SUPREME COURT OF QUEENSLAND

CITATION:	*Cape York Airlines Pty Ltd v QBE Insurance (Australia) Ltd* [2010] QSC 313
PARTIES:	**CAPE YORK AIRLINES PTY LTD** **ACN 000 627 010** (plaintiff) **v** **QBE INSURANCE (AUSTRALIA) LIMITED** **ACN 003 191 035** (defendant)
FILE NO/S:	BS 1762 of 2005
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	27 August 2010
DELIVERED AT:	Brisbane
HEARING DATE:	16 November 2009 – 20 November 2009; 20 January 2010 – 22 January 2010
JUDGE:	Daubney J
ORDER:	**1. There will be judgment for the plaintiff in the sum of $1,942,367.88 plus interest to the date of judgment of $1,229,519, being a total judgment of $3,171,886.88.** **2. I will hear the parties as to costs.**
CATCHWORDS:	INSURANCE – THE POLICY – PRINCIPLES OF CONSTRUCTION – ELECTION – where the plaintiff had a policy of insurance in respect of an aircraft with the defendant insurer – where the policy allows for the insurer to elect to pay for, repair, or pay for the repair of, accidental loss of or damage to the aircraft – where the plaintiff made a claim following the ditching of the aircraft –where the plaintiff was not convinced that a repair would return the aircraft to the condition it was prior to the ditching and sought that the defendant pay the amount insured under the policy – where the defendant obtained a quote described as a 'repair guestimate' for repairing the aircraft – where the defendant wrote to the plaintiff requesting that they sign an 'authority to repair' the aircraft in accordance with this quote and attempting to limit their liability to the amount specified in the quote – whether this was an option available to the

	insurer under the policy – whether this amounted to an election of an option available to the insurer under the policy
	Civil Aviation Act 1988 (Cth) *Civil Aviation Regulations* 1988 (Cth)
	Champtaloup v Thomas [1976] 2 NSWLR 264, cited *Immer (No 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW)* (1993) 182 CLR 26; (1993) 67 ALJR 537, cited *Freshmark v Mercantile Mutual Insurance (Australia)* [1994] 2 Qd R 309, cited *Lake v Hartford Fire Insurance Co Ltd* [1966] WAR 161, cited *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, applied *Surfers Paradise Investments Pty Ltd (in liq) v Davoren Nominees Pty Ltd* [2004] 1 Qd R 567, cited
COUNSEL:	DR Cooper SC, with C Francis for the plaintiff SSW Couper QC for the defendant
SOLICITORS:	Kilmurray Solicitors for the plaintiff Cooper Grace Ward for the defendant

[1] At about 4.10 pm on 8 February 2004, the plaintiff's Cessna 208 Caravan Aircraft VH-CYC ("the Aircraft") suffered engine failure and ditched in the sea about 120 metres off Green Island, near Cairns. The Aircraft was recovered from the sea some 42 hours later, on 10 February 2004. During that time, the Aircraft, which was partially submerged, underwent periods of immersion in salt water by reason of four tidal ebbs and flows.

[2] This action arises out of the plaintiff's claim on the defendant insurer as a consequence of that incident.

The policy of insurance

[3] The relevant policy of insurance which the plaintiff held with the defendant for the Aircraft was Policy No 04 Q01 0011543 ("the Policy"). It was effective from 30 September 2003.

[4] The relevant coverage provided by the Policy was:

> "1. Coverage
>
> (a) The Company will at its option pay for, repair, or pay for the repair of, accidental loss of or damage to the Aircraft described in the Schedule ("the Aircraft") arising from the risks covered, including disappearance if the Aircraft is unreported for thirty days after the commencement of Flight, but not exceeding the Amount Insured as specified in the Schedule and subject to the amounts to be deducted as specified in the Schedule."

[5] The Policy specified in relation to the claims procedure under the Policy as follows:

> "Claims Procedure

> 3. Immediate notice of any event likely to give rise to a claim under this Policy shall be given as stated in the Schedule. In all cases the Insured shall:
>
> (a) furnish full particulars in writing of such event and forward immediately notice of any claim with any letters or documents relating thereto;
>
> (b) give notice of any impending prosecution;
>
> (c) give all information, do all things, provide signed statements, provide all documents, records and things, and assist the insurers and their agents in any other way in the investigation and in connection with any proceeding or inquiry as the Company or its agents or representatives may require;
>
> (d) be available and attend conferences and give evidence and/or instructions when required by the Company or its agents, ensure that any employees required by the Company are available to do likewise and take all reasonable steps to ensure that any other person connected with the Insured is available and will assist and give evidence if so required;
>
> (e) not act in any way to the detriment or prejudice of the interest of the Company."

[6] The Policy also provided cover for loss of the Aircraft's use as a result of an accident. For this particular aircraft, the amount allowed was $1,500 per day in excess of 14 days for 90 days.

[7] The "Amount Insured" under the Policy was $1,800,000.

The course of events

[8] After the Aircraft ditched on 8 February 2004, the plaintiff's principal, Mr Arthur Williams, contacted his insurance broker, Mr Toby Palham of Heath Lambert Group, to advise of the ditching. The fact of the incident and the claim arising therefrom was also communicated to the defendant insurer and its loss adjuster, Mr Mike Ellis of GAB Robins, who subsequently attended the Aircraft on behalf of the defendant.

[9] On 9 February 2004, Mr Daniel Nash, the defendant's relevant national claims manager, sent a "Request for Authority" to the defendant's general manager, Mr John Buckley. This request stated:

> "The above claim exceeds my Delegated Authority in the following respects: Repair quote being obtained, but likely to exceed equivalent of AU$1,000,000.
>
> I seek authorisation to: Manage and settle claim up to Hull Sum Insured AU$1.8 million if necessary."

On 10 February 2004, Mr Buckley completed the counterpart of this request form, and gave Mr Nash "authority to handle this Hull claim".

[10] It is not in issue that on 11 February 2004, the defendant accepted that the ditching was an "accident" within the meaning of the Policy.

[11] Mr Ellis began consulting with the GAB Robins' London office with a view to identifying a repairer who could rebuild the Aircraft. He was referred to a company located in Oklahoma, USA, called Aircraft Structures International Corp ("ASIC"). Mr Ellis was told that ASIC specialised in rebuilds of this particular model of aircraft. On 12 February 2004, Mr Ellis sent an email to the principal of ASIC, Mr Mickey Stowers, saying:

> "Thanks for the general information you passed onto me a short time ago. I have attached some photographs which should give you an overall perspective of the event and the extent of the water immersion. As mentioned when we spoke on the telephone, the aircraft was immersed for about 72 hours and subjected to a number of rising and falling tides. It is now located on the barge in the Trinity Inlet in Cairns and because of environmental issues we cannot do any cleaning or inhibiting. We hope to get it back to Cairns International Airport early next week.
>
> I would be grateful if you could give me a ball park figure of the sort of cost that would be involved to do a complete rebuild.
>
> Let me know if you require any additional information and I look forward to hearing from you."

[12] On 13 February 2004, Mr Ellis sent an email responding to an inquiry from Mr Stowers, saying:

> "Thanks for your email and photos. You certainly seem to have the space and equipment.
>
> Yes your assumption is correct. In view of its age we would only use brand new components if it was the only option available. However I appreciate that in some areas you might have to go for new to satisfy airworthiness requirements, etc. I will leave it up to you.
>
> Look forward to receiving your estimate."

[13] In the meantime, Mr Ellis had been communicating with the defendant in relation to the matter. He accepted in evidence before me that, as is recorded in a file note dated 9 February 2004 on the defendant's file, that he advised the defendant insurer on that day that the Aircraft was probably a "CTL", i.e. constructive total loss. On 13 February 2004, Mr Ellis telephoned Ms Robson of the defendant insurer advising that he had spoken with a repairer in the USA who specialised in these aircraft, that he had been given a figure of between US$700,000 and US$800,000 (including freight) and suggested that the Aircraft, being a 1986 model, was over-insured.

[14] On 16 February 2004, Mr Stowers of ASIC provided Mr Ellis with a "Repair Estimate" for the Aircraft. It is necessary to set out the terms of that Repair Estimate in full:

> "Repair Estimate for VH-CYC, Serial Number 20800108
>
> Transport aircraft from Queensland, Australia to Enid, Oklahoma for repairs (includes labor to place aircraft into two shipping containers, airline tickets, meals, car rental, lodging, and two 40ft containers). $25,000.00
>
> Labor to remove aircraft from shipping containers; remove all avionics, instruments, and electrical components. Flush interior of aircraft with fresh water and chase with diesel fuel. Remove all control cables, pulleys, torque tubes, and bearings. Remove

all wiring. Clean and flush all oil lines, fuel lines, fuel sumps, pneumatic lines, and brake lines. Remove and replace all nut plates. Remove firewall and clean structure, prime, and replace. Remove trailing edge skins from flaps, elevators, ailerons, and rudder; flush and reinstall trailing edge skins. Coat interior surfaces of entire aircraft with LPS-3. Install replacement wiring harness, avionics and instruments. Install new pulleys, bearings, and torque tubes, reinstall control cables after inspection. Remove and replace all engine and prop, control cables. Disassemble pedestal, clean, lubricate and reassemble. Remove circuit breaker panel and clean, replace all wiring, switches, and circuit breakers. Install new engine mounts, install used serviceable engine with similar hours. Overhaul prop, and install. Replace all damaged cowling and install all overhauled engine accessories. Disassemble nose gear, clean, reassemble and install. Disassemble main gear springs, flush internal walls, prime inside walls, and reassemble springs. Disassemble and clean wheels and brakes. Reinstall main gear and bleed brakes. Assemble aircraft and rig all flight and engine controls. Install new carpet and upholstery. Perform new weight and balance

2,486 hours @ $69.00 per hr.	171,534.00
Parts (see attached list)	298,844.81
Freight (parts only)	500.00
Shop supplies (MEK, paper towels, glue, etc.)	300.00
PT6A-114A engine (comparable time)	200,000.00
Paint (complete strip, etch, alodyne, poly-urethane)	20,000.00
Oklahoma sales tax (delivered out of state 0%)	0.00
Total Repair	$691,178.81

All work is to be completed under a repair station authorization. Parts prices are good at time of quote; and increases by OEM will be passed on. Hidden damage discovered after disassembly will be priced accordingly.

Please don't hesitate to contact me if you have any questions."

[15] On 17 February 2004, Mr Ellis sent an email to Mr Stowers, saying:

"Thanks for your estimate and the prompt manner in which you responded. You have obviously done it all before. I accept your comments as discussed on the phone that the proposal is an estimate only and that you would provide me with any variations that were found necessary once you had dissembled the structure and established the extent of the corrosion.

I have referred the estimate to the Insurance company and will get back to you soonest. I agree that we have to act quickly to preserve the bits."

[16] On 17 February 2004, Mr Ellis prepared a report for the defendant, confirming that he had travelled to Cairns on 8 February 2004 and describing the results of his

investigations and observations to that time. In relation to rebuilding the Aircraft, the report stated:

> "**Rebuild Option:**
>
> Given the high sum insured at $1,800,000 we have been somewhat reluctant to simply recommend that the hull be determined a constructive total loss without first establishing the feasibility and costs that would be involved in carrying out a repair/rebuild.
>
> Having said that we have doubts that a rebuild of this extent could be successfully undertaken in Australia, certainly not in the Cairns to Brisbane region. The resources required simply do not exist in this part of the world. We therefore sought the assistance of our London Office who referred us to a company in Oklahoma, USA, namely Aircraft Structures International Corp (ASIC) who specialize in Cessna 208 Caravan rebuilds. ASIC has a solid and proven reputation for undertaking Cessna Caravan aircraft retrievals and rebuilds especially post seawater submersion rebuilds."

[17] The report described the damage to the Aircraft as follows:

> "**Damage:**
>
> The water landing or ditching took place in calm waters in the lee of the Island on its northern shoreline. Accordingly, and as a result of Pilot Davy's relatively good handling of the situation the touchdown was smooth. The only impact or landing damage occurring was the splitting open of the fibreglass cargo pod, which Pilot Davy believes acted as a "Boogie Board" as the aircraft decelerated.
>
> The aircraft then floated and drifted for a short while before settling on its wheels onto the reef in the shallow water. It was subsequently tethered to the shore by ropes preventing it drifting out to sea.
>
> The fuselage, wings and airframe in general escaped impact damage and it is therefore virtually free of any denting, holing or distortion to skins and/or frames. The only damage noted is buckling to the rear fuselage tail cone or stinger.
>
> Unfortunately because of the unfavourable tides and shallow water the salvage operation could not take place until Tuesday (10/02/04) morning at approximately 1030 hours. The entire aircraft has therefore been subjected to saltwater tidal rises and falls over a period of some 60 hours during which time complete and total immersion occurred as is illustrated in the attached photographs.
>
> Accordingly, the corrosive effects of the sea are already apparent on many alloy components such as rudder pedals and the numerous alloy housings. The turbine engine is already displaying an advanced stage of deterioration.
>
> Likewise all electrical circuits, wiring looms, control cables and pulley systems together with avionics and instrumentation have been totally submersed to the degree that they are no longer reusable."

[18] Mr Ellis also described the salvage of the Aircraft:

> "**Salvage:**

> The salvage exercise undertaken by Perrott's involved the use of flotation bags, divers, two barges and tugs. One of the barges carried a mobile crane with which to lift the aircraft from the sea and onto the deck of the other transporting barge.
>
> Because of the shallow water that covers the reef and the possible risk of causing damage to the reef, the raising of the aircraft from the sea had to be accomplished in deeper water approximately one kilometre offshore.
>
> The floatation bags were placed on either side of the fuselage and inflated to raise the aircraft to a level were (sic) it could then be towed to the waiting barges. It was then lifted onto the clear deck of the transporting barge for the voyage back to the Trinity Inlet, Cairns.
>
> At the time of compiling this report arrangements were being made to tow the barge carrying the aircraft to the mouth of the Barron River where it will then be towed upstream a short distance to the Cairns Airport Emergency Services boat ramp located on the northern boundary of the Airport. From here it will be lifted by crane onto the airport taxiway then towed across the main runway to the Insured's hangar located in the General Aviation area.
>
> Unfortunately some delays have been experienced in obtaining the necessary approvals from the Government Agencies concerned. However, we are now able to report that the approvals have at last been granted and the operation is scheduled to take place in the early hours of Wednesday 18th February 2004 on a suitable high tide.
>
> The total cost of the salvage operation has yet to be realized. However, we have suggested that you set aside the figure of $20,000."

[19] The retrieval and salvage was undertaken by Perrott Salvage & Construction Pty Ltd ("Perrott's"). A report describing the work undertaken in the salvage operation has been obtained from that company which describes the method utilised for lifting the Aircraft, and the Aircraft then being towed to a crane barge. The Aircraft was then lifted slowly out of the water and placed onto the deck of the barge, and then secured for sea transport back to Cairns. In evidence before me it emerged that the Aircraft needed to be towed for a distance of about a kilometre before it was lifted out of the water and placed onto the barge. The barge then steamed back to Perrott's premises at Trinity Inlet, Cairns. It arrived there late on 10 February 2004. Despite some evidence suggesting that the Aircraft was lifted onto the hard stand at Perrott's, I accept that the Aircraft in fact remained on the barge which was moored at Perrott's premises until 18 February 2004, by which time the necessary clearances were obtained to enable the barge to be towed from Trinity Inlet to a position adjacent to the Cairns airport. It was then able to be unloaded from the barge and moved to the plaintiff's premises within the airport.

[20] In evidence before me, Mr Williams said that the first time he saw the plane was when it was recovered back to Cairns on 10 February 2004. He said that the exterior of the plane looked quite immaculate, but when he got up close to it, it was evident that most of the alloy castings had deteriorated very dramatically and there was significant corrosion. He said instruments and rudder pedals were badly corroded and there was impact damage on the tail of the Aircraft. He said that the Aircraft had been immaculately maintained before the incident.

[21] I should also say at this point that I find that the Aircraft was not washed down at any time while it was on the barge at the Perrott's premises. Mr Ellis, in his evidence in chief, had a recollection of the Aircraft being offloaded from the barge onto the hard stand at Perrott's and of asking for it to be washed down there. He also had a recollection of inspecting the Aircraft and seeing water in the interior. Under cross-examination, however, it emerged that Mr Ellis' recollection was less than accurate. He initially said in evidence, for example, that after the barge carrying the Aircraft arrived at the Perrott's premises at Trinity Inlet late on 10 February 2004, he next saw the Aircraft on the following day at which time it had been lifted off the barge onto the concrete hard stand. His recollection faltered, however, when he was shown a photograph which depicted him inspecting the Aircraft while it was on the barge late on 10 February 2004. Nor, as was put to him in cross-examination, is there any mention in the relatively contemporaneous report he wrote on 17 February 2004 about the Aircraft being unloaded from the barge and put on the hard stand. Nor is there any mention of the Aircraft being unloaded from the barge in the Perrott's salvage report. Mr Ellis conceded under cross-examination that he was having "trouble recollecting ... the events at the time".

[22] Returning to the chronology, on 18 February 2004, the Aircraft on the barge was towed to the emergency services boat ramp at the Cairns airport. It was lifted by crane from the barge onto the taxiway, and then towed across to the plaintiff's hanger in the general aviation area of the airport. It was then that the Aircraft was washed down; at Mr Ellis' request, the plaintiff completely stripped out the interior trim, panels and inspection panels throughout the Aircraft. It was washed out and then sprayed with LPS-3 inhibitor.

[23] Mr Phillip Stacy was, at the time, the defendant's national claims and technical officer. He reported to Mr Nash. He was closely involved in liaising with Mr Ellis with respect to this aircraft claim.

