SUPREME COURT OF NOVA SCOTIA

Citation: All-Up Consulting Enterprises Inc. v. Dalrymple, 2013 NSSC 46

Date: 20130207
Docket: Pic No. 188801
Registry: Pictou

Between:

All-Up Consulting Enterprises Incorporated, Helico Air Services Limited and Peter Skinner
Plaintiffs

v.

Russell Dalrymple nd Royal SunAlliance Insurance Company of Canada

Defendants

Judge:	The Honourable Justice Arthur J. LeBlanc
Heard:	March 21-22, 2011 in Pictou, Nova Scotia; November 14-17; 21-24; 28-30; December 1-2; 13, 2011; January 9-13; 16-20; February 13-17, 2012, in Halifax, Nova Scotia
Final Written Submissions:	March 30; April 16; April 23, 2012 December 6, 2012
Counsel:	Bruce T. MacIntosh, Q.C. and Donn L. Fraser for the plaintiffs Murray J. Ritch,Q.C., Matthew G. Williams and Lisa Richards, for the defendants

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By the Court:

INTRODUCTION

[1] This case involves claims in tort and contract arising out of an incident in which a helicopter operated by the plaintiffs was damaged in a vehicle collision on the ground. The plaintiffs claim against the driver of the vehicle that hit the helicopter, and against his insurer, who they say committed to resolve the claim and then failed to do so.

BACKGROUND

[2] Peter Skinner is the sole shareholder, director and officer of the plaintiff companies, Helico and All-Up Consulting. Mr. Skinner withdrew his personal claim, but remains a named party for purposes of dealing with the issue of costs. Mr. Skinner's aviation career began in the 1980s. After qualifying as a pilot, he flew for companies doing charter and aerial spraying. He started a helicopter services business called Pegasus. Its work included mining exploration, aerial photography, and forest fire services. Starting with one helicopter, Pegasus grew to about a dozen. Due to financial activities unconnected to Mr. Skinner, Pegasus entered voluntary liquidation in 1993. Mr. Skinner himself went through personal bankruptcy. After Pegasus folded, Mr. Skinner's father assisted him in setting up a new company, Helicon. Operating three Hughes 300 helicopters bought from the Pegasus receiver, Helico started operations in 1993. Its operations included aerial spraying, helicopter charters (such as power line maintenance and aerial filming), aircraft maintenance, and flight training. Helico's primary geographic market was

Atlantic Canada, as well as Labrador and northern Québec, although Mr. Skinner described his ambition to expand to a wider market. Helico operated from facilities at the airport in Trenton, NS. Its quarters were pole barns built in the 1970's, with no electricity or running water.

[3] In the late 1990s, Mr. Skinner wanted to bring all of Helico's operations under one roof, with concrete floors, better working conditions and more space. In 1998 he approached the Atlantic Canada Opportunities Agency (ACOA) for funding to assist in facility expansion. He prepared a business plan with the assistance of an accountant, Dick Steele, and a consultant, Jim Moore. ACOA approved the proposal in November 1998, allocating $215,950 as a repayable contribution. Mr. Skinner provided a revised business plan on May 31, 1999, calling for an amount of $157,200. Funds of $116,000 were advanced by July 1999. In addition to the facility expansion, the ACOA proposal anticipated that Helico would undertake the manufacture of a removable multifunctional cargo pod (a "helipod") that could be attached to the belly of the Robinson R44 helicopter. As it transpired, nothing came of this manufacturing project.

[4] Mr. Skinner also sought financing for Helico's expansion plans through the Nova Scotia Business Development Corporation (BDC). Prior to the accident, he had received verbal confirmation of a BDC loan, which was confirmed in writing on August 5, 1999, in the amount of $155,000.

[5] Mr. Skinner's evidence, which I accept, was that he and his companies had various sources of financing, including credit with suppliers and a good

relationship with the Bank of Montreal (BMO), where the plaintiffs had an operating line of credit that had risen to some $100,000. Paul McCracken of BMO, who handled Mr. Skinner's personal and business banking, testified that the bank had made frequent temporary loans, with the knowledge that Helico's revenues largely came during the spraying season. He also testified that the bank would permit the balance on the line of credit to rise by up to ten per cent over the maximum, in confidence that a deposit was coming soon. He said he would have been prepared to provide bridge financing on the strength of an ACOA approval. Mr. Skinner also testified that he had been able to call on private sources of financing where necessary.

[6] Helico spent a large part of 1998 and 1999 in recovery from the effects of two accidents that occurred in 1998, one of which killed two personnel. In July 1999, Helico controlled two Hughes 300C helicopters: C-FPHG (PHG) and C-FULL (FULL). PHG was operated under a long-term leasing arrangement with another company, Aeroco. FULL was being refurbished and was scheduled to be operational for the prime spraying season beginning in early August.

[7] The planned expansion of the Trenton facility was under way by the summer of 1999. Helico's Director of Maintenance at the time, Bill Walsh, testified that work had been done on modernizing the hangars and installing heating. He said the floors were in and the septic system was installed. Mr. McCracken of BMO, who saw the site while discussing the plaintiffs' financing, testified that he was surprised with the extent of the work that had been done. Maintenance had not previously been one of Helico's main fields of

operation. Mr. Walsh recalled that at least two or three aircraft were undergoing maintenance or refurbishment at the time, including a Cessna 172 airplane and at least one helicopter. Mr. Walsh's view was that aircraft maintenance was a promising area for Helico, with limited local competition.

The July 1999 collision

[8] On July 8, 1999, Mr. Skinner was spraying at Rainbow Farms in Rawdon, NS, flying the helicopter PHG. At the end of the day, he landed and parked the aircraft. Mr. Skinner, Bill Walsh, and Bruce Paige, a Helico aviation engineer, inspected the aircraft and transferred it from the "restricted" category - that is, ready to spray - to the "normal" category, which would be required for a charter flying engagement the next day. This process involved removing the spray equipment and washing the aircraft. According to Mr. Skinner and Mr. Paige, PHG was in perfect operating condition. Their inspection revealed no damage to the aircraft. Mr. Walsh certified that the aircraft was ready to fly in the charter category.

[9] Mr. Skinner had permission from Bud Weatherhead, the property owner, to leave the aircraft on the property overnight. The helicopter was parked near a blueberry processing facility, adjacent to a field. The ground was rutted and dry, but Mr. Skinner landed with the helicopter's skids in ruts. The clutch was disengaged. The rotor blade was in a "sock" tied down to the tail boom. The tie-down is an eight-foot strap that covers the end of the blade and goes around the tail boom, securing the blade and preventing it from turning.

[10] Mr. Skinner and Mr. Paige arrived back at the farm shortly after 9 a.m. on July 9, 1999, intending to take off at 10:00. They began preparing the helicopter. Brian Parent, who was working in a nearby blueberry processing facility, approached them and asked Mr. Skinner if Mr. Weatherhead had called him. Mr. Skinner said he may have said something about the helicopter being hit by a vehicle. Mr. Skinner searched, but could not find Mr. Weatherhead. Mr. Paige, similarly, testified that Mr. Parent made reference to a collision.

[11] At some point after Mr. Skinner and Mr. Paige left the aircraft the previous day, the defendant Russell Dalrymple attempted to drive a truck and haywagon past the parked helicopter. Instead, the wagon collided with the aircraft, striking a rotor blade. Mr. Dalrymple denied that he hit a rotor blade. However, in Mr. Parent's July 16, 1999, statement to Gilles Nobert, the insurance adjuster for the plaintiff's insurer, Mr. Parent said he saw one of the two stakes in the back of the wagon make contact "against the helicopter main rotor blade with the stake exceeding about ½ into the blade." This statement was admitted into evidence without objection. Further, in a defence dated January 4, 2002, Mr. Dalrymple admitted that "a vehicle operated by him came into contact with a helicopter at Rainbow Farms in Upper Rawdon," but denied that "the aforesaid contact caused any material damage to the helicopter." A pre-trial motion to amend the defence to withdraw this admission was dismissed. Mr. Dalrymple testified that he was careful not to hit the helicopter, stepping onto the running board in an attempt to avoid it. I do not accept his trial evidence, given some 11 years after the incident,

as establishing that there was no collision. I am satisfied that his wagon struck the helicopter as admitted in the 2002 defence.

