the exclusion of all warranties, obligations and liabilities arising by law (see in particular clauses 12.1.1, 12.1.3, 12.1.4 and 12.5). The clause set out also a procedure for making a claim under the warranties (clauses 12.1.5 and 12.1.6). Clause 12.3 provided for Airbus to provide the Buyer of each aircraft with such warranties as it had obtained from suppliers.

12. Clause 13 of the Purchase Agreement provided for Airbus to indemnify the Buyer against patent and copyright claims.

13. The Purchase Agreement was initially subject to French law but this was changed to English law by an amendment dated 9 April 2008. It provided (both before and after this amendment) for ICC arbitration with a seat in Geneva (clause 22.4):

> "Any dispute arising out of or in connection with this Agreement shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by a panel of three (3) arbitrators appointed and ruling in accordance with such rules.
>
> Arbitration shall be conducted in the English language and shall take place in Geneva, Switzerland."

The Novation Agreement

14. Air One transferred its right to purchase 50 of the A320-200 aircraft (including the Aircraft) to Aircraft Purchase Fleet Limited, an Irish company ("APFL") by a Partial Novation and Amendment Agreement dated 23 December 2008. The parties to this agreement were Airbus, Air One and APFL. So far as these aircraft were concerned, the Purchase Agreement was novated with the consequence that Air One was released from its obligations under the Purchase Agreement and APFL assumed the obligation to purchase the Aircraft in accordance with the terms and conditions of the Purchase Agreement. The agreement was governed by English law and also contained its own arbitration agreement providing for ICC arbitration in Geneva (clause 11).

The Purchase Agreement Assignment

15. APFL then assigned certain of its rights under the novated Purchase Agreement to Mainstream Aircraft Leasing Ltd ("Mainstream"), an Irish company, by a Purchase Agreement Assignment dated 8 July 2010. This was two days before the Aircraft was due to be delivered. The parties to this agreement were APFL and Mainstream and it was limited to the particular Aircraft with which this case is concerned. Specifically, Mainstream acquired the right to accept delivery of and purchase the Aircraft under clause 2.1 of the Purchase Agreement and to compel Airbus to perform its obligations under that clause and it took an assignment of "the Warranties", defined to mean the warranty rights given by Airbus pursuant to clauses 12 and 13 of the Purchase Agreement (see clause 2.1 of the Purchase Agreement Assignment). Mainstream, in turn, agreed to purchase the Aircraft on the delivery date and pay the purchase price to Airbus (clause 3.1).

16. This agreement was governed by English law and provided in clause 17.2 for the exclusive jurisdiction of the English courts "to settle any disputes arising out of or in connection with this Agreement and any non-contractual obligations connected with it (including a dispute regarding the existence, validity or termination of this Agreement)". (This is the same wording as contained in clause 13.2 of the Warranties Agreement: see below).

The Sale and Leaseback Agreement

17. Having acquired the right to purchase the Aircraft, Mainstream entered into a Sale and Leaseback Agreement with Jetstream Aircraft Leasing Limited ("Jetstream"), a Cayman Islands company, by which it sold the Aircraft to Jetstream and leased it back again.

The Sub-Lease

18. Mainstream then sub-leased the Aircraft to Alitalia by a Sub-Lease dated 6 July 2010 (in fact two days before the date of the Purchase Agreement Assignment, but it is apparent that the agreements concluded at or about this time were coordinated) for a term of 12 years from delivery of the Aircraft to Mainstream. Clause 6.4 of the Sub-Lease provided that to the extent not otherwise provided directly by Airbus to Alitalia pursuant to a Warranty Agreement which was to be concluded (see below), Mainstream would extend to Alitalia the benefit of various post-delivery warranties, and Alitalia was entitled during the term of the Sub-Lease to take action in respect of such warranties in the name of Mainstream.

19. Clause 13.1 of the Sub-Lease provided that Alitalia was responsible for the maintenance of the Aircraft during its term.

20. The Sub-Lease was governed by English law and provided in clause 26.2.1 for what was described as the "exclusive jurisdiction" of the English courts "to settle any dispute arising out of or in connection with this Agreement and the other Lease Documents (including a dispute regarding the existence, validity or termination of this Agreement or any other Lease Document)". This apparent exclusivity was qualified, however, by clause 26.2.3 which permitted either party to take legal proceedings in the courts where the other party was incorporated or, if different, its principal place of business. Thus Mainstream could sue Alitalia in England or Italy, while Alitalia could sue Mainstream in England or Ireland.

The Warranties Agreement

21. Also on 8 July 2010, and as foreshadowed by clause 6.4 of the Sub-Lease, the Warranties Agreement was entered into between Airbus (as Manufacturer), Jetstream (as Lessor), Mainstream (as Lessee), Credit Agricole Corporate & Investment Bank which had financed Jetstream's purchase of the Aircraft (as Security Trustee) and Alitalia (as Sub-Lessee). The Warranties Agreement recited briefly the background which I have set out and recorded that the parties wished "to make arrangements in respect of the Warranties on the terms and conditions set out herein".

22. By way of introduction to the Warranties Agreement, it provided in brief summary as follows:

    (1) Mainstream warranted that it was the legal and beneficial owner of the Warranties (clause 3.4.1);

    (2) All parties agreed that, unless and until Airbus received a Notice (broadly) to the effect that the Lease or Sub-Lease was terminated, Alitalia would have the exclusive benefit of and would be entitled to exercise all rights in respect of the Warranties (clause 3.4.2);

    (3) Alitalia agreed that the terms and conditions of clauses 12 and 13 of the Purchase Agreement (which were set out in full as a Schedule to the Warranties Agreement) would apply to any exercise of its rights in respect of the Warranties and that it would be subject to all obligations, restrictions, limitations and conditions of clauses 12 and 13 of the Purchase Agreement with respect to the exercising of such rights (clause 3.4.3);

(4) Upon service of a Notice, Alitalia's rights in respect of the Warranties would terminate (clause 4.1) and Airbus would grant to any one of the other parties (i.e. Jetstream, Mainstream or Credit Agricole, together referred to as "the Transaction Parties") as specified in the Notice the benefit of such of the warranties as remained available, referred to as the "Remaining Warranties" (clause 2).

(5) All parties agreed that in the event of a grant of the benefit of the warranties to one of the other parties following service of a Notice, nothing in the Warranties Agreement would modify in any way Alitalia's rights under the Purchase Agreement or subject it to any liability, obligations, costs, losses, expenses or damages to which it would not otherwise be subject (clause 8.4) and that the terms and conditions of the Purchase Agreement would apply to all claims made in respect of the Warranties (clause 8.5).

23. In view of the detailed arguments addressed to us, it is necessary to set out some of the terms of the Warranties Agreement more fully.

24. Clause 1 set out various definitions including a definition of the "Warranties":

> "Warranties means the warranty rights in respect of the Airframe given by the Manufacturer to Aircraft Purchase Fleet Limited pursuant to clauses 12 (Warranties and Service Life Policy) and 13 (Patent Indemnity) of the Purchase Agreement, as set out in Schedule 1, including all post-delivery rights in respect thereof as the same remain available at the Delivery Date".

25. Clause 2, headed "Covenant", provided:

> "Subject to clause 3 (*Notice to the Manufacturer and Warranty Confirmation*) and clause 4 (*Termination of Rights*), the Manufacturer agrees to grant by way of the Warranty Confirmation to any one of the Transaction Parties (including, if applicable, the Nominee) as may be specified in any Notice duly served in accordance with clause 3 (*Notice to the Manufacturer and Warranty Confirmation*) a package of warranties equivalent to such of the Warranties which as at the date of the Notice shall remain available (the Remaining Warranties)."