[24] On 19 February 2004, Mr Nash and Mr Stacy had a telephone conference with Mr Palham to discuss the claim. The diary note of that telephone conversation records:

> "We explained that we had obtained a quote for US$691,178 from ASIC in Oaklahoma, and that after doing some checking we believe they are a reputable organization with sufficient experience to do the repairs satisfactorily. We also advised that we had checked with CASA who are OK with the aircraft being repaired providing it is all done in accordance with Cessna requirements and approval – which will be the case.
>
> Toby advised he was not sure whether this would be acceptable to the insured, but that he would have the insured – Arthur Williams – contact us to discuss."

[25] There was then a telephone discussion with Mr Williams. Mr Nash's diary note records:

> "Arthur Williams rang. I explained to him that we had a quote which we are satisfied indicates that the aircraft can be repaired. The insured indicated quite clearly that he would not be happy to have the aircraft repaired. He would not be confident that it would be safe to fly, and he would not be comfortable having high profile people – such as the shadow transport minister, the Prime Minister, and senior judges and magistrates – travelling in the aircraft after it is returned to service.

> I mentioned to him that the only other option would be for us to offer to cash settle for the repair cost. I added that we would also be willing to consider paying the Loss of Use (90 x $1,500) in cash as an incentive to finalise the claim.
>
> He stated that we should put this in writing to him, and that he would refer the matter to the shareholders for a decision."

[26] Also on 19 February 2004, Mr Stowers of ASIC wrote to Mr Stacy describing the process involved in restoring an aircraft that had been submerged in salt water. This letter said:

> "The restoration of an aircraft that has been submerged in salt water is a simple and straightforward process even though it is a very tedious and time-consuming one. The FAA has no objection to the process and allows these aircraft to be returned to service as long as the manufacturer of the aircraft has no objections. We have restored numerous water-immersed aircraft with great success. Some of the Caravans we have restored are as follows: 20800254, fresh water, 30 days under water and 120 days on the bank before cleanup; 20800292, salt water, 24 hours under water and 3 days before cleanup; 20800289, salt water, 3 days under water and 120 days before cleanup; 20800135, fresh water, 24 hours under water and 2 days before cleanup. The head of Caravan Product Support at Cessna, Steve Charles, states that there is no loss of structural integrity if the aircraft is cleaned and preserved properly.
>
> The majority of structure and skins used by Cessna to produce the Caravan are fabricated from 2024T3 or T4 aluminium, which is clad with pure aluminium, alodined, and then epoxy primed before assembly. There are very few parts that are not primed but those that are not are anodized. The wing spar caps are fabricated from 7075T7511 extrusion and are completely covered with epoxy primer before being bonded to the web. The fuel cell skins are sealed to the spar caps during assembly to form an integral fuel cell. The wings and flight controls having already been removed from the fuselage, the next step to restore this Caravan to an airworthy condition is to remove all attaching components so that only the structure and skins remain on the major assemblies.
>
> With only the basic structure and skins remaining all anchor nuts must be removed as well as the firewall, the control surface trailing edges for better access and all assemblies are thoroughly washed with fresh water. While the aircraft is still wet the entire exterior and interior is flushed with diesel fuel to chase the water from all surfaces, including the lap seams. The aircraft is thoroughly and painstakingly inspected for any corrosion. Any corrosion found is either removed from the part or the part is replaced. Every piece of avionics, instruments, bearings, circuit breakers, and wiring is replaced. All fabric or leather upholstery is replaced.
>
> After the aircraft is assembled and the exterior is completely stripped of paint, the exterior is once again inspected for corrosion, etched, alodined and epoxy primed and painted. The interior of all structural components is then treated with LPS-34, which also creeps into the skin lap seams, to prevent any future corrosion.
>
> Cessna does not require any additional inspections after the aircraft is returned to service and the normal inspection regimen is followed. As with

> any Caravan if corrosion is ever found it is repaired in accordance with chapter 51-11-00 in the Cessna Structural Repair Manual, D5132-5-13."

[27] On 20 February 2004, there was a further telephone discussion between Mr Nash and Mr Palham. Mr Nash's diary note records:

> "Toby Palham rang to discuss.
>
> He emphasised that the insured was not satisfied with the repair option. He stated there was no way the aircraft could be repaired for the estimated figure. He said there were CASA requirements which did not apply in USA which would add a further $250,000 to the repair cost. I advised I did not know about this, but would ask Phil to look into.
>
> He stated that the best option would be for us to pay out the sum insured ($1.8 million AU), and keep the aircraft ourselves – either repair and sell, or sell as is. I advised that this was not a valid option. As far as we are concerned, the only two options are to repair or cash settle for the repair cost.
>
> Toby asked about what aircraft the repairer had previously repaired – and where they were from – which country. He asked where the engine would come from, and it's condition etc ... I advised that we can obtain whatever further information the insured requires to satisfy them that the repairs can reasonably be completed for the estimated cost."

[28] Mr Nash's diary notes also record that on 20 February 2004, Mr Buckley telephoned Mr Nash, advising that he had just got off the phone with Mr Palham and saying that he would like to discuss the matter with Mr Stacy and Mr Nash. Mr Nash's diary note records:

> "Phil and I discussed generally with John, who agrees that we should continue to push the repair option – which will probably lead to a cash settlement in due course. We need to do whatever we can to convince and satisfy the insured that the repair is viable, the cost involved is accurate, and that CASA will approve once complete.
>
> We should leave the cash settlement option to one side for the moment until the above occurs."

[29] Mr Stacy had also been making inquiries with some of his contacts within the aircraft industry with respect to ASIC as a repairer. He received certain advice from a representative of Trans-Pacific Air, and on 20 February 2004 Mr Stacy sent an email to his contact at Trans-Pacific Air saying:

> "Thanks so much for our information and input. We had only heard good things about his abilities and workshop [referring to Stowers].
>
> I have spoken to him twice asking him to write to us stating the method, approvals etc for the work.
>
> Personally I think we will convince the owner that cash in lieu of repairs will be the way to go but we still need to go through the process of getting a comparable quote to settle on.
>
> The time taken could be a big factor in all of this and its good to know up front that some jobs take a lot of time. He admitted to me that he's too

> busy to come out to Australia even for a couple of weeks to oversee the job done in an Australian W/shop.
>
> I'll give you a call next week when things are a little less hectic."

[30] Mr Stacy copied this email exchange with Trans-Pacific Air to Mr Ellis. On 20 February 2004, Mr Ellis responded to Mr Stacy, advising that he did not think that the comments "should deter us from proceeding with the repair option". Mr Ellis also reported having spoken to Mr Gunter Stern (the plaintiff's maintenance manager) and:

> "... he has assured me they have given the interior a good wash. They are going to spray some Kero around on Monday after it has dried out properly. One point he did mention is that Cape York Air have an anti-corrosion programme in place and had only recently sprayed the entire internals, including inside the wings and tail with an inhibiting wax product. I think he called it Bosguard. That being the case the corrosion should be retarded to some extent."

[31] On 23 February 2004, Mr Stacy sent an email to Mr Palham to update him on the plaintiff's claim. This email said:

> "To ensure we all make the correct decisions for all parties concerned, I have,
>
> - Asked our assessor Mike Ellis of GAB Robins to ask Gunter Sturn of CYA to ensure the total aircraft is completely stripped of interior trim, panels and inspection panels throughout the aircraft and it be washed out thoroughly. This is to be followed by a liberal spray of kerosene or jet fuel. Mike informed us today that this was being carried out last week. As an aside Gunter told Mike that the whole of the airframe was treated recently with an anti corrosive liquid as part of CYA's maintenance program. This will assist the repair of the aircraft. I said we would pay for this dismantling, washing and flushing up to about 50 man hours.
> - Since last Wednesday I have had two long conversations with a Mr Mickey Stowers the President of Aircraft Structures International Corp (ASIC) re the recovery, repair and ultimate return to service of this Australian aircraft. He spent a considerable time with me describing the return to service process, the areas opened up, parts removed overhauled or replaced and how this fitted in to the instructions already laid down within the Cessna Caravan's Structural Repair Manual (SRM). I also quizzed him of the perceived hurdles that the owner, CASA and QBE Aviation would have on any undertaking by his company to return the aircraft to full serviceability on the Australian register ***without*** any loss in value, long term structural integrity, corrosion problems or reduced life within the Cessna Ageing Aircraft program that may be applicable to this early Caravan. If you or the owner wish to speak to me directly regarding this process please do not hesitate to contact me.
> - Mike Ellis and I have independently checked out the capabilities and work carried out by ASIC with people who know them both here in OZ and the USA.
> - I have also discussed carrying out the repair in Australia with ASIC and CASA.
> - From Wednesday to Friday I also contacted a number of CASA airworthiness people I know within the aviation industry (one for 43 years) both in Queensland and Canberra regarding this exercise. After

> the usual and predicable silence when I said what may happen to VH-CYC they all said that if it was carried out in an approved shop (be it USA or Australia), to approved data (ie Cessna SRM and or a Reg 35 engineer's scope of works) the aircraft could be returned to service with out any long term penalties.
> - I have not been able to clarify the extra value $250,000) regarding VH-CYC that you mentioned to Daniel Nash. Mike Ellis said that as this was an very early Caravan it may have had mods to bring it into line with later ones that had factory IFR capability. He also mentioned it had a camera hatch which was an unusual modification.
>
> I hope this assures you that I am trying to find an acceptable outcome for both CYA and QBE Aviation and that we can all make a decision on it's outcome as soon as possible.
>
> I will continue to keep you in touch."

[32] On 24 February 2004, Mr Stacy sent an email to Mr Stowers concerning the correspondence received from ASIC to date. The email said:

> "Thanks for the letter and all your help on this project. The owner is stalling us on accepting the repair option so we are waiting to see what will transpire.
>
> We will keep in touch."

[33] I interpolate that this statement by Mr Stacy was patently incorrect. At the time Mr Stacy sent that email, the only information which had been provided to the plaintiff was that which was passed on in the telephone discussions with Mr Williams and Mr Palham on 19 and 20 February 2004. When challenged on this in cross-examination, Mr Stacy was quite evasive. He initially contended that the plaintiff was "stalling" through lack of communication with Mr Ellis and Mr Palham, then resorted to asserting that the insurer wanted the plaintiff to sign a release. But when it was pointed out to him that no release had been provided to the plaintiff at that stage, he finally conceded that he had no basis for saying that the owner had been "stalling us on accepting the repair option".

[34] On 26 February 2004 Mr Palham received, and on-forwarded to Mr Williams, a letter addressed to Mr Williams from the defendant. That letter said:

> "Dear Mr. Williams,
>
> **Re: Claim 674 – Engine failure and ditching 8th February 2004 – VH-CYC**
>
> We refer to the above claim and your telephone conversation with Mr Daniel Nash our National Claims Manager on 19th February 2004. We have also discussed this claim on numerous occasions with your broker – Toby Palham.
>
> We are writing to confirm that we have obtained repair estimate from Aircraft Structures International Corporation (ASIC) in Oklahoma. Please find attached a copy of that estimate totalling US$691,178.81 (equivalent of approx AU$895,000).
>
> Under your policy, we have the option to "... pay for, repair, or pay for the repair of accidental loss of or damage to the Aircraft ..." (refer Aircraft

Insurance Policy Section 1, subsection 1(a)). As the aircraft is insured for AU$1,800,000, and in it's post damage condition would be valued at no more than AU$150,000, it is clear that it is repairable based on the above mentioned estimate.

We have made enquiries with several aviation industry contacts in the United States, and we are satisfied as to the integrity and capability of the repairer to complete the work required. This work will be carried out in accordance with the Cessna Structural Repair Manual (SRM) and the FAA repair station standards, and be returned to service with CASA acceptable paperwork.

We have also made initial enquiries of CASA in Canberra, Brisbane and Townsville to ensure that they have no concerns with the repair and return to service of this aircraft. We are assured that they have no concerns with this process, however we will formally notify CASA of our intentions to ensure that there is no misunderstandings. We will provide you with a copy of our formal notification.

We also refer you to your obligations under the policy to make every effort to strip all the interior trim and fittings out of the aircraft, all access and inspection panels have been removed, all interior areas of the aircraft and its structure has been washed thoroughly with fresh water and it further sprayed with kerosene.

Could you please instruct Aircraft Structures International Corporation to proceed with the repairs to the aircraft as per their estimate.

We enclose an Authority to Repair for your signature. Could you please pass this on to Aircraft Structures International Corporation as soon as possible and send a signed copy to us for our files.

We take this opportunity to remind you that the work undertaken by the above company to repair and restore the aircraft to its former state being the subject of this claim is performed in accordance with the terms and conditions of the policy and our interest is limited to the cost of the accident repairs as quoted in accordance with your entitlement under the policy.

Cape York Air will be required to pay the excess of AU$18,000 and the repair or maintenance of any non accident related damage, the repair of any fair wear and tear items discovered in the course of these repairs, contribution towards lifed items and any other work to bring the aircraft to an airworthy condition to Aircraft Structures International Corporation on completion of the repairs.

At the completion of the repair you will be required to sign a release accepting the repairs as being complete and satisfactory.

Should you have any enquiries on the repair of your aircraft please do not hesitate to contact me at this office at any time.

Yours faithfully,

Phillip Stacy
National Technical Claims Consultant"

Enclosed with that letter was a document entitled "Authority to Repair", which provided:

"**AUTHORITY TO REPAIR**

I/We .....

For and on behalf of Cape York Airlines hereby authorise Aircraft Structures International Corporation and their sub-contractors to proceed with repairs to the Cessna 208 Caravan aircraft Registration VH-CYC.

All other costs and non-accident related repairs will be borne by Cape York Airlines.

Signed: _____
Address: _____
Date: ____/____/2004

Witnessed: _____
Address: _____
Dated: ____/____/2004"

A copy of the ASIC repair estimate was also enclosed.

[35] On 2 March 2004, and as a consequence of discussions which Mr Stacy had already held with representatives of the Civil Aviation Safety Authority ("CASA"), Mr Stacy sent an email (copied to Mr Palham) to Mr Ron Simon and Mr Neville Probert of CASA. This email relevantly stated:

"I'm formally writing to you regarding our intentions with the airframe of Cape York Airlines Cessna Caravan S/n 20800108 VH-CYC.

As you know the aircraft landed in the sea without structural damage on the 8/2/04. In due course it was totally submerged by the in coming tide. It was later recovered to Cairns Airport by barge without further damage. The interior has been removed, the whole airframe then has been thoroughly rinsed, flushed, treated with kerosene (sic) and preserved as much as possible in accordance with instructions from Cessna and Aircraft Structures International Corp. (ASIC) of Oklahoma who specialize in Cessna Caravan major maintenance and repair.

ASIC has been recommended to us by a number of repairers, insurance companies and assessors in the USA, Britain and operators in Australia. I have attached a number of letters from ASIC for your information. It further expands the return to service process, parts replaced and capabilities of the company.

It is our intention to suspend the C of A, dismantle the airframe, ship it to ASIC in the USA, it be repaired, test flown in the USA, dismantled, shipped back to Australia and returned to service on the Australian register. The engine is being stripped and inspected by P & W Brisbane & ATSB and then parted out in a responsible manner.

As per our discussion Ron, the airworthiness process by which the aircraft returns to service onto the Australian register would have to be through a full C of A process with a inspection as to the adequacy of the ASIC repair, conformance to type design and all the releases and paperwork from ASIC

> and its contractors and suppliers is adequate, traceable and meets Part 21 and 25 (CAR 24) Certificate of Airworthiness.
>
> At the end of the day it will be the owner's decision as to whether he authorises the repair or accept another form of settlement.
>
> If he chooses not to retain the aircraft, then you need to be aware of the situation as there have been a number of people interested in buying the aircraft and either repairing it with the view of a return to service or parting it out."

[36] Mr Simon responded on 3 March 2004, raising a query as to the insurer's authority to suspend the certificate of airworthiness. Mr Stacy replied by email on 3 March 2004 clarifying that he would recommend that the owner do the suspension "once he has agreed to the repair which at this moment he has not".

[37] On 16 March 2004, Mr Palham wrote to Mr Stacy by fax, advising that the "insured is ... formulating a detailed response to your earlier letter". He referred to a request by Mr Ellis that the plaintiff compile a list of additional equipment fitted to the Aircraft, and enclosed with this fax, a copy of a fax received from Mr Williams concerning this extra equipment. That fax from Mr Williams stated:

> "**Re: VH-CYC additional equipment & turbine specifications**
>
> Mike Ellis asked me to compile a list of additional equipment fitted to VH-CYC and to obtain pricing for these items. This has been a somewhat lengthy process, but I've managed to obtain costings for either the fitted item or the current equivalent. The prices reflect the cost of adding the items as a factory option and may differ in price if they need to be retro-fitted.
>
> The table below reflects the current times for the PT6-114A, which only needed a new impellor and CT disc hub to return it to full service for another 5,000 hours. Most of the accessories were also low time."

Mr Williams then set out several pages of parts, particularly avionics and extras, and the cost of those which he calculated to total AUD$829,580.

[38] On 16 March 2004, Mr Ellis sent an email to Mr Stowers attaching a copy of the extra parts schedule which had been prepared by Mr Williams, but which redacted out the pricings which Mr Williams had included. The covering email stated:

> "We are still trying to convince the Owner that a repair is feasible.
>
> I have attached a copy of the Owner's list of the avionics and additional equipment that is installed in the subject Caravan and which they claim will make a large difference to your repair estimate.
>
> I believe the fibreglass Cargo Pod is repairable. It sustained a split through the right side at the door opening.
>
> The Camera Belly Hatch is not really an issue as it is simply a round hole cut out in the floor and cover plate. I am sure you have seen it before.
>
> I am not certain what the Parachuting Kit involves. Probably something to do with the rear cabin door arrangement. Have you had any previous experience with this?