[12] Mr. Skinner and Mr. Paige inspected the aircraft after speaking to Mr. Parent. They inspected the blades but observed no damage. Mr. Paige described his blade inspection, which involved a visual check for signs of damage, taking 30 to 40 minutes. They followed the prescribed special inspection procedure for main rotor blade strikes. This was a progressive inspection, which required them to stop if any step revealed damage. After the inspection, Mr. Skinner phoned Bill Walsh, who, as well as being maintenance director, had drafted the Helico maintenance manual. Mr. Walsh testified that Mr. Skinner informed him that an inspection had revealed no visible signs of damage. He advised Mr. Skinner to run the engine on the ground and then hover the aircraft if there was no vibration. It does not appear that Mr. Skinner was aware at this point that the impact was on the blade. Mr. Walsh testified that if he had known that there was a strike to a rotor blade, he would have instructed them to ground the aircraft. I infer that had Mr. Skinner known specifically that the strike was to the blade, he would have told Mr. Walsh this. Mr. Paige's evidence was that Mr. Parent did not provide any specifics of the collision when he first approached them.

[13] Mr. Skinner followed Mr. Walsh's instructions. He started the engine. He let it warm up, and then engaged the clutch and rotor system slowly, bringing the engine to ground idle speed, then to flight idle speed. Not hearing anything unusual, he pulled the helicopter into a hover. According to Mr. Skinner, he

hovered for no more than five seconds, then felt a vibration. He backed up about eight feet, in order to determine whether the vibration was caused by wind coming off a roof and disturbing the air. The vibration got worse. Mr. Skinner then "bumped" the collective, to establish whether a damper in the rotor system was out of place. With the vibration still increasing, he landed the aircraft.

[14] Mr. Skinner estimated that the engine ran for between two and three minutes, and that his flight time was about 30 seconds. He said he hovered at a height of about 12 feet. According to a statement by Mr. Parent, the helicopter rose 25 or 30 feet and flew across the pasture and back. Mr. Skinner denied this. Mr. Parent did not testify, and I accept Mr. Skinner's account of the test flight, which also generally accords with Mr. Paige's observation.

[15] The helicopter was grounded, and was shipped back to Trenton by trailer. When the helicopter was inspected back at Helico's Trenton facility, two blades were found to be rippled. He believed that one or both blades may have been de-bonded on the trailing edge. The trailing edge is bonded together with glue in the manufacturing process. Mr. Paige testified that while dismantling the helicopter for shipment back to Trenton, he observed a separation on the trailing edge of a blade. He thought he would have noticed it when he did his first inspection as he said it was a considerable bulge.

[16] While Mr. Paige was preparing the helicopter for shipment, Mr. Parent approached him and further described the collision. Mr. Paige said he described an impact by a stake on the haywagon with one of the rotor blades; he also indicated

that he thought the helicopter would roll over. Mr. Paige said that he and Mr. Skinner had not heard this when they inspected the helicopter before the test flight. He said he had understood that Mr. Weatherhead, who Mr. Skinner had unsuccessfully gone looking for, had the details of the collision. He said he might have done more than a visual check on the blades had they had more information about the collision at the time. However, Mr. Skinner testified that he manipulated the blades during the inspection prior to the flight.

[17] I am satisfied, based on the evidence of Mr. Skinner, Mr. Paige and Mr. Walsh, that the inspection and test flight were conducted in accordance with Helico's applicable checklists and guidelines, and without negligence. The evidence does not suggest that there was any negligence on the part of Helico's personnel in the course of the inspection and test flight. I find that there was no visible damage to the blades prior to the test flight, and that damage to the aircraft became apparent during the test flight. I also find that there is no evidence to establish that the helicopter would have sustained greater damage had the test flight been conducted in the manner described in Mr. Parent's statement.

[18] Speaking more broadly about the nature of the physical damage, I accept the evidence of Kim Mizera of Rilpa Enterprises, an experienced helicopter technician, that the overall damage to the aircraft resulted from the transmission of the force of the collision from the rotor blade through a path that ran through the hub assembly to the frame of the helicopter and out through the strut to the ground. Mr. Mizera concluded that the airframe was twisted as the aircraft sat on the ground. This account of the load path of the impact was not contradicted by

any expert evidence adduced by the defendants, and was broadly consistent throughout the evidence of Mr. Mizera, Mr. Walsh, Mr. Nobert and Mr. Skinner. All four witnesses were knowledgeable about the mechanical aspects of helicopters (though not qualified as experts), and all four gave evidence that I found to be credible and reliable. Furthermore, I regard Mr. Mizera and Mr. Nobert as essentially disinterested witnesses, with no direct stake in the outcome of the proceeding.

Involvement of the insurers

[19] Mr. Skinner notified his insurance broker, Anthony Conway, about the collision. Mr. Conway reported the loss to Peter Sifakis of Willis Corroon, to which his company was a sub-broker. They, in turn, notified the plaintiffs' insurer, British Aviation Insurance Group (hereafter BA). PHG was insured by BA under a Hull coverage "All Risks" policy, effective from 1 May 1999 to 1 May 2000. This policy included coverage for liability and property damage. Helico also had drift liability coverage, which insured for damage to vegetation as a result of spraying. Helico did not have business interruption insurance.

[20] On the evening of July 9, Mr. Skinner spoke to Ken Spence, a representative of Mr. Dalrymple's insurer, Royal & SunAlliance (RSA). They met (along with Mr. Walsh) at Helico's Trenton facility on July 12. Mr. Skinner told Mr. Spence that he wanted an independent inspection, in order to avoid conflicts that could slow down a settlement. Mr. Spence made no objection. The blades were sent to Composite Technology, a specialist in rotor blades, on July 12, 1999. Other parts

were sent to Rilpa Enterprises in Calgary, a certified service facility, on July 12 and 22: the main rotor shaft and hub assembly, the static mast and the transmission, as well as the tailboom. There was evidence that components were also delivered to IMP Aerospace, but these do not factor into the claim.

[21] Helico's insurer, BA, appointed an adjuster, Gilles Nobert. Mr. Nobert went to Helico's facility in Trenton and reviewed the logs for PHG. He checked the serial numbers of certain parts, and the inspection records. Mr. Nobert reported to BA that PHG was properly maintained and had recently come through a 1200 hour inspection. While some parts (as noted above) had already been sent to Rilpa, this did not concern him. He said he would not have been in a position to test them even if he had seen them.

[22] At the time of the accident, PHG was Helico's only operational helicopter. As noted earlier, a second aircraft, FULL, was being refurbished for the high spraying season beginning in early August, for which Helico would require two aircraft. Mr. Skinner testified that it would cost $60,000 to make FULL airworthy, in addition to using parts in inventory. He was awaiting financing to proceed, after receiving verbal confirmation of the BDC loan. After the accident, however, refurbishment of FULL was delayed while personnel dismantled PHG and sent out parts for inspection. The damage to PHG meant that Helico had no functioning aircraft.

[23] Mr. Skinner said he told Mr. Spence of RSA on July 12 that he required two aircraft to service the upcoming contracts, starting around August 5. In a second

conversation, on July 14, Mr. Spence told him that RSA would waive any deductible. He told Mr. Spence that he was looking for a helicopter to lease. Mr. Spence indicated that Mr. Skinner should deal with Mr. Nobert. Based on what Mr. Spence said, Mr. Skinner said he understood that RSA would rely on Mr. Nobert's adjustment of the claim. According to Mr. Skinner, Mr. Spence said he would deal with the issue as quickly as possible. Mr. Skinner understood that there was no issue of liability.

