COMMONWEALTH OF THE BAHAMAS

IN THE COURT OF APPEAL

SCCivApp. No. 221 of 2017

B E T W E E N

SKYBAHAMAS AIRLINES LIMITED

Appellant

AND

SOUTHERN AIR CHARTER COMPANY LIMITED

Respondent

BEFORE:	**The Honourable Sir Michael Barnett, President** **The Honourable Sir Brian Moree, Chief Justice** **The Honourable Mr. Justice Milton Evans, JA**
APPEARANCES:	**Mr. Marco Turnquest with Miss Chizell Cargill Counsel for the Appellant** **Mr. Wayne Munroe QC with Ms. Krystian Butler, Counsel for the Respondent**
DATES:	**19 November 2019; 11 February 2020; 11 May 2020; 2 June 2020** **19 January 2021**

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Civil appeal – Assessment of Damages – Award for Diminution in Value and Loss of Opportunity Award for Loss of Use – Requirements for Determining Diminutive Value - Recognition of expert witnesses – Duty to mitigate Damages –who has the onus of proof on the issue of mitigation? - Whether Registrar properly assesses the evidence - Whether proper reasons given for decision?

On June 2009 the Appellant’s Beechcraft 1900D aircraft bearing registration number N2YV was being parked at apron five at the Lynden Pindling International Airport when it came into contact

with the Respondent's parked aircraft causing damage to the aircraft. The Respondent filed an action in the Supreme Court seeking an award of Damages.

On 21 March, A.D., 2011 an interlocutory judgment was entered with damages to be assessed and the matter was subsequently set before the Registrar for the Assessment of Damages. The sum of $497,954.22 awarded by the Registrar consisted of $76,099.22 in respect of the costs of repair to the Respondent's aircraft; $141,315.00 in respect of the diminution in value of the aircraft and $280,540.00 in respect of loss of opportunity/loss of use of the aircraft.

By this appeal the Appellant challenges the award for diminution in value and loss of opportunity and loss of use. There is no appeal against the award for the costs of repair. The appeal also challenges the award of interest and costs.

Held (Moree, CJ dissenting on allowing the appeal on the Diminution Value): appeal allowed; we accept the evidence of Mr. Muhler's that the valuation would be reduced by no more than 5-10% and place the diminution in the value at 10%; we remit the issue relative to the loss of use to the Supreme Court for a rehearing. We invite the parties to address the Court on the question of costs both here and in the Court below.

per Evans JA: The Registrar was mandated to give full consideration as to whether the repairs to the Aircraft had preserved the value of the Aircraft or whether there had been a diminution in the value notwithstanding the repairs.

It is not apparent from the judgment of the Learned Registrar that she applied her mind properly to the issue at variance between the parties. The parties differed as to the extent of the damages and as to whether the airplane was fully restored.

It is clear that the Registrar made no finding of fact as to the true nature of the extent of the damages sustained by the aircraft in the accident nor as to the extent to which the repairs effected cured those damages. She further did not address the issue as to the extent to which the class and use of the Aircraft affected the value of an aircraft which has a history of being damaged. She erred in simply accepting the evidence of Mr. Coonan (expert witness relied upon by the respondent) and rejecting the evidence of Mr. Muhler (expert witness relied upon by the appellant) without considering the merits of both opinions.

It is now well established that although the Plaintiff has a duty to mitigate his damages the burden rests with the Defendant to prove one of two things. Firstly he can prove that certain events have occurred which have minimized the damages which the plaintiff would have otherwise occurred. In the alternative he can prove that the Plaintiff had the opportunity to avail himself of reasonable steps which would have minimized his damages. What is at play is two conflicting burdens. Firstly the Plaintiff has a burden to prove that he is entitled to the loss which he has pleaded. The Defendant' in response seeks to show that the plaintiff is not entitled as he could have avoided that loss by reasonable conduct. The question which the court has to decide in such cases is what was the cause for that loss?

It is apparent that the Registrar was not sure which of the witnesses to believe so she made what she thought was a Solomon like decision and cut the award for loss of use in half. This was fundamentally wrong. There was agreement between the parties as to the offer of the plane and the use for the two days. The parties diverged as to what transpired thereafter. If the Registrar had accepted Captain Butler's evidence on that point she could not make any award at all. If she accepted the evidence of Mr. Gibbs then the Respondent was entitled to the full award and not the 50% she awarded. The award clearly had to be all or nothing. It is clear that the award of 50% represent no legal reasoning. She was required to determine the cause of the loss during the period of repair. This she failed to do and thus could not properly make any award without a specific finding on that issue. In these circumstances the proper course of action is to remit this issue relative to the loss of use to the Supreme Court for a rehearing.

Coles v Hetherton [2013] EWCA Civ 1704 applied
Payton v Brooks [1974] RTR 169 considered
Standard Chartered Bank v Pakistan National Shipping Corporation and others [2001] All ER (D) 186 applied
Waterdance Ltd v Kingston Marine Services Ltd [2014] EWHC 224 applied

per Moree, CJ: The Loss of Use Award by the Registrar is unsustainable as the Registrar did not resolve the conflict in the factual evidence on the reason for the discontinuance of the use by the respondent of the alternative aircraft offered by the appellant during the period when the damaged airplane was being repaired. If the Registrar had accepted the appellant's evidence, she would have rejected the loss of use claim in its entirety (apart for any period not covered by the offer), whereas if she had accepted the respondent's evidence, she would have found that the respondent mitigated its damages, and it would have been awarded the claim in its entirety, subject to adjustments, if any, for vouching and verifying the components of the claim. Reducing the claim by 50% merely on the basis of the unresolved conflict in the factual evidence was not a reasoned outcome.

With respect to the Diminution in Value Award, the damage history of a commercial aircraft is important. Based on the damage to the aircraft as described in the report of Mr. Coonan, and not challenged by Mr. Muhler, a diminution of value of 5% seems de minimis. Mr. Coonan's computation of the diminution in value of the aircraft as 20% of the Green Value is accepted.

J U D G M E N T

Judgment delivered by the Honorable Mr. Justice Evans, JA: (with whom Barnett P agreed)

1. This is an appeal by the Appellant against a judgment by the Registrar Mrs. Donna Newton (as she then was) on an assessment of damages whereby she ordered the appellant to pay to

the Respondent, the sum of $497,954.22 in respect of damages as a result of one of the Appellant's aircraft colliding with one of the Respondents aircrafts which was parked at the time. The collision occurred in the vicinity of the domestic terminal at the Sir Lynden Pindling International Airport, in the Western District of the Island of New Providence.

2. In its statement of claim before the Supreme Court the Respondent after setting out its particulars of negligence claimed damages in the following terms:

> **"4. By reason of the matters more particularly set out in paragraph 3 hereof, the Plaintiff has suffered loss and damage.**
>
> **PARTICULARS**
>
> **i. The cost of repairing the Plaintiffs aircraft - $ 96,944.46**
> **ii. Diminution in the value of the Plaintiffs aircraft - $ 300,000.00**
> **iii. Operational loss - $ 652,800.00**
>
> **- $ 1,049,744.46."**

3. On 21 March, A.D., 2011 an interlocutory judgment was entered with damages to be assessed and the matter was subsequently set before the Registrar for the Assessment of Damages. The sum of $497,954.22 awarded by the Registrar consisted of $76,099.22 in respect of the costs of repair to the Respondent's aircraft; $141,315.00 in respect of the diminution in value of the aircraft and $280,540.00 in respect of loss of opportunity/loss of use of the aircraft.