> Some of the other items we have already discussed, but I would be grateful if you could compare the complete list with what you allowed in your own estimate and advise me of any additional costs over and your initial estimate."

[39] On 17 March 2004, Mr Stacy sent an email to Mr Ellis and Mr Palham thanking Mr Ellis for sending the plaintiff's list of additional items on the Aircraft, and saying:

> "I will be interested in ASIC's comments about this but from my viewing of the list there are only a couple of items that **may** not be on ASIC's quote which may effect their repair cost.
>
> I will also talk to Cessna Product Support tomorrow morning about their policy on the impact of the repair on the aircraft's long term value and any additional long term maintenance requirements."

[40] On 22 March 2004, Mr Ellis sent an email to Mr Stacy which said:

> "I have received a final response from Mickey Stowers regarding the additional items raised by the Insured plus a couple of other items that I had previously asked Mickey to price.
>
> The following is a summary of the current position.

Original ASIC Repair Estimate and shipment to Oklahoma)	US$691,178.81 (includes dismantling
Plus Wheel Assemblies	$1,729.00
Rudder Pedals	1,036.00
Engine Trend Monitor	20,000.00
Oxygen Gauges/Regulator	1,000.00
Air Conditioning components	10,000.00
Avionics/equipment variations	7,000.00
Electric Vacuum System	4,500.00
Shadin Fuel Management System	15,000.00
Return aircraft to Cairns	20,000.00
Total Revised Estimate	US$771,443.81
Convert to AUS Dollars @0.73	A$1,056,772.34

> The ASIC Estimate allowed US$200,000 for a replacement PT6 engine. Pacific Turbine in Brisbane has advised they have a suitable replacement in the USA which we could have for US$150,000. This would give a saving of US$50,000. The Revised Estimate could therefore be reduced to US$721,443.81 or A$988,279.20.
>
> Pacific Turbine also indicated that the engine they are offering was apparently being considered by Cape York Airlines, prior to the incident, as a replacement for the engine that got wet in view of the low hours remaining on that unit. The replacement has very similar hours remaining on the main components as the wet engine.
>
> I spoke with Toby Palham on Friday, you are correct he is moving to Singapore and finishes up with Heath Lambert on the 8th April. Toby's comments were that the matter is likely to get legal because Arthur Williams was not prepared to accept either a repair or a cash settlement in lieu. Have you heard anything today? I haven't.

> Regards
>
> Mike Ellis"

[41] Mr Stacy forwarded that email on to Mr Buckley on 22 March 2004 with the following message:

> "This is the latest from the assessor Mike Ellis re the "wet" Cessna Caravan.
>
> This has not changed our intention to repair or cash settle the claim, preferably the later.
>
> We will write to him via Toby P today and reaffirm that the next thing he has to do is sign an "Authority to Repair" ASAP and if he procrastinates he could be liable for any additional repair do (sic) to continuing deterioration."

[42] Mr Stacy then wrote Mr Williams a letter wrongly dated 26 February 2004 but accepted by the parties as having been sent on 22 March 2004, in which he said:

> "Further to our letter of the 26th February with the attached Authority to Repair we thank you for the aircraft's equipment and additional costing's received from Cape York Airlines that may affect the cost of repairs.
>
> We sent those aircraft details to Aircraft Structures International Corp. (ASIC) for their review and to adjust the repair quote accordingly. Mr Stowers of ASIC has replied and the repair costing including freight both ways and the other installed equipment as notified has risen to USD 771,443.81 or AUD 1,056,772.34 @ .73 to the USD.
>
> We reiterate that under your policy, we have the option to "... pay for, repair, or pay for the repair of accidental loss of or damage to the Aircraft ...", and it is clear that the aircraft is repairable based on the above-mentioned estimate.
>
> Could you please instruct Aircraft Structures International Corporation to proceed with the repairs to the aircraft as per their estimate. We have enclosed a copy of the Authority to Repair for your signature. Could you please pass this on to Aircraft Structures International Corporation as soon as possible and send a signed copy to us for our files.
>
> We take this opportunity to remind you that the work undertaken by the above company to repair and restore the aircraft to its former state being the subject of this claim is performed in accordance with the terms and conditions of the policy and our interest is limited to the cost of the accident repairs as quoted in accordance with your entitlement under the policy.
>
> We are concerned that the assured may have to bear any additional cost due to further deterioration if the repair decision is delayed.
>
> Should you have any enquiries on the repair of your aircraft please do not hesitate to contact me at this office at any time."

Another form of "Authority to Repair" was enclosed with that letter.

[43] On 23 March 2004, Mr Palham sent Mr Stacy a fax enclosing correspondence which had been received from Mr Williams. That letter from Mr Williams stated:

"**Re : VH-CYC Repair**

We are in receipt of the copy of the email from Phil Stacy of 11 March 2004, which states:

"We are concerned that the assured may have to bear any additional repair costs if we are prejudiced as a result of any further delays in this decision."

We utterly refute that we are delaying the process. It should be noted that Mike Ellis requested that we compile a list of additional equipment fitted to VH-CYC and obtain pricing for these items – a process that we believe the underwriters should have performed. This has been a time consuming process, but nevertheless we supplied the requested information on 16 March 2004. To date we have received no response from the underwriter to this information.

We are concerned about the proposal to repair the aircraft for a number of reasons which are dealt with briefly below.

ASIC Repair Schedule

To date there has been no inspection from an Aircraft Structures International Corporation engineer or any direct contact with our company. It appears that the repair estimate has been based solely upon digital photographs and prior experience. The repair of tropical salt water damaged aircraft is highly controversial and we are not aware of any aircraft returned to service after an extended period of submersion in countries that come under the same level of regulatory surveillance as Australia. The ASIC repair schedule does not involve any significant disassembly and reassembly of the aircraft, or consider the replacement of corroded and damaged parts. In our opinion, the repair schedule is superficial, contains a significant number of engineering assumptions which are unsupported and does not provide for restoration of the aircraft to a condition equivalent to that prior to the ditching.

Given the differences in regulatory requirements between Australia and the USA has any consideration been given to the supervision of the repair by an Australian CAR35 certified engineer? Furthermore, has any documentation been provided for the on-going corrosion control assessment of other Cessna Caravans that have been repaired after tropical salt water immersion? What warranty is ASIC prepared to provide in support of the repair and what type of insurance coverage are they able to provide against a claim in the future?

To date, we have been unable to find a qualified engineer who believes that the repair would be satisfactory or would be prepared to work on or certify such a repaired aircraft as airworthy. Have Cessna USA or the FAA provided written approval of the proposed system of repair for an ASETPA Cessna Caravan? Cessna Pacific are deeply concerned about the possibility of this aircraft being put back into service and a representative will be inspecting the aircraft later this month. It is our opinion that CASA may not be prepared to reinstate the Certificate of Airworthiness following the repair.

> **Future Liability**
>
> We remain deeply concerned about the possibility of unlimited legal liability against all parties in the event of any future incident or accident. As a responsible aircraft operator, we are not prepared to expose our clients, staff, company or underwriters to a situation where it could reasonably be argued that we had negligently operated the aircraft. In any event, it appears that given the aircraft's history we will be unable to get LAMEs to work on the aircraft, or pilots to fly it.
>
> **Commercial Considerations**
>
> From a commercial perspective, we don't believe if the aircraft is repaired that we would be able to sell the aircraft for a fraction of its prior value. As you are aware VH-CYC was highly equipped for ASETPA RPT operations and was also one of only three Caravans built with a camera hatch and certified to 30,000 feet.
>
> It is our opinion that even if a repair was feasible from an engineering point of view, that the cost of doing so would be uneconomic. The liability issues of operating such an aircraft are potentially unlimited. It is now six weeks since the aircraft was ditched, we do not believe that it is repairable to Australian standards, and the company requests settlement of this matter as soon as possible."

[44] In the meantime, Mr Stacy had sought to obtain confirmation from Cessna concerning the repair of an aircraft which had been subjected to salt water immersion. On 24 March 2004, Mr Stacy received a letter from Mr Steve Howard, Cessna's manager of Field Service. This letter stated:

> "Cessna's Maintenance Manual (MM) and the Structural Repair Manual (SRM) do NOT cover the disassembly, repair and return to service after a salt-water immersion.
>
> The MM and SRM provide maintenance, disassembly, repair, and return to service of components requiring inspection, replacement or repair.
>
> Cessna has no data concerning the repair or long term effects that might be caused by salt-water immersion.
>
> ASIC and Mr. Mickey Stowers is known to Cessna Aircraft for the rebuilding of model 208 Caravans. ASIC has been inspected by Cessna and ASIC does have the tooling necessary to do major repairs and rework to the Cessna model Caravan."

[45] On that same day, i.e. 24 March 2004, however, Mr Ellis wrote directly to Mr Williams, saying that he had been requested by the defendant to provide Mr Williams with "some general information and case examples concerning aircraft that have been repaired and returned to service following long term salt water immersion and as such have been the subject of an insurance claim". The letter then summarised details of some other aircraft immersion incidents in which Mr Ellis or his colleagues had been involved. This letter concluded:

> "In this instance ASIC have confirmed that the airframe/wing skins and panels would be opened up and all airframe corrosion would be removed (including that hidden corrosion that might have existed prior to the

incident) and if it cannot be removed then the skin/rib/frame is replaced. This is in fact the case with the engine firewall because of its laminar construction. All electrical/avionics/instrument systems, wiring looms, motors, control cables, pulleys, hinges and hydraulics are either replaced or overhauled and returned to either new or zero time condition. The engine and propeller would be replaced with fully overhauled similar status units to that which existed. All work is carried under scrutiny of Cessna Aircraft Company and in accordance with their SRM.

ASIC has advised that they rely on their reputation, which has not been questioned either by the FAA or Cessna Aircraft Company over the years they have been undertaking rebuilds of this nature."

[46] Also on 24 March 2004, Mr Stacy sent a fax to Mr Williams which stated:

"Thank you for your letter of the 22nd March 04 received via Heath Lambert Group. As noted in my letter posted/faxed to you Monday (my apologies for it being captioned under the date 26th February 2004), we received your additional equipment list and forwarded this on to Aircraft Structures International Corp. (ASIC).

Mr Stowers of ASIC has replied to us with regard to your listing and the repair quote including freight both ways and the other installed equipment as notified is now USD 771,443.81 or AUD 1,056,772.34 @ a conservative A0.73 to the US$. This includes all ASETPA items and the ASETPA approval would remain valid.

We can assure you that we have gone into the acceptability of ASIC's repair scheme thoroughly. We have spoken to the principle of ASIC on a number of occasions about the method of repair, the amount of disassembly such as the removal and replacement of the engine propeller, firewall, all general hardware, nuts, bolts, anchor nuts, bearings, pulleys, wiring loom, instruments, avionics, circuit breakers, etc the list goes on and on.

The aircraft would be test flown in the USA and in Australia before it's return to service. The Australian Certificate of Airworthiness would be reissued under the watchful eye of CASA before returning the aircraft to service. This has been taken into account in the repair budget.

CASA accepts the FAA's approval of ASIC's FAA Repair Station approval and any certification issued by that Repair Station and the repair process under existing reciprocal ICAO Airworthiness procedures and Certification as it is being carried out in accordance with the Cessna Structural Repair Manual (SRM).

To ensure the credibility of the repair process we have contacted the following entities,

- ASIC themselves and quizzed them as to the repair process, past projects, how and where these projects became inundated and the airframe's long-term corrosion control program.
- Cessna Product Support in Wichita KA USA. They said they will write to us about the acceptability of the ASIC repairs
- Other insurance companies who have used their services in the USA.
- Assessors in America who have been involved in these "wet" aircraft repairs.

- We asked a number of USA based aircraft suppliers and companies we deal with to independently check ASIC out for us.
- The Australian CASA airworthiness both on a state and federal level.
- A number of Australian Cessna Caravan operators who have dealings with ASIC

To date we have not received any negative response either with regards to the company's capability to carry out the repair or the acceptability of these repairs to either the FAA USA, other Airworthiness Authorities in a number of foreign countries, or the Australian CASA Airworthiness both Head Office in Canberra or your local office in Townsville.

We might add that many other types of aircraft, from Cessna 180, 185 and 206 series to De Havilland Twin Otters have been returned to service after salt-water submersion and Airworthiness Authorities around the world accept these repairs when carried out in accordance with the manufacturers instructions and SRM. This will be the case for VH-CYC.

Cessna Product Support have assured us they accept the repair process as carried out by ASIC in accordance with the Cessna 208 SRM. There would be NO additional long-term inspections or operational penalties or airworthiness risk to the basic airframe of VH-CYC if the repair is carried out in accordance with the Maintenance & SRM. CASA have also indicated the same. We can assure you that it will be repair to the highest standard.

In accordance with the policy provisions we would, as is our obligation, return the aircraft to your organisation in the same or in this case a better condition as many of the parts (pullies, bearings circuit breakers and wiring loom etc) would be new rather than up to 18 years old.

The repair would not affect the aircraft's high altitude photography or ASETPA capabilities with no issues affecting its basic airworthiness."

[47] On 25 March 2004, Mr Palham sent Mr Stacy a facsimile asking the following questions:

"1. Please can you advise how QBE came to the conclusion that the ASEPTA approval would remain valid as certain certification processes are involved.

2. With regard to the Aircraft being certified for its airworthiness upon return to Australia can you please advise the cost of this certification process which you say has been taken into account in the repair budget.

3. Please could you provide a copy of the Cessna Product Support letter with regard to the acceptability of the ASIC repairs.

4. Can you please confirm what Warranty will be provided by Cessna or ASIC on the aircraft after repairs have been completed.

5. Please can you advise when the Insured may expect to receive the Loss of Use payments as currently the Insured is without one aircraft and we are beyond the 14 days excess period."

[48] On 30 March 2004, Mr Palham sent Mr Stacy an email (copied to Mr Nash and Mr Ellis) advising that he was going on leave for two weeks, and asking whether there was some direction in the matter.

[49] On 31 March 2004, Mr Stacy responded to Mr Palham's list of queries with an email to Mr Doug Williamson (who had stepped in to act as the plaintiff's broker in the place of Mr Palham). In relation to questions 3 and 4 which had been posed by Mr Palham, Mr Stacy's email response said:

> "Para 3 – We have the letter but are clarifying a point with Cessna and Mickey Stowers of ASIC
>
> Para 4 – We are clarifying this with ASIC. As Cessna is not specifically involved with the actual restoration they would not be able to give a warranty"

[50] On 30 March 2004, Mr Ellis sent an email to Mr Stowers inquiring as to whether Mr Stowers had been able to contact Steve Charles at Cessna. Mr Stowers responded by email on 3 April 2004, saying that he had spoken with Mr Charles (who was in Peru) and "as we expected, he was reluctant to sign anything". Mr Stowers said that Mr Charles did reiterate that an aircraft that had been submerged, if properly cleaned and preserved, could be returned to service, and said to Mr Ellis that he could call Mr Charles for verification "but he won't put it in writing".

[51] On 30 April 2004, Mr Stowers sent an email to Mr Ellis asking for an update on the status of the matter and saying if Mr Ellis was still negotiating with the owner he would continue to wait but if it had been decided to settle, he would forward his invoice. It would appear that Mr Ellis replied to this email on 7 June 2004, in which he said to Mr Stowers:

> "Phil Stacy and I have been discussing the proposed repair with the client and his Insurance Broker and would now ask if you could obtain written confirmation from Cessna Product Support to the effect that the repairs can be done in accordance with the 208 SRM.
>
> This will provide the client with some comfort should they decide to sell the aircraft at some point in the future following the repairs carried out by ASIC.
>
> I look forward to your response and hopefully Cessna's assistance."

[52] For his part, Mr Williams had arranged for the Aircraft to be inspected in April 2004 by Mr Chad Brown, international field service engineer of the Cessna Aircraft Company. In response to an email from Mr Williams asking Mr Brown to advise whether there was "an approved Cessna repair scheme for a Cessna Caravan which has been immersed in tropical salt water for an extended period of time", Mr Brown responded on 12 May 2004:

> "No unfortunately we do not have a repair scheme for immersion in salt water. As you can imagine, we never designed these aircraft for flying in salt water!"

[53] Mr Williams forwarded this email exchange with Mr Brown to Mr Ellis on 15 June 2004.

[54] On 20 May 2004, Mr Ellis sent an email to Mr Williamson, copied to Mr Stacy and Mr Nash, saying:

> "Phil is away from his office until next week. I appreciate this matter is urgent and therefore feel I should just make a few comments to clarify a few issues in Phil's absence.
>
> Cessna doesn't and never has issued specific approval for any type of repair work, whether it be due to water immersion or airframe structural damage. They simply say that the repairs should be carried out in accordance with the Cessna Structural Repair Maintenance Manual, D5132-5-13 by an FAA approved facility. ASIC is an FAA approved facility and has assured us the repair would be carried out in accordance with the Cessna Manual.
>
> Cessna does not have a specific repair scheme for water immersion because in effect water immersion alone does not cause structural damage. It is simply a drying out and inhibiting procedure. This does not mean that it cannot be done.
>
> Although Cessna will not put anything in writing (for obvious liability reasons) their representatives have inspected the ASIC facility on many occasions. Cessna has demonstrated its approval of the ASIC facility by supplying them with all the assistance and parts they require to undertake work of this nature. The Cessna representative expressed this view to Phil during recent telephone conversations on the subject. If Cessna or more importantly the FAA did not approve then I am sure the ASIC operation would have closed down years ago.
>
> In terms of the subject of Cessna warranty. Cessna never has and probably never will provide a warranty on work performed by another entity, whether it be a straight forward maintenance inspection or major structural repair work. In fact no manufacturer does, whether it be Cessna, Beechcraft, Airbus or Boeing. They will only give a warranty of work they actually perform themselves. It is the industry or the repair/maintenance organisation that provides the warranty.
>
> If the aviation industry had to rely on first obtaining a manufacturer's warranty or specific repair approval prior to undertaking repairs then the industry would come to a standstill. Certainly there would not be any structural repair work undertaken or indeed any insurance related repair work performed.
>
> I have just finalised a claim in a De Havilland Beaver Floatplane that went turkey up and floated around for 4 days whilst being battered by wave action. The rebuild was performed in Canada by one of the most well known and respected Beaver repair shops in the Country. The Insurer was London based. The Owner is delighted with the finished product and reckons it flies and looks better than it ever did.
>
> Doug, I hope this gives you a wider perspective on this issue, clearly it is a difficult case.
>
> No doubt Phil will respond to you with his own views."