Rilpa's damage estimate

[24] Rilpa provided a damage estimate on July 15, 1999. Kim Mizera, Rilpa's Quality/Production Manager, made recommendations on the scope of work on PHG based on Mr. Skinner's description of the accident, a visual inspection of the parts that had been shipped from Helico, information from Composite respecting blade damage, and his experience, including a similar incident with a similar aircraft a year earlier. Rilpa, it should be noted, was an approved maintenance facility for the manufacturer, Schweizer. Mr. Mizera made the following comments in his estimate:

> Inspection of the main rotor blades by a Schweizer Aircraft approved service centre. This inspection revealed that the blue blade, the one that was tied down to the tail boom, was damaged from overload. The load to fail this blade was transmitted through the red blade and the main rotor hub and shaft assy. I recommend the red blade be replaced, as it is impossible to determine the amount of load was put on this unit.
>
> The main rotor hub and shaft needs to be inspected for run out and loading damage. The load damage will have been the reverse of the design loading of the hub assy - eg. one blade being held and the other blade trying to collapse the hub

ears together. The same load will have put a bending load on the shaft. The shaft requires a run out and twisting inspection to confirm if the shaft can be returned to service. It has been Schweizer Aircraft's recommendation in the past to replace the unit due to unusual loading of the assembly.

The main rotor pitch housings requires [sic] the inspection of the housing pitch shafts and replacement of the bearings and pitch links.

The swashplate assembly and associated hardware requires replacement of the bolts and bearings. This unit also requires NDT inspection on the balance of the assembly.

The flight controls require inspection and NDT for overload.

The static mast requires inspection of the mount legs. The legs will have transmitted the load to the airframe.

The main rotor transmission requires the inspection of the mounting legs as they transfer the load from the static mast.

The rest of the airframe requires inspection for damage.

The tailboom inspection determined the unit to be beyond repair due to the main rotor tie down damage. The tailboom will require replacement. The load would have been transferred through the boom to the airframe along the attachment fittings and struts. The attachment fittings and struts will require inspection.

Mr. Mizera added that the helicopter "will need to be completely inspected keeping in mind that the load (in reverse of normal) would have been transmitted from the main rotor blade through the landing gear which kept the aircraft from rotating."

[25] Rilpa's July 15, 1999, estimate, including labour, non-destructive testing inspections, supplies, shipping and parts, was in the amount of $133,215.19. Of this total, the largest amount was for parts, at $112,765.19. Mr. Mizera invited Mr. Skinner to "advise your findings on the balance of the aircraft inspection so we can revise these inspection requirements if necessary." Mr. Mizera's evidence was that the repairs on the July 15 list were a minimum, that is, the final amount would not be less than this. It was possible that additional components would be found to be in need of replacement or repair following their inspection. He said any further inspection would not reduce the scope of parts required to return PHG to service.

[26] On July 29, Mr. Mizera provided Mr. Nobert with a further breakdown of inspection hours. He noted that the earlier estimate was overstated because certain work would be done by Helico. Mr. Mizera added that Dave Roemer of Schweizer agreed with his recommendation to replace the hub and shaft assembly, "as well as the two blades for the reasons of flight safety." He wrote that he had spent 35 hours preparing the estimate and that he could do "a more in depth inspection of the aircraft, either to verify or to make changes to this estimate, I can make the necessary arrangements provided I am compensated for my time and expenses." Composite had already advised that at least one rotor blade was scrap, and ultimately confirmed that two of the three main rotor blades were damaged beyond repair and required replacement.

[27] Mr. Skinner spoke to Mr. Spence's superior at RSA, claims manager Jim Higgins, on July 30. He said he informed Mr. Higgins of the same issues that

he had discussed with Mr. Spence: the urgency of the situation, the need to have PHG repaired, and the potential losses resulting from downtime and lost cash flow. Mr. Higgins directed Mr. Skinner to deal with Mr. Nobert. Like Mr. Spence, he had no experience with aviation claims. At trial, he denied having any knowledge that the failure to settle the claim after the discussions with Mr. Spence would interfere with Mr. Skinner's ability to perform contracts. He agreed that this was an inquiry that Mr. Spence should have made. However, he said there was no obligation to address a replacement helicopter, and he did not believe that Mr. Skinner told him that he needed one to meet upcoming contracts. After this discussion, Mr. Higgins went on vacation.

Replacement helicopters

[28] Mr. Skinner needed a replacement helicopter to service Helico's herbicide spraying contract with Kimberly-Clark. On July 30 he obtained a quote from Heli-Max for rental of a Hughes 500 helicopter for 30 days at a cost of $87,000, plus $13,000 for spray equipment. The spray equipment that was required was specific to the Hughes 500 and was therefore not covered by Helico's own operator certificate. The lease was in a form known as a "wet lease," essentially a subcontract from another operator. It includes a pilot, who flies under the direction of the operator leasing the aircraft. (A dry lease, by contrast, is a lease under the operator's own certificate.) Mr. Skinner informed Mr. Nobert of the Heli-Max proposal, indicating that Helico stood to lose contracts worth more than $250,000 if no replacement was obtained.

[29] In early August, Helico leased a helicopter, C-GREA, which was owned by Rilpa. He intended for GREA to take the place of FULL, which could not now be refurbished in the necessary time frame. GREA did not have a certificate of airworthiness. It arrived at Helico's facility in early August. It was eventually cannibalized for parts and components to make PHG airworthy. Rilpa ultimately leased these parts and components to Helicon.

Mr. Nobert's appraisal

[30] Mr. Nobert provided his appraisal of PHG's damage on August 2, in the form of a summary of repairs based on the cost of parts and labour estimated by Rilpa. Mr. Nobert was in general agreement with Mr. Mizera's estimates. He applied his own *pro rata* figures, and deducted Helico's labour rate by $10.00. He set the costs of parts at $111,488.48, plus paint of $2000, less *pro rata* deduction on life-limited components of $36,839.47, for a net total of $76,649.01. Adding labour costs brought the amount to $99, 805.20, less deductible of $2500, for a net total of $97,305.20.

Discussions with Ms. Hallman

[31] On August 3, 1999, Mr. Skinner informed his broker, Tony Conway that he was having trouble contacting Mr. Higgins and Mr. Spence at RSA. Mr. Conway reached Cynthia Hallman, RSA's senior agent in charge of examiners, on August 4. He described the urgency of the situation, including the approaching spraying season, Helico's shortage of aircraft, and the availability of a rental

through Heli-Max. He told Ms. Hallman that Mr. Skinner did not have the means to secure the rental. He faxed Ms. Hallman information from Rilpa and Mr. Nobert. He noted on the fax that time was of the essence due to increasing "extra expense," and added that "the big issue is *pro rata* or depreciation on parts," quoting Mr. Skinner's lawyer and Mr. Mizera to the effect that such expenses should not fall upon Mr. Skinner "for something that was in no way his fault." (In his evidence, Mr. Mizera was skeptical that he would have expressed such an opinion to Mr. Conway.)

[32] On August 5, Mr. Skinner and Mr. Conway spoke to Ms. Hallman by telephone. According to Mr. Conway, Ms. Hallman said RSA would accept the BA appraisal prepared by Mr. Nobert as the basis for valuing the physical damage, given that BA had expertise in the area. (Like Mr. Spence and Mr. Higgins, Ms. Hallman had no experience with aviation claims.) She said she would contact Heli-Max to arrange the rental. She instructed Mr. Skinner to track his downtime losses. Mr. Skinner testified that Ms. Hallman indicated that she did not see any important issues with the Rilpa figures, but there were particulars that she wanted to verify. She also said she would speak to Mr. Mizera.