26. Clause 3 provided for the service of a Notice to Airbus in terms set out in Schedule 2 to the Agreement in the event of termination of the Lease or Sub-Lease, in which event Airbus was required to execute a Warranty Confirmation:

> "3.3 Subject to clause 8 below and upon receipt by the Manufacturer of any of (i) the Lessee's Notice in accordance with clause 3.1 (*Lessee's Notice to Manufacturer*) or (ii) the Enforcement Notice in accordance with clause 3.2 (*Enforcement Notice to Manufacturer*), the Manufacturer shall execute and deliver to the Transaction Parties (including the Nominee, if applicable) the Warranty Confirmation and grant the Remaining Warranties to the Transaction Party (including the Nominee, if applicable) specified in the Notice duly delivered in accordance with clauses 3.1 or 3.2."

27. The terms of the Warranty Confirmation which Airbus was required to execute were set out in Schedule 3 as follows:

> "2 … Accordingly, the Manufacturer hereby confirms that, from the date hereof, the Remaining Warranties shall be made available to [the Lessor/the Security Trustee/Nominee/the Lessee] subject to the terms and conditions of the Airframe Warranties Agreement.
>
> 3. This Warranty Confirmation and any non contractual obligations associated with it shall be governed by and construed in accordance with the laws of England and Wales."

28. Whereas clauses 2 and 3.1 to 3.3 had dealt with the position in the event of premature termination of the Lease or Sub-Lease, the parties' expectation was presumably that the Lease and Sub-Lease would be performed in accordance with their terms so that Alitalia would operate the Aircraft for 12 years after its delivery and thus throughout the period when any warranty claim might need to be made. That position was dealt with in clause 3.4, headed "Benefit of Warranties", as follows:

> "3.4.1 The Lessee represents and warrants for the benefit of each of the other parties hereto that the Lessee is the legal and beneficial owner of all the rights, title, benefit and interest in and to the Warranties.
>
> 3.4.2 Each of the parties hereto hereby agrees in favour of the Sub-Lessee and the Manufacturer that, until receipt by the Manufacturer of a Notice in accordance with clauses 3.1 or 3.2, the Sub-Lessee shall have the exclusive benefit of and shall be entitled to exercise all rights in respect of the Warranties.
>
> 3.4.3 The Sub-Lessee agrees that the terms and conditions of clauses 12 and 13 of the Purchase Agreement shall apply to any exercise of the Sub-Lessee's rights in respect of the Warranties and shall be binding on the Sub-Lessee, and the Sub-Lessee shall be subject to all obligations, restrictions, limitations and conditions of clauses 12 and 13 of the Purchase Agreement with respect to the exercising of such rights (including without limitation, the waiver, release and renunciation in clause 12.5 of the Purchase Agreement) to the same extent as if it had originally been a party to the Purchase Agreement until such time as any Notice has been served."

29. Clause 4 provided, in summary, that Alitalia's rights against Airbus would terminate on service of a Notice.

30. Clause 8 dealt further with the terms on which Airbus would provide the Warranty Confirmation:

> "The parties hereby agree that the Manufacturer will provide the Warranty Confirmation subject to the following conditions:
>
> …
>
> 8.4 nothing herein nor in the Warranty Confirmation shall modify in any way the rights of the Manufacturer under the Purchase Agreement or subject the Manufacturer to any liability, obligations, costs, losses, expenses or damages to which it would not otherwise be subject;

> 8.5 the Transaction Parties and the Sub-Lessee shall have no obligation or liability under the Purchase Agreement by reason of or arising out of this Agreement, provided that the terms and conditions of the Purchase Agreement shall apply to all claims made in respect of the Warranties and shall be binding upon the Transaction Parties and the Sub-Lessee and the Transaction Parties and the Sub-Lessee shall be subject to all obligations, restrictions, limitations and conditions of the Purchase Agreement with respect to the making of such claim (including, without limitation the Waiver, Release and Renunciation in clause 12 of the Purchase Agreement) to the same extent as if they had been named 'Buyer' thereunder; …"

31. Clause 13 of the Warranties Agreement provided as follows:

> "**Law and Jurisdiction**
>
> 13.1 This Agreement and any non contractual obligations connected with it shall be governed by and construed in accordance with the laws of England and Wales.
>
> 13.2 The parties hereto irrevocably agree that the courts of England shall have exclusive jurisdiction to settle any disputes arising out of or in connection with this Agreement or any non-contractual obligations connected with it (including a dispute regarding the existence, validity or termination of this Agreement)."

32. Clauses 13.3 and 13.4 designated agents for service of proceedings in England and agreed to waive any immunity from the jurisdiction of the English court and any objection to such jurisdiction on the grounds of *forum non conveniens* or any similar grounds.

33. Clause 13 of the Warranties Agreement is the term on which Airbus relies in order to found jurisdiction in this case. It is this clause of which Airbus contends that the appellants are in breach by virtue of their Italian proceedings.

34. As already mentioned, Schedule 1 to the Purchase Agreement set out in full clauses 12 and 13 of the Purchase Agreement.

Delivery of the Aircraft

35. The Aircraft was delivered by Airbus to Mainstream and by Mainstream to Alitalia on 10 July 2010 pursuant to the contractual arrangements described above and thereafter was operated by Alitalia as part of its fleet.

The claim in the Italian proceedings

36. In the Italian proceedings commenced on 24 July 2017 in the Civil Court of Civitavecchia the appellants claim damages as a result of the failure of the Aircraft's right hand landing gear to open properly when landing at Fiumicino airport on 29 September 2013. The claim was made by the appellants in their capacity as insurers of Alitalia exercising rights of subrogation under Articles 1916 or 1201 of the Italian Civil Code having indemnified Alitalia for its losses.

37. The appellants' factual case is that the incident was caused by the failure of the actuator of the hatches of the main landing gear due to the presence of pieces of debris

inside the actuator and the fact that some components of the actuator piston were missing. Reference was made to previous incidents said to have been caused by technical problems with the same component as had failed on this occasion and to directives issued by the European Air Safety Agency in 2008, 2012, and 2013.

38. The claim made against Airbus is a claim in tort under Article 2043 of the Civil Code that, following an identical incident to another A320 aircraft, Airbus "negligently failed to take the essential steps necessary to prevent the damage from repeating itself … while also failing to take the most basic technical and precautionary measures" such as recall of the aircraft or a "communication to ensure a more appropriate handling of the fault". The claim continues that "damage to the actuator of the landing gear door was a regular feature of the 'operational life' of the component" which Airbus had only ever dealt with after incidents reported from time to time, "without ever taking preventive action in the form of a full redesign" and that Airbus had "an obligation, at the very least, to completely overhaul the components of the entire fleet and/or to take preventive action in the form of adequate, prompt, intervention".

39. In its reply dated 16 February 2018 Airbus challenged the jurisdiction of the Italian court relying on the exclusive English jurisdiction clause in the Warranties Agreement and called upon the Italian court to stay its proceedings pursuant to Article 31.2 of the Brussels Recast Regulation until such time as the English court as the court seised on the basis of the clause had determined the issue of jurisdiction. In addition, as it was required to do under Italian procedural law, Airbus set out its defence on the merits. It did not advance any alternative factual case as to the cause of the incident, but denied any liability, maintaining that it had always acted with proper diligence in responding to what it characterised as the small number of previous incidents which had occurred. Further and in any event, Airbus relied on the terms of the warranties set out in the Warranties Agreement, and in particular clause 12.5, as constituting an exhaustive statement of the remedies available to Alitalia (in whose shoes the appellants stood) in the event of manufacturing defects in the Aircraft or its components.