[55] This was an interim response to an email that Mr Williamson had sent to Mr Stacy (copied to Mr Ellis) on 20 May 2004 in which he referred to having sought advice from his London claims colleagues regarding the proposed repair of the Aircraft. Mr Williamson raised, amongst other things, the following concerns:

> "We note the quoted cost to repair and understand that you will have factored into the equation the associated costs of transportation, import/export taxes & duties, insured's own labour/incidentals etc. Based on these & the possibility of added costs once the aircraft has been delivered to ASIC, will the threshold between repair & CTL be a factor.
>
> We are also acutely aware of the insured's concerns over the future airworthiness of the aircraft, particularly due to the corrosive nature of saltwater. This is highlighted by the fact that Cessna are not providing a warranty. Under the circumstances, we question what would happen if ASIC go bust and the aircraft suffers a subsequent failure, who does the client go to, certainly not Cessna.
>
> The client has also been in contact with Cessna over the past weeks and they have verified in writing that Cessna do not have a repair scheme for salt water immersion. Cessna have also verified that such a repair scheme would likely cost in the vicinity of $1m to be approved.
>
> Under the circumstances and based on the Estimated repair costs by ASIC plus the cost of a repair scheme by Cessna, this would simply mean the aircraft is not economical to repair. In our opinion, we believe the insured should not agree to the ASIC repair option unless Cessna approve such repairs.
>
> We are sure you'll understand that due to residual value implications for this aircraft, a repair without a Cessna approval would not constitute indemnity as the Insured will not be put back in the same position they enjoyed immediately prior to the loss. Indeed using a wide body aircraft anology, if Airbus review one of their aircraft and after technical inspections are not prepared to authorise a repair scheme then put simply that is it. Whilst this is a General Aviation aircraft, that should not make the manufacturers view any less relevant."

[56] Mr Nash also responded to Mr Williamson's email on 21 May 2004, saying:

> "Whilst we appreciate the insured's concerns, we agree with what Michael has said in his response.
>
> We remain confident that this aircraft can be repaired and returned to service as previously outlined. There is no chance that we will consider it to be a CTL.
>
> I will discuss with Phil on Monday, and we will send you a more detailed response – which will be along the same lines as above."

[57] Mr Williamson sent a further email to Mr Nash (copied to Mr Stacy) on 24 May 2004 referring to his consultation with his UK colleagues. Mr Williamson said:

> "My UK colleagues have again looked at the situation and have made the following comments:
>
> > From the correspondence it seems that Cessna feel that the aircraft is not repairable and we again note that Cessna has no repair scheme for such damage. If the manufacturer has no repair scheme how can an independent repair facility say it can do the job? Normally such independent repair facilities would look to the manufacturer for guidance on repair schemes generally albeit saltwater immersion.

> The insurance policy is there to indemnify the insured in the event of a loss. Again, from the papers we have read, if Cessna refuse to provide a warranty for any repair clearly the insured has not been placed in the same position as he was before the loss.
>
> We have spoken to 2 x independent loss surveyors who have heard of ASIC. Apparently ASIC is good at physical damage repairs but the immersion of the aircraft in salt water for an extended period is a completely different scenario. Both of the adjusters we spoke with expressed concern at repairing the aircraft in such circumstances.
>
> I accept there have been delays & these have taken time, however we are attempting to argue the point for our client who as you know is adamant that the repair of the aircraft will not put him in the same position as prior to the loss. I also note your advices that the insured did not wish to take a cash settlement offer, however I am not aware of the details of your offer so cannot comment at this point. Would you therefore please provide an outline of this soonest..
>
> Await your comments to the above."

[58] On 24 May 2004, Mr Nash sent Mr Williamson an email, saying that the insurer remained confident "that the aircraft can be repaired and returned to service within the amount quoted by ASIC". Mr Nash expressed sympathy for the "difficult position" in which the insured found himself, but said "we are extremely concerned at the delays in settling this matter". He referred to discussions he had had with Mr Williams about the possibility of a cash settlement in lieu of repair, and said:

> "As this option was not taken up by the insured, we requested that they authorise repairs – this was over two months ago – refer Phil's letter of 22nd March (dated 26th February 2004 in error).
>
> Would you please advise ASAP your and the insured's response to the points made in Mike Ellis' email?
>
> I sincerely hope we can reach an amicable solution to this claim in the very near future."

[59] Mr Nash responded with an email on 25 May 2004 in which he stated, amongst other things, that Cessna did not provide a warranty in relation to any repairs carried out – whether under a Cessna approved repair scheme or not, nor, to the insurer's knowledge, did any other aircraft manufacturer. The email continued:

> "Doug I understand you are trying to argue the point for your client – and that's fair enough. However it seems the insured is trying everything to avoid having the aircraft repaired. It is clear to me that the insured is never going to be willing to have the aircraft repaired – by anyone. Even if he agreed to it being repaired, he would probably never be totally satisfied and comfortable that something would never go wrong in the future. Insurance is all about peace of mind. However this should not be at the expense of underwriters when a reasonable repair option is available.
>
> Back on 19th February 2004 I spoke with the insured and offered the option of a cash in lieu of repair settlement. At that time I did not make a firm offer – was sounding out the option. I did also indicated that we would consider including the full Loss of Use amount in such a cash settlement. However at that time repairs were estimated at US$691,178,

> and the exchange rate was 0.7885. Now some three months later – the repairs are US$771,444 and the exchange rate has dropped to 0.6999. The increase in AU$ terms is around AU$120,000.
>
> However, we would still be willing to consider offering a cash in lieu of repairs."

[60] Interestingly, the email from Mr Nash to Mr Williamson on 25 May 2004 started by questioning the opinion which had been provided by Mr Williamson's UK colleagues. Mr Nash asserted:

> "Indications to us from Cessna Product Support are that they accept the repair process to be carried out by ASIC in accordance with Cessna 208 SRM."

The email also asserted that ASIC had a "solid reputation of completing similar repairs in the past – under the scrutiny of Cessna".

[61] Mr Nash's assertions concerning Cessna led Mr Williamson to send him a further email (copied to Mr Stacy) on 3 June 2004, in which he said:

> "Firstly the issue of Cessna's position is the crux of our argument at this stage. On the one hand, we have written advice from them saying they do not have a repair scheme for this aircraft in respect of saltwater immersion. On the other, you are saying that you have "indications" from Cessna they will accept the repair process to be carried out by ASIC.
>
> Our concern has always been that if Cessna do not provide a written confirmation they will accept the repairs to be carried out by ASIC either with or without a Cessna approved repair scheme, then the client is not being put in the position he was in before the incident.
>
> You mention that Cessna have "indicated" they will accept the ASIC repairs, do you have this confirmed from them & if so, may we be provided with a copy?"

[62] On 4 June 2004, Mr Stacy forwarded Mr Williamson's email to Mr Ellis, with a covering email which said:

> "Here is the latest from Doug Williams and CYA. Have you looked at the 208 SRM to comment on how specific it is when it comes to unusual repair such as this or say hail damage or lightning strikes or deterioration of the paint or is it as I imagine it is specific about bent metal rather than unusual happenings
>
> Could you please consider this and ring us as we wish to reply asap."

[63] On 4 June 2004, Mr Nash responded to Mr Williamson's email as follows:

> "It is true that Cessna does not have a repair scheme specifically in respect of repairs following salt water immersion. Repair schemes are generic by nature, and generally relate to the repair of structural damage – hence "Structural Repair Manual". In this case there is no structural damage to the aircraft.
>
> The lack of a specific repair scheme for repair of aircraft immersed in salt water does not mean that these aircraft are not repairable. It simply indicates that the manufacturer is not as concerned about repairs of this nature as they are in relation to repairs effecting the structural soundness of the aircraft.

> Take for example an aircraft maliciously damaged by pouring of acid over the paint work, or an aircraft caught in a hail storm. Cessna would not have a repair scheme specifically in relation to an aircraft requiring a total strip down and repaint or repair of hail damage. This does not mean the aircraft is not repairable, and it would not be necessary to obtain pre-approval from Cessna before commencing repairs.
>
> As you and the insured would be aware, no manufacturer will pre-approve repairs. If it was necessary to seek pre-approval from the manufacturer prior to commencing repairs the repair industry would grind to a halt - and aircraft sales would sky rocket.
>
> Cessna Product Support have verbally assured Phil Stacy that repairs carried out by ASIC in accordance with the Cessna 208 SRM would be acceptable. This is also evidenced by the fact that ASIC have repaired other salt water immersed Cessna aircraft, and these have been successfully returned to service.
>
> We indicated to the insured in February 2004 that we would be willing to cash settle for the cost of repairs plus Loss of Use. I believe we are being very reasonable in offering this – considering our obligation under the policy is to "... repair, or pay for the repair of, accidental loss of or damage to the Aircraft ...". However this claim has been ongoing for nearly four months now. We feel it may be necessary to reconsider our approach to this claim if it is not resolved in the near future.
>
> I look forward to your urgent response."

[64] Mr Williamson responded to Mr Nash, advising that he had discussed the matter with Mr Williams and asked that the insurer obtain a written confirmation from Cessna Product Support "to the effect that the repairs can be done in accordance with the 208 SRM" and asked for a copy to be forwarded to the plaintiff for its records. Mr Williamson said that this would provide the client with comfort and evidence of Cessna's approval should they decide to sell the Aircraft at some point in the future after the repairs carried out by ASIC.

[65] Mr Nash sent Mr Williamson an email in response on 7 June 2004, saying:

> "We will see if we can obtain written confirmation from Cessna that it is in order for repairs to be undertaken in accordance with the Cessna 208 SRM.
>
> However, as previously advised, for reasons of legal liability exposure we would not expect Cessna to pre-approve or in any way guarantee the repairs in advance, so I would not be expecting anything too comforting.
>
> This in no way means that they would have any problems with the end result – as they have not on other occasions.
>
> We will see what they can provide."

[66] This correspondence was forwarded to Mr Ellis who, on 7 June 2004, sent an email to Mr Stowers asking him to obtain written confirmation from Cessna Product Support to the effect that the repairs could be done in accordance with the 208 SRM.

[67] Mr Stowers responded to Mr Ellis on 8 June 2004 in an email which said:

> "Have spoken with Steve Charles, head of Cessna Propeller Product Support, and he has stated that nothing in the SRM specifically addresses water immersion repairs but at the same time he said nothing precludes them either. He did state that although the manual did not cover water immersion it did cover the repair of any corrosion that might develop.
>
> Steve is going to check with his engineering department, which is out of pocket for the next few days, before he will put anything in writing.
>
> At least now there is the possibility he will put something in writing."

[68] Mr Ellis forwarded that response from Mr Stowers to Mr Stacy who, in turn, passed it on to Mr Nash.

[69] On 11 June 2004, Mr Ellis sent a follow-up email to Mr Stowers in which he said:

> "I was wondering if you have heard from Steve Charles?
>
> I have today been told by the aircraft Owner that they had a visit recently from Chad Brown of Cessna Support, Wichita. Apparently, Mr Brown inspected the aircraft and made the comment that is was not repairable and supposedly issued a letter to this effect. We are attempting to get a copy of this letter but in the meantime have you heard of Chad Brown.
>
> I understand the wreck is deteriorating due to the passage of time. I have a report that the doors are all difficult to open because the hinge pins and the like are seizing up. Given the amount of time that has lapsed since you did your repair estimate do you think the repair cost would increase by much assuming you were to commence collection in say the next few weeks or by the end of June 2004.
>
> Mickey, things are getting a little urgent here and I would be most grateful if you could do the follow up with Steve Charles or Chad Brown ASAP."

Mr Ellis copied that email to Mr Stacy.

[70] Mr Stowers responded to Mr Ellis on 12 June 2004 by email, saying:

> "Attempted to call Steve Charles today but as yet he has not returned my call, will try again Monday.
>
> Yes I've heard of Chad Brown, he is a lower echelon service rep. for Cessna. His area covers Australia and the 'Far East'. All he really is is a liaison between the customer and the Cessna factory. He makes no decisions.
>
> As I said in the beginning, time is of the essence. The longer it sits the more labour and more parts will have to be either repaired or replaced and the Cessna factory raises their prices every three months. The used engine price won't have changed much but the total of the parts and labour was approximately $500,000.00 and the delay may have cost as much as 10%. Not being able to actually see the aircraft this is only a guess."

[71] In May 2004, Mr Chad Brown had provided Mr Williams with an email which said, amongst other things, that he could not provide Mr Williams with an opinion or recommendation on whether the Aircraft should be scrapped or saved. He suggested that an option to consider was having an independent inspector give an estimate on what could be repaired and what would need to be replaced, and such an inspection

might provide Mr Williams and the insurer with an additional opinion as to how to proceed.

[72] Mr Williams on-forwarded that correspondence from Mr Brown to Mr Ellis on 15 June 2004. Mr Ellis, in turn, forwarded it to Mr Stacy with an email of 16 June 2004, in which he said to Mr Stacy:

> "I received the following message from Arthur Williams.
>
> > The comments made by Chad Brown are nothing like what I was told by Mr Williams or indeed by Arthur, as expected! In fact the comments are quite open and objective and in no way rule out a repair as being a feasible option.
> >
> > As we already know, the Cessna SRM does not specifically cover water immersion repairs as Chad has pointed out.
> >
> > Since I have not heard back from Mickey Stowers, I guess he is waiting for Steve Charles to submit his views in an email."

[73] On 22 June 2004, Mr Stacy sent Mr Williamson an email to keep him "up to date" with the claim. The email said:

> "We spoke with Mike Ellis this morning and he said that he has spoken to Mickey Stowers of ASIC in the USA this morning and Mickey has been contracted by Steve Charles from Cessna 208 Product Support Wichita who is only just back from leave.
>
> Steve Charles assured Mickey he would be sending a letter to Mickey "within the week" regarding Cessna's attitude to the recovery of aircraft that have been wet with salt water.
>
> We will continue to monitor this so a speedy resolution can be reached ASAP."

[74] Mr William Edwards of Multitech Aircraft Services provided a report dated 5 July 2004 to the plaintiff in which Mr Edwards, a licensed aircraft maintenance engineer with many years experience, reviewed the restoration process proposed by ASIC. Mr Edwards summarised his review as follows:

> "**Summary**
>
> > The proposal to send the aircraft to the USA for the maintenance indicated will be difficult to control The treatment of corrosion needs to be closely monitored to ensure all areas are properly treated. Any area not propable treated may result in failure of a critical structural area.
> >
> > Assembly of the aircraft will need to satisfy the original manufacturers standards. Any deviation may effect the aircrafts reliability and ongoing maintenance requirements.
> >
> > The requirements of Cessna in respect to their published severe time limit inspection program needs to be addressed. The effect of salt water contamination on the wing structure needs to be assessed.
> >
> > As the owner of the aircraft, Cape York Airlines will need to ensure all work is carried out to an acceptable standard. This is standard practice

> amongst airline operators. Quality assurance is part of the Airlines responsibility for holding an AOC.
>
> Additional maintenance for the purposes of continued airworthiness will be required to maintain the aircraft as part of the requirements for issue of an Australian C of A.
>
> In general:-
>
> - The process detailed by ASIC is not considered adequate for the long term airworthiness of the aircraft.
> - The process does not take into account the aircraft manufacturers special inspections process for aircraft operated in a severe salt water environment.
> - The process does not indicate if the assembly of the aircraft will result in the aircraft meeting the manufacturers original standard.
> - The process will not allow the existing airline operator to maintain the standards required under the Australian regulations.
> - The process does not take into account how the aircraft is to be released to service as an Australian Aircraft.
> - The process is not considered by ASIC to be worthy of a warranty.
> - The process will not ensure corrosion and loss of structural integrity will not developed at a latter date."

[75] On 8 July 2004, Mr Stowers sent an email to Mr Ellis advising that Mr Stowers had left a message for Mr Charles of Cessna to call him. Mr Ellis forwarded this email to Mr Stacy, with the following message:

> "One possible resolution put forward by Arthur Williams at the recent meeting I had with Arthur and his Mum was that an independent CAR35 Engineer inspect the aircraft and that a decision as to whether a repair is feasible be based on that individuals findings.
>
> Let me know what you think."

[76] On 17 July 2004, Mr Charles sent an email to Mr Stowers (this email was on-forwarded to Mr Stacy) in which Mr Charles said:

> "As we've discussed in the past, submersion in and of itself may not have any bearing on the airworthiness and longevity of a Cessna. Simply put, if properly handled you may never see the affects, improperly handled the airframe may be plagued with issues forever. Attached are some simple guidelines Cessna Propeller Customer Service provides. For more specific questions let me know and I will try to answer them in a timely manner."