[33] Mr. Skinner said Ms. Hallman did not indicate any disagreement with Mr. Nobert's damage figures, although she indicated that RSA would not pay the deductible of $2500, contrary to what Mr. Spence had said. He used the expression "one-stop shopping" to describe RSA taking the lead on the claim, although he was not certain that this was Ms. Hallman's phrase (she denied it, and Mr. Conway did not recall it.) He understood that there was no issue of liability. He testified

that Ms. Hallman seemed to understand the importance of covering the rental costs for a replacement helicopter, and of getting PHG in the air again. He said they specifically discussed the details of the Heli-Max rental, including the hourly rate of $725, the daily minimum of four hours over three weeks, and the need for an extra charge for spray gear. He said Ms. Hallman told him that RSA would take over the matter.

[34] Mr. Conway testified that he understood after the conversation with Ms. Hallman that the only outstanding issue was the *pro rata* deduction. He said the BA policy had a *pro rata* clause, but Mr. Skinner and his counsel did not believe he should be subject to such a provision on account of damage he had not caused. Ms. Hallman testified that Mr. Skinner was seeking recovery for damage without factoring in depreciation. Mr. Skinner denied this, and maintained that he always understood that there would be some deduction for depreciation. He stated, however, that he hoped to offset part of this deduction against the reduced value of PHG as a result of the accident history arising from the incident. According to Mr. Skinner, Ms. Hallman indicated that the diminished value and the blade balancing costs might be offset against any pro-rated deduction in the damage claim.

[35] After the conversation of August 5, Mr. Skinner sent Ms. Hallman a fax containing the additional documents she had requested, including invoices from Composite Technology for blade balancing (done to make PHG a better film platform), and the Heli-Max rental contract. Ms. Hallman contacted Heli-Max, as well as Mr. Mizera. Mr. Mizera testified that he made it clear to Ms. Hallman

when they spoke that Rilpa needed assurance of payment for the parts he ordered. Many of the necessary components were not in stock. He knew that Mr. Skinner would be unable to pay the amount of the estimate. He said Ms. Hallman told him that the claim was near settlement. He did not, however, receive an assurance that RSA would pay the amounts on his estimate. Ms. Hallman denied telling Mr. Mizera that the claim was close to settling. I accept Mr. Mizera's recollection of the conversation, in particular, the tenor of the letter to Mr. Skinner indicating that RSA would "do everything possible to assist you."

[36] Ms. Hallman wrote to Mr. Skinner on August 6, 1999, the day after the discussion. Noting that he had provided "the information pertaining to servicing of the unit along with upcoming contracts to be fulfilled", and indicating that Ken Spence would continue to handle the claim, she wrote:

> As we discussed, your policy carries a pro rata clause, which requires you to pay a set percentage of damages. For this reason, you have decided not to continue with the loss adjustment with your insurance company. Our policy will provide coverage for your damages; however, depreciation must be charged on any parts that are replaced "new for old". We have discussed the issue of the blades with you and Rilpa in Calgary - they have advised if the blades are refurbished, they would be considered 100%. You have forwarded an invoice showing recent overhaul of the blades and have also indicated you are prepared to waive the costs of paint for airframe damages. Rilpa indicate this would be in the area of $2000. Based on these factors, we feel we can easily resolve this portion of the claim. The appraisal of damages we have on file is somewhat incomplete which puts us in an extremely difficult position to discuss the amount of repairs with you. We asked Rilpa to fax a copy of their scope of work and their second quote. As of this morning, we have not received this information.
>
> In our discussions with Rilpa, they indicate they have all components to be repaired and you are left with the air frame in Trenton. When the components are repaired and freighted back to you, your firm will handle the actual installation.

> Components could be repaired (conservative minimum) in three weeks and shipped; your installation would take upwards of 4 days, with two men working 8 hour days.

[37] There is a question respecting Ms. Hallman's description of the *pro rata* clause in the BA policy. It does not appear that she was correct in suggesting that BA would require the plaintiffs to pay a "set percentage" of damages. Nothing of significance turns on the specific content of the BA policy, however.

[38] Having addressed the repairs, Ms. Hallman went on in the August 6 letter to discuss the arrangements respecting rental of a helicopter, as well as loss of revenue:

> We understand you are currently documenting your loss of revenue claims from the date of loss until August 6th, at which time you will be taking a rental from Heli-Max Ltee. To confirm our discussions with Denis of this firm and yourself today, you will be renting for a period of three weeks, with a daily option thereafter of $2900/day. During this rental period, you will be seeking to purchase a used unit to complete your contracts, thus relieving us of any further rental charges...Originally, you suggested you could attempt to buy a unit within two weeks and commit to a two-week rental. We feel it more prudent to go with a three week rental contract as it will take time to find a suitable used craft and should you be unable to do so within two weeks and the helicopter of Heli-Max is contracted to others, we will be in the unfortunate position of having to find a way for you to complete your spraying contracts. The personnel at Rilpa and Denis at Heli-Max have commented that trying to find a suitable unit in two weeks would not be easy and we don't want to be left without options mid-contract.
>
> Peter, we want to make it clear that we will do everything possible to assist you, however, at this point it is imperative that repairs are commenced at your direction immediately with Rilpa. We have agreed to a maximum three week rental, with a per day grace period, however, should you be unable to locate a replacement helicopter, our liability for any rental contract would cease in accordance with the time to complete the repairs as set out in the appraisal. I will leave it to you and

> Ken to discuss the depreciation factors, but suspect this will be resolved to everyone's satisfaction.

[39] Mr. Skinner said he was surprised at the suggestion that the appraisal was incomplete, because on August 5 Ms. Hallman had indicated that she was comfortable with Mr. Nobert's estimate. Mr. Conway, similarly, said this seemed inconsistent with her previous statement that RSA would rely on BA's expertise in aviation matters. Mr. Skinner also said he made it clear that Rilpa needed an assurance of payment by RSA. Ms. Hallman testified that she did not recall a request for a purchase order, and said Mr. Skinner was obliged to authorize any repairs, as RSA did not own the aircraft. She did state, however, that she would have issued a joint cheque if she was satisfied with the appraisal.

[40] Mr. Skinner testified that he understood from his discussions with Ms. Hallman that the situation was not adversarial. She sent greetings to his father, a doctor who had cared for her mother. He understood that RSA was taking over the adjustment. He testified that after the August 5 discussion, he understood that they were within $5000 of settling the property damage claim. For her part, Ms. Hallman did not recall any discussion about being this close to settlement; if that was the case, she believed it would have been indicated in her letter or notes. She also denied telling Mr. Skinner or Mr. Conway that RSA was taking over the claim; she said she only indicated that RSA would assist with property damage. Nor did she agree that she had accepted the Rilpa figures, or that Mr. Nobert's figures provided a final appraisal of damage. Ms. Hallman agreed, however, that she knew that Mr. Skinner needed RSA's assistance and that he was not in a position to repair or replace PHG, or to pay for a rental. She understood that

Helico's spraying contracts were at risk, although she denied knowing that charter contracts were also threatened.

[41] In recalling the conversation of August 5, Ms. Hallman said Mr. Skinner's view appeared to be that RSA should pay the claim without depreciation. She testified that depreciation is always applied on a third party claim for property damage. Other than discussing the urgency of a rental helicopter to complete his contract, she said, there was no discussion about the plaintiffs' financial situation.

[42] At trial, Ms. Hallman agreed that RSA had accepted liability. She disagreed with the suggestion that the expression "our policy will provide coverage" in her letter was confirmation that RSA had accepted the Nobert appraisal and that the Dalrymple policy would cover the claim. Rather, she said, it meant that Mr. Dalrymple had a liability policy that could cover a claim of the nature of Helico's. She agreed on cross-examination that there was "agreement in principle" to use the Nobert appraisal as the foundation for adjustment. She denied, however, that RSA was "taking ownership" of the claim, saying that the words "our policy will provide coverage" only meant that RSA would "work through the estimates with Mr. Skinner" and that "[i]f we could come to a reasonable agreement, then we would settle the file..." She agreed that there was a commitment to pay the claim if Mr. Skinner provided the supporting documentation.