40. By an order made on 3 July 2018 the Italian court decided not to stay its proceedings, at any rate at that stage.

41. Subsequently, on 23 October 2018, which was the day after delivery of judgment by Moulder J, the appellants added a new claim in Italy, claiming that as insurers they have their own non contractual claim not dependent on rights of subrogation:

> "According to art. 2043 of the Italian Civil Code, anyone who causes unjust damages is required to compensate it. In our case, the unjust damages for the insurers is the fact that they have had to pay compensation for an accident which their own insured person suffered, caused by Airbus grossly negligent omission.
>
> The present case for sure results in a breach the right to credit, which is recognised as part of our legal system following the well-known *Meroni* case.
>
> In other words, this case deals with damage that is unjust because it has an effect – that would never occur without the third-party's misconduct – on a contractual relationship, the 'financial statement' of which is therefore negatively affected to some extent.

> Therefore, the insurers specify here that the claim is put forward on a non-contractual basis also on the grounds of a concurrent own right, which is not subject as such to the contractual relationships between their policyholder and Airbus." (Translation provided by Airbus's solicitors: although something may have been lost in translation, the gist is reasonably clear).

42. The appellants added that the facts on which this new claim was based, the damages claimed and the grounds of claim were unchanged.

The judgment

43. In the Commercial Court Moulder J dealt first with the question whether Airbus could found jurisdiction under Article 25 of the Brussels Recast Regulation in reliance on the exclusive English jurisdiction clause in the Warranties Agreement. The appellants submitted that the issue of how clause 13.2 should be construed was a matter of law, not dependent on any issue of fact on which the judge was unable to make a reliable assessment, and that the issue should therefore be decided. The judge, however, held at [26] and [27] that in order to found jurisdiction under Article 25, Airbus was required only to satisfy the test of "good arguable case" as explained in *Bols Distilleries BV v Superior Yacht Services Ltd* [2006] UKPC 45, [2007] 1 WLR 12 and *Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80, [2018] 1 WLR 192.

44. The judge held that the terms of the jurisdiction clause were of wide scope, that the Warranties Agreement was intended to be a free-standing agreement between Airbus and Alitalia, separate from the Purchase Agreement, and that it set out *in extenso* the warranties of which Alitalia was to have the benefit, even if some cross-reference was required to the Purchase Agreement. Therefore the clause was not limited (as the appellants contended) to disputes regarding the mechanism by which the benefit of the warranties was to be transferred to persons who were not party to the Purchase Agreement, but extended to substantive claims under the warranties. The clauses of the Warranties Agreement which referred to Alitalia being subject to all the conditions of clauses 12 and 13 of the Purchase Agreement, and which provided that the terms and conditions of the Purchase Agreement would apply to warranty claims and that the Warranties Agreement would not subject Airbus to any obligations to which it would not be subject under the Purchase Agreement, all referred to the substantive terms of the Purchase Agreement, not to the arbitration clause. There was no apparent business purpose for construing the Warranties Agreement to require disputes about who was entitled to the benefit of the warranties to be subject to English jurisdiction while substantive warranty claims were subject to ICC arbitration in Geneva. Accordingly the judge concluded at [54] that:

> "… the intention of the parties (applying the objective test) was that Clause 13.2 should apply to all disputes arising out of or in connection with the Warranties Agreement including substantive claims under the warranties."

45. Although this conclusion was stated in unqualified terms, at the end of the judgment when she summarised her conclusions the judge expressed this finding as being that Airbus "has the better of the argument". It was, therefore, a conclusion that Airbus satisfied the test of good arguable case.

46. The judge considered next whether the claim advanced in the Italian proceedings was a claim "connected with" the Warranties Agreement. She held that it was, because it pertained to an alleged manufacturing defect of one of the components of the Aircraft. Although the claim was put forward based on a failure to take appropriate measures after delivery of the Aircraft in the light of incidents involving other aircraft, the essence of the complaint was that the component was defective and that Airbus was liable as its manufacturer. Accordingly the judge concluded at [61] that:

> "On the evidence before me in my view Airbus has established that it has the better of the argument that the Italian proceedings are non contractual claims that are 'connected with' disputes under the Warranties Agreement namely a warranty claim arising under Schedule 1 and thus within Clause 13.2 of the Warranties Agreement."

47. Despite limiting this conclusion to finding that Airbus had the better of the argument, and therefore satisfied the test of "good arguable case", the judge not only granted a declaration that the English court has jurisdiction but also granted declarations that the appellants' Italian proceedings had been commenced in breach of clause 13.2 of the Warranties Agreement. Those latter declarations were expressed in final and unqualified terms. However, it was clearly premature to grant final declarations at a stage when the appellants had not had an opportunity to decide whether to file a fresh Acknowledgement of Service in the light of the court's decision on jurisdiction (see CPR 11.7), let alone when the judge's conclusion was merely that Airbus had a good arguable case that the Italian proceedings were in breach of contract.

The issues on appeal

48. There are three issues raised by the appellants on this appeal:

(1) What is the true construction of the jurisdiction clause in the Warranties Agreement? In particular, does it extend to a substantive claim under the warranties?

(2) Is the commencement and pursuit of the Italian proceedings contrary to the terms of the jurisdiction clause?

(3) If so, can the English court make a declaration to that effect against the appellants in circumstances where as insurers they were not parties to and do not found their claim on the Warranties Agreement or the Purchase Agreement?

Good arguable case or final decision?

49. The standard of proof to be applied in determining whether the English court has jurisdiction under Article 25 of the Brussels Recast Regulation is that of a good arguable case. That test has been considered in two decisions of this court since the date of the judge's judgment. In *The Atlantik Confidence* [2018] EWCA Civ 2590, Gross LJ said at [34]:

> "As is clear from *Brownlie*, the test remains that of a 'good arguable case'. A majority of the Supreme Court deprecated any 'glossing' of that test but said, in terms, that Lord Sumption's 'explication' at [7] did not constitute any such

> impermissible gloss. Accordingly, a good arguable case remains something more than a *prima facie* case and something less than a case satisfying a balance of probabilities test. Where there is a dispute as to the applicability of a gateway, unless prevented by reason of some consideration relating to the interlocutory stage of the proceedings, the Court 'must take a view on the material available if it can reliably do so'. … I would be content to say that in asking himself who had the better of the argument on the material available, the Judge may be seen to give effect to the test as subsequently formulated in *Brownlie*; but it suffices to conclude, as I do, that if any distinction can be drawn between the Judge's approach and the *Brownlie* formulation, it is a distinction without any meaningful difference."

50. In *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV* [2019] EWCA Civ 10, Green LJ said at [70] to [80] that Lord Sumption's formulation of the test in *Brownlie*, approved by the Supreme Court in *Goldman Sachs International v Novo Banco SA* [2018] UKSC 34, [2018] 1 WLR 3683 at [9], must now be taken as authoritative, and that this is a relative test requiring the court to decide whether the claimant has the better of the argument on the material available. Davis LJ added at [119] that:

> "… whatever the niceties of language involved, it is sufficiently clear that the ultimate test is one of good arguable case. For that purpose, however, a court may perfectly properly apply the yardstick of 'having the better of the argument' (the additional word 'much' can now safely be taken as consigned to the outer darkness). That, overall, confers, in my opinion, a desirable degree of flexibility in the evaluation of the court: desirable, just because the standard is, for the purposes of the evidential analysis in each case, between proof on the balance of probabilities (which is not the test) and the mere raising of an issue (which is not the test either)."