[77] Mr Ellis responded to the email from Mr Stowers on 21 July 2004 (copied to Mr Stacy), saying:

> "I have passed [the information] onto the Insurers and am waiting their response. Although Steve was non-specific we believe the info he provided gave a firm indication that Cessna are not against water immersion repairs providing it is done in accordance with the guidelines they have set."

[78] Mr Stacy responded to Mr Ellis (and copied to Mr Stowers) by email saying that the plaintiff's broker wanted him to go to Brisbane next week to have a meeting with the broker, Mr Williams, Mr Ellis and Mr Stacy, but Mr Stacy had asked what there was to talk about. The email continued:

> "We are ready to repair the aircraft or settle for the repair amount plus ? X$'s as per the policy option etc and CYA have not accepted that fact for X months so what is there to talk about now?
>
> So he's [the broker] going to talk to Arthur W and get back to us at some stage.
>
> We'll wait and get on with life for the moment."

[79] On 30 July 2004, Mr Stowers sent Mr Ellis a fax, attaching an extract from FAA Advisory Circular AC43.13-1B entitled "Acceptable methods, techniques and practices – aircraft inspection and repair". The extract was of s 14 of that Advisory Circular, which was entitled "Handling and care of aircraft recovered from water immersion".

[80] On 2 August 2004, Mr Ellis sent an email to Mr Stacy and Mr Nash referring to discussions Mr Stacy had had with two of his contacts in relation to Mr Stowers' business. The email continued:

> "I have also attached a copy of the FAA Advisory Circular relating to water immersion repairs. I retrieved it from the internet over the weekend, with Mickey's assistance. As you will note, it virtually endorses the repair procedure supplied to us by Steve Charles of Cessna."

A copy of AC 43.13-1B was attached to the email.

[81] On 2 August 2004, Mr Williams and his brokers, together with the plaintiff's solicitor and Mr Edwards met in a without prejudice meeting with Mr Nash and Mr Ellis. The defendant was provided with a copy of Mr Edwards' report of 5 July 2004 at that meeting.

[82] On 3 August 2004, Mr Nash wrote to Mr Williams in the following terms:

> "**Re: Claim 674 – Engine failure and ditching 8th February 2004 – VH-CYC**
>
> Thank you for making the time to discuss the above claim yesterday. It was good to finally meet you in person. I thought it might be useful to follow up the meeting with a brief letter to reinforce QBE's position in relation to the settlement of your claim.
>
> Firstly I would like to assure you that we understand your doubts and concerns regarding repair of the aircraft and returning it to service.
>
> Having said this we are also confident that the repair of the aircraft is economically viable. This is because the sum insured is AU$1,800,000 and the salvage has minimal value (perhaps AU$100,000 to AU$150,000). The repair quote from ASIC amounts to the equivalent of AU$1,095,000 at today's exchange rate.
>
> Your policy clearly states that we will (at our option) pay for the repair of the aircraft (Page 1, Section 1 – 1(a)). It also states that the deductible and any contribution towards betterment will be deducted from the claim (Page 2, Section 1 – 3(e)).

> As mentioned above, the cost of repairs is the equivalent of AU$1,095,000. The policy deductible (AU$18,000) and any contribution would be deducted from this amount, bringing the net cost of repairs down to a maximum of AU$1,077,000. It is unclear at this stage how much the contribution would be.
>
> However, on a strictly without prejudice basis, we would be willing to cash settle for the gross repair cost of AU$1,095,000 without applying the deductible or any contribution. In addition we would be willing to pay the Loss of Use amount of AU$135,000, bringing the total to AU$1,230,000.
>
> We believe this is a generous offer as it amounts to at least AU$153,000 more than the potential net cost of repairs.
>
> Should this offer be acceptable, please advise by return and our release will be arranged as soon as possible.
>
> If you have any queries in relation to this matter, please do not hesitate to contact me."

[83] On 3 August 2004, Mr Williams' broker sent an email to Mr Ellis referring to the meeting, saying that there was a feeling that there was "greater determination from both parties to resolve this matter". The plaintiff's broker asked for further details, namely:

1. A realistic salvage value;

2. A more detailed repair cost estimate;

3. A statement that Mr Williams needed an "alternative quotation to work from" on the basis that the ASIC quote was unreliable and Mr Williams would appreciate something to "benchmark" it against.

[84] Mr Ellis forwarded that email on to Mr Stacy and Mr Nash on 3 August 2004, saying that he would be happy to establish an accurate salvage value by seeking offers or bids from around the market. In relation the second and third points, however, he said that he had discussed this with Mr Stacy and "we both are of the view that the reliability of the quote is not a Cape York Airlines issue or problem". He said:

> "If the quote is underestimated and the actual repair cost is greater then it is an Insurer's problem."

[85] Mr Nash then, on 4 August 2004, responded to the broker's email, and in relation to the points specifically raised, said:

1. He had asked Mr Ellis to arrange some indicative tenders for salvage, saying that he believed this would assist to confirm that the Aircraft was not a write-off;

2. He asked that Mr Williams detail exactly – point by point – what "additional costs" Mr Williams was concerned about, and the insurer would then address each of those individually;

3. If Mr Williams required an additional quote then he was more than welcome to arrange one, but the insurer was "satisfied with the quote from ASIC". He

said that "if there are additional costs during the repair process these will obviously be at QBE's expense".

[86] Ultimately, the defendant agreed to have the Aircraft inspected and reviewed by the aircraft maintenance firm Hawker Pacific, particularly for the purpose of establishing whether or not the Aircraft was repairable and to obtain costings for the repair.

[87] On 28 September 2004, Mr Stacy sent an email to Mr Noel Nas of Hawker Pacific (copied to Mr Ellis), saying:

> "Good to talk to you yesterday.
>
> Since then our National Claims Manager & I have had further discussed (sic) regarding our expectations of your 'quote' and thought it might best be done in two stages
>
> At first we would like you to review the attached scope of works and parts listing and give us an indicative non-binding "guestimate" of your expected labour component within say A$50,000 and agree that the parts costing would be in the range of say A$340,000 to $420,000 thus giving a rough total to consider.
>
> If this initial "guestimate" came within in the range of our expectations we would then ask you to do a more detailed quote and parts costing. We would also do a parts quote through one of our American parts brokers who we use quite a lot as a comparison.
>
> Noel, in doing this quote for us, given the sensitivity of the claim, the delicate stage of the claim proceedings, the "small town" atmosphere on an airport such as Cairns, the close proximity of Cape York Airlines and your facility of Cairns Airport and how rumours fly around this industry, we require it be done in the strictest confidence and require that no one approaches the management or staff of Cape York Airlines for information or assistance in forming the quote.
>
> I hope we can work together with you on this and if you or Nevil Evans needs further information or assistance don't hesitate to call me or our assessor Mike Ellis of GAB Robins. He can be contacted on 07 3376 6305.
>
> Thanks for your time and confidentiality,"

A scope of works and list of equipment was attached to the email.

[88] On 13 October 2004, Mr Nas sent Mr Stacy an email saying:

> "Have discussed your request with Neville Evans and we believe our 'guestimate' to rebuild the Cessna as per the work scope supplied would take about 5000 man hours. Electrical/Avionics, 2500 hours at $80/hour and Engine/Airframe 2500 hours at $70/hour. Total Labor Cost of $375,000.00. It may be wise to add $10,000 for our engineering department to cover any repairs and to come up with a procedure for the repair of a submerge (sic) Cessna Caravan that will keep CASA happy. To this you would need to add Engine & Propeller overhaul, Replacement Avionics, wiring and parts as required. However if you would like we could carry out an inspection of the aircraft and supply you with an itemised detailed repair quotation estimate for $2,500.00. This would cover the cost of a return trip to Cairns to inspect the aircraft and quotation research. We would need to talk to Cessna re approval to rebuild a Cessna

> caravan that has been submerged in the ocean. Hope this helps and thank you for contacting Hawker Pacific for this Repair guestimate."

[89] On 13 October 2004 Mr Stacy responded to Mr Nas asking him to "do a more detailed quote to restore the Aircraft to a serviceable condition with a current C of A etc". Mr Stacy's email continued:

> "I might add as a guide that ASIC in Oklahoma quoted us around the 2500 man hours for the airframe/electrics/avionics work etc, + Spares + freight, + Engine/Prop, + strip & repaint.
>
> I say that not to put pressure on you, but to give you a guide as to what ASIC, a company who has done this sort of job on a number of occasions quoted. Of course there are other costs in shipping the aircraft to and from the USA and reissuing the Australian C of A."

In subsequent emails on 14 October, Mr Stacy confirmed to Mr Nas that he needed the quote as soon as Hawker Pacific could accurately complete it.

[90] On 17 October 2004, Mr Nash sent an email to Mr Ken Newell, the Cessna Citation Field Service Representative, advising:

> "We have been approached by QBE insurance company to do a survey and to supply a quotation to repair the above Cessna Caravan.
> This aircraft was fully submerged in the ocean several months ago. The aircraft was recovered and washed with fresh water and then washed down with diesel fuel which we understand is the procedure for protecting aircraft that have been submerged in salt water.
> Could you please advise if there are any special OEM requirements for a Cessna Caravan that has been submerged in salt water that we should be aware for our repair quotation."

[91] Cessna's response came from Mr Bill Raftopoulos in an email dated 19 October 2004, in which he said to Mr Nas:

> "I believe that this issue was answered by Chad Brown and the matter closed as far as we are concerned. I know that the customer wanted it to be a write off and the insurance company wants to rebuild. All I can say is that when an aircraft is submerged as this aircraft was (actually for an extended period of time), the standard aircraft maintenance inspection intervals do not apply. Cessna does not have any special inspection criteria for such incidents. I really do not want to comment any further on this aircraft."

[92] On 22 October 2004, Mr Nas followed up with Mr Raftopoulos in an email which referred to Hawker Pacific's position of needing to do an independent survey of the Aircraft and report to QBE on its findings. He noted that numerous aircraft over the years had been repaired after being submerged, and the time submerged was not "the major problem but the time being recovered to being cleaned and protected is". He also noted that AC43.13-1B does cover handling and care of aircraft recovered from water immersion and corrosion inspection and protection, and then set out the matters on which Hawker Pacific would quote if the survey showed "no major reasons why the aircraft should not be repaired". His email to Mr Raftopoulos concluded with the expression of hope that Hawker Pacific could "count on OEM support if and as required".

[93] Mr Raftopoulos responded to Mr Nas by an email on 22 October 2004 in which he said:

> "This aircraft was ditched in a saltwater environment and sat in that environment for a long time. After it was salvaged, the aircraft sat for a period of time untreated or cleaned with this contamination. This aircraft has been through a very severe corrosive environment for an extended period of time, and the corrosion is likely severe. This type of exposure to saltwater, then sitting for a period of time prior to cleaning would result in extensive corrosion, in many cases in areas that are not only inaccessible to cleaning but also impossible (or nearly so) to inspect.
>
> The published Maintenance Manual is intended to be utilised by aircraft operating with the normal aircraft operating environment and this environment and the subsequent corrosive environment exposure is well outside that normal aircraft operating environment. Therefore inspection and maintenance procedures published in the Model 208 Maintenance Manual are not adequate to identify future corrosion issues that will develop as a result of this event.
>
> What type of support would you require from the OEM?"

[94] On 25 October 2004, Mr Nas forwarded these emails to and from Mr Raftopoulos to Mr Stacy, with the covering message: "This is not a reply that I was after".

[95] Mr Ellis provided a written report dated 1 November 2004 to the defendant arising from an inspection of the Aircraft which Mr Ellis conducted on 26 October 2004. This report stated:

> "As requested I attended the Insured's premises in Cairns on Tuesday 26th October 2004 for the purpose of introducing Noel Nas of Hawker Pacific Pty Ltd to Arthur Williams and Chief Engineer, Gunter Stern, also to oversee the appraisal work being undertaken by Noel.
>
> As a result of my attendance I can confirm the following:
>
> 1. You might recall there was a suggestion by the Insured that all the cabin seating would need to be replaced. I have since confirmed with the Insured's Chief Engineer that only the Pilot and Co-pilots seats were installed in the aircraft at the time of the accident as was noted by myself when I did my initial damage survey. I am advised the other passenger seats are stored in the Cape York Airlines hangar in an undamaged condition. The Pilot and Co-pilot seats that were affected are displaying severe deterioration due to corrosion attack and would need replacing.
>
> 2. The seat tracks attached to the cabin floor are displaying advanced levels of corrosion and would need to be replaced if a repair was to proceed. This is a major task as the tracks are riveted to the floor longerons and this would probably necessitate the entire floor structure being removed. I contacted Mickey Stowers about this and he advised that they usually only need to clean and anodise the seat tracks, but he agreed with Noel Nas that because the aircraft has sat for so long without proper attention then the tracks would likely need to be replaced.
>
> 3. Additional damage has been discovered in the tail of the fuselage. This became evident when rear panels were removed to allow access to the tail. The two rear bulkheads have been distorted and would require

replacement together with the lower rear belly skin. Noel has suggested this task would involve about 200 man-hours.

4. The left and right Windscreens are displaying pitting and crazing due to the aircraft sitting in the open air for a lengthy period (9 months) and would need to be replaced.

5. Although the airframe was washed and inhibited with LPS-3 all primary control system actuator assemblies, control yoke/column tubes and rudder bars have now seized and would need to be replaced. The power lever, propeller and fuel control centre pedestal is at an advanced stage of corrosion and would need to be rebuilt.

6. The same applies to all door catches, air conditioning outlets, bell cranks, cables and turnbuckles.

7. The airframe structure itself is relatively free of corrosion and this is probably due to the extensive epoxy coatings that were applied during manufacture. The airframe is therefore quite sound and is definitely retrievable.

8. The three bladed constant propeller appears to be relatively free of external corrosion. Because of its high value (approximately $35,000 - $40,000) I have arranged for the unit to be sent to a propeller shop at Archerfield Airport for it to be stripped and a detailed appraisal carried out. If the Hub is free of damage I would recommend it be overhauled as this will ensure its value is preserved. Arthur Williams was reluctant to release the propeller suggesting to his Chief Engineer that it should be thrown away.

9. I have been advised by Hawker's in Cairns that the Landing Gear spring legs have an 8,000 cycle life after which they must be replaced. I am currently trying to confirm this with appropriate documentation and will confirm whether or not it is correct in due course. Examination of the airframe logbook revealed that the gear cycles had not been accurately recorded and it is therefore not possible to say how many cycles they had accumulated. Nevertheless, given that the airframe has some 8,753 hours time in service it is probable that the leg cycles would be in excess of the 8,000 cycle life and should have been replaced at an earlier date. There was no notation in the logbooks of the legs having been replaced. The Insured's Chief Engineer was not aware of this requirement. Hawker's advise the cost to perform the replacement of the legs and ancillary parts is about A$52,000. This would need to be taken into account in any settlement proposal.

Noel Nas is currently putting together his appraisal and repair cost estimate based on the damage as presently exists. However, it is apparent from my discussions with Noel that their estimate will be considerably higher than that submitted by ASIC for the reason many components as discussed above have deteriorated due to the passage of time."

[96] A week or so later, the plaintiff's broker inquired of Mr Nash as to whether the Hawker Pacific quote had been obtained. Mr Nash responded in an email dated 12 November 2004, saying that the insurer had not yet heard from Hawker Pacific and he understood that they were still sourcing parts prices. Mr Nash's email continued:

> "Not surprisingly, the indication is that the quote will be higher than the ASIC quote. The reason being the deterioration of the aircraft over the last several months. We believe this deterioration is the insured's responsibility, so we do not expect the next quote will enable us to improve our previous offer – i.e.: repairs should be authorised or the insured can take advantage of our previous offer to cash settle.
>
> Speaking of which, has the insured given our previous offer any further thought?
>
> The delay is causing us significant concern. We believe we have been patient with this claim – to our own detriment. It is getting to a point where we must soon consider an alternative tact."

[97] On 15 November 2004, Hawker Pacific provided the insurer with a "Quotation Estimate for the repair of aircraft after immersion in salt water". The total of this quote was AUD$1,471,407.53 plus GST (being a total of AUD$1,618,548.28).

[98] On 17 November 2004, Mr Ellis sent Mr Stacy an email setting out Mr Ellis' review of the Hawker Pacific estimate. He attached a spreadsheet in which he summarised his adjustments "which reflect the fact that the aircraft has sat for nearly nine months and thus many components have deteriorated to the extent that they would need to be replaced as opposed to cleaning and overhaul, which would have been possible had the repair gone ahead in the early days as we proposed". His email continued:

> "The deductions I have made include adjusted labour/man-hours and items such as brake assemblies, seat rails, windows, windscreens, wing struts and main landing gear spring legs and trunions. Noel Nas was of the opinion that many of the flight and engine instruments/gauges could have been retrieved as most are sealed units, however given the passage of time it would now be doubtful that they could be saved. Because ASIC in the USA quoted to replace some of the instruments and gauges I have deducted $50,000 from the Hawker's figure of $200,000. Clearly their (sic) could have been other cost savings had the repair had gone ahead in the early days.
>
> I have also deducted the cost of the propeller and the engine assemblies adopted by Hawker's, but have added them in afterwards using my own figures for the reason the propeller has been given a preliminary clean bill of health by the propeller shop and they therefore consider it can possibly be overhauled for approximately $8,000 (strip report yet to be submitted). The engine price as estimated by Hawker's is a bit on the high side and we could do better if we were to source an engine though our own contacts.
>
> It will be noted that there were some duplications in the Hawker's estimate. Some costs had been included in the overall summary and also in the parts listing. I have therefore deleted some of the materials costs were duplicated.
>
> I have also deducted the Hawker Pacific Project Management estimate of $32,000 as I believe it is unnecessary and overstated.
>
> It will be seen that my adjustments to the Hawker's estimate gives an adjusted figure of A$1,103,690 (GST exclusive). The figure includes the cost of rectifying the rear fuselage skin and bulkhead damage which was has not been allowed for in the ASIC quote. The figure does not take into

account any pro-rata owner contributions that might apply, for example on the engine and propeller.