4. By this appeal the Appellant challenges the award for diminution in value and loss of opportunity and loss of use. There is no appeal against the award for the costs of repair. The appeal also challenges the award of interest and costs. The Notice of Appeal sets out a number of grounds on which the Appellant relies however, in the skeleton submissions their position is summarized as follows:

> **"23. The Appellant's case in summary is that the Registrar's judgment cannot be upheld because she:**
>
> **1. Failed to give a properly reasoned judgment**
> **2. Failed to critically analyse the evidence in the case and simply accepted the Respondent\s evidence.**
> **3. Made factual findings without considering all the evidence.**
> **4. Failed to properly consider the applicable law relevant to the case.**

24. As a result of the above failures, the Appellant submits the Registrar's judgment should be set aside and the Court of Appeal should determine the issues in this appeal de novo."

5. I will deal with this matter under two specific heads i.e. (1) Diminution of value and (2) Loss of Use.

DIMINUTION OF VALUE

6. In arriving at her position relative to the diminution of value the learned Registrar observed as follows:

> **"Having considered the requirements for determining diminutive value as outlined by Cooke J, in *Cooles* supra and the Report of Mr. Coonan, the expert witness, I am satisfied that the Plaintiff has discharged its duty to prove on a balance of probability to do so "the reasonable cost of repairing it". I will therefore allow the amount of $l4l,315 representing the diminutive value of the aircraft".**

7. The award for the diminution in value and loss of opportunity and loss of use was determined entirely on the evidence of two "expert" witnesses called by the parties. Both provided written reports and testified at the assessment. The Respondent/Plaintiff relied on the evidence of Stephen J Coonan and the Appellant/Defendant relied upon the evidence of Wayne C. Muhler. Mr. Coonan position was that the diminution in value should be placed at 20% of the market value of Aircraft whereas Mr. Muhler paced it at 5%.

8. The Registrar rejected the evidence of Mr. Muhler on the basis that *"he (Mr. Muhler) admitted under cross examination that he has no certification as an aircraft appraiser".* As noted she based her decision on the consideration and presumably acceptance of "**the requirements for determining diminutive value as outlined by Cooke J, in Cooles supra and the Report of Mr. Coonan."** It is important therefore to examine the authority on which she purported to rely.

9. The case referred to by the Registrar was that of **Coles v Hetherton [2013]** EWCA Civ 1704. In that case a dispute arose between insurance companies as to the principles on which damages for negligence should be calculated in claims arising out of minor road traffic accidents where repairs to the damaged vehicles had been arranged and paid for by the claimants' insurer pursuant to the terms of the claimants' policies. Cooke J in the Court below in dealing with the claim observed that "*the reasonable cost of repair is only a way of ascertaining the diminution in the value of the chattel by reason of the physical damage, though it is the normal and conventional way".*

10. When the matter got to the Court of Appeal the decision of Cooke J was affirmed and **AIKENS LJ** who delivered the judgment of the court observed:-

> **"27. The first question is: "Where a vehicle is damaged as a result of negligence and is reasonably repaired (rather than written off), is the *measure* of the claimant's loss taken as the reasonable cost of repair?" There can be no doubt about the legal analysis of the general rules. It was summarised by Lord Hobhouse in his speech in *Dimond v Lovell* [2002] 1 AC 384, 406 and the relevant passage was quoted by the judge in judgment (1) at para 225. *Dimond v Lovell* was concerned with the recoverability of the cost of hiring a replacement car on credit hire terms after a claimant's car had been damaged in a collision caused by the negligence of the defendant. But Lord Hobhouse began his analysis with basic principles. Taking Lord Hobhouse's statement together with statements in other cases: (1) Where a chattel is damaged by the negligence of another that loss (the "direct" loss) is suffered as soon as the chattel is damaged. (2) The proper measure of that loss is the diminution in value that the chattel has suffered as a result of the negligence of the defendant. This follows the general principle in awarding damages, ie that of restitution: see *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39, per Lord Blackburn. In Lord Hobhouse's phrase, "this can be expressed as a capital account loss". (3) If the chattel can be economically repaired, the claimant is entitled to have it repaired at the cost of the wrongdoer, although the claimant is not obliged to repair the chattel to recover the direct loss suffered. (4) Events occurring after the infliction of the damage are irrelevant to calculating the diminution in value measure of damages: see *Burdis v Livsey* [2003] QB 36, para 95. Thus, subsequent destruction of the chattel, or a decision to delay repairs (*The Kingsway* [1918] P 344), or an ability to have the repairs done at less than cost (*Jones v Stroud District Council* [1986] 1 WLR 1141) or for nothing (*The Endeavour* (1890) 6 Asp MC 511; *Burdis v Livsey* [2003] QB 36, where no sum was payable because the repairs were carried out under an unenforceable credit agreement) will not prevent the claimant from recovering the diminution in value of the chattel that has been caused by the negligence of the tortfeasor. (5) Generally, the practical way that the courts have calculated this diminution in value is to ask how much would be**

the reasonable cost of repair so as to put the chattel back in the state it was in before it was damaged. In general this is a convenient practice which we think the courts should continue to follow. Only if the sum claimed appears to be clearly excessive will the court be justified in investigating whether that sum exceeds the cost that the claimant would have incurred in having the repairs carried out by a reputable repairer.

28. As Cooke J pointed out in judgment (2) at para 7, the correct jurisprudential analysis of a claim for diminution in value, even if it is measured by the reasonable cost of repairs, is that it is a claim for general damages, not one for "special damages". The diminution in value claim should therefore be pleaded as a claim for general damages. Documents such as an invoice for the cost of the repairs undertaken are no more than evidence of the diminution in value suffered by the chattel as a result of the negligence of the wrongdoer which can be used to make good the claim. Strictly speaking, the cost of the repairs is not itself the loss suffered. In addition to the direct loss represented by diminution in value, there may be other, consequential losses, such as deprivation or "loss of use" of the vehicle, but that constitutes a different head of claim. Once again a claim for simple deprivation, or loss of use, is a claim for general damages. However, if the chattel concerned is one that is normally used in the hope of making a profit (such as a trading ship, a lorry or a taxi), then a claim for the profits lost because the chattel could not be used for that trading would constitute "special damages". Those damages have to be specifically pleaded and proved: see *Owners of the Steamship Mediana v Owners, Master and Crew of the Lightship Comet (The Mediana)* [1900] AC 113, 117–118, per Lord Halsbury LC with whom the other Law Lords agreed, although adding supplementary comments.

29. The argument that the claimants cannot recover the full cost of repair to RSAI because they must mitigate their loss by having the repairs done at a lower cost is wrong because mitigation is not relevant in respect of this "direct" loss. As we have already pointed out, the loss to a claimant whose chattel has been damaged by the negligence of another is immediate. That loss cannot be "mitigated" by having the chattel repaired free or for a lower cost, because it is not the cost of the repairs

that constitutes the loss; the loss is the diminution in value of the chattel8.