51. Thus the burden is on the claimant to show that it has the better of the argument, making due allowance for the limitations of the material available at an early stage of the case. This was the test which the judge applied.

52. Sometimes, however, it will be sensible, when a question of law arises on an application to challenge jurisdiction, for the court to decide it rather than merely deciding whether it is sufficiently arguable. This is well established, as Lord Collins of Mapesbury explained in *Altimo Holdings & Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012] 1 WLR 1804 at [81]:

> "A question of law can arise on an application in connection with service out of the jurisdiction, and, if the question of law goes to the existence of jurisdiction, the court will normally decide it, rather than treating it as a question of whether there is a good arguable case: *E F Hutton & Co (London) v Mofarrij* [1989] 1 WLR 488, 495; *Chellaram v Chellaram (No 2)* [2002] 3 All ER 17, para 136."

53. Before taking this course the court needs to be confident that it has all the relevant material with which to make such a decision and that doing so will not unfairly prejudice either party. But if this is so, it will often be useful to reach a final decision on the point as this will enable the action to go forward on a firm footing without

putting the parties to the trouble and expense of arguing the point all over again. In the present case the parties agree that the issue as to the true construction of the jurisdiction clause in the Warranties Agreement (issue (1) above) should be finally decided, as should the question whether the English court can make a declaration against the appellants (issue (3)). These are questions of law which have been fully argued and neither party has suggested that there is any additional material not presently before us which may bear on the answer. A final decision from this court may also be of assistance to the Italian court in considering whether to stay the proceedings before it.

54. Different considerations apply, however, to the question whether the appellants' commencement of the Italian proceedings was contrary to the jurisdiction clause, at any rate if issue (1) is determined against the appellants. The parties agree that this question should not be finally determined and that the test of good arguable case should be applied.

55. I shall consider each of these issues in turn.

Issue (1) – the construction of the jurisdiction clause

56. The construction of the jurisdiction clause in the Warranties Agreement was the principal issue argued before us. As before the judge, the appellants submitted that the clause is limited to disputes about which party has the benefit of the warranties at any particular time, together with related issues such as the validity of the Warranties Agreement itself, while Airbus supported the judge's wider construction.

The appellants' submissions

57. Mr Angus Rodger for the appellants submitted, in summary, that:

(1) The Warranties Agreement was part of an overall scheme and had to be construed in the context of the other agreements entered into at the same time. It was therefore necessary to consider the function of the Warranties Agreement within that scheme, which was to set out the circumstances in which various parties, including Alitalia, would have the benefit of the warranties contained in the Purchase Agreement which had been assigned to Mainstream by the Purchase Agreement Assignment.

(2) If Mainstream had sought to enforce the warranties pursuant to the Purchase Agreement Assignment, it would have had to do so by arbitration, notwithstanding the English jurisdiction clause in that agreement, as an "assignee is bound by an arbitration clause in the sense that he cannot assert the assigned right without also accepting the obligation to arbitrate" (*The Jordan Nicolov* [1990] 2 Lloyd's Rep 11 at 15). This is sometimes referred to as a "benefits and burdens" analysis.

(3) Close analysis of the terms of the Warranties Agreement demonstrated that the assigned rights to which Alitalia became entitled pursuant to clause 3.4.2 of the Warranties Agreement were the same rights as had been assigned to Mainstream, which rights were enforceable by way of arbitration. Thus:

a) The definition of the Warranties in clause 1 showed that the rights in question were those given "pursuant to clauses 12 (Warranties and Service Life Policy) and 13 (Patent Indemnity) of the Purchase Agreement".

b) The "Warranties" referred to in clause 3.4.1, which were the subject of a representation by Mainstream, could only be the same warranties under the Purchase Agreement as had been assigned to Mainstream by the Purchase Agreement Assignment and not some new warranties created by the Warranties Agreement itself.

c) The "Warranties" referred to in clause 3.4.2 of which Alitalia was to have the benefit must therefore be the same warranties under the Purchase Agreement as the term "Warranties" cannot have referred to different warranties in two adjacent paragraphs of the same clause.

d) The "obligations, restrictions, limitations and conditions of clauses 12 and 13 of the Purchase Agreement", to which clause 3.4.3 provided that Alitalia's exercise of its warranty right would be subject, included the obligation to arbitrate as the warranties in the Purchase Agreement could only be enforced by arbitration.

e) This was reinforced by the concluding words of clause 3.4.3 ("to the same extent as if it had originally been a party to the Purchase Agreement"). If Alitalia had been a party to the Purchase Agreement, it would have been bound by the arbitration clause in that agreement.

f) Clause 8.4 provided further confirmation. If enforcement of the warranties was now to be by litigation in England instead of arbitration in Geneva, that would constitute a modification of Airbus's rights under the Purchase Agreement contrary to clause 8.4.

g) Further, clause 8.5 provided that "the terms and conditions of the Purchase Agreement shall apply to all claims made in respect of the Warranties", which terms and conditions included the arbitration clause.

h) Litigation in England would potentially expose Airbus to "liability, obligations, costs, losses, expenses or damages to which it would not otherwise be subject" in view of procedural differences between litigation in England and ICC arbitration in Geneva, which would be contrary to the terms of clause 8.4.

i) Clause 8.5 provided that the terms and conditions of the Purchase Agreement would apply to all claims made in respect of the Warranties and were binding upon both the Transaction Parties and Alitalia as the Sub-Lessee without expressly limiting those terms and conditions to those set out in clauses 12 and 13. Those terms and conditions therefore included the arbitration clause.

j) Although clause 8 is introduced by words which suggest that it applies only when a Warranty Confirmation has been given, and therefore when Alitalia no longer has an interest in enforcing the warranties, the repeated references to Alitalia ("the Sub-Lessee") in clause 8.5 show that this cannot be the case.

k) Although clauses 12 and 13 of the Purchase Agreement are set out at Schedule 1 to the Warranties Agreement, that cannot be because the Warranties Agreement was intended to be a self-contained and comprehensive code as reference to the Purchase Agreement would still be necessary in order to understand such matters as (for example) the terms of the specification or what components are excluded from the warranties.

(4) There is in principle no objection to a scheme of dispute resolution whereby different clauses in different agreements may involve a degree of fragmentation, as explained in *Sebastian Holdings Inc v Deutsche Bank AG* [2010] EWCA Civ 998, [2011] 1 Lloyd's Rep 106. There were good reasons for such fragmentation in this case. For example, a dispute about which party was entitled to the benefit of the warranties was suitable for determination by a judge in court, but it may be advantageous in a technical claim under the warranties to nominate an arbitrator with technical expertise, as well as being potentially in Airbus's interest for such a claim to be determined in proceedings which would be confidential.

(5) Accordingly substantive disputes about liability in connection with clauses 12 and 13 of the Purchase Agreement are subject to the arbitration clause in that agreement. The jurisdiction clause in the Warranties Agreement covers only disputes about the subject matter of the Warranties Agreement, namely which party has the benefit of the warranties at any particular time, together with related issues such as the validity of the Warranties Agreement itself. Since Airbus's claim for a declaration of non-liability concerns the effect of clause 12 of the Purchase Agreement, that claim falls outside the jurisdiction clause in the Warranties Agreement and the English court therefore has no jurisdiction over it.