The adjusted figure compares most favourably with the ASIC quotation, after we added in the additional parts (refer my email of 22/03/2004) which lead to the ASIC quote increasing to US$771,443.81. At current exchange rates the ASIC quote would convert to A$1,001,875. If the additional cost to rectify the rear fuselage skins and bulkhead damage is added to the ASIC quote then it increased by A$22,120 to a total of A$1,023,995.

I believe the slightly higher Hawker's estimate (as adjusted) is due to the fact that they have quoted high in terms of their labour hours for the reason they do not have the same level of experience and knowledge of the aircraft type that ASIC has. The figure for consumables could also be trimmed back."

[99] On 19 November 2004, Mr Nash wrote to Mr Williams, enclosing a copy of the Hawker Pacific quote. This letter stated (excluding privileged parts of the letter):

"As you are aware, Hawker Pacific Pty Ltd recently carried out an assessment of the damage to VH-CYC and it has now provided us with its repair estimate. The estimate is in the amount of $1,471,407.53 (this includes a component for labour at $330,310). A copy is **enclosed** for your reference.

We have taken the opportunity to ask our loss adjuster to review the estimate.

After consideration of this estimate and the earlier quotation from Aircraft Structures International Corporation ("ASIC"), two important points emerge:

a) our initial view that the aircraft is not a total constructive loss and is economically repairable is substantiated; and

b) there has been significant deterioration to the aircraft due to the delay in resolving this claim.

Our loss adjuster has confirmed that most, if not all of the variation between the ASIC quotation and the Hawker Pacific Pty Ltd estimate is due to the worsening condition of the aircraft over the last nine months. QBE Aviation will not accept responsibility for the additional costs resulting from this delay.

We have previously expressed our concern about the likely increase to the repairs costs if those repairs were not carried out promptly. It should also have been apparent to you that a delay of several months would have had a significant impact on the ultimate repair of an aircraft that had been submerged in saltwater. We are not prepared to wait until the costs of those repairs make it uneconomic to in fact carry out the reinstatement.

In March this year, ASIC provided an amended quotation in the amount USD771,443.81, which converted to $1,056,772.34 at that time. You were asked to proceed with the repairs in accordance with that quotation.

..."

> We now require you to proceed with the repairs in accordance with the ASIC quotation (that is to a limit of $1,056,772.34). We require you to confirm your acceptance of the hull claim on this basis by no later than Friday, 26 November 2004. I confirm that a payment for loss of use will also be made following receipt of your acceptance.
>
> ...
>
> Please note that we will not be responsible for any losses resulting from:
>
> - the deterioration to the aircraft from March this year, and this includes deterioration that may arise in the future; or
> - any unfavourable movement in the US exchange rate since March 2004.
>
> These are losses that are the direct result of your refusal to accept our offer to repair the aircraft.
>
> Finally, we will not be liable to make a payment for a total constructive loss should the repair costs increase as a result of any future deterioration.
>
> We have incurred significant costs to investigate and address your concerns. We believe that we have gone beyond what is required of us under the policy. The proposals in this letter represent our final position on the claim and we are not prepared to entertain any further negotiations."

[100] Correspondence subsequently passed between the parties, particularly from the defendant with a view to eliciting a response from the plaintiff to Mr Nash's letter of 19 November 2004.

[101] No resolution was reached between the parties. It is sufficient for present purposes to note that the present proceeding was then commenced by the plaintiff filing its claim and statement of claim in this Court on 3 March 2005.

Some matters not in issue

[102] It is convenient, at this point, to list some of the facts and propositions which are not in issue on the pleadings:

(a) At all material times, the plaintiff was the holder of the certification of registration for the Aircraft;

(b) Prior to 8 February 2004 there was a certificate of airworthiness ("C of A") issued in respect of the Aircraft;

(c) Prior to 8 February 2004, the Aircraft was registered as a Class A aircraft for commercial purposes for transporting persons and cargo for hire or reward within the provisions of the *Civil Aviation Regulations* 1988 (Cth) ("the CAR");

(d) After the incident, the repair of the Aircraft following salt water immersion constituted a "major repair" within the provisions of the Federal Aviation Regulation USA ("the FAR");

(e) The Aircraft had to be repaired so that it would be in a condition "at least equal to its original condition" as provided for in the FAR;

(f) The Aircraft had to be repaired in accordance with "approved data" within the provisions of the FAR and in accordance with "approved maintenance data" within the provisions of the CAR ("Approved Data");

(g) CASA would not issue a C of A, or lift the suspension of the C of A, in respect of the Aircraft unless it was satisfied that:

(i) the repair of the Aircraft was done in accordance with Approved Data;

(ii) the Aircraft was in a condition for safe operation; and

(iii) there was in place an ongoing airworthiness maintenance and inspection programme in respect of the Aircraft (alleged by the plaintiff to have needed to be an "amended" programme).

(h) CASA would not issue an air operator's certificate ("AOC") pursuant to the provisions of the *Civil Aviation Act* 1988 (Cth) ("the CAA"), or otherwise allow the Aircraft to be returned to service as a Class A aircraft for scheduled public transport activities and used for business or commercial operations, unless it was satisfied that:

(i) the repair of the Aircraft was done in accordance with Approved Data;

(ii) the Aircraft was in a condition for safe operation; and

(iii) there was in place an ongoing airworthiness maintenance and inspection programme in respect of the Aircraft (alleged by the plaintiff to have needed to be an "amended" programme).

(i) The Aircraft could not be returned to service for scheduled public transport activities, and used for business or commercial operations as contemplated by the Policy, without the issue by CASA of a C of A and an AOC;

(j) The Maintenance Manual ("MM") and the Structural Repair Manual ("SRM") of the manufacturer, Cessna, did not provide any specifications, instructions or guidance with respect to the disassembly, repair and return to service of an aircraft after salt water immersion;

(k) Cessna did not provide any ongoing airworthiness maintenance and inspection programme for any aircraft that had been submerged in any kind of water;

(l) FAA Advisory Circular AC43-13-1B contained s 14 Chapter 6 entitled "Handling and care of aircraft recovered from water immersion";

(m) AC43-13-1B was "Approved Data" for the purposes of repair of the Aircraft following the ditching. The defendant asserted, however, that this Advisory Circular was not the only or exclusive source of Approved Data pursuant to which the Aircraft could be repaired after the ditching.

The plaintiff and the Aircraft

[103] Mr Williams acquired his shares in the plaintiff in March 2002, and became Chief Executive Officer of the company. He has continued in that role since that time. He described the nature of the business being conducted by the plaintiff after he acquired the business as providing a mail service around Cape York, search and rescue services for the north-eastern region of Australia, providing transport for the Magistrates Court and other court circuits on Cape York and surrounding areas, general charter services for major corporations and the mining industry, regular public transport services in the Torres Strait, and specialised scientific survey services in low-lying areas of Papua New Guinea. At that time, the company had a very large hanger and office complex at the Cairns Airport. It flew seven aircraft, and employed around 25 staff, who were engaged in flying operations, engineering and administration. The plaintiff had its own maintenance division and held the necessary certificate of approval to perform aircraft maintenance.

[104] Mr Williams described the Cessna Caravan model aircraft as having a particular ability to service remote airstrips, having an ability to land on short dirt airstrips. He said the Aircraft also provided substantial cargo capability. It was licensed to carry up to 12 passengers. The Aircraft generally operated below 10,000 feet, but it was equipped with oxygen systems which enabled it to go up to 30,000 feet. The reason for this was that the Aircraft was specially equipped for aerial photography, and had a special camera hatch modification to enable aerial mapping to be done.

[105] Mr Williams said that the Aircraft was quite different from a regular Cessna Caravan because it was an Approved Single Engine Powered Turbine Aircraft ("ASEPTA"). This characteristic, in short, allowed the Aircraft, as a single engine aircraft, to be operated on instrument flight rule conditions, thereby enabling it to be flown in cloud, at night, and in reduced visibility weather. Mr Williams said that ASEPTA qualification requires quite substantial modification of the aircraft by duplication of a number of its systems, a higher standard of avionics and instrumentation, weather radar, and other such technical requirements.

The insurer's liability

[106] The final version of the plaintiff's pleading (the fourth further amended statement of claim) sought the following relief:

> "(1) Damages for breach of the duty of utmost good faith, contract or negligence:
>
> (a) in the sum of $1,807,367.88; and
>
> (b) a further amount for loss of income and/or loss of use to be determined by the Court;
>
> (2) Declarations that:-
>
> (a) by reason of the Ditching;
>
> (i) the repair of the Aircraft is impractical, uneconomic and unreasonable; or
>
> (ii) the Aircraft is an actual loss or, alternatively, a constructive total loss;

(b) the Defendant is, accordingly, obliged under Section 1, clause 1(a) of the Policy, to pay to the Plaintiff the Agreed Value of the Aircraft, namely $1,800,000.00;

(c) alternatively, the Defendant has, by its conduct, opted, under Section 1, clause 1(a) of the Policy, to pay the Plaintiff the Agreed Value of the Aircraft, namely $1,800,000.00 (and an order for the payment of that sum by the Defendant to the Plaintiff):

(3) Declarations that:

(a) the Defendant failed to act with the utmost of good faith towards the Plaintiff;

...

(5) Exemplary damages:

(6) Interest pursuant to section 57 of the *Insurance Contracts Act*, or alternatively, s.47 of the *Supreme Court Act* 1995 (Qld);

(7) Costs."

[107] As the matter was argued before me, however, the plaintiff identified the following principal issues:

(a) Whether the Aircraft was a total loss or constructive total loss under the Policy which obliged the defendant to pay the plaintiff the agreed value of $1,800,000;

(b) Whether the Aircraft could have been repaired or restored to its pre-accident condition;

(c) Whether the defendant made an election under the Policy to repair the Aircraft;

(d) Whether the defendant breached a duty of utmost good faith, breached the contract of insurance, or acted negligently;

(e) Whether the plaintiff failed to act with utmost good faith;

(f) The loss and damage recoverable by the plaintiff;

(g) Whether the plaintiff is entitled to indemnity costs.

[108] I should observe that resolution of issues (a) and (b) would require recourse to the expert evidence which was led by the parties on the questions of what repair or restoration works would or could have been possible to bring this aircraft back to the condition, and having the certifications it had, prior to the ditching, what did and did not constitute "Approved Data" for that purpose, and whether the works referred to in the ASIC repair estimate of 16 February 2004 would have achieved the necessary result.

[109] However, counsel for the plaintiff submitted (and counsel for the defendant did not demur from this position) that it was appropriate for me to consider issue (c) first,

because if the plaintiff succeeds on that issue then it is not necessary for me to determine issues (a) and (b).

[110] On the election issue, the plaintiff's submissions, in brief, were as follows:

- that under section 1 clause 1(a) of the Policy, the defendant had three options, namely to "pay for" accidental loss of or damage to the Aircraft, to "repair" accidental loss of or damage to the Aircraft, or "pay for the repair of" accidental loss of or damage to the Aircraft, in each case up to an amount not exceeding the agreed value of $1,800,000;

- that choosing between these options required the defendant to make a clear and unequivocal election between these different contractual rights within a reasonable time of the claim having been made; and

- the defendant made no election within a reasonable time, or at all, and as a consequence the insurer was and is required to pay the agreed value of $1,800,000.

[111] The defendant was quite clear in the case it advanced. The submissions by counsel for the defendant opened with the following:

> "In short summary, the defendant's case is that it exercised the election under the Policy to repair the plaintiff's Aircraft. By that election, the Policy became relevantly a contract to repair the Aircraft. Cape York Airlines (CYA) was obliged to make the Aircraft available to be repaired pursuant to the contract. CYA refused to do so. It thereby repudiated the repair contract. The consequence is that the defendant has no further liability in respect of the claim."

[112] This issue was squarely raised, and joined, on the pleadings. Paragraph 14 of the statement of claim pleaded:

> "14(a) QBE did not exercise any option under Section 1 Clause 1 of the Policy to repair the Aircraft, or pay for the repair of the Aircraft, or pay the Agreed Sum within a reasonable time of CYA's making the Claim as referred to in paragraph 20 herein, or at all."

[113] Paragraph 10A of the eighth further amended defence responded:

> "10A(a)(i) The defendant denies the allegations in paragraph 14(a) of the Statement of Claim that it did not exercise any option under Section 1 Clause 1 of the Policy and believes the allegation to be untrue because the Defendant exercised the option to repair the Aircraft."

[114] The defendant's case, consistent with that pleading, was that it had made an election, namely by choosing the option to repair. Specifically, the defendant submitted that it made the election to repair and gave notice of that election by its letters of 26 February 2004, 22 March 2004 and 24 March 2004. The defendant's position, as confirmed in its counsel's submissions, was that, having exercised the election to repair the Aircraft, then it was obliged to repair the Aircraft so that it could be returned to service with a C of A. The position advanced by the defendant was that once the defendant elected to repair, it was the defendant which was on risk – it was obliged to undertake the repairs. The defendant expressly conceded that if such repairs had been unsuccessful, the plaintiff would have been entitled to damages for the failure of the defendant to return to it the Aircraft in proper condition, which would be calculated by reference to the agreed sum under the Policy. It also conceded that the plaintiff would,

in such circumstances have been entitled to damages for any consequential loss caused by a breach of the repair obligation.

[115] The central question then, on the case as defended by the defendant, is whether the three letters on which the defendant relies constitute evidence of the making of and communication of an unequivocal election to repair. If not, then the ineluctable consequence is that the plaintiff is entitled to recover $1,800,000 as the "Amount Insured" under the Policy.

[116] Under section 1 clause 1 of the Policy, the defendant had the option of electing between three modes of performance of its obligations under the Policy. As was observed by Dutney J in *Surfers Paradise Investments Pty Ltd (in liq) v Davoren Nominees Pty Ltd*[1] a convenient starting point is to refer to the judgment of Stephen J (with whom McTiernan J agreed) in *Sargent v ASL Developments Ltd*:[2]

> "The words or conduct ordinarily required to constitute an election must be unequivocal in the sense that it is consistent only with the exercise of one of the two sets of rights and inconsistent with the exercise of the other; thus for a lessor to continue to receive rent under a lease will be consistent only with his rights as lessor and inconsistent with the exercise of a right to determine the lease ... However, less unequivocal conduct, only providing some evidence of an election, may suffice if coupled with actual knowledge of the right of election ... There need be no expressed intention to elect, nor will an express disclaimer of such an intention be of any avail in preserving one right if in fact there be an exercise of another inconsistent right ... For an election there need be no actual, subjective intention to elect ... , an election is the effect which the law attributes to conduct justifiable only if such an election had been made ..."

[117] Dutney J also[3] referred to the judgment of Mahoney JA (with whom Street CJ agreed) in *Champtaloup v Thomas*[4] in which his Honour identified two types of election:

> "First, it may be exercised by a conscious act of election. The party having the right may actually determine on his election and, in so far as communication may be necessary ... communicate it to the other party, and an election is thereby made.
>
> ...
>
> Second, the party may do some act which is of such a nature that, irrespective of his actual intention or determination, the law treats him as having exercised his election. This imputation of an election may occur even though the party does not subjectively know that he has the right to elect, or even where he does not intend to elect."

[118] A party called on to make an election is in a situation in which that party is "confronted" with a number of mutually exclusive courses of action (specifically in this case under a contract) between which the party must, in fairness to the other party,

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1 [2004] 1 Qd R 567 at [31].
2 (1974) 131 CLR 634 at 646 (citations omitted).
3 [2004] 1 Qd R 567 at [32].
4 [1976] 2 NSWLR 264 at 274-275.

make a choice. The choice is between inconsistent rights and involves not merely the affirmation of the chosen course but the abandonment of the others.[5]

[119] When a party is faced with the necessity to make an election then, in the absence of any specific contractual provision, such an election is required to be made within a reasonable time. As was said by Jackson J (with whom Nevile J agreed) in *Lake v Hartford Fire Insurance Co Ltd*:[6]

> "As applied to an insurer's option to pay the loss or to reinstate or repair, the doctrine [of election] is that the insurer is free to decide what he will do, and unless a time is fixed by the policy, he has a reasonable time within which to come to his decision. He may make a decision expressly or it may be implied from his conduct."

[120] But it is also clear that a party purporting to make an election can only make a choice between the suite of options available under the relevant contract. In a case such as the present, where a suite of choices is available, the electing party is plainly limited in its range of choices. A purported election by it of an option which is not within the available range is no election at all.

[121] In the present case, it is thus necessary to look carefully at the letters which were expressly, and solely, relied on by the defendant to ascertain whether, as the defendant asserts, these letters constituted a clear and unequivocal communication of the election of a choice which was available to the defendant under the policy or whether, as the plaintiff contends, there was, in truth, no election made by the defendant.