[43] As to her conversation with Mr. Mizera, I accept Mr. Mizera’s recollection of the conversation that the claim was close to settling, in particular, the tenor of

the letter to Mr. Skinner that RSA was indicating “we feel we can easily resolve this portion of the claim” and “do everything to assist you.”

After August 6

[44] On August 10, after speaking to Mr. Nobert, Mr. Spence, who retained the RSA file, contacted Mr. Skinner. Mr. Spence suggested the possibility of settling the property damage claim on the basis of actual cash value, and asked for a proposal. Mr. Spence's computer notes indicate that RSA was considering a settlement based on a cash value of about $167,500, plus various expenses, lost revenue up to August 7, and expenses for a three-week rental and a sprayer. His August 10 notes reference a total claim of up to $228,245. He understood that Mr. Skinner was not eager to claim under his own insurance policy with BA.

[45] Mr. Skinner proposed a settlement based on a net figure of $152,500.00 (cash surrender value of $167,500, less $15,000 for salvage.) This matched Mr. Spence's figure. The proposal also included the costs of work by the engineering staff, transport and freight costs, certain administrative expenses, lost revenue to July 28 ($34,540) and from July 29 to August 6 ($13,562.20), and the adjusted cost of rental of the Heli-Max Hughes 500 to that point, $62,459.20. This resulted in a total claim of $276,033.14.

[46] On August 11 Mr. Spence informed Mr. Skinner that RSA was retaining its own adjuster. Mr. Spence and Mr. Higgins considered the claim to be high. Mr. Higgins testified that he requested a recommendation for an aviation adjuster

from RSA's head office in Toronto. The result was the appointment of Pierre Gareau, a Quebec-based adjuster, to adjust the claim on RSA's behalf. Mr. Higgins said Mr. Gareau was retained to review the file, quantify the claim, and make a recommendation to RSA. He made no inquiries as to Mr. Gareau's background or qualifications.

[47] Mr. Skinner said he protested at the delay the appointment of Mr. Gareau would cause, given Helico's circumstances, but to no avail. He again described Helico's situation, including lost revenues, the Heli-max lease, and Rilpa's need for a purchase order. Revenue from Helico's spraying contract for Kimberley Clark had to be diverted to pay the Heli-Max leasing costs.

The August 16, 1999 meeting

[48] After the retainer of Mr. Gareau, a meeting was held at Helico's Trenton facility on August 16. Those present included Mr. Skinner, Mr. Gareau, Mr. Spence and Mr. Higgins, as well as Bill Walsh. Mr. Skinner raised the issue of Helico's cash-flow problems. In response to Mr. Skinner's concerns, RSA provided an advance of $20,000. Mr. Gareau suggested at trial that this money should have been applied to repairs for PHG, and specifically to Rilpa's inspections. However, Mr. Spence testified that there was no particular direction as to how the money was to be used, and that Mr. Skinner would use it as he saw fit, given his cash flow situation. Similarly, Mr. Higgins testified that the money was meant to assist with Helico's cash-flow issues. According to Mr. Skinner, they discussed Rilpa's need for a purchase order; Mr. Spence denied that there was any such discussion.

In the course of the meeting, Mr. Skinner began to develop concerns about Mr. Gareau's aviation industry knowledge.

[49] As noted earlier, Helico had leased a Hughes 500 helicopter from Heli-Max. Heli-Max's pilots had no spraying experience, and Helico's own pilots could not fly the Heli-Max aircraft, as it was not on Helico's operating certificate. Mr. Skinner obtained the training and certification to operate the aircraft on Helico's certificate. He said one Heli-Max pilot became proficient at spraying by mid-August. The Hughes 500 was a larger aircraft than the 300, and more expensive to operate. Mr. Skinner had to arrange for Heli-Max to be a joint payee on Kimberly-Clark's checks on the spray contracts, in order to cover the leasing cost. Ms. Hallman's letter of August 6 indicated that RSA would assume the leasing cost, but as of mid-August, no funds had been forthcoming.

[50] In addition to Helico's difficulties funding the rental, the repairs to be done by Rilpa raised cost issues. Mr. Mizera had to order parts that were not kept in stock from the manufacturer as required. Rilpa needed assurance that the insurer would provide funds to pay for the parts he ordered, given that Helico did not have the necessary financial means. As noted earlier, Ms. Hallman had told Mr. Mizera that the claim was near settlement, but he had not received a purchase order or a guarantee that RSA would pay the amounts on his estimate. Both Mr. Higgins and Ms. Hallman testified that in their view, it was up to Mr. Skinner to direct Rilpa to do the work. It is clear, however, that Mr. Mizera and Mr. Skinner told them, as well as Mr. Gareau, that Rilpa would not proceed without an assurance of payment.

[51] After the August 16 meeting, Mr. Gareau phoned Mr. Mizera, who was on vacation in British Columbia. Mr. Mizera testified that, after pointing out how difficult it had been to contact him, Mr. Gareau demanded that he immediately return to his facility in Calgary, some seven hours drive away, to have the PHG components inspected by a third party. Mr. Gareau recalled this conversation in a less disputatious light. I accept Mr. Mizera's account where the evidence differs. Mr. Mizera told Mr. Gareau that he had done the inspection and there was no need to re-inspect the parts. He also pointed out that he needed a guarantee of payment so that he could order parts from Schweitzer.

[52] Mr. Mizera never received a direction to order the required parts with an assurance that he would be paid. Mr. Gareau's evidence was that Mr. Skinner had said he did not have the money for the inspection, but he did not recall being told that Rilpa would not proceed without an assurance of payment. I find that he was told this by Mr. Mizera.

[53] According to Mr. Spence's records, on August 19 Mr. Gareau reported to him that Rilpa had not tested the parts, but had only done a visual inspection. In Mr. Gareau's view, this meant that there was no confirmation that all of the parts listed were actually required. Presented at trial with Rilpa's July 14, 1999, work order, which details the parts received and the findings upon inspection, Mr. Gareau testified that this did not change his view that the inspection was incomplete. Mr. Gareau also questioned the fact that Mr. Skinner had inspected the aircraft after learning that there had been a collision and observed no damage,

when it was allegedly evident that the skin of the blades was rippled. I have found that there was no visible damage to the blades before the test flight. Mr. Gareau demonstrated an unwillingness or inability to grasp the fact that the initial damage was not observable, but was aggravated by the test flight.

[54] Mr. Gareau wrote to Helico on August 19, pledging to give the matter "preferred attention." He stated that Helico should finish repairs and return PHG to service as soon as possible "while we control damages at our end." Mr. Skinner responded, inquiring what additional information was needed and expressing concern with the timing and the manner in which the adjustment was being handled, given that the "entire process has been documented, the aircraft has been inspected by an independent adjuster as well as an independently approved overhaul and inspection facility." He added that he understood that Mr. Gareau had the complete file at his disposal, and invited a response "as soon as possible."

[55] Mr. Skinner also wrote to Jim Higgins on August 19, setting out his concerns with the situation. He noted that Mr. Mizera had indicated that it was likely that many of the parts requiring inspection would not require replacement, but that Mr. Mizera would not "proceed further until he has a purchase order and assurance that he will be paid for his time and expenses related to this work." Mr. Skinner noted that he had agreed to "settle on the estimate of the repair costs of our helicopter as per my conversation with Ms. Hallman," on the basis of Mr. Mizera's opinion that "these components/parts would indeed pass inspection. I felt the risk that additional costs could be incurred was outweighed by an expedient and reasonable settlement of this claim." (Mr. Higgins agreed at trial

that Mr. Skinner was assuming the risk that the repair cost would be higher than estimated.) He went on:

> The timing to inspect, repair and/or replace the parts/components as per the estimate from Rilpa was such that the aircraft would not be completed and returned to service in the time frame required to complete our forestry contracts. In my discussions with Ms. Hallman I indicated that if an expedient settlement could be reached I was prepared to try and find a used serviceable helicopter and/or parts to return the aircraft to service so that I would be able to utilize it for completion of these forestry contracts. In the meantime we have a 3 week arrangement with Helimax that I negotiated down from 4 weeks on your behalf saving you approximately $20,000.