30. *Darbishire v Warran* [1963] 1 WLR 1067 does not assist Mr. Curtis's argument. That was a case where the claimant chose to repair his car that had been damaged in a collision at a cost which exceeded its market value. He did so because he valued and trusted his car. There was also some evidence that it might have been difficult to find another second-hand car of the same type on the market. The argument in the Court of Appeal was as to whether the claimant was entitled to recover all the cost of the repairs, £192, as he claimed, when the undamaged value of the car was only £85. The straightforward answer is that he could not do so, because, on proper analysis, the claim should have been one for general damages for the diminution in value to the car. The problem arose because the claim was made for the total repair cost, which led the court into consideration of "mitigation of loss". However, Harman LJ gave the correct answer when he stated, at p 1073, that this car was not an "irreplaceable article" and, as the cost of repairs greatly exceeded its value (before damage), "the car should be treated as a constructive total loss and the measure of damage is its value", by which I think he must have meant the measure of damage was the total diminution in value of the car.

31. Both Harman and Pearson LJJ made some remarks suggesting that the claimant was under a duty to mitigate his loss and that he failed to do so in this case and that was the reason why he could not recover the full cost of the repairs: see pp 1071 and 1076. Pennycuick J made similar comments. In our view these statements suggesting that the principle of mitigation of loss was relevant to the question of what damages could be recovered for the physical damage to the car were, with respect, misplaced. <u>They lost sight of the fact that the cost of repairs is only evidence of the amount of the loss recoverable, viz the amount of the diminution in value of the chattel.</u> As Cooke J pointed out in judgment (1) at para 35, the court in *Darbishire v Warren* was apparently not referred to the long line of Admiralty cases which established the law, such as *The Endeavour* (1890) 6 Asp MC 511, *The Glenfinlas (Note)* [1918] P 363, *The Kingsway* [1918] P 344, and *The London Corporation*

[1935] P 70. The principles established in those cases have since been authoritatively reaffirmed by Lord Hobhouse in the House of Lords in *Dimond v Lovell* [2002] 1 AC 384 and by this court in both *Jones v Stroud District Council* [1986] 1 WLR 1141, especially at p 1150 h, per Neill LJ (with whom Ralph Gibson and Fox LJJ agreed) and *Burdis v Livsey* [2003] QB 36, paras 84–85, per Aldous LJ giving the judgment of the court. Thus we agree with the statement of Cooke J in judgment (1) at para 40 that the remarks on mitigation in *Darbishire v Warran* must be seen as an "aberration". But the actual decision in that case, based on Harman LJ's analysis, was correct.

32. <u>In summary, if a claimant, whose damaged chattel is capable of economic repair, chooses to repair it at a cost which is not reasonable, then the reason why he cannot recover that unreasonable cost as damages will be because that cost does not represent the diminution in value of the chattel. What is the diminution in value of a chattel or the "reasonable cost of repair" will always be a question of fact for the trial judge to determine if it is in dispute.</u>

33. As will be clear from the discussion in the preceding paragraphs, on a strict analysis of the law, preliminary issue (1) asks the wrong question, because <u>the measure of the claimant's loss that results from the damage inflicted by the tortfeasor is the diminution in value of the vehicle.</u> <u>With that important qualification, our answer to preliminary issue (1) is: "Yes", because the "reasonable cost of repair" is, as a rule of thumb, taken as representing the diminution in value of the chattel that has been suffered as a result of the damage caused by the negligence of the defendant. However, it may not always represent the full amount of the diminution in value, as this court made clear in *Payton v Brooks* [1974] RTR 169 at p 174, per Edmund Davies LJ; p 175, per Buckley LJ; and p 176, per Roskill LJ.</u>" [Emphasis added]

11. It is clear from the above extract that if the Registrar was to rule consistent with the principles derived from **Coles** she could not properly make an award for the diminution of value without reference to the costs of repairs. The case of ***Payton v Brooks*** referred to by Aikens LJ, in the excerpt above makes the point that if the evidence shows that the market value is reduced, despite good repairs, compensation for that diminution can be awarded to an injured plaintiff. This is consistent with the view that the costs of repair is prima facie evidence of the

diminution of value. There has to be a recognition that in some cases the saleable value was lowered regardless of the quality of the repairs.

12. The case of **Waterdance Ltd v Kingston Marine Services Ltd [2014] EWHC 224** is also of note. In that case **STUART-SMITH J had these comments:-**

> **"[17] It is now established beyond argument to the contrary at this level that the Claimant suffered a direct loss when the damage occurred on 12 January 2007: see *Jones v Stroud District Council* [1988] 1 All ER 5, 84 LGR 886, [1986] 1 WLR 1141; *Dimond v Lovell* [2002] 1 AC 384, 406B-H, [2000] 2 All ER 897, [2000] 2 WLR 1121 per Lord Hobhouse, *Lagden v O'Connor* [2002] EWCA Civ 510, [2003] QB 36 at 84-85, [2003] RTR 22; *Coles v Hetherton* [2013] 1 All ER (Comm) 453 at 15 – 26 per Cooke J, affirmed at [2013] EWCA Civ 1704.**
>
> **[18] Those authorities also establish that the reasonable cost of repairing a damaged chattel is prima facie evidence of the diminution in value caused by the damage, whether or not it is in fact repaired. In *Coles v Hetherton* Aikens LJ summarised the present position as follows at 27:**
>
> > **"Taking Lord Hobhouse's statement [in *Dimond v Lovell*] together with statements in other cases:**
> >
> > **(1) where a chattel is damaged by the negligence of another that loss (the 'direct' loss) is suffered as soon as the chattel is damaged.**
> >
> > **(2) The proper measure of that loss is the diminution in value that the chattel has suffered as a result of the negligence of the Defendant. This follows the general principle in awarding damages, ie that of restitution. In Lord Hobhouse's phrase, 'this can be expressed as a capital account loss'.**
> >
> > **(3) If the chattel can be economically repaired, the Claimant is entitled to have it repaired at the cost of the wrongdoer, although the Claimant is not obliged to repair the chattel to recover the direct loss suffered.**
> >
> > **(4) Events occurring after the infliction of the damage are irrelevant to calculating the diminution in value measure of damages. Thus, subsequent destruction of the**

chattel, or a decision to delay repairs, or an ability to have the repairs done at less than cost or for nothing will not prevent the Claimant from recovering the diminution in value of the chattel that has been caused by the negligence of the tortfeasor.

(5) Generally, the practical way that the courts have calculated this diminution in value is to ask how much would be the reasonable cost of repair so as to put the chattel back in the state it was in before it was damaged. In general this is a convenient practice which we think the courts should continue to follow. Only if the sum claimed appears to be clearly excessive will the court be justified in investigating whether that sum exceeds the cost that the Claimant would have incurred in having the repairs carried out by a reputable repairer."

[19] The question directly in issue in *Coles v Hetherton* was whether a person who had the benefit of insurance cover and who, by virtue of that cover, had repairs carried out at a lower cost than he would have had to pay if he had not had that benefit, should recover the full cost that he would have had to pay if uninsured or the reduced cost that he in fact incurred. That question does not arise here. Sub-para 4 of 27 is, however, directly in point and is founded on authority going back to *The London Corporation* [1935] P 70, 51 Ll L Rep 68, 104 LJP 20 and beyond.

[20] The facts of *The London Corporation* were very similar to those of the present case. The Defendant's vessel caused damage to the Claimant's, which would have cost £250 to repair. Before repairs were carried out, the Claimant's vessel was sold to be broken up. The Defendant submitted that the Claimant had suffered no loss and was entitled to no damages. In finding for the Claimant, Greer LJ (with whom the other judges of the Court of Appeal agreed) said, at 77-78:

"Prima facie, the damage occasioned to a vessel is the cost of repairs – the cost of putting the vessel in the same condition as she was in before the collision, and to restore her in the hands of the owners to the same value as she would have had if the damage had never been done; and prima facie, the value of a

damaged vessel is less by the cost of repairs than the value it would have if undamaged, though it is true that evidence may establish that the value of the vessel undamaged is exactly the same as her value after she had been damaged. The learned judge decided that if that proposition were going to be established, it was for the owners of the *London Corporation* to establish it.