[122] Dealing first with the letter of 26 February 2004, the defendant asserts that this letter constituted its unequivocal notice of its election to repair. A close reading of the letter, however, reveals that it is no such thing. The letter, and its enclosed "Authority to Repair":

- enclosed a copy of the ASIC repair estimate;

- identified the option to "... pay for, repair, or pay for the repair of accidental loss of or damage to the Aircraft ...";

- asserted that, as the Aircraft's post-damage condition would be valued at no more than AU$150,000, it was clear that the Aircraft was repairable "based on the abovementioned estimate";

- asserted that the defendant's inquiries led it to be satisfied as to the integrity and capability of ASIC to complete the work, and that the work "will be carried out in accordance with the Cessna Structural Repair Manual (SRM) and the FAA repair station standards, and be returned to service with CASA acceptable paperwork";

- asserted that CASA had "no concerns" with the process proposed by the defendant;

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[5] *Immer (No 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW)* (1993) 182 CLR 26; (1993) 67 ALJR 537 per Deane, Toohey, Gaudron and McHugh JJ at 544-546; *Freshmark v Mercantile Mutual Insurance (Australia) Ltd* [1994] 2 Qd R 390 per Fitzgerald P at 393-394.

[6] [1966] WAR 161 at 166.

- referred to the plaintiff's obligations to strip the interior trims, etc and ensure the Aircraft had been washed with fresh water and sprayed with kerosene;

- requested that the plaintiff "**please instruct Aircraft Structures International Corporation to proceed with the repairs to the Aircraft as per their estimate**";

- requested the plaintiff sign the "Authority to Repair" by which the plaintiff authorised ASIC "to proceed with repairs to" the Aircraft, and required the plaintiff to sign an acknowledgment that "all other costs and non-accident related repairs will be borne by" the plaintiff;

- asserted that the defendant's interest was "**limited to the cost of the accident repairs as quoted** in accordance with your entitlement under the Policy";

- asserted that the plaintiff would be required to pay not only the excess but also would be required to pay "contribution towards lifed items **and any other work to bring the Aircraft to an airworthy condition** to Aircraft Structures International Corporation on completion of the repairs".

[123] This letter was not, in my view, clear and unequivocal notification of the option "to repair" given under the Policy. What it was, rather, was a request by the defendant for the plaintiff to instruct ASIC "to proceed with the repairs to the Aircraft as per their estimate". That was not one of the options within the suite available to the defendant under the Policy.

[124] It will be apparent from the extensive statement of background that I have set out above that the defendant's request for the plaintiff to authorise ASIC to "proceed with the repairs to the Aircraft as per their estimate" led to considerable consequential debate between the parties as to whether the repairs referred to in the ASIC repair estimate would ultimately yield the return of the Aircraft in its pre-ditching condition. It is unnecessary for present purposes to decide that point because, in any event, the one thing that was clear on the face of the ASIC "repair estimate" of 16 February 2004 is that that is precisely what the document was – it was nothing more than a "repair estimate" given by an aircraft repairer with experience in the field but who had not had the opportunity to inspect the Aircraft and ascertain properly the nature and extent of the works which would be required to be undertaken. In evidence before me, Mr Stowers described the repair estimate as giving a "ball park figure", and acknowledged that things might change when the plane was stripped down. He affirmed that the repair estimate was not a promise to repair the plane for the amount stated. He said "I never gave a binding quote".[7]

[125] Mr Stacy also referred to the repair estimate being a "quote ... within insurers' and engineers' ball park figures"[8] and despite seeking to defend it as what he described as a "creditable quote" ultimately conceded agreement with the proposition that the repair estimate from ASIC was a "non-binding guestimate". This evidence is hardly surprising, given that Mr Ellis' initial request to Mr Stowers had been for Mr Stowers

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7 T 5-68.58.

8 T 6-70.60.

to provide "a ball park figure of the sort of cost that would be involved to do a complete rebuild".[9]

[126] It is also abundantly clear from the contemporaneous correspondence that the defendant was seeking to employ the tactic of fixing the plaintiff with the quantum of ASIC's repair estimate for the purpose of negotiating a cash settlement. There is, of itself, nothing objectionable about the defendant seeking to compromise on its rights once it has properly made an election. That is clearly not what was happening here. But whatever extra-contractual manoeuvring the insurer was seeking to engage in for the purpose of snaring a favourable settlement is irrelevant to the present question of whether the letter of 26 February 2004 was evidence of the defendant having elected to repair the Aircraft. For the reasons I have given, I consider that it was not.

[127] The second letter relied on by the defendant as evidence of having made and communicated an election to repair was that sent on 22 March 2004. In that letter, the defendant:

- advised of Mr Stowers' response to the further equipment and other costings, citing a "repair costing including freight" as having risen to AUD$1,056,772.34;

- reiterated the options to "... pay for, repair or pay for the repair of accidental loss of damage to the Aircraft ...";

- repeated the request that the plaintiff "instruct Aircraft Structures International Corporation **to proceed with the repairs to the Aircraft as per their estimate**";

- enclosed the same form of "authority to repair" which the defendant asked the plaintiff to pass on to ASIC and send a copy to the defendant;

- again asserted that the defendant's interest was "limited to the cost of the accident repairs as quoted", as it had in its previous letter.

[128] Once again, what was being offered in this letter was for the plaintiff to submit the Aircraft to ASIC for repair with the defendant seeking to limit its exposure under that offer to "the cost of the accident repairs as quoted". Clearly, that was not one of the available options under the Policy. Indeed, it stands in stark contrast to the position as articulated by counsel for the defendant in submissions namely that:

> "Once an insurer has made an election to repair, the insurer is obliged to repair even if the cost exceeds the agreed sum. ... This is the risk which the insurer takes by electing to repair."

[129] Those propositions, as a matter of law, are undoubtedly correct. But that is not, on any fair reading of either of the two letters to which I have already referred, the option which the defendant was placing before the plaintiff as its purported election under the Policy. I therefore find that the letter sent on 22 March 2004 was not clear and unequivocal notification of the defendant's election of an option available to it under section 1 clause 1 of the Policy.

[130] The third letter relied on by the defendant is that dated 24 March 2004. By this time, Mr Stacy had received the correspondence from Mr Williams (via Mr Palham) setting out in detail Mr Williams' concerns about the ASIC repair process. The defendant's

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[9] See email of 12 February 2004.

letter of 24 March 2004 then sought to address Mr Williams' concerns, including by Mr Stacy asserting that what he was by then describing as a "repair quote" from Mr Stowers included ASEPTA items and approval. In this letter, Mr Stacy "assured" Mr Williams that "we have gone into the acceptability of ASIC's repairs scheme thoroughly" and stated that CASA would accept the FAA approval of ASIC's repair station and approvals because they were "being carried out in accordance with the Cessna Structural Repair Manual (SRM)". This letter also asserted that Cessna Product Support "have assured us that they accept the repair process as carried out by ASIC in accordance with the Maintenance & SRM".

[131] These last-mentioned statements by Mr Stacy in this letter were quite disingenuous, given the contents of the letter of 24 March 2004 he had received from Mr Howard of Cessna, in which Mr Howard had confirmed that Cessna's Maintenance Manual and Structural Repair Manual did not cover the disassembly, repair and return to service after a salt water immersion.

[132] The letter of 24 March 2004 concluded by asserting that the defendant would return the Aircraft "in the same or in this case a better condition" as it had been previously.

[133] The defendant asserts that this letter was evidence of the defendant having elected to repair the Aircraft under the Policy. It was nothing of the sort. As I have already found, the defendant sought to advance an option which was not available under the Policy, being an offer which mandated repair of the Aircraft in accordance with the ASIC repair estimate and nothing else. This letter was clearly a response to queries and challenges raised by the plaintiff in the context of that offer made by the defendant. The letter was not either by itself or in the context of the dealings between the parties a clear and unequivocal election of the option to repair under the Policy. At best, it was an attempt to persuade the plaintiff to accept the offer which had been put by the defendant in its previous letters.

[134] As I have said, the case expressly advanced by the defendant, both on the pleadings and in argument before me, was that the defendant did exercise the option to repair the Aircraft and that the evidence of the exercise of that election is contained in the three letters to which I have just referred. No case was advanced on behalf of the defendant that one need look any further than those three letters for evidence of the election. It was not suggested, for example, that this is a case in which the defendant acted in such a way as to require the defendant to have been treated as having exercised the election to repair. Such a case would, in any event, have been exceedingly difficult, if not impossible, for the defendant to run given that, as is clear from the correspondence, its tactic was to make the (illegitimate) offer to have ASIC repair the Aircraft in accordance with the repair estimate, while attempting to have the plaintiff accept a cash settlement. In any event, and despite the pleaded and argued case, it would appear that the defendant itself was, at the very least, not clear at the time as to whether it had in fact exercised the option to repair. In his facsimile of 3 August 2004 to the plaintiff, Mr Nash referred to having the option to "pay for the repair of" the Aircraft. This is not the option which was available to the defendant, and which the defendant says it exercised.

[135] In my opinion, the correct position with respect to this matter is summarised in the following submission by counsel for the plaintiff (omitting references to authority):

> "Further, if QBE had made an election to repair then it did not need to go through the charade of providing to CYA the ASIC repair estimate at all – it merely had to effect the repairs. QBE would have been entitled to take

> and reinstate the Aircraft and CYA could not legally prevent it from doing so. There is no evidence of any unconditional demand upon CYA to deliver up the Aircraft, nor any refusal by CYA to do so."

[136] For completeness, I should note that neither of the deliveries of the "authority to repair" documents constituted unconditional demands for the plaintiff to deliver up the Aircraft to enable the defendant to fulfil its obligations under the election to repair. Indeed, Mr Stacy confirmed in evidence that there was no obligation under the Policy for the plaintiff to sign such a document. The best Mr Nash could do was assert that the defendant could not repair the insured's aircraft without the plaintiff's authority, but was unable to give any sensible explanation for this proposition.

[137] It is, however, unnecessary for me to say anything further in respect of those matters. The defendant does not, as I have already said, contend this to be a case in which the election ought be implied.

[138] For the reasons I have given above, I am quite satisfied that none of the three letters on which the defendant relied constitute evidence of the defendant having made the election to repair which was available to it under the terms of the Policy. It follows, therefore, that no election was made by the defendant, and certainly none was made within a reasonable time after the claim was made. The consequence is that the defendant is liable to indemnify the plaintiff for the Agreed Value of the Aircraft under the Policy.

[139] Having determined that the defendant did not make an election to repair under the Policy, it is, as I mentioned above, unnecessary for me to consider the alternative bases on which the plaintiff advanced its claim. Indeed, it is probably undesirable that I do so. Analysis of the plaintiff's alternative claims would necessarily involve the articulation of findings with respect to the conduct of this claim by the defendant. Particularly insofar as it was contended that the defendant acted without good faith towards the plaintiff, it would be necessary to make findings about the credit of the defendant's witnesses and the credit worthiness of the defendant's conduct. As such findings are not necessary to be made for the purposes of resolving this case, I think it undesirable to do so.

[140] For completeness, I should mention that a significant part of this trial, and the preparation for trial, was devoted to issues of expert evidence, particularly on the following issues:

- whether the repairs identified in the ASIC repair estimate would be sufficient to restore the Aircraft to its pre-accident condition with the necessary certificate of airworthiness and other certification;

- whether it would have been possible or feasible in any event for such restoration to occur;

- whether the Aircraft, if restored, would have required additional ongoing maintenance.

[141] The experts, Mr Edwards (licensed aircraft maintenance engineer of Multitech), Mr Llewellyn (aeronautical engineer), Mr Whitney (aeronautical engineer) and Mr Gatz (consultant structural designated engineering representative) provided reports,

including a number of joint reports, and gave their evidence before me concurrently.[10] Mr Stowers gave evidence about the work encompassed within his repair estimate and Mr Thomas of CASA gave evidence as to regulatory requirements for the issuing of a certificate of airworthiness.

[142] It ultimately emerged as effective common ground between the experts that, viewed in isolation, the ASIC repair estimate did not comprehend the works and processes which would have been required to restore the Aircraft to its pre-accident condition. Mr Llewellyn and Mr Whitney made the following agreed statement in their joint report:

> "As presented in its estimate, the ASIC decontamination process was insufficiently detailed for the purposes of airworthiness approval, and fell short of addressing the issue of any approved amendment to the Aircraft's system of maintenance to ensure that the structural integrity of the Aircraft was maintained in the long term, following immersion."

[143] The expert evidence was then principally concerned with the processes which could or might have been followed for the purpose of obtaining the necessary FAA's approvals and the requisite CASA certifications upon the Aircraft's return to Australia, as well as any necessity to formulate a specific ongoing maintenance programme for this aircraft as part of that process.

[144] As I have noted, the plaintiff has expressly submitted that there is no need for me to resolve these matters in view of the findings I have made with respect to the election issue. Counsel for the defendant submitted:

> "50. It is the defendant's submission that it is not necessary to determine whether the proposed repair process as set out in the ASIC repair estimate (part of Exhibit 16), the ASIC document of 19 February 2004 (Exhibit 74) and the evidence of Mr Stowers ... would have been successful in repairing the aircraft so that it could be returned to service. This is so for two reasons. If repair, per se, was not impossible, as discussed above, then the defendant insurer took the risk. It was obliged to repair. If it needed to have the repairer perform a different and more expensive operation then that is what it was obliged to do.
>
> 51. Secondly, as Mr Whitney said in evidence, the repair estimate was just that. It did not purport to be a fully detailed specification of the repair work. It could not be expected to be that because additional works might be required upon disassembly and inspection of the aircraft."

[145] To that submission I would only add that Mr Whitney's oral evidence before me went further to say that until the Aircraft had been taken to America, stripped down and looked at, then it would have been impossible to say whether the Aircraft could have been repaired or not.[11]

[146] It is, however, unnecessary for me in these circumstances to say anything further about the expert evidence.

Damages

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[10] Mr Gatz participated by video link.

[11] T 9-13.30-40.

[147] Clearly enough, the plaintiff will be entitled to be awarded the sum of $1,800,000.

[148] The plaintiff also has a claim for $7,367.88 for recovery expenses incurred by it in connection with the cleaning of the Aircraft done by the plaintiff at the defendant's request. The plaintiff's entitlement to recover this under the Policy was not seriously disputed.

[149] The principal points of issue were claims by the plaintiff for loss of income and loss of use as a consequence of the Aircraft being taken out of service. These items were claimed by the plaintiff to be some $324,270 per annum.

[150] Needless to say, the plaintiff bore the onus of proof in respect of these aspects of its claim. As the case unfolded, however, it became apparent that evidence originally given by Mr Williams on critical aspects of these claims was at least suspect, if not plain wrong, that the plaintiff had failed to make disclosure of documents (including parts of its own accounts) which were directly relevant to these claims, and that much of this documentation, when it was disclosed in the course of the trial, further undermined the credibility of the claims being made by Mr Williams on behalf of the plaintiff. Such were the inroads made into these components of the plaintiff's claim that counsel for the plaintiff, doing their best to salvage the plaintiff's position on these points, were driven effectively to abandon their arguments that the plaintiff had proved its case for recovery of damages for lost income and lost use and to submit that:

- it was "difficult for CYA to establish with mathematical precision what actual loss of profits were attributable to not having the Aircraft available"; and

- this was "really a 'loss of opportunity' to earn income case, and precise mathematical calculations are not possible or appropriate".

[151] The plaintiff's pleaded case on these claims was as follows:

> "50A. Further:
>
> a) since about 1980 CYA (by its current name and by its previous names of Janlin Pty Ltd and Hevi Lift Pty Ltd) has traded as Cape York Air;
>
> b) CYA, trading as Cape York Air, operated its aircraft (including the Aircraft) for reward throughout Cape York Peninsula providing, inter alia, the following services (**"the air services"**):-
>
> i) the delivery of passengers, goods and mail pursuant to agreements with the Commonwealth of Australia (via the Department of Transport and Regional Services and its predecessors) and the Australian Postal Corporation (and its predecessors) during the period from about 1980 to 1 November 2004;
>
> ii) the delivery of passengers, goods and mail by way of private charter during the period since about 1980;
>
> iii) the delivery of passengers on behalf of the Queensland Government in respect of the Cairns Magistrates Court during the period since about 1992;

iv) search and rescue operations pursuant to agreements with the Commonwealth of Australia (via the Department of Transport – Australian Maritime Safety Authority and its predecessors) during the period since about 1994;

c) following the Ditching of the Aircraft, CYA did not have the financial resources to lease, hire or otherwise acquire a suitable alternative aircraft for use in CYA's business to, inter alia, provide the air services;

d) by reason of the failure of QBE to accept the claim as an actual loss or a constructive total loss and to pay to CYA the insured sum in a timely way, and/or the failure of QBE to pay to CYA an amount in respect of the loss of use of the Aircraft in a timely way:-

i) CYA was unable to lease, hire or otherwise acquire a suitable alternative aircraft for use in CYA's business to, inter alia, provide the air services;

ii) CYA was unable to continue to provide the air services;

iii) CYA was forced to sell its hangar, assets and remaining aircraft and discontinue its operation by about November 2006.

51. It was within the contemplation of the parties when the Policy was entered into, that:-

a) the funds received by way of indemnification for the loss of an aircraft (including the Aircraft) would be used by CYA to purchase, lease, hire or otherwise acquire a suitable alternative aircraft for use in CYA's business to, inter alia, provide the air services to derive income;

b) the funds received by way of loss of use in respect of the loss of an aircraft (including the Aircraft) would be used by CYA to lease, hire or otherwise acquire a suitable alternative aircraft for use in CYA's business to, inter alia, provide the air services to derive income;

c) the failure to pay to CYA the funds referred to in (a) or (b) was likely to cause CYA such financial hardship that (as was the case) it would have to sell its hangar, assets and remaining aircraft and discontinue its operation.

51A. At all material times prior to the Ditching, QBE was aware or ought to have been aware of the matters referred to in paragraphs 50A(a), 50A(b), and 51(a) to 51(c) herein.

PARTICULARS

(1) From about 1980 to about 2001 the aircraft operated by CYA were insured with Australian Aviation Underwriting Pool (**"AAUP"**).

(2) In about 2001 QBE took over (or otherwise acquired) the business and business records of AAUP including the business and business records relating to the insurance of the aircraft operated by CYA.