Airbus's submissions

58. Mr Akhil Shah QC for Airbus submitted, again in summary, that:

(1) The Warranties Agreement created an independent agreement between Airbus and the other parties including Alitalia which granted equivalent warranties to those previously granted under the Purchase Agreement. It was the only agreement between all those parties. Alitalia obtained the benefit of the warranties under this agreement and not merely by way of assignment. Accordingly the Warranties Agreement superseded the warranties previously granted and rendered all claims relating to them subject to the English jurisdiction agreement at clause 13.2.

(2) Clause 13.2 is in all-encompassing terms and applies to non-contractual as well as contractual obligations arising out of or connected with the Warranties Agreement.

(3) There is no good reason why the parties would have wanted some disputes arising out of their relationship to be subject to English jurisdiction, but not others. In particular, there would only be a dispute about which party was entitled to the benefit of the warranties if a warranty claim was going to be made by somebody. On the appellants' construction that would necessitate litigation in England to decide who should bring the claim, followed by an arbitration in Geneva on the substantive claim. That would be highly inconvenient.

(4) Unlike *Sebastian Holdings*, this is not a case of several agreements with varying dispute resolution clauses between the same parties, but a case where there is only one relevant agreement relating to the warranties between all the parties concerned with them.

(5) Contrary to the appellants' submission, analysis of the text of the Warranties Agreement supports Airbus's position. Thus:

a) While the definition of the Warranties in clause 1 described them as being given pursuant to clauses 12 and 13 of the Purchase Agreement, it was of equal or greater significance that they were "as set out in Schedule1".

b) Clause 2 referred to a "grant" of "a package of warranties equivalent to" the Remaining Warranties, which suggested a grant of something new, even if the content was the same as the content of the warranties in the Purchase Agreement.

c) Clause 3.4.2 was a new agreement between all concerned parties in which Alitalia was given a direct right to the exclusive benefit of the warranties, not a right derived from an assignment or transfer of the Purchase Agreement.

d) The opening words of clause 3.4.3 provided that "the terms and conditions of clauses 12 and 13 of the Purchase Agreement" would apply to any exercise of its warranty rights, not that the arbitration clause or even the terms of the Purchase Agreement generally should apply.

e) The "obligations, restrictions, limitations and conditions", to which clause 3.4.3 provided that Alitalia's exercise of its warranty right would be subject, were likewise expressly limited to those of clauses 12 and 13 of the Purchase Agreement.

f) Clause 8.4 was concerned to ensure that Airbus's substantive rights under the Purchase Agreement should not be modified, but was not concerned with the procedural question whether a warranty claim should be enforced by arbitration or litigation.

g) Similarly clause 8.5 was concerned with the substantive obligations of the Purchase Agreement. Although the language did not include an express reference to the terms and conditions in clauses 12 and 13 in the way that clause 3.4.3 did, it was saying the same thing in different

language. In particular, the words "all obligations … with respect to the making of such claim" amounted to a reference to clause 12 of the Purchase Agreement as it was there that the obligations, restrictions, limitations and conditions applicable to a warranties claim are to be found.

h) In any event the opening words of clause 8 ("the Manufacturer will provide the Warranty Confirmation subject to the following conditions") show that it has no application for so long as it is Alitalia which has the benefit of the warranties.

i) The fact that clauses 12 and 13 of the Purchase Agreement are set out at Schedule 1 to the Warranties Agreement shows that the Agreement was intended to be a self-contained and comprehensive code so far as the warranties are concerned. The fact that some cross reference to the Purchase Agreement would still be necessary does not detract from this.

(6) Accordingly the English court has jurisdiction over the claim for a declaration of non-liability.

Principles of construction

59. The principles applicable to the construction of a jurisdiction clause where the parties have entered into a number of agreements with different dispute resolution clauses were summarised by Thomas LJ in *Sebastian Holdings* at [39] to [42]:

"39. It is clear that in construing a jurisdiction clause, a broad and purposive construction must be followed: *Donohue v Armco Inc* [2002] 1 Lloyd's Rep 425; *Fiona Trust & Holding Corporation v Privalov* [2007] 2 Lloyd's Rep 267 affirmed in *sub nom Premium Nafta Products v Fili Shipping* [2008] 1 Lloyd's Rep 254 where Lord Hoffmann observed at para 7:

'If, as appears to be generally accepted, there is no rational basis upon which businessmen would be likely to wish to have questions of the validity or enforceability of the contract decided by one tribunal and questions about its performance decided by another, one would need to find very clear language before deciding that they must have had such an intention.'

40. The Supreme Court emphasised in *Re Sigma Finance Corporation* [2009] UKSC 2 the need, when looking at a complex series of agreements, to construe an agreement which was part of a series of agreements by taking into account the overall scheme of the agreements and reading sentences and phrases in the context of that overall scheme.

41. It is generally to be assumed on these principles that just as parties to a single agreement do not intend as rational businessmen that disputes under the same agreement be determined by different tribunals, parties to an arrangement between them set out in multiple related agreements do not generally intend a dispute to be litigated in two different tribunals.

42. However, where there are multiple related agreements, the task of the court in determining whether a dispute falls within the jurisdiction clauses of one or more related agreements, depends upon the intention of the parties as revealed by the agreements against these general principles: see Collins LJ in *Satyam Computer Services Ltd v Upaid Systems Ltd* [2008] EWCA Civ 487 at para 93 and *UBS* at para 83.

43. The considerations have been examined in particular by Rix J in *Credit Suisse v MLC* [*Credit Suisse First Boston (Europe) Ltd v MLC Bermuda Ltd* [1999] 1 Lloyd's Rep 767] and by Lord Collins in *UBS* [*UBS AG v HSH NordBank AG* [2009] EWCA Civ 585, [2009] 2 Lloyd's Rep 272]. It is necessary to refer to these in a little more detail. In the first of these cases, *Credit Suisse,* … Rix J referred to the dispute being, on the one hand, one single narrative arising out of the purchase, but on the other,

> 'where different agreements are entered into for different aspects of an overall relationship, and those different agreements contain different terms as to jurisdiction, it would seem to be applying too broad and indiscriminate a brush simply to ignore the parties' careful selection of palette' (page 777)".

60. Thomas LJ concluded, at [49]:

> "49. The decisions in *Credit Suisse* and *UBS* are both examples of the process of construction that has to be undertaken, using the well-recognised general principles and tools of contractual construction in the context of the principles relating to different jurisdiction clauses in related agreements. The overall task of the court is summarised in the 2010 supplement to *Dicey, Morris and Collins* at para 12-094:
>
> > 'But the decision in *Fiona Trust* has limited application to the questions which arise where parties are bound by several contracts which contain jurisdiction agreements for different countries. There is no presumption that a jurisdiction (or arbitration) agreement in contract A, even if expressed in wide language, was intended to capture disputes under contract B; the question is entirely one of construction. ... The same approach to the construction of potentially overlapping agreements on jurisdiction (but there will, in this respect, be no difference between the construction of agreements on jurisdiction, arbitration agreements and service of suit clauses) was taken in [*UBS*] … In the final analysis, the question simply requires the careful and commercially-minded construction of the various agreements providing for the resolution of disputes, the point of departure being that agreements which appear to have been deliberately and professionally drafted are to be given effect so far as it is possible and commercially rational to do so, even where this may result in a degree of fragmentation in the resolution of disputes. It may be necessary to enquire under which of a number of inter-related contractual agreements a dispute actually arises; this may be answered by seeking to locate its centre of gravity. …'."