. . .

Quite apart from that, however, I agree with the learned judge that in cases of this sort, the prima facie damage is the cost of repair, and circumstances which are peculiar to the Plaintiffs – namely, that they have, before the damage has been determined, sold the vessel to be broken up, is an accidental circumstance which ought not to be taken into account in the way of diminution of damages, any more than it is in a case of the sale of goods, where the difference in market price and contract price is always allowed, regardless of the fact that having regard to what the purchaser has done, no such damages are in fact suffered by him. It is desirable that there should be a measure of damage which can be easily and definitely found. In this case, circumstances which are accidental to the Plaintiffs of which the Defendants have no knowledge, or circumstances applicable to the Defendants of which the Plaintiffs have no knowledge, need not be taken into account."

[21] The Court of Appeal affirmed the judgment of Bateson J and, so far as I am aware, Greer LJ's statements of principle have never been doubted. The first passage was effectively endorsed by the Court of Appeal in *Coles v Hetherton* at 28 where Aikens LJ said:

> **". . . the correct jurisprudential analysis of a claim for diminution in value, even if it is measured by the reasonable cost of repairs, is that it is a claim for general damages, not one for 'special damages'. The diminution in value claim should therefore be pleaded as a claim for general damages. Documents such as an invoice for the cost of the repairs undertaken are no more than evidence of the diminution in value suffered by the chattel as a result of the negligence of the wrongdoer which can be**

> **used to make good the claim. Strictly speaking, the cost of the repairs is not itself the loss suffered."**
>
> **[22] On <u>this state of the authorities, the Claimant accepts that diminution in value is the touchstone, with the agreed cost of repairs being the prima facie measure of loss; and the Defendant accepts that the burden rests upon it to prove that there was no diminution in value despite that prima facie evidence.</u>**

13. In my view having accepted that the principles set out in ***Cooles*** were applicable to this case the Registrar was mandated to give full consideration as to whether the repairs to the Aircraft had preserved the value of the Aircraft or whether there had been a diminution in the value notwithstanding the repairs. It was for this purpose which the two "expert" witnesses were called.

14. It is noted that there was no specific finding by the Registrar that the repairs effected to the Aircraft was inadequate to maintain the value of the Aircraft. It appears that she was content to operate on the basis that the cost of repairs was a separate head of damages akin to a claim for special damages. This is inconsistent with the authority on which she sought to rely which indicate that diminution of damages is a claim for general damages of which the cost of repairs is prima facie the measure of those damages.

15. The two expert witnesses however, clearly set out to determine the value of the Aircraft post repairs with a view to assessing the level of depreciation. It is to be noted that both experts concluded that despite the repairs there was a level of depreciation the difference between them being the extent of that depreciation. According to Mr. Coonan the damage to the airframe was significant (frames, intercostels, stringers, etc.) and indicates that the pressure vessel part of the fuselage **<u>may</u>** have been affected. For this reason, he contends, that although the portion of the damage deduction was made only from the airframe, that damage was significant. He opined that deduction of 20% of the Green Value was reasonable for that damage. It is noted that he makes no allowances for what his opinion would be if the fuselage was **<u>not</u>** affected.

16. Mr. Muhler's position was that all of the damaged components on the Aircraft have been replaced with non- damaged parts with the exception of the skin behind the door. This area of damage he says would be categorized as minor, or moderate at best and as such a deduction of 20% for this damage is excessive. He added that Past sales support deduction between 5—10% based on the market and the specifications of the aircraft for sale as the N376SA is very desirable aircraft; it has very low total time in service, an excellent maintenance history, and excellent avionics. He concluded that using the current strong market conditions a 5% deduction in value is appropriate.

17. It was a matter for the Registrar to determine which aspect of the evidence she accepted. Her finding on this issue is reflected as follows:

> **"I refuse to accept Mr. Muhler's evidence to contradict the expert evidence of Mr. Coonan as he (Mr. Muhler) admitted under cross examination that he has no certification as an aircraft appraiser".**

It is unfortunate that she resorted to rejecting the Appellant's position on the sole basis that Mr. Muhler was not a certified Appraiser. Although Mr. Muhler was not a certified appraiser he clearly has a vast experience in the Airline Industry and is very familiar with the operation, maintenance and repair of Aircrafts. With that background he was qualified to speak to the issue as to the extent to which the repairs effected restored the airplane to its prior condition.

18. I should also note that it is unfortunate that the Learned Registrar did not make her determination as to who she would accept as experts prior the commencement of the hearing which is the usual practice. It is obvious that if she had indicated from the beginning that she was not prepared to accept Mr. Muhler's credentials the Appellant's would have been afforded the opportunity to provide an alternate expert who could have been accepted by the Court.

19. The Registrar gave no indication whether she accepted all of Mr. Coonan's evidence or just some aspects and clearly provided no analysis of the two positions proffered by the experts. In my view whilst the learned Registrar was entitled to regard Mr. Coonan as having better qualification than Mr. Muhler there was still a requirement for a critical analysis of Mr. Coonan as well as Mr. Muhler's evidence. It is trite that the Court is not obligated to accept the evidence of an expert merely because he is an expert. That evidence must still be assessed for its cogency and reasonableness.

20. It appears that the real gist of the position taken by Mr. Coonan can be gleaned from his report as seen in the following extract:-

> **"The percentage decrease in value depends on the type of aircraft, the extent of damage, and the method of repair. There are other factors as well. <u>The market is less accepting of damage history on certain classes of aircraft. Unfortunately, the stigma of damage is far greater to corporate jet or commercial aircraft than it is to single-engine piston aircraft. In this case, the value was significantly decreased and *may not be totally mitigated over time*. The stigma of the 337 will negatively impact its value from now on.</u> On the other hand, most damage events do not affect the entire aircraft. In many cases, major components (engines, landing gear, avionics, etc) that account for an aircraft's value are unaffected by the damage. Such is the case here. It therefore**

does not make much sense to make unilateral deduction from the entire aircraft. However, the damage to the airframe was significant (frames, intercostels, stringers, etc.) and indicates *that the pressure vessel part of the fuselage may have been affected*. For this reason, although the portion of the damage deduction was made only from the airframe, that damage was significant. A deduction of 20% of the Green Value was made for that damage. The engines and major operating components would be reduced in value only at the end of the repair process if they were compromised in any way by that repair process. An example would be failure to exercise the engines on scheduled basis, as called for in the Pratt Whitney Maintenance Service Plan (MSP)".

21. In the final analysis it is not apparent from the judgment of the Learned Registrar that she applied her mind properly to the issue at variance between the parties. The parties differed as to the extent of the damages and as to whether the airplane was fully restored. Additionally and perhaps more fundamentally, Mr. Coonan was of the view that the fact that the airplane was damaged was by itself an automatic cause for depreciation. He opined that "**the market is less accepting of damage history on certain classes of aircraft. Unfortunately, the stigma of damage is far greater to corporate jet or commercial aircraft than it is to single-engine piston aircraft. In this case, the value was significantly decreased and *may not be totally mitigated over time*. The stigma of the 337 will negatively impact its value from now on".**

22. Mr. Muhler however was of the view that the fact that the airplane was a commercial aircraft was not of much significance. He added that Past sales support deduction between 5— 10% based on the market and the specifications of the aircraft for sale as the N376SA is very desirable aircraft; it has very low total time in service, an excellent maintenance history, and excellent avionics. He concluded that using the current strong market conditions a 5% deduction in value is appropriate.