[56] After discussing Helico's use of parts from the Rilpa rental helicopter to get PHG operational, Mr. Skinner noted Mr. Gareau's insistence that repairs be finalized and that the aircraft be returned to service as soon as possible. Asking "[h]ow would you like me to proceed from here," he wrote:

> Do I remove the installed parts/components and wait until you decide to replace/repair my parts/components and do you intend to cover my costs to do so?
>
> Are you prepared to cover the costs of transportation from Calgary, lease costs for components/parts from Rilpa and Helico and associated wages for same?
>
> If there is additional insurance costs involved in regard to component values with Rilpa as a named insured are prepared to cover these costs?
>
> In the event that you cannot make a decision on this in a timely manner are you prepared to extend the existing contract with Helimax until such time that our forestry contracts are completed (approximately September 25-30)? As explained to Ms. Hallman by Helimax and myself and stated in contract, if we do not make a commitment and another job comes up for the Helimax helicopter we may find that it is not available to complete our contracts. It is imperative that we complete these contracts.

Mr. Skinner went on to describe Helico's operating circumstances, and his view of the urgency of the situation:

> I would prefer to have this entire issue resolved as soon as possible as the effect it is having on my company, my customer base and my own time is detrimental to the operations of my business. I appreciate the advance of twenty thousand dollars on our lost revenues last Monday but it still leaves my cash flow in a deficit of over $60,000 and would request that you advance me this as soon as possible. This is a very large amount of money to our operations. Our operating line at the bank is only $100,000 and this cash flow problem is happening at the worst possible time as far as operating cash requirements. We have 14 employees and many up front costs associated with our speciality forestry services and in addition to that, I do not have the time to deal with short term banking solutions and operational emergencies that are related to a lack of available cash flow. Also is the issue of the subcontract with Helimax for their contracted amount of $73,900. As this contract was agreed to and confirmed with by Ms. Hallman I would like payment to be issued either directly to Helimax, or if not then to Helico, so that I can take care of this obligation.
>
> Unfortunately I have been put into a proactive position as a result of the delays in the settlement of this claim. At this point I need concrete and timely answers to the aforesaid concerns and questions. I trust you will discuss this with Mr. Spence and I will be expecting to hear from him in the very near future. Certainly you will hear from me and/or my representative if we do not have timely answers and decisions on this matter.

[57] Mr. Skinner also expressed concern to Mr. Higgins regarding Mr. Gareau's qualifications. He expressed surprise at some of Mr. Gareau's questions at the August 16 meeting, and at the apparent state of his aviation knowledge, "in particular the value of helicopters-new and used; the procurement of parts-new and used; and the inspection requirements (which are prescribed by the manufacturer) of a main rotor strike, rotors not in motion." Mr. Skinner wrote that

such matters would be "common knowledge to industry oriented people." He went on to identify several specific statements of Mr. Gareau's that had triggered this concern, one of them being that "he didn't feel that the aircraft looked all that bad." Over the subsequent weeks, it became evident that Mr. Skinner's concerns were well-founded.

[58] The evidence at trial indicated that Mr. Gareau had no technical training or specialized certification in aviation adjusting, nor did he have any particular background or experience in the field. He had apparently only dealt with a single helicopter damage claim of any significance before July 8, 1999. By contrast, Gilles Nobert, who adjusted the claim for BA, had specialized in aviation claims for some 25 years, adjusting 10 to 20 per month, about 30 per cent of them involving helicopters. Nevertheless, Mr. Gareau maintained that he was no less qualified than Mr. Nobert. While Mr. Gareau said it would have been open to him to retain a consultant for technical assistance, he did not do so, although he spoke to several, each of whom offered the provisional view that Mr. Mizera's figures looked reasonable. Both Mr. Spence and Mr. Higgins professed to have no experience with aviation claims, and indicated that they relied on Mr. Gareau's judgment. Mr. Gareau, however, had no particular experience or expertise in the mechanical aspects of helicopters, as he admitted at trial. Holding a pilot's license in no way qualified him in this way. Nevertheless, he did not hesitate to speculate, as, for instance, when he questioned the wisdom of the July 9 test flight. In view of the fact that Mr. Skinner and Mr. Walsh, as well as Mr. Mizera and Mr. Nobert, considered it an appropriate procedure in the circumstances, the speculations of

Mr. Gareau carry no weight. Mr. Mizera and Mr. Nobert, in particular, were independent witnesses without a direct interest in the fortunes of Helicon.

[59] Speaking generally, where Mr. Gareau's evidence conflicts with that of other witnesses, I accept the evidence of the other witness. I note also that Mr. Gareau was provided with summaries of some of the evidence adduced on behalf of the plaintiffs prior to his own testimony despite a witness exclusion Order. This came to light during trial. While this further undermines the weight I would be inclined to accord to Mr. Gareau's evidence, the finding on his credibility rests fundamentally on my assessment of his evidence in the context of all the other evidence.

[60] Mr. Higgins and Mr. Spence made it clear in their evidence that they did not inquire about Mr. Gareau's qualifications, either with Mr. Gareau himself or with RSA's head office, nor did they raise any such questions with Gareau himself. It was evident from Mr. Higgins's testimony that he subsequently regretted his failure to inquire about Gareau's qualifications, although he insisted that conflicts between claimants and adjusters are common. Similarly, Mr. Spence seemed to regard any criticism of Mr. Gareau as nothing more than the usual adversarial attitudes that tend to arise in the course of an insurance dispute. This was not mere disagreement or personality conflict, however; Mr. Skinner's complaints rested on specific statements and observations, as first described in his letter after the August 16 meeting. Mr. Higgins admitted at trial that Mr. Skinner had legitimate concerns; he agreed, for instance, that Mr. Skinner had reason to take exception to Mr. Gareau's baseless claim that there appeared to be little damage to PHG's

airframe. Ms. Hallman testified that in her view the appropriate course of action if such a complaint was received would be to discuss it with higher management.

[61] There was evidence that Mr. Gareau developed personal animosity against Mr. Skinner, starting from their first meeting. Mr. Gareau testified that he suspected Mr. Skinner's integrity and did not believe that he was acting in good faith. The friction Mr. Gareau provoked with Mr. Skinner, as well as Mr. Nobert, contributed to the deterioration of relations between the plaintiffs and RSA. It later had the secondary effect of contributing to BA's decision to deny the plaintiffs' hull damage claim.

[62] RSA provided a second advance of $20,000 on August 20. Mr. Higgins indicated at trial that this was meant as further cash-flow assistance, though the $60,000 requested by Mr. Skinner on August 19 seemed high. As of August 23, Mr. Skinner testified, he understood that RSA had all the documents they required. The trial evidence gave no indication to the contrary.

[63] Mr. Spence wrote to Mr. Skinner on August 23, repeating that it was Mr. Skinner's obligation to have the helicopter "repaired and in the air, once again, as soon as possible." He wrote:

> We were notified on August 3rd, 1999, that you requested Royal Sun Alliance assume adjustment of this loss as you did not wish to deal with your own insurer, British Aviation.
>
> We authorized a rental on August 6th for a maximum of three weeks. At that time, you were directed to have repairs at Rilpa commenced immediately.