61. This approach has been followed in more recent cases, including *Trust Risk Group S.p.A. v AmTrust Europe Ltd* [2015] EWCA Civ 437, [2015] 2 Lloyd's Rep 154; *Monde Petroleum S.A. v Westernzagros Ltd* [2015] EWHC 67 (Comm), [2015] 1 Lloyd's Rep 330; *Deutsche Bank AG v Comune di Savona* [2018] EWCA Civ 1740 and *BNP Paribas S.A. v Trattamento Rifiuti Metropolitani S.p.A.* [2019] EWCA Civ 768, although all of these were cases where there was more than one agreement between the same parties. In the last of these cases Hamblen LJ summarised the position as follows at [68]:

> "In the light of the guidance provided by these authorities, so far as relevant to the present case I would summarise the approach to be as follows:
>
> (1) Where the parties' overall contractual arrangements contain two competing jurisdiction clauses, the starting point is that a jurisdiction clause in one contract was probably not intended to capture disputes more naturally seen as arising under a related contract: *Trust Risk Group* at [48]; *Dicey, Morris & Collins* at § 12-110.
>
> (2) A broad, purposive and commercially-minded approach is to be followed - *Trust Risk Group* at [48]; *Sebastian Holdings* at [39] and [50].
>
> (3) Where the jurisdiction clauses are part of a series of agreements they should be interpreted in the light of the transaction as a whole, taking into account the overall scheme of the agreements and reading sentences and phrases in the context of that overall scheme: see *UBS v Nordbank* [2009] at [83]; *Trust Risk Group* at [47]; *Sebastian Holdings* at [40].
>
> (4) It is recognised that sensible business people are unlikely to intend that similar claims should be the subject of inconsistent jurisdiction clauses: *UBS v Nordbank* at [84], [95]; *Sebastian Holdings* at [40]; *Savona* at [1].
>
> (5) The starting presumption will therefore be that competing jurisdiction clauses are to be interpreted on the basis that each deals exclusively with its own subject matter and they are not overlapping, provided the language and surrounding circumstances so allow: *Monde Petroleum* at [35]-[36]; *Savona* at [1].
>
> (6) The language and surrounding circumstances may, however, make it clear that a dispute falls within the ambit of both clauses. In that event the result may be that either clause can apply rather than one clause to the exclusion of the other – *Savona* at [4] and [31]."

Discussion

62. I would accept that the Warranties Agreement was part of an overall scheme of contracts, several of which were concluded at or about the same time, and that the contractual background cannot be ignored. It is after all referred to in the recitals to the Warranties Agreement itself. It shows that enforcement of the warranties in the Purchase Agreement was subject to ICC arbitration in Geneva and that (unless arrangements similar to those in this case were entered into in respect of the remaining aircraft to be built by Airbus) enforcement of warranty claims in respect of other aircraft may have remained so subject. However, the background could also be

said to indicate a shift in favour of English jurisdiction in the agreements concluded in July 2010 so far as this particular Aircraft was concerned. Ultimately the contractual background sheds little light on the question whether the parties to the Warranties Agreement intended a claim under the warranties to be brought by litigation in England or by arbitration in Geneva.

63. What is clear, however, is that the Warranties Agreement was the only contract to which all those who were or might become interested in the warranties were parties and that the warranties themselves were set out separately in a schedule.

64. A significant strand of the appellants' case was that if Mainstream in its capacity as assignee of the warranties had sought to enforce them pursuant to the Purchase Agreement Assignment, it would have had to do so by arbitration. To my mind, however, this submission begs the question. It is true that, in general, an assignee will be bound by an arbitration or jurisdiction clause in the contract from which its assigned rights derive, at any rate in the sense that if it seeks to enforce those rights, it must do so by the contractually agreed mechanism (see e.g. not only *The Jordan Nicolov* at [15], but also *The Jay Bola* [1997] 2 Lloyd's Rep 279 at 286 and *Glencore International AG v Metro Trading International Inc* [1999] 2 Lloyd's Rep 632 at 645). However, this general rule must yield to any contrary agreement between the assignee and the counterparty against whom the assigned rights are to be asserted. In the present case, both the Purchase Agreement Assignment (to which Airbus was not a party but to which it gave its consent) and the Warranties Agreement included their own jurisdiction clauses. It is by no means obvious that if Mainstream had sought to make a warranty claim, it would have had to do so pursuant to the arbitration clause in the Purchase Agreement.

65. Moreover, once the Warranties Agreement between all parties concerned had been concluded, there would be no question of Mainstream enforcing any rights pursuant to the Purchase Agreement Assignment, either by litigation or arbitration. The effect of the Warranties Agreement was that it would be Alitalia and not Mainstream who had the benefit of the warranties unless and until a Notice was served. Alitalia's right to enforce the warranties was not dependent on the Purchase Agreement Assignment but arose directly under the terms of the Warranties Agreement. Even in the event of a Notice being served so that Alitalia's right to enforce the warranties was terminated, their enforcement by any of the other parties (including Mainstream) would be an enforcement of direct contractual rights pursuant to the Warranties Agreement and not merely enforcement of derived rights as an assignee. To a large extent, therefore, the Purchase Agreement Assignment was a stepping stone in the contractual structure, but was superseded by the Warranties Agreement.

66. It is necessary, therefore, to approach the construction of the jurisdiction clause in the Warranties Agreement without any preconception deriving from the fact that Mainstream was an assignee.

67. Turning then to the Warranties Agreement itself, the presumed intention of the parties is to be ascertained primarily from the terms of that agreement. The minute analysis of its terms undertaken by the parties which I have summarised above demonstrates that there are points of detail which can be made in favour of each of the rival constructions. However, I do not propose to engage with the competing analyses. In my judgment they are inconclusive. Further, they are ultimately unhelpful. I do not

regard this kind of detailed textual analysis, with some points going one way and some another, in order to identify what would at best be a winner on points by a narrow margin, as a reliable guide to the parties' intentions on the point at issue.

68. In my judgment it is necessary to concentrate on the bigger picture. The following matters strike me as important.

69. First, as already noted, the Warranties Agreement was the only contract to which all those who were or might become interested in the warranties were parties. This is not a case like *Sebastian Holdings* where there were a number of different dispute resolution clauses in contracts between the same parties. It is not a case, therefore, where the parties must necessarily be taken to have agreed that some disputes will be governed by one dispute resolution clause and others by another or, to borrow Rix J's metaphor from the *Credit Suisse* case, where they have made a "careful selection of palette".

70. Second, the terms of the jurisdiction clause are extremely wide. They extend expressly not only to any disputes "arising out of or in connection with this Agreement", itself on the face of things an all-encompassing expression, but also to any disputes "in connection with … any non-contractual obligations connected with" the Warranties Agreement, as well as disputes regarding the existence, validity or termination of the Agreement. The natural meaning of the clause, therefore, is that it is intended to be comprehensive.