23. It is clear that the Registrar made no finding of fact as to the true nature of the extent of the damages sustained by the aircraft in the accident nor as to the extent to which the repairs effected cured those damages. She further did not address the issue as to the extent to which the class and use of the Aircraft affected the value of an aircraft which has a history of being damaged. In my view she erred in simply accepting the evidence of Mr. Coonan and rejecting the evidence of Mr. Muhler without considering the merits of both opinions.

24. I have given anxious thought as to whether this matter should be remitted to the lower court for determination or whether we should determine the matter ourselves. I am aware that we

have not had the benefit of seeing the witnesses in this matter. However, the nature of the evidence does not raise issues or credibility but rather opinion. We have the benefit of the opinions rendered by the experts as well as the transcripts of their explanations of those opinions given at trial. In these circumstances I do not see that we would be overstepping to embark on a determination of the issue raised. This is especially so when we consider the expense to the parties and the time consumed by the Court in having the experts return to give the same evidence.

25. In comparing the opinions proffered by the experts I am inclined to accept that of Mr. Muhler as being more rational. He speaks to the value of the aircraft not theoretically but based on "past sales" and the "current market conditions". His position is more consistent with the view that diminution is more reflective of the cost of repair. I would therefore accept his estimate that the valuation would be reduced by no more than 5-10%. In my view it would be appropriate to place it at 10%.

LOSS OF USE

26. In **Coles v Hetherton** the Court observed that:-

> "**In addition to the direct loss represented by diminution in value, there may be other, consequential losses, such as deprivation or "loss of use" of the vehicle, but that constitutes a different head of claim. Once again a claim for simple deprivation, or loss of use, is a claim for general damages. However, if the chattel concerned is one that is normally used in the hope of making a profit (such as a trading ship, a lorry or a taxi), then a claim for the profits lost because the chattel could not be used for that trading would constitute "special damages". <u>Those damages have to be specifically pleaded and proved:"</u>**

27. The Registrar as a part of her judgment awarded the Respondent the sum of $ 280,540.00 in respect of loss of opportunity/loss of use of the aircraft. The accident took place on 1 June, 2009, and the Respondent's aircraft was not repaired and returned to service until on the 19 July, 2009. The Respondent claimed that it lost money as a result of its inability to utilize the aircraft for the 48 days it was out of service being repaired. The Appellant asserted that the Respondent could not recover any loss under this head as it made available to the Respondent one of its aircrafts and in addition the Respondent had another aircraft in its fleet that it could have used whilst the aircraft was being repaired.

28. In deciding the matter the learned Registrar stated as follows:-

> **"The Defendant contends that the Plaintiff ought not to be awarded any sums for loss of use and loss of opportunity as the**

Plaintiff had failed to mitigate its damages by refusing to use a replacement aircraft offered by the Defendant while the subject aircraft was under repair. The Defendant by way of Notice served the Plaintiff that it would be relying on the defence of mitigation at the Assessment hearing.

Randy Butler, the CEO of the Defendant Company in his evidence explained that based on his knowledge as a licensed Aircraft Pilot and his experience in the aircraft accident and occurrence investigations he did not believe the damage was such that it required major repairs causing it to be out of operation for a long period of time. He stated that he offered the use one of his aircraft, which is similar, together with a crew, to the Plaintiff at no cost to the Plaintiff which was accepted and used on 5th and 7th June 2009 respectively. However, he said the Plaintiff abruptly without any explanation indicated that it no longer wished to use the aircraft.

The Plaintiffs CEO, Mr. Nathaniel Gibbs, on the other hand, stated that it was the Defendant who refused to allow the Plaintiff to continue using the aircraft, because, according to Mr. Gibbs, the Defendant was competing with the Plaintiff on the same routes. However under cross examination Mr. Gibbs said he was not the person to negotiate the use of the Defendant's aircraft, that it was done by other members of his staff. <u>Based on the evidence of the two CEOs it is therefore not clear why the use of the Defendant's aircraft was discontinued after only two uses.</u>

I note however that Mr. Randy Butler's evidence regarding the degree of the damage to the aircraft is self— serving as he was not giving evidence as an expert but rather as the CEO of the Defendant Company.

The Defendant also submits as failure to mitigate the fact that the Plaintiff had another aircraft similar to the subject one which it failed to use or that it made no attempt to lease a replacement aircraft.

The Defendant relied on a number of authorities to support its position that the Plaintiff failed to mitigate its damages including the decision of Osadebay Sr. J. in Ingraham v. Ru (Ztn's Crystal Palace Hotel Corp. (2000) where he confirmed

that the onus is on the Defendant to prove that the Plaintiff has failed to mitigate its damages. He also relied on the case of Diamond vs Lovell ZAER (2000 897) and the decision of Hoffman. J. I find that the Defendant has not proven its assertion that the Plaintiff had an aircraft to use or that another aircraft was available for the Plaintiff to lease.

I find that the Plaintiff is entitled to recover under this head but as stated earlier, the fact that it is not clear why the aircraft loaned to the Plaintiff was only used on two occasions coupled with the fact of the Defendant's assertion but not proving that the Plaintiff Company had an alternative aircraft or made any attempt to lease a replacement aircraft, I will allow fifty percent of its claim for loss of use and loss of opportunity ($ 28,000 + $ 533,080 by 2) $282,540.00."

29. In **Standard Chartered Bank v Pakistan National Shipping Corporation and others** [2001] All ER (D) 186 (Jan) the English Court of Appeal discussed the law with respect to damages and mitigation of loss. It said:

"38. It is trite law that the onus of proof on the issue of mitigation lies upon the defendant: see Roper -v- Johnson (1873) LRCP 8 167, confirmed by the House of Lords in Garnac Grain Co. -v- Faure & Fairclough [1968] AC 1130 at 1140. The interrelation of that issue with the general obligation upon the plaintiff to prove his damages has been clearly and succinctly stated by Sir Owen Dixon CJ in the High Court of Australia in Watts -v- Rake (1960) 108 CLR 158 as follows:

"The law of course places upon a plaintiff who sues in tort for unliquidated damages the burden of satisfying the tribunal of fact of the damages he has suffered both special and general and of the quantification in money that should be adopted in the sum awarded. That is the legal burden of proof which rests upon him throughout. Only in one respect is the burden of proof upon the defendant and this is when he sets up matters in mitigation of damages. If it appears satisfactorily that damage in a particular form or to a particular degree has been suffered by the plaintiff as a result of the wrong but the defendant maintains that the plaintiff might have avoided or mitigated that consequence by adopting some

> **course which it was reasonable for him to take, it seems clear enough that the law places upon the defendant the burden of proof upon the question whether by the course suggested the damage could have so been mitigated and upon the reasonableness of pursuing that course ...” .**

And later:

> **“In every case where an issue of failure to mitigate is raised by the defendant it can be characterised as an issue of causation in the sense that, if damage has been caused or exacerbated by the claimant’s unreasonable conduct or inaction, then to that extent it has not been caused by the defendant’s tort or breach of contract. However, it seems clear that the burden of proving both unreasonable conduct and exacerbation of damage as a result rests upon the defendant. The doctrine of mitigation of damage is a rule as to avoidable loss”.**

30. Whereas the law is clear that a plaintiff is obligated to mitigate his damages as far as is reasonable, he is not required to take steps which are unreasonable and which could result in further damage to him. On the evidence it was clear that the Aircraft was out of service for 48 days. Mr. Turnquest had complained before us that it was unreasonable that it would have taken 48 days to have the aircraft repaired. I found no merit in that complaint as the evidence indicated that the plane being subject to a lease there was a process by which repairs were done. There was nothing on the evidence which showed that the Respondent had acted without reasonable dispatch to have the work done.