> We met with you again on August 16th and our adjuster, Pierre Gareau, confirmed that the unit is repairable and you were directed to start repairs as soon as possible. At that time, we made an interim payment of $20,000 towards your loss.
>
> We are still awaiting confirmation of the repair figures from our adjuster/appraiser, who is discussing the repair figures with Composite and Rilpa. Also, there was an additional advance made on August 19th of $20,000 towards your loss.
>
> Once we have the repair figures, we will be prepared to make you an offer of settlement for your helicopter damages/downtime/rental. We cannot discuss the matter further until we have the documentation to support this loss. As soon as this is received, you will be the first person to be contacted.

[64] There are several points to be noted in this letter. Mr. Spence did not deny that RSA had agreed to "assume adjustment", nor did he deny that RSA intended to deal with the physical damage to PHG. The letter can only be taken as an indication that RSA would make an offer as soon as Mr. Gareau reported. In effect, the message was "don't call us, we'll call you." Also worth noting is the identification of Mr. Gareau as an "appraiser" as well as an adjuster, which seems to overstate his qualifications, and the claim that Mr. Gareau was in active contact with Composite and Rilpa, which does not seem to be accurate, at least as regards Rilpa.

[65] That same day, August 23, Mr. Gareau, having learned of Mr. Skinner's concerns, wrote to Mr. Skinner "to address the issue of my competence as an aviation insurance adjuster." He did not "take it kindly that you would question my experience and competence," and insisted that he had extensive aviation experience. He asserted that there had been no determination of whether the blades

were damaged beyond repair. In fact, Composite had confirmed that two blades were scrap. Mr. Gareau did not believe the airframe was affected by such a "relatively minor impact," and added that he would demonstrate his ability to "handle an aviation insurance claim as you will no doubt have the opportunity of seeing in the near future."

[66] On August 24, Mr. Gareau asked Rob Pritchard, a helicopter mechanic with Avialta Aviation in Alberta, to examine the components at Rilpa and to report to one Helmut Bizonka (apparently Helmut Pryzonka) of A.O.G. Helicopters of his observations, for the purpose of preparing a quote for inspection and repairs. Mr. Pritchard responded on August 28:

> I have reviewed the information that you sent to me via fax and from the description of the incident and the apparent force of the impact the inspections that are being recommended or carried out are more than justified. If the impact was severe to scrap two main rotor blades and the tailboom, one must certainly trace the load path and conduct the necessary inspections, including dismantling, visual and/or non-destructing testing.

[67] By late August, it appears, Mr. Gareau abandoned serious attempts to obtain expert advice. Although he claimed to have made inquiries, Mr. Gareau agreed that he did not know whether Helicraft, his preferred service facility, was an authorized overhaul facility like Rilpa. It appears that it was not. Mr. Nobert gave evidence that Helicraft would not have been certified to carry out the necessary work. Mr. Skinner also testified that Helicraft would not have been able to do component overhaul. Mr. Nobert also said AOG of Kingston would not have been a qualified overhaul facility like Rilpa.

[68] While Mr. Gareau suggested that his inability to retain the assistance of experts was due to Mr. Skinner's supposed bad reputation in the industry, he provided no specifics of this allegation. Mr. Mizera, who was in the industry and had a history of dealing with Mr. Skinner, did not suggest that there was an issue with Mr. Skinner's reputation or trustworthiness.

[69] Mr. Gareau agreed on cross-examination that between August 25 and September 15 he had essentially "retired" from the file. His position from then on was that Mr. Skinner must arrange repairs and then submit a claim. On August 26 Mr. Skinner inquired about any issues that remained outstanding. He wrote to Mr. Gareau that "[t]he only aspects that could change are the components that Rilpa has yet to inspect that may not be serviceable. The estimate assumes that they will in fact be serviceable. If you have found some discrepancy in this estimate then I would like to be informed…" (I note Mr. Mizera's evidence that any remaining inspections would not reduce the scope of parts needing replacement.) He emphasized that inspection criteria were set by the manufacturer, and wrote that "all we have done is followed instructions and reinstalled parts/components as required by our Approved Maintenance Organization Standards which are based on the CAR's and the manufacturer's instructions."

[70] Mr. Skinner's counsel put RSA and Mr. Gareau on notice of potential liability for damages "as a consequence of the unwarranted delay in administering this admitted claim" on August 26, 1999. Referring to the cash flow problems described in Mr. Skinner's letter to Mr. Higgins on August 19, he added, "[s]hould

such cash flow problems result in receivership or other adverse financial consequences, this claim will grow exponentially beyond the present quantum."

[71] Meanwhile, Mr. Gareau was questioning the applicability of a Mandatory Service Bulletin issued by Textron Lycoming, manufacturer of PHG's engine, originally issued on August 9. The bulletin concerned "Recommendations Regarding Accidental Propeller/Rotor Strike or Loss of Propeller/Rotor Blade or Tip." After consulting with the manufacturer, Bill Walsh concluded that the bulletin applied to PHG. As a result, instead of stripping and rebuilding the engine, he replaced it with a fresh one. This process kept PHG, which had been test-flown with the leased Rilpa parts by August 20 and was ready for use by August 25, out of service for several days; it was operational on August 29. Mr. Skinner passed this Bulletin to Mr. Spence, who, in turn, sent it to Mr. Gareau. Mr. Gareau then obtained the opinion of Schweizer, the aircraft manufacturer, that engine removal was unnecessary. Over the next several weeks, Schweizer changed its view several times in response to new information. No expert evidence was adduced on this point, but it is clear that Bill Walsh felt it necessary to comply with the bulletin. I have no basis upon which to find that Helico's action was unreasonable in the circumstances, even if it was eventually held to be unnecessary.

[72] The friction between Mr. Gareau and Mr. Skinner has been noted. The evidence also points to strained relations between the two adjusters, Mr. Nobert and Mr. Gareau. At one point, Mr. Nobert pointed out to Mr. Spence that Mr. Gareau had questioned his competence. Mr. Spence's response was that RSA

was not getting involved in "mudslinging." This fits the "hands-off" policy maintained by RSA officials with respect to Mr. Gareau's competence and qualifications. Around the same time, Mr. Gareau complained in his notes that Mr. Nobert was "not happy with me after asshole Skinner sent him a copy of my fax re competence." Mr. Higgins agreed that this was unprofessional language. Mr. Gareau, on the other hand, thought his note was "privileged" and "nondisclosable", and maintained that he was a professional.

[73] Mr. Nobert reported to BA on September 8 that nothing had been settled at the August 16 meeting, and that since that time Mr. Gareau had been "attempting to prove his competence and no negotiations whatsoever, with the exception of a few items, were discussed." Mr. Nobert wrote that he was "staying away from this endless battle and will only interfere in the event that the insureds wish to submit a claim through the hull insurers and if this happens, our intentions are to attempt to negotiate a settlement..." As it transpired, Mr. Skinner was sufficiently frustrated by early September that he decided to seek a settlement through his own insurer. In a postscript to his September 8 report , Mr. Nobert wrote that Mr. Skinner had contacted him and "explained it has now become urgent that some funds be received so that the repairs to the damaged helicopter can be undertaken to minimize the claim as he does not see the day this part of the claim will be settled." He was therefore intending to claim under the BA policy, for repairs totaling $97,805.20. Deducting the $40,000 advanced by RSA, which Mr. Nobert assumed to be for property damage, and BA's deductible, this left a net claim of $55,305.20. Mr. Nobert requested instructions. He was concerned about

overpaying, in that event that RSA denied recovery of the $40,000 in a subrogated claim, should they treat this advance as a property damage payment.

[74] Also on September 8, Mr. Gareau wrote to Mr. Skinner, questioning "how you will eventually finalize repairs to your helicopter, since at the time of my visit on August 16th, 1999, you had installed a used drive train and tail boom and I do not know what you have done with regards to the rotor blades." He indicated agreement to pay for two new blades, for which Composite had quoted a price of $23,211.26 USD, but with a *pro rata* discount resulting in a net amount of $16,106.05, plus transportation, balancing, and handling. Mr. Gareau went on to propose that Rilpa should examine the components in its possession, and any non-serviceable parts would be shipped to Helicraft in St.-Hubert, Quebec, "for inspection and confirmation of the above." He added the editorial comment that "I doubt very much that any of the components will be found to have suffered damage" in the collision. Alternatively, he suggested, all the components held at Rilpa would be sent to Helicraft "for examination, replacement or tagging at Royal's direct expense." He went on to suggest a cash settlement. As has been noted, Helicraft was not a comparable service facility to Rilpa.