71. Third, the question then arises whether there is anything to show that this was not after all what the parties intended, and that they intended to reserve arbitration in Geneva for a substantive claim under the warranties. If that is what the parties intended in the face of a jurisdiction clause in such wide terms, it is to be expected that they would make their intention clear. In my judgment they have not done so. In particular, none of the detailed textual points made by the appellants is determinative. References to the "terms and conditions" or to the "obligations, restrictions, limitations and conditions" of the Purchase Agreement in clauses 3.4.3, 8.4 and 8.5 are well capable of referring to the substantive terms of the Purchase Agreement applicable to the exercise of warranty rights, and in this context do not necessarily include reference to the arbitration clause.

72. Fourth, while fragmentation of dispute resolution may have to be accepted if that is what the parties must be taken to have agreed, that is not a conclusion which should be lightly reached.

73. Fifth, the scope for argument about whether an arbitration clause in one contract is incorporated into another contract by general words is well known. The leading textbook, *Mustill & Boyd, Commercial Arbitration*, 2nd Edition (1989) states that:

> "In principle an arbitration clause may be incorporated by a reference to a standard form of contract or the particular terms of another contract in which the clause is set out, even without express reference to the clause. But it must be clear that the parties intended the arbitration clause to apply."

74. The February 1996 Departmental Advisory Committee report on what became the Arbitration Act 1996 stated at para 42 that:

> "In English law there is at present some conflicting authority on the question as to what is required for the effective incorporation of an arbitration clause by reference."

75. It may be that in more recent times English law has adopted a less stringent approach to this issue than previously. However, no case was cited to us in which it was sought to incorporate by general words an arbitration clause from one contract into another contract which already contained its own dispute resolution clause. Against the legal background which I have summarised, it is highly likely that if the parties had intended the arbitration clause in the Purchase Agreement to apply to warranty claims despite the existence of an exclusive jurisdiction clause in wide terms in the Warranties Agreement itself, this professionally drafted contract would have said so.

76. For all these reasons I would conclude, and would grant a final declaration, that clause 13.2 of the Warranties Agreement applies to all disputes arising out of or in connection with (1) the Warranties Agreement and (2) any non-contractual obligations connected with the Warranties Agreement, including any dispute connected with a substantive claim under the warranties contained in the Purchase Agreement. It follows that I reject the appellants' contention that the clause is limited to disputes about which party has the benefit of the warranties at any particular time.

Issue 2 – the Italian proceedings

77. It is common ground that the question whether the appellants' claim in Italy falls within the scope of the English jurisdiction clause depends on the nature of the claim brought in Italy, not on the defences which may be or have in fact been raised by Alitalia. As Thomas LJ explained in *Sebastian Holdings* at [62]:

> "… the question as to whether a claim falls within the jurisdiction clause is an issue that has to be determined at the time the proceedings are issued."

The appellants' submissions

78. Mr Rodger for the appellants submitted that the claim in Italy is not within the scope of the clause for two reasons. The first was that it is common ground that Alitalia was the party with the benefit of the warranties, so that there is no issue about that such as would need to be resolved under the jurisdiction clause. The second was that in any event, the claim is not a warranty claim or connected with a warranty claim, but an independent claim in tort under Italian law for negligence in failing to take appropriate remedial steps following a number of other incidents.

Airbus's submissions

79. Mr Shah for Airbus submitted that the judge was right to find that Airbus had the better of the argument that the Italian proceedings were connected with the Warranties Agreement. The claim in Italy is effectively an allegation that Airbus supplied a defective product to Alitalia in its capacity as the manufacturer of the Aircraft which it failed to remedy or recall. Such a claim is within the scope of the warranties or, at any rate, is connected with the Warranties Agreement so as to fall within the jurisdiction clause.

Discussion

80. The appellants' first reason for submitting that commencement of the Italian proceedings did not constitute a breach of the jurisdiction clause was dependent on their limited construction of the clause. As I have rejected that construction, this reason falls away. The question falls to be considered on the basis that the jurisdiction clause is of wide scope, as I have concluded. On that basis the appellants nevertheless maintain that the claim in Italy is outside the scope of the clause as it is neither a warranty claim nor connected with a warranty claim, but an independent claim in tort under Italian law for negligence in failing to take appropriate remedial steps following a number of other similar incidents involving other aircraft.

81. In my judgment, however, there is at least a good arguable case that the claim commenced by the appellants in Italy is sufficiently closely connected with the warranties to fall within the scope of the jurisdiction clause in the Warranties Agreement. Even though the claim is not a claim for breach of any contractual obligation, but a claim in tort, the only capacity in which Airbus can sensibly be alleged to be liable for having failed to take appropriate remedial steps is that it was the manufacturer of the Aircraft and that the landing gear door actuator which it supplied was defective. The allegations made in the Italian proceedings that Airbus had an obligation to recall the Aircraft or to undertake "preventive action in the form of a full redesign" or otherwise "to completely overhaul the components of the entire fleet" only make sense in this context. But whether Airbus had an obligation to do any of these things is at least connected with the post-delivery obligations set out in clauses 12 and 13 of the Purchase Agreement and now provided for by the Warranties Agreement.

82. In my judgment that is sufficient to give Airbus the better of the argument that, even though the Italian claim is for breach of non-contractual obligations under articles of the Italian Civil Code, it is sufficiently connected to the Warranties Agreement to be within the scope of the exclusive jurisdiction clause.

83. Accordingly, while as already explained I consider that the judge was wrong at this stage of the case to grant a final declaration that the commencement of the Italian proceedings was in breach of clause 13.2 of the Warranties Agreement, I would hold that there is a good arguable case that the commencement and pursuit of those proceedings was contrary to the terms of that clause and that the English court has jurisdiction to determine that claim. (I express it in this way because, as explained in the next section of this judgment, this is not strictly speaking a claim for breach of contract, but rather for breach of an equivalent obligation in equity). It is not of course suggested that this is a case where an anti-suit injunction could be granted by the English court, but nor is it suggested that a declaration in appropriate terms (if granted in due course) would serve no useful purpose.

84. I have so far been considering the position at the time when the Italian proceedings were commenced and before Airbus indicated the nature of its defence. It was common ground, as already indicated, that this is what we are required to do. At that stage the Italian proceedings were founded exclusively on the appellants' rights of subrogation as insurers. Since then, as explained above, the appellants have added a claim which is said to be independent of any such rights of subrogation, although they have not abandoned their original claim. However, it was not submitted on their

behalf that the addition of this claim would require a different answer to be given to issue (2) in the event that the claim as initially commenced was contrary to the terms of the exclusive jurisdiction clause. Indeed, in circumstances where the subrogated claim remains a significant part of the appellants' case in Italy and where the appellants have confirmed that the independent claim is based on the same facts, and seeks recovery of the same damages on the same grounds, it is hard to see how it could do so.

Issue (3) – a declaration against the insurers

85. The final issue is whether the English court can make a declaration against the appellants that the commencement and pursuit of the Italian proceedings is contrary to the terms of the exclusive jurisdiction clause in the Warranties Agreement in circumstances where as insurers the appellants were never parties to that agreement and do not found their claim in Italy upon it.

The appellants' submissions

86. In his written submissions Mr Rodger accepted that if the appellants were exercising rights of subrogation to bring a claim which Alitalia could have brought, they could only bring that claim in a forum where Alitalia could have brought it. Accordingly, if (as I have held) the jurisdiction clause in the Warranties Agreement is to be widely construed as extending to a claim under the warranties, such a claim could only be brought in England. He submitted, however, that this does not mean that Airbus is entitled to bring a claim against the appellants in England or that the appellants are in breach of contract in commencing the Italian proceedings. The appellants are not themselves parties to the Warranties Agreement and are not seeking to take the benefit of that contract. Accordingly, Mr Rodger submitted, they are not subject to its burdens.