31. The Registrar heard the evidence in this case and found specifically as a question of fact that the Defendant did not prove its assertion that the Plaintiff had an aircraft to use or that another aircraft was available for the Plaintiff to lease. These were findings which were open to her as the arbiter of the facts and we can take no issue with her findings on those points. The issue however, relates to the question of whether the Respondent failed to mitigate its damages by accepting the Appellant’s offer to use one of its Aircrafts while the Respondent’s Aircraft was being repaired.

32. There is no dispute that an offer was made and that initially the Airplane was utilized for two days by the Respondents. There was a conflict of evidence however as to why the Aircraft was not utilized thereafter. Mr. Gibbs the CEO of the Respondent testified that the access to the Aircraft was withdrawn by the Appellant. Captain Butler, the CEO of the Appellant testified that the Respondent without any reason known to the Appellant declined to utilize the Aircraft any further. This was a question of fact which had to be determined in order to resolve the claim for loss of use.

33. As noted above it is now well established that although the Plaintiff has a duty to mitigate his damages the burden rests with the Defendant to prove one of two things. Firstly he can prove that certain events have occurred which have minimized the damages which the plaintiff would have otherwise occurred. In the alternative he can prove that the Plaintiff had the opportunity to avail himself of reasonable steps which would have minimized his damages. **What is at play is two conflicting burdens.** Firstly the Plaintiff has a burden to prove that he is entitled to the loss which he has pleaded. The Defendant' in response seeks to show that the plaintiff is not entitled as he could have avoided that loss by reasonable conduct. **The question which the court has to decide in such cases is what was the cause for that loss?**

34. In this case the Appellant has alleged that the Respondent could have mitigated its damages by utilizing the Aircraft which was offered by the Appellant for more than the two days which it was used. There was no evidence before the Registrar save for the oral evidence of the CEO of each party. It follows that in order for the Appellant to succeed on this point the Registrar had to accept the evidence of Captain Butler above that of Mr.Gibbs. Likewise in order for the Respondent to succeed on its claim it had to satisfy the Court that all of its losses were caused by the conduct of the Appellant. The salient question for the Registrar to decide was whether the Respondent refused to utilize the Aircraft after the second day or were they prohibited from utilizing the same by the Appellant.

35. It is apparent that the Registrar was not sure which of the witnesses to believe so she made what she thought was a Solomon like decision and cut the award for loss of use in half. **This in my view was fundamentally wrong.** There was agreement between the parties as to the offer of the plane and the use for the two days. The parties diverged as to what transpired thereafter. If the Registrar had accepted Captain Butler's evidence on that point she could not make any award at all. If she accepted the evidence of Mr. Gibbs then the Respondent was entitled to the full award and not the 50% she awarded. **The award clearly had to be all or nothing.**

36. It is clear that the award of 50% represent no legal reasoning but rather with all due respect to the learned Registrar was an abdication of her responsibility to properly decide the issue before her. **She was required to determine the cause of the loss during the period of repai**r. This she failed to do and thus could not properly make any award without a specific finding on that issue. In taking the route that she did she inevitably did injustice to one of the parties. In these circumstances the proper course of action is to remit this issue relative to the loss of use to the Supreme Court for a rehearing.

37. It follows then that in my view this issue must be the subject of a rehearing as it relates to a finding of fact based on the credibility of the witnesses. These in my view must be decided by the Supreme Court as we cannot determine the issue not having seen the witnesses as they gave their evidence. It ought to be clear to all concerned however, that having regard to the

age of this matter and the time and money already spent before the Court wisdom points towards a more serious effort to resolve this dispute between the parties. But again unfortunately we can make no such order.

38. I invite the parties to address the Court on the question of costs, both here and in the Court below.

The Honourable Mr. Justice Evans, JA

39. I agree.

The Honourable Sir Michael Barnett, P

Judgment delivered by the Honourable Sir Brian Moree, CJ:

40. This appeal relates to a case arising from a ground collision between two airplanes on the ramp at the Sir Lynden Pindling International Airport.

41. On 1 June 2009 an aircraft operated by the appellant, SkyBahamas Airlines Limited ("SkyBahamas"), collided with a Beechcraft 1900C airplane ("the Beechcraft") which was parked on the airport ramp. As a result of the collision the Beechcraft was damaged and had to be taken out of service for repairs.

42. At the time of the collision the Beechcraft was leased to the respondent, Southern Air Charter ("Southern Air"), under a lease purchase agreement.

43. Southern Air commenced a civil action against SkyBahamas claiming damages arising from the collision. On 21 March 2011 an interlocutory judgment on liability was filed by Southern Air against SkyBahamas ("the Interlocutory Judgment") leading to an assessment of damages by the Registrar of the Supreme Court.

44. On 25 September 2017 the Registrar delivered her judgment on the assessment ordering SkyBahamas to pay to Southern Air the sum of $497,954.22. That amount is comprised of $76,099.22 for the cost of repairs, $141,315.00 in respect of the diminution in value of the Beechcraft ("the DV Award") and $280,540.00 for the loss of opportunity/loss of use of Southern Air's airplane ("the LOU Award"). By this appeal, SkyBahamas is challenging only

the DV Award and the LOU Award respectively, together with the order of the Registrar in respect of costs.

45. I have read a draft of the judgment of Evans, JA (with whom the President agrees). I have come to a different conclusion on the DV Award and will therefore set out my views on that issue. With regard to the LOU Award, I concur with the judgment of Justice Evans and therefore I only intend to briefly address that point.

The LOU Award

46. The Registrar found that as a result of the collision, the Beechcraft was out of service for repairs from 1 June 2009 until 19 July 2009 – a period of 48 days. Southern Air claimed loss of opportunity/loss of use ("the loss of use claim") for that period.

47. A pivotal issue of fact arose before the Registrar on the loss of use claim relating to the duty to mitigate.

48. The undisputed evidence before the Registrar was that while the Beechcraft was being repaired, SkyBahamas had offered to Southern Air the use of a comparable aircraft in its fleet. Southern Air had initially accepted the offer and utilized the SkyBahamas airplane for two flights on 4 June 2009 and 7 June 2009. However, Southern Air made no further use of the SkyBahamas airplane after that date.