(3) From about 2001 the aircraft operated by CYA (including the Aircraft) have been insured by QBE.

(4) From about 2001 QBE frequently visited and inspected CYA's facilities and the aircraft operated by it.

(5) From about 2001 QBE has been familiar with CYA's business (including its provision of the air services) for the period since about 1980.

(6) In or about September 2003 CYA (through its then broker, Toby Palham of Heath Lambert) negotiated with QBE so that the Policy would include cover for loss of use of certain aircraft (including the Aircraft) operated by CYA.

52. By reason of the failure of QBE to accept the claim as an actual loss or a constructive total loss and to pay to CYA the insured sum in a timely way:-

a) CYA has been deprived of the opportunity to purchase, lease, hire or otherwise acquire a suitable alternative aircraft for use in CYA's business to, inter alia, provide the air services to derive income;

b) CYA was unable to continue to provide the air services;

c) CYA was forced to sell its hangar, assets and remaining aircraft and discontinue its operation by about November 2006;

d) CYA has lost income and continues to lose income, of at least $324,270.00 per annum.

PARTICULARS

(i) in respect of the air services referred to in paragraph 50A(b)(i) herein:-

Gross receipts	$1,000 per hour
Costs	$750 per hour
Nett income	$250 per hour
x annual hours of use	700 hours x $250 per hour - $175,000.00

(ii) in respect of the air services referred to in paragraphs 50A(b)(ii) to (iv) herein:-

Gross receipts	$1,340 per hour
Costs	$750 per hour
Nett income	$590 per hour
x annual hours of use	253 hours x $250 per hour - $149,270.00

iii) total of (i) and (ii) = $324,270.00 per annum.

52A. Further and in the alternative to paragraph 52 herein, by reason of the failure of QBE to pay to CYA an amount in respect of the loss of use of the Aircraft in a timely way:-

a) CYA has been deprived of the opportunity to lease, hire or otherwise acquire a suitable alternative aircraft for use in CYA's business to, inter alia, provide the air services to derive income;

b) CYA was unable to continue to provide the air services;

c) CYA was forced to sell its hangar, assets and remaining aircraft and discontinue its operation by about November 2006;

d) CYA has lost income and continues to lose income, of at least $324,270.00 per annum.

PARTICULARS

CYA relies upon the particulars to paragraph 52 herein.

52B. Further and in the alternative to paragraph 52A herein, if (which is denied) CYA is not entitled to indemnity under Section 1 of the Policy arising from a total or a constructive total loss of the Aircraft, then it is entitled to payment from QBE of an amount of $135,000.00 in respect of the loss of use of the Aircraft.

PARTICULARS

90 days x $1,500.00 per day - $135,000.00"

[152] The starting point for the plaintiff in respect of these claims was the assertion by Mr Williams in evidence of the very great importance of this Aircraft to the plaintiff's business. In evidence in chief he said:

> "... It is fair to say that Cape York Airlines was fairly and squarely built around the Cessna Caravan because of its capabilities for servicing the region. The Aircraft generated approximately 50% of the company's revenue so it was a major revenue stream. It was pivotal and central towards us holding and continuing, I guess, to hold the mail service contract through the region. The mail service being one that typically involved a mixture of mail obviously, passengers and cargo, and so we needed to cope with quite significant demands on that. Very often not weight based but cubic based so you needed a large aircraft in that respect."

[153] It will be seen from the extract from the statement of claim I have set out above that the following elements were central to the claims for lost income and loss of use of the Aircraft:

(a) After the ditching, the plaintiff could not, and did not have the financial capacity to, lease, hire or otherwise acquire an alternative aircraft to provide the "air services" to derive income;

(b) The "air services" which the plaintiff was restricted or prevented from engaging in, and thereby earning income from, were:

(i) delivery of passengers, goods and mail pursuant to agreements with the Commonwealth of Australia and Australia Post.

(ii) the delivery of passengers, goods and mail by way of private charter;

(iii) the delivery of passengers on behalf of the Queensland Government in respect of the Cairns Magistrates Court;

(iv) search and rescue operations pursuant to agreements with the Commonwealth of Australia.

(c) By reason of the defendant's failure to accept the claim, the plaintiff was "forced to sell its hangar, assets and remaining aircraft and discontinue its operation by about November 2006".

[154] As Mr Williams' evidence unfolded, however, and as further documents were produced, the basis for these underlying assumptions fell away or were completely removed.

[155] In respect of the contention that the plaintiff was deprived of an opportunity to "lease, hire or otherwise acquire a suitable alternative aircraft" for use in its business, it is sufficient to find that the plaintiff did not lead any evidence whatsoever to establish that such an alternative aircraft was, in fact, available to it at the time.

[156] Before turning to examine the "air services", it is necessary to record some further evidence which emerged during the course of Mr Williams' cross-examination.

[157] It will be recalled that one of the particular characteristics of this Aircraft was that it held ASEPTA approval from CASA. On 20 June 2003, the plaintiff requested an extension of the ASEPTA approval from CASA, but CASA only granted an extension of the existing approval until 26 December 2003. The Aircraft did not hold ASEPTA approval at the time of the ditching. This meant that it could not be used for regular public transport. In his evidence, Mr Williams sought to explain that the lack of a further renewal of the ASEPTA approval after 26 December 2003 was to do with a lack of resources issue within the CASA office, and sought to give me the impression that this issue was really an administrative delay caused within CASA's office and by reason of the intervention of the Christmas holiday period.

[158] There was, however, clearly far more to this issue than Mr Williams was prepared to volunteer. In fact what had happened was that in March 2003, CASA gave the plaintiff notice that the plaintiff's Air Operator's Certificate ("AOC") was varied so as to expire in December 2003, and this notice identified conditions which had to be fulfilled in order for the plaintiff to maintain its AOC after December 2003. The plaintiff's AOC was endorsed to enable it to engage in Regular Public Transport (RPT"), i.e. carry fare-paying passengers. Subsequent correspondence was engaged in between the plaintiff and CASA and in October 2003 CASA conducted an audit of the plaintiff's operations. CASA issued an audit report indicating, in brief, that it was not satisfied that the plaintiff was complying with the conditions imposed.

[159] On 19 December 2003, CASA wrote to Mr Williams giving him "notice of proposed action to vary, suspend or cancel" the plaintiff's AOC. The notice was said to flow

from, inter alia, audits undertaken by CASA staff on 19 November 2001, 28 March 2002 and 18 October 2002 in relation to the company's records which raised "serious concerns about the safety of the company's operation due to non-compliance found on a regular basis" in relation to a number of specified matters. The notice referred to a "show cause" notice which had been issued to the plaintiff in November 2002, which was responded to by the plaintiff on 19 December 2002. It referred to a "show cause conference" which had been held between CASA and Mr Williams on 30 January 2003, in the course of which Mr Williams provided CASA with certain further information. After that conference, CASA issued a notice dated 26 March 2003 by which it varied the plaintiff's AOC such that it would lapse on 26 December 2003 and specified that "subsequent issue of the AOC at the end of this period depends upon [the plaintiff] being able to satisfy CASA that ... it has met undertakings made by Arthur Williams to CASA" at the show cause conference. CASA's notice of 19 December 2003 referred to an audit conducted by CASA on 14 May 2003, and a further spot check audit in September 2003, which resulted in CASA issuing a "request for corrective action". It referred to Mr Williams' challenge to the request for corrective action and to subsequent correspondence and attendance by CASA for the October audit. The notice of 19 December 2003 referred to the conditions contained in the notice of 26 March 2003, and stated:

> "52. Whilst some progress has been made to meet those conditions, on the basis of the facts and circumstances set out above the company has not satisfied CASA that:
>
> (i) it's Training and Checking organisation under CAR 1988 217 is operating efficiently in a compliant manner;
>
> (ii) that it has implemented the safety management system;
>
> (iii) it's control of maintenance is at an acceptable level."

This notice gave the plaintiff 28 days to provide CASA with reasons why the AOC should not be varied, suspended or cancelled, and invited Mr Williams to participate in an optional "show cause conference" in relation to the notice.

[160] On 6 January 2004, Mr Williams wrote to the chief executive of CASA, requesting that CASA withdraw the notice dated 19 December 2003 and that CASA "immediately re-issue the Air Operator's Certificate for a normal three year period of validity, and re-issue the chief pilot approval issued to Arthur Williams to remain valid whilst he remains employed by Cape York Airlines". The letter then referred to difficulties which the plaintiff alleged it had experienced with CASA's North Queensland area office and set out some lengthy responses to the various issues that had been raised in the CASA notice of 19 December 2003.

[161] In any event, as Mr Williams conceded under cross-examination, from 26 December 2003 until the time of the ditching, the Aircraft did not have ASEPTA approval, and could not during that period be used for regular public transport. At best, according to Mr Williams, it could be used for some charter purposes. Mr Williams accepted in evidence that, as the ASEPTA approval of the Aircraft had expired in December 2003, it could not be used for regular public transport services thereafter.

[162] In relation to the plaintiff's AOC, further temporary extensions of the AOC were granted during 2004 while negotiations were initially conducted between the plaintiff

and CASA and then, after negotiations were unsuccessful, when the plaintiff instituted review proceedings in the Administrative Appeals Tribunal. That proceeding was resolved in late 2004 on the basis of a settlement between the plaintiff and CASA which saw the plaintiff continuing to hold an AOC which did not permit regular public transport.

[163] Returning to deal with the "air services", the first of these were services provided by the plaintiff pursuant to a contract with the Commonwealth of Australia (Department of Transport and Regional Services) under the auspices of the Remote Air Service Subsidy (RASS). This subsidy scheme enabled air operators to provide air services to remote areas of Australia. One of the specific terms of the RASS scheme was that a relevant air operator was required to meet the relevant CASA regulations for air passenger transport services.

[164] As I have already noted, the Aircraft lost its ASEPTA rating in December 2003. That had nothing to do with the ditching incident. The Aircraft was not, at the time of the ditching, lawfully able to be used for the purposes of the RASS scheme. The plaintiff's books, however, clearly demonstrate that the plaintiff continued to provide services, and derive income, under the RASS scheme, utilising its other aircraft. There is no evidence that the plaintiff lost any income under the RASS scheme during 2004 by reason of the non-availability of the Aircraft. Mr Williams had originally estimated in his evidence that the Aircraft was responsible for 50 per cent of the income earned under the RASS scheme. A detailed review of the plaintiff's own documentation relating to the Aircraft and the plaintiff's other aircraft used to service the RASS scheme demonstrated, however, that, historically, this Aircraft had contributed nothing like that level of service to or derived that proportion of income under the RASS scheme. Indeed, when challenged on this in cross-examination, Mr Williams conceded that it was correct that it was "abundantly clear" from the plaintiff's own RASS returns (documents which the plaintiff was required to complete and submit to the relevant department under the RASS scheme) that in the 2003 year the Aircraft had contributed "nothing like 50% of the flying time". He sought to explain that, however, by referring to charter work which the Aircraft was undertaking for the judiciary and other scientific survey work. That, however, was a shallow explanation, when one considers the repeated assertion by Mr Williams that this Aircraft had, in effect, made up half of the RASS income stream.

[165] In 2004, the plaintiff tendered to the relevant department for a renewal of its contract under the RASS scheme. On about 18 November 2004, the department gave formal notification to the plaintiff that its tender had been unsuccessful. It is plain enough from the evidence that the reason why the tender was unsuccessful had nothing to do with whether or not the plaintiff had the Aircraft available to be used in servicing the RASS contract, but rather because, at the time it made the tender, the plaintiff's AOC allowing it to engage in regular public transport was due to expire on 31 December 2004. As I have already said, the settlement negotiated with CASA which enabled the plaintiff to have an ongoing AOC was conditioned such that the plaintiff did not thereafter have an AOC which permitted regular public transport. Mr Williams had said in his evidence in chief that, because of the absence of the Aircraft from his fleet, the tender which the plaintiff put in for the new RASS contract was a non-conforming tender, and this was the reason for its rejection. This tender document was one of the documents which the plaintiff had not disclosed. When it was disclosed in the course of the trial, and when Mr Williams was challenged on it in cross-examination, it became apparent that the document was, on its face, a

conforming tender, and Mr Williams conceded that his suggestion that the contract had been lost because of a "non-conforming tender" was speculation.

[166] As to the "delivery of passengers on behalf of the Queensland Government" it emerged that the Department of Justice had, in fact, discontinued using the plaintiff's services prior to 11 November 2004, and that this cessation came about because the department became aware that CASA had issued the plaintiff with a notice cancelling its AOC permitting regular public transport. Mr Williams also confirmed that the plaintiff's services to the department resumed some time after November 2004, because he had satisfied the department that the CASA action was over. Moreover, the plaintiff continued providing services to the Department of Justice until 2006 when, as Mr Williams said, there was a "change in the requirement by the department".

[167] In short, to the extent that there was an interruption in the plaintiff's revenue stream from the Queensland Government after the ditching of the Aircraft, that was completely unrelated to the Aircraft and was caused by the regulatory difficulties the plaintiff was having with CASA.

[168] In respect of the search and rescue operations, it is sufficient to note that, when cross-examined on this contractual stream of income, Mr Williams conceded that the Aircraft was listed as only the fourth possible supplementary aircraft to be used for search and rescue, and that it was very rarely used for that purpose. He also conceded that on 1 December 2004, the plaintiff submitted a tender for a proposed new search and rescue contract, that the plaintiff was unsuccessful in that tender, and that the lack of success in that tender had nothing to do with the absence of the Aircraft.

[169] The matters to which I have referred are, of themselves, sufficient to justify me finding that the plaintiff has failed to prove that any loss of income which it may have suffered was caused by it being deprived of the use of the Aircraft for the provision of the specified air services. For completeness, however, I should also say that the evidence adduced from Mr Williams, and particularly the evidence which came from him under cross-examination, casts serious doubt on the veracity of the estimates he had made concerning the financial returns received from the Aircraft and the costs attributable to the Aircraft. There was, for example, considerable divergence between the figures initially presented to me in respect of income and expenditure in the course of his evidence in chief and those disclosed in the company's own general ledgers, which were put to him in cross-examination. By way of further example on this aspect, Mr Williams asserted in the course of his evidence in chief, in effect, that the plaintiff's records (which he had not disclosed at that stage) did not permit a precise allocation of expenses to this particular aircraft, and this justified him adopting a broad brush apportionment of the expenses incurred by the plaintiff across its fleet of aircraft according to what Mr Williams contended was the rate of usage of this particular aircraft. An examination of the plaintiff's ledgers and books, particularly the RASS returns, identified that it was indeed quite possible for the repair and maintenance costs attributable to different aircraft within the fleet to be identified, but this exercise had not been undertaken by Mr Williams.

[170] In short, the state of the plaintiff's evidence is such that I am not satisfied that, even if it had established an entitlement to be remunerated for lost income or loss of use of the Aircraft in respect of the identified air services, it has proved any proper basis to quantify, or make any proper estimate of that lost income or the damages flowing from the loss of use.

[171] Similarly, it emerged in the course of Mr Williams' evidence that the sale by the plaintiff of its assets in November 2006 had nothing to do with the loss of the Aircraft. Rather, the situation was that the plaintiff owed a significant debt under the contract of sale by which the plaintiff itself had acquired the Cape York Airlines business. The shares in the plaintiff are owned by Paragon Pacific Pty Ltd, a company of which Mr Williams is the sole shareholder. Under the contract to sell those shares, the plaintiff agreed to pay certain monies to the vendor. An issue arose between the plaintiff and the vendor as to the quantum required to be paid by the plaintiff to the vendor under that contract. That dispute resulted in litigation which was settled on terms which included that the assets of the plaintiff be sold and a certain sum then be paid to the vendor. The circumstances of the sale were summarised in the following passage of cross-examination of Mr Williams:

> "Well, were you operating at loss prior to the sale in 2006? – Yes. We would have been operating at a – at a loss.
>
> And you also faced this situation, did you not, that under the contract by which the shares in Cape York Airlines were acquired, a payment was due to the vendor? – Yes, we disputed that payment.
>
> Yes. But you ended up settling on the basis that the payment of $350,000 would be made to the vendor out of the proceeds of sale; is that right? – Yes.
>
> Right. Your view was always, was it not, that you had a substantial liability to the vendor of the shares, although perhaps not the full liability the contract called for? – Yes.
>
> And you had no means of paying that substantial liability except by the sale of the assets of the company, correct? – Yes.
>
> So that the sale was driven by the need to pay that debt, correct? – Yes, that debt and the – the debt from the Commonwealth Bank was important."

[172] Accordingly, I find that the plaintiff has failed to prove the claims for damages articulated in paragraphs 52 and 52A of its pleading.

[173] The plaintiff does, however, have a contractual entitlement under the Policy to the payment of $1,500 per day for 90 days. There is, so far as I can see, no proper defence to the plaintiff receiving that to which it is contractually entitled, being a total of $135,000.

[174] In summary, then, the plaintiff is entitled to recover the following:

-	Agreed value of Aircraft	$1,800,000.00
-	Recovery expenses	$7,367.88
-	Loss of income (as per Policy)	$135,000.00
		$1,942,367.88

[175] I will allow interest on that sum from 30 April 2004. It seems to me that that represents an appropriately reasonable allowance of time within which the defendant insurer ought to have paid on the claim after having been notified of the incident and

the claim being made. Allowing interest at the rate of 10 per cent for six years and four months on the damages yields $1,229,519.

Conclusion

[176] There will be judgment for the plaintiff in the sum of $1,942,367.88 plus interest to the date of judgment of $1,229,519, being a total judgment of $3,171,886.88.

[177] I will hear the parties as to costs.