87. In oral submissions, however, Mr Rodger's focus was more limited. He relied on the statements in *The Jay Bola* to the effect that the only remedy in such circumstances for a party in Airbus's position was an anti-suit injunction, a remedy which of course is no longer available against an EU defendant since the decisions of the CJEU in *Turner v Grovit* (Case C-159/02, [2005] AC 101) and the *West Tankers* case (Case C-185/07, [2009] AC 1138), as showing that the court is unable to grant a declaration.

Airbus's submissions

88. Mr Shah submitted that the appellants were exercising rights of subrogation and were bound by the jurisdiction agreement at clause 13.2 of the Warranties Agreement to the same extent as Alitalia would have been. He challenged the appellants' interpretation of what was decided in *The Jay Bola*.

Discussion

89. In *The Jay Bola* a voyage charterparty contained a London arbitration clause. The charterers' insurers commenced court proceedings in their own name against the time charterers (the owners under the voyage charter) in Brazil claiming that the cargo had been damaged. The time charterers in response sued the insurers in London, claiming an anti-suit injunction to restrain the pursuit of the proceedings in Brazil, to which the

insurers responded that they were not parties to the arbitration clause in the charterparty.

90. The Court of Appeal agreed that the insurers were not parties to the arbitration clause, but their rights as subrogated insurers were nevertheless derived from and dependent upon the rights of the voyage charterers. Accordingly their claim was one which, if made by the voyage charterers, the voyage charterers would have been obliged to refer to arbitration in London. In those circumstances the insurers were not entitled to take the benefit of the voyage charter contract (the right to claim damages for breach) without accepting its burden (the obligation to arbitrate). The insurers argued nevertheless that the time charterers had no cause of action which could be asserted against them in England. That argument was rejected. Hobhouse LJ said at 286 rhc:

> "However, where the action brought by the assignee in another jurisdiction which does not recognise the equitable right of the debtor, *the debtor's only remedy* is (just as it was in the first half of the last century) to apply for an injunction restraining the assignee from refusing to recognise the equity of the debtor. The present case is such a case. The insurance company is failing to recognise the equitable rights of the time charterers. The equitable remedy for such an infringement is the grant of an injunction." (Emphasis added).

91. As he put it a little later, the application for an anti-suit injunction was "made to protect a contractual right of the time charterers that the dispute be referred to arbitration, a contractual right which equity requires the insurance company to recognise".

92. As already noted, Mr Rodger relied on the words which I have emphasised. However, I would not accept that Hobhouse LJ was saying that the court could not even grant a declaration. That question did not arise.

93. The analysis in *The Jay Bola* was further developed by Colman J at first instance in the *West Tankers* case [2005] EWHC 454 (Comm), [2005] 2 Lloyd's Rep 257. Italian insurers brought claims in tort in Italy which were within the scope of the London arbitration clause in a charterparty. The owners claimed an anti-suit injunction to which the insurers responded (among other things) that as insurers they were not bound by the arbitration clause. Colman J's conclusion at [70] and [71] was that even though the insurers were not in breach of any contract between them and the owners, the owners nevertheless had an equitable right to have a claim against them referred to arbitration which the English court would protect:

> "70. Accordingly, I conclude that, if, as I have held, the ambit of the subject-matter of the transfer by subrogation is to be determined by English law, the insurers were bound to pursue subrogated claims against the owners by arbitration. Their insistence on proceeding in the Italian courts would be inconsistent with the equitable rights of the owners under the arbitration agreement to have a claim against them in tort referred to arbitration. In principle, therefore, the anti-suit injunction would be an appropriate remedy unless strong cause were shown to the contrary.
>
> 71. If the ambit of the subject-matter transferred by subrogation is determined by Italian law to be the right to sue in court proceedings subject to the owners'

> option to insist on the claim being referred to arbitration, the result would be the same. The owners have asserted that they require arbitration and the insurers have refused to accede to that requirement. They have thereby acted and they continue to act inconsistently with the owners' equitable rights and, although that conduct may not amount to an actionable breach of the agreement to arbitrate, it gives rise to a right of protection by way of injunctive relief under English law which governs the agreement to arbitrate."

94. While *The Jay Bola* was a straightforward benefit and burden case, *West Tankers* was not. In *West Tankers* the insurers were not seeking to take the benefit of any contractual rights contained in or derived from the charterparty. On the contrary their case was, as the case of the insurers in the present case is, that they had an independent claim in tort under provisions of Italian law which they were entitled to enforce by way of subrogation free of any obligation to arbitrate to which their insured may have been subject. The insurers were not parties to the charterparty which contained the arbitration clause and could not, therefore, be in breach of contract. Nevertheless it was held that the owners had an equitable right that such a claim be enforced against them in arbitration, and that this right was enforceable against the insurers.

95. Although the remedy being discussed in *The Jay Bola* and *West Tankers* was an anti-suit injunction, which is no longer available against an EU defendant and is not claimed in the present action, that does not affect the analysis that an English arbitration or jurisdiction clause gives rise to an equitable right enforceable against subrogated insurers who seek to act inconsistently with the clause. Colman J's reasoning on this point was unaffected by the further course of the *West Tankers* case. This was confirmed by Flaux J at a later stage of the case after it had completed its round voyage to Luxembourg via the House of Lords (see [2012] EWHC 854 (Comm), [2012] 2 Lloyd's Rep 103 at [73]). Moreover, the remedy actually granted by Colman J consisted not only of an injunction, but also a declaration. This does not appear from the report at first instance, but does appear from the speech of Lord Hoffmann in the House of Lords [2007] UKHL 4, [2007] 1 Lloyd's Rep 391 at [5]:

> "Colman J gave a judgment on 21 March 2005. He decided that both in English and Italian law the right to the delictual claim which had been transferred to the insurers by subrogation was subject to the arbitration clause in the charterparty. He therefore made the declarations claimed by Tankers."

96. In my judgment the House of Lords implicitly approved the reasoning of Colman J on this point but, in any event, I would do so now. Accordingly the position is as follows:

(1) Insurers exercising rights of subrogation to make a non-contractual claim are bound by an English arbitration or jurisdiction clause to the same extent as their insured would have been.

(2) Whereas the commencement and pursuit of proceedings contrary to the terms of an arbitration or jurisdiction clause by the insured would constitute a breach of contract, the commencement and pursuit of such proceedings by insurers constitutes a breach, not of the contract but of an equivalent equitable obligation which the English court will protect.

(3) The remedies available in such a case include the grant of a declaration in an appropriate case.

97. I can see no valid basis on which *West Tankers* can be distinguished. If it is held that commencement of the Italian proceedings by Alitalia would have been a breach of the jurisdiction clause in the Warranties Agreement, it follows that their commencement by the appellant insurers is a breach of an equivalent obligation in equity which Airbus is entitled to enforce and that the English court has jurisdiction to grant a declaration to say so.

Disposal

98. For the reasons set out above I would uphold the judge's construction of the jurisdiction clause in the Warranties Agreement and would grant a final declaration to that effect. I would dismiss the appellants' appeal against the judge's decision that the English court has jurisdiction to determine Airbus's claims against the appellants, but I would set aside the judge's grant of final declarations that the Italian proceedings fall within the scope of the jurisdiction clause and that their commencement was a breach of that clause. Whether such declarations should be granted will be a matter for trial.

Lord Justice Lewison :

99. I agree.

Lord Justice Davis :

100. I also agree.