49. There was a direct conflict in the evidence on why the use of the alternative aircraft by Southern Air was discontinued. The Registrar summarized the evidence in this way at pages 12 – 13 of her judgment:

> **"[Mr. Randy Butler, the CEO of SkyBahamas] stated that he offered the use of one of his aircraft, which is similar, together with a crew, to [Southern Air] at no cost to [Southern Air] which was accepted and used on 5th and 7th June 2009 respectively. However, he said [Southern Air] abruptly without any explanation indicated that it no longer wished to use the aircraft.**
>
> **[Southern Air's] CEO, Mr. Nathaniel Gibbs, on the other hand, stated that it was [SkyBahamas] who refused to allow [Southern Air] to continue using the aircraft, because, according to Mr. Gibbs, [SkyBahamas] was competing with [Southern Air] on the same routes. However under cross examination Mr. Gibbs said he was not the person to negotiate the use of [SkyBahamas'] aircraft, that it was done by other members of his staff. Based on the evidence of the two CEOs it is therefore not clear why the use of [SkyBahamas'] aircraft was discontinued after only two uses."**

50. Counsel for SkyBahamas contends that the loss of use claim should have been rejected in its entirety by the Registrar as a result of the failure of Southern Air to mitigate its damages by continuing to use the alternative aircraft offered by SkyBahamas while the Beechcraft was being repaired. That contention was also advanced before the Registrar. Clearly, this required the Registrar to make a finding of fact on the reason for the discontinuance of the use of the alternative aircraft based on the conflicting evidence of Mr. Butler and Mr. Gibbs. She did not do so. Rather, at page 13 of her judgment, the Registrar dealt with the loss of use claim in this way:

> **"I find that [Southern Air] is entitled to recover under this head but as stated earlier, the fact that it is not clear why the aircraft loaned to [Southern Air] was only used on two occasions coupled with the fact of SkyBahamas' assertion but not proving that [Southern Air] had an alternative aircraft or made any attempt to lease a replacement aircraft, I will allow fifty percent of its claim for loss of use and loss of opportunity ($ 28,000 + $ 533,080 by 2) $28[0],540.00."**

51. In my view, this was not a proper approach and the LOU Award is not sustainable. If the Registrar had accepted the evidence of Mr. Butler, apart from any period of time not covered by the offer of the use of the alternative aircraft, the proper course would have been to reject the loss of use claim. Alternatively, if the evidence of Mr. Gibbs had been accepted, the Court would have rejected the submission that Southern Air had not mitigated its damages and awarded the full amount of the loss of use claim subject to any issues of vouching and verifying the constituent components of that claim.

52. The decision to allow $280,540.00 simply on the basis that it was one half of the amount claimed for the loss of use claim was not a reasoned outcome. In one scenario, if the Court had accepted the evidence of Mr. Butler, it would be too high. In the other scenario, where the Court would have accepted the evidence of Mr. Gibbs, it would be too low.

53. Therefore, I would allow the appeal on the LOU Award. I am acutely aware that, bearing in mind the collision occurred in June 2009, it is undesirable to remit the loss of use claim to a Registrar for a new hearing. However, the reason for the discontinuance of the use of the SkyBahamas aircraft is a pure issue of fact to be determined on the evidence of Messrs. Butler and Gibbs. We cannot resolve the conflict in the evidence between those two witnesses merely on the basis of the transcript. Consequently, I reluctantly agree that this discrete issue will have to be remitted to a Registrar for determination.

54. I should state at this stage that I fully agree with the view of the majority that there is no basis for this Court to interfere with the findings by the Registrar that (i) it was not unreasonable for the repairs to the Beechcraft to take 48 days; (ii) it had not been proved that Southern Air

had an available aircraft in its fleet to use during the 48 day period to service the routes flown by the Beechcraft; and (iii) it had not been proved that another aircraft was available for Southern Air to lease. I would not interfere with any of those findings.

The DV Award

55. I have read the carefully reasoned judgment of the majority on the DV Award and agree with the legal principles enunciated therein with regard to a claim for diminution of value. No purpose is served by reiterating those principles in this short judgment. However, I have a different view on the treatment of the two appraisers who gave evidence before the Registrar.

56. Both appraisers agreed that after the repair of the damage to the Beechcraft the value of the airplane would be diminished. The material difference between them narrowly focused on the percentage of the decrease in the value of the Beechcraft after the repairs had been properly carried out. The appraiser for Southern Air, Mr. Stephen J. Coonan, opined that a deduction of 20% would be appropriate. Mr. Wayne C. Muhler, the appraiser for SkyBahamas, thought that was excessive and stated in his Report that a deduction of 5% - 10% would be reasonable. He ultimately settled on a 5% decrease in value.

57. The type of aircraft and the nature of its usage are important factors in deciding on the percentage of the diminution of value after repairs are completed. In this case, Mr. Muhler states in his report that:

> **"…Beechcraft 1900 aircraft are utility aircraft used by regional airlines, cargo operators, and in limited number as corporate shuttles. These aircraft are not corporate executive transports, but utility aircraft."**

58. Mr. Coonan addressed this point in the following way:

> **"The percentage decrease in value depends on the type of aircraft, the extent of damage, and the method of repair. There are other factors as well. The market is less accepting of damage history on certain classes of aircraft. Unfortunately, the stigma of damage is far greater to a corporate jet or commercial aircraft than it is to a single-engine piston aircraft."**

He then proceeded on the basis that the Beechcraft was a commercial aircraft.

59. Neither Mr. Coonan nor Mr. Muhler inspected the Beechcraft for the purpose of providing their opinion in this case. Mr. Coonan based his review on documents, records and information provided to him and submitted his Report on 2 August 2012. The Report of Mr. Muhler is not dated but it was prepared after 2 August 2012 as, according to its terms, it was based on Mr. Coonan's Report.

60. There does not appear to be any disagreement on the actual damage caused to the Beechcraft as a result of the ground collision. That is not surprising as Mr. Muhler sourced his information from Mr. Coonan's Report. The Muhler Report describes the damage in this way:

> **"The damage to [the Beechcraft] was limited to the left aileron, left flap, the cargo door, and the aft fuselage."**

61. There is a more detailed description of the damage in Mr. Coonan's Report in these terms:

> **"-Skin panel on rear fuselage left side adjacent to cargo door - scratched, dented and distorted, with white paint transfer evident in circular pattern from contact with radome of N2YV.**
>
> **- Aft cargo door on fuselage left side - scratched and deformed with paint transfer evident, and door hinges and bearings abnormally loaded.**
>
> **- Rear fuselage left side internal structure deformed - frames, intercostels, stringers, etc.**
>
> **- Left wing outboard flap - buckled and distorted, and out board flap track deformed.**
>
> **- Left wing aileron - buckled and distorted.**
>
> **- Left wing - aileron and flap hinge points distorted, outboard section of lower skin paint scratched, and stall warning transducer impacted.**
>
> **[The] final repair did not indicate puncture of the pressure vessel or structural damage beyond skin damage.**
>
> **…**
>
> **In this case, the value was significantly decreased and may not be totally mitigated over time. The stigma of the 337 will negatively impact its value from now on.**
>
> **On the other hand, most damage events do not affect the entire aircraft. In many cases, major components (engines, landing gear, avionics, etc) that account for an aircraft's value are unaffected by the damage. Such is the case here.**
>
> **It therefore does not make much sense to make unilateral deduction from the entire aircraft.**
>
> **However, the damage to the airframe was significant (frames, intercostels, stringers, etc.) and indicates that the pressure vessel part of the fuselage may have been affected. <u>For this reason,</u>**

> **<u>although the portion of the damage deduction was made only from the airframe, that damage was significant. A</u> deduction of 20% of the Green Value was made for that damage."** [Emphasis added]

62. It is apparent from the above extract from the Report, that the 20% deduction for the diminution of value after the repairs relates only to the damage to the airframe and did not include any possible damage to the pressure vessel part of the fuselage. It is axiomatic that the 20% deduction by Mr. Coonan would have been higher if the fuselage had been affected by the collision.

63. Mr. Coonan's report is thorough, comprehensive, reasoned and appears to be well researched. He concludes that the Market Value of the Beechcraft on 1 July 2009 was $816,904.00. When correcting a minor calculation error this figure is $816,819.00. The Appraisal Computation on page 17 of his Report clearly sets out the calculations to support the conclusion that the amount of the diminution valuation of 20% is $141,400.00 (when adjusted for the minor calculation error it is $141,315.00). A helpful analysis of Mr. Coonan's computation is contained in the Muhler Report which states:

> **"…Based on the Green Aircraft value of $706,575.00 [Mr. Coonan] assumes a diminished valuation of 20% or $141,400.00 for post accident value of $565,175.00. To this value he adds $312,124.00 for the above identified components to bring the value to $877,299.00. This value is again adjusted for the total time on the airframe since new by deducting $60,396.00 for final value of $816,904.00. This number is slightly wrong as 20% of the green value is $141,315.00, not $141,400.00 for a corrected value of $816,819.00."**

64. Mr. Coonan sets out in detail, amongst other matters, (i) the factors which he considered when calculating the diminution of value; (ii) his Certifications; (iii) the history of the model 1900; aircraft; and (iv) the Assumptions in connection with the Report. It is an impressive Report. A detailed CV is attached to the Report showing that Mr. Coonan is a Certified Aircraft Appraiser and an experienced Aviation Service Provider. The first paragraph of his CV reads:

> **"Completed over $3 billion worth of aircraft and business valuations as a Senior Appraiser of the National Aircraft Appraiser's Association (NAAA). Completed course requirements of the Uniform Standards of Professional Appraisal Practices. Member of the National Business Aircraft Association (NBAA). Ten years' experience conducting certified appraisals for lenders such as Citibank, Deutsche Bank, Merrill Lynch, Goldman Sachs and Wells Fargo. Acquisitions and Operations Consultant. Over $40 million in aircraft acquisitions in the past two years…"**

65. Mr. Muhler has 35 years' experience in the aircraft industry. He does not have the NAAA Certification but sets out his experience in this way:

> **"Pilot with approximately 7,500 hours (sic) experience in over 50 makes and models of aircraft**
>
> **Contract accident investigator for the US D.O.T - 1977-1979**
>
> **Owner - Muhl-Air Aircraft Sales 1979-Present. Aircraft sales, management, and aircraft Appraisals**
>
> **Manager— Tri County Aviation 1982-1983. A full service FBO with 141 Flight School, 145 Repair Station, 135 Air Taxi, aircraft rental and fuel.**
>
> **Partner - Pro Flight, Inc. 1990-1993. Air Taxi/Air Ambulance operation utilizing multiple Lear Jet Aircraft.**
>
> **Owner— Sunwest Aviation, Inc 1993-2001. On demand Air Taxi operation (freight, passengers, commuter) and FAA Part 145 Repair Station."**

66. A major area of disagreement between the two appraisers is reflected in the following extract from Mr. Muhler's Report:

> **"One assumption made by Mr. Coonan in his appraisal and diminished value report is that commercial and corporate aircraft have the same stigma associated with damage history. I feel that this is far from the real world. Corporate aircraft are both tools for the business and means of transporting executive in "the means they are accustomed to." The history and cosmetic condition of the plane is important. Commercial aircraft do not have emotion attached to them. A motor vehicle comparison is appropriate. People do not want to buy cars that have been damaged, even when repaired to new condition. CARFAX is the best example of this as they have created a market for their service in the used car arena based on reporting prior damage. Most people do not care if the UPS truck has been damaged, they just want their package. Bus, taxi, and train passengers are primarily concerned with getting to their destination safely, not if the vehicle has prior damage. Owners of these vehicles are concerned with providing a safe service and making a profit. The primary concern of these business owners is to acquire a tool (bus, taxi, boat, airplane, etc.) that will meet their business requirements and not require excessive maintenance or modification. Prior damage does not affect the**

> **usefulness of their tool (plane, bus, etc.) Passengers want to know an airplane is safe, not that it has had an incident in it's (sic) past. The market history for utility aircraft, especially those in demand indicates most buyers are not concerned with minor or moderate damage history."**

67. Mr. Muhler concludes by stating that:

> **"All of the damaged components on [the Beechcraft] have been replaced with non damaged parts with the exception of the skin behind the door. This area of damage would be categorized as minor, or moderate at best. A deduction of 20% for this damage is excessive. Past sales support a deduction between 5-10% based on the market and the specifications of the aircraft for sale. [The Beechcraft] is a very desirable aircraft. It has very low total time in service, an excellent maintenance history, and excellent avionics.**
>
> **Using the current strong market conditions I feel a 5% deduction in value is appropriate…"**

68. The Registrar was entitled to make her assessment of the appraisers. She preferred the evidence of Mr. Coonan based on his qualifications. Her conclusion was expressed in this stark extract from page 8 her Judgment:

> **"…I refuse to accept Mr. Muhler's evidence to contradict the expert evidence of Mr. Coonan as he (Muhler) admitted under cross examination that he has no certification as an aircraft appraiser".**

69. That was a severe approach, but it is open to the court to prefer one expert over another based on qualifications. Also, there was nothing perverse or unreasonable about the decision to accept the evidence of Mr. Coonan over the evidence of Mr. Muhler.

70. I note the view of Evans, JA expressed in his Judgment (with which the President agreed) on this Court determining the issue raised by the two appraisers. If that course was adopted, I would accept the evidence of Mr. Coonan over that of Mr. Muhler.

71. The Report by Mr. Coonan is detailed and provides sound reasons and support for his conclusions. It seems to me that the damage history of a commercial aircraft is important. Mr. Coonan states in his Report that:

> **"...the stigma of damage is far greater to a corporate jet or commercial aircraft than it is to a single-engine piston aircraft"**

In making this statement, I do not understand him to be equating the comfort or luxury of a corporate jet with a commercial aircraft but simply that the safety factor for both is significant and that safety is in part related to the damage history of the aircraft. Also, I did not find the comparison in the Muhler report with a motor vehicle or a UPS truck delivering packages particularly helpful or persuasive. Mr. Muhler states in his Report that:

> **"…Bus, taxi, and train passengers [presumably equating them with passengers on a commercial aircraft] are primarily concerned with getting to their destination safely, not if the vehicle has prior damage."**

While, in my view, the analogy is inapposite, the main point is that there seems to me to be a connection between **"getting to their destination safely…"** and the **"prior damage"** to the vehicle. The premise that the two are entirely separate and unconnected is tenuous.

72. In view of the damage to the Beechcraft, which is described in Mr. Coonan's Report, and not challenged by Mr. Muhler, a 5% diminution of value after the repairs are completed seems to me to be *de minimis* and I would not accept it.

73. Therefore, whether on the basis of the decision of the Registrar on the DV Award or on a *de nova* determination by this Court of the percentage of the diminution of the value of the Beechcraft after the repairs were completed (as set out in the majority judgment), I would accept the evidence of Mr. Coonan and his computation of the diminution of value of $141,400.00 (adjusted to $141,315.00 as per paragraph 24 above) based on a 20% reduction of the 'Green Value' of the Beechcraft.

74. Therefore, in the result, I would dismiss the appeal on the DV Award and allow the appeal on the LOU Award.

75. I join the majority in inviting counsel to address the Court on the issue of costs, both here and in the Court below.

The Honourable Sir Brian Moree, CJ