[75] In a letter to Ken Spence the same day, Mr. Gareau asserted that he had convinced Helicraft to assist him, but that various experts had declined to get involved due to Mr. Skinner's alleged bad reputation. As will be clear from my earlier comments, I reject any claim that Mr. Skinner had a bad reputation that contributed to Mr. Gareau's difficulties. Mr. Gareau's efforts to obtain the assistance of qualified experts had been sporadic and unsuccessful, and those he

spoke to tended to confirm that the Rilpa estimate was reasonable. Mr. Gareau maintained, however, that there was little chance of damage to the drive train, and that the only likely damage referenced in the Rilpa letter of July 29 was to the tailboom, which he believed was near the end of its useful life. His authority seems to have been "the information that I have obtained from Helicraft and two other experienced helicopter mechanics…"

[76] Mr Gareau's queries about technical issues were not based on any expertise beyond his own largely irrelevant experience as a fixed-wing pilot, but Mr. Spence and Mr. Higgins continued to give him the benefit of the doubt. Ultimately, Mr. Gareau's September 8 proposal amounted to little more than payment for the blades; he preferred to minimize the scale of damage to the aircraft. He acknowledged in correspondence with RSA that there was a possible loss of use claim, but opined that it would require verification by a forensic accountant, although Ms. Hallman had advised Mr. Skinner to keep a record of his issues.

[77] To be clear, Mr. Gareau rejected the opinions of various individuals who were knowledgeable about the technical aspects of helicopters, including Mr. Skinner, Mr. Nobert, and Mr. Mizera, and apparently even Mr. Pritchard, in favour of his own opinions, supported only by vague and unsubstantiated references to other mechanics. The plaintiffs allege that Mr. Gareau prepared this settlement proposal with the intention that it would be rejected.

[78] Mr. Gareau reported to RSA on September 16, 1999. He adopted Brian Parent's account of a minor collision followed by a longer test flight than

that described by Mr. Skinner. He criticized Mr. Skinner's decision "in the middle of the process" to bring his claim directly to RSA "under the mistaken impression that he would receive new parts for old without depreciation." He went on to accuse Mr. Skinner of doing nothing to get PHG repaired, and spending his time "writing complaint letters to just about everyone and looking to lease a helicopter in the Montreal region…" Mr. Skinner's settlement proposal, he wrote, has been an attempt to take advantage of RSA's lack of aviation expertise, and "[i]f he had wanted to show any amount of decency and good faith, he would have produced a reasonable proposal. On the contrary, he attempted to take advantage of the situation…." Mr. Gareau went on to assert that Mr. Skinner knew "very well that the great majority of the components held by Rilpa for inspection were undamaged and that such inspection would probably cost under $15,000."

[79] Mr. Mizera, whose evidence I accept where it conflicts with Mr. Gareau's, testified that Helico had acted quickly in shipping the parts to Rilpa. He also said Rilpa already knew that some parts, such as the main rotor blades, the main rotor hub and shaft, and the tail boom, could not be returned to service. He dismissed Mr. Gareau's claim that inspection had not been done, testifying that he had confirmed the main rotor blades, tail boom and main rotor drive shaft were not usable. Non-destructive testing had been completed. All that would have been necessary to complete the work outlined in the July 1999 estimates would have been an indication that Rilpa would be paid.

[80] Mr. Gareau went on in his report to air his suspicion that Mr. Skinner was scheming to "quickly repair the damaged helicopter with used parts, with the

intention of eventually having the components from the damaged helicopter verified and tagged by Rilpa and reinstalled on their helicopter purchased in the U.S." This was based on comments by an unnamed helicopter operator in Ontario. Expanding on his theory that Mr. Skinner was trying to fool RSA, he wrote: "We do not trust this claimant at all. We suspect strongly that thinking he was going to get $276,000 from you, he purchased Rilpa's U.S. purchased helicopter with the intention of shifting parts from one machine to another and ending up with 2 helicopters for the price of 1." Mr. Gareau never explained in a comprehensible way how the alleged "two for one" scheme would have worked, although he was cross-examined on the point. Mr. Higgins agreed at trial that this language "went overboard," and agreed that Mr. Gareau never reported a single example of a suspicious action on the part of Mr. Skinner. I conclude that this theory had no merit.

[81] Mr. Gareau advised RSA that he did not believe that “PHG should be considered to have a reduced value due to damage history", partly due to the alleged absence of log books covering the entire history of the aircraft, and partly based on his own opinion that the structural integrity of the airframe was not affected. Similarly, he doubted that the tailboom would have been damaged, and suggested that Mr. Skinner was simply trying to have it replaced by RSA. He believed the actual cash value of PHG was between $160,000 and $170,000. He reservedly accepted Mr. Skinner's view that he should not be charged depreciation of $10,000 on the blades, which had some ten years of life remaining. He acknowledged that Rob Pritchard and Helicraft's maintenance manager Daniel Hauser had indicated that Rilpa's estimate seemed reasonable, but

emphasized that any parts found to be damaged by Rilpa should be examined by an "independent expert."

[82] Mr. Gareau advised RSA to offer repair costs of $58,500, plus loss of use of $25,000, plus costs and possibly some components damaged beyond repair in the amount of $16,500, for a total of $100,000. As a course of action, however, he recommended leaving the file "in abeyance," waiting for Mr. Skinner to submit a "totally outrageous" claim, then demanding further details. Mr. Higgins denied that this meant that RSA should demand more documentation no matter what Mr. Skinner submitted, but agreed that Mr. Skinner had provided everything RSA required to that point.

[83] Mr. Skinner wrote to Mr. Gareau, on September 18:

> …How do you expect me to operate my company without any cashflow? Your client crashed into my helicopter. It happened at the worst possible time of year and this was fully explained to all concerned. My company has done the impossible to resolve this at our expense. We are not a huge company with unlimited resources, in fact we are a very small company with very limited resources and this has been completely and fully explained and disclosed to all concerned. Independent suppliers went out of their way to get expedient and timely answers. You people went on vacation, made commitments, broke these commitments and are now dragging this issue on much longer than it ever had to go. Nothing could be clearer that the countless times in verbal and written communications from myself or my representatives that time is of the essence in this matter. In every telephone conversation I have had with you, with no exceptions, you have told me that you didn't have the file in front of you…

[84] In September 1999, the plaintiffs' situation was deteriorating. The Bank of Montreal was raising concerns about Helico's operating line of credit, as acknowledged in evidence by Paul McCracken. Some time earlier, Helico's line of

credit had been extended from $75,000 to $100,000. At the time of the accident, Helico was over the limit, at some $106,406. This does not appear to have been an unusual situation, nor was it one that seems to have caused the bank particular concern in the past. After the accident and the subsequent drying up of cash flow, however, the situation changed. Mr. Skinner's evidence was that the two advances from RSA, totaling $40,000.00, had an insignificant effect. The line of credit had a balance of $86,000 on August 19, before the second advance. A week later, after the second advance, it had risen to $89,234.87. On September 27 the bank issued a demand letter. Mr. Skinner replied, referencing the losses arising from the accident and indicating that he hoped for a resolution from RSA; he wrote that he hoped to pay $50,000 by the end of October. On October 9, Helico laid off all of its non-essential employees.

[85] On October 26, Mr. Skinner submitted a settlement proposal through counsel to Mr. Gareau, seeking damages of $335,239.07. His lawyer, Mr. MacIntosh, noted that Helico still could not afford to authorize and pay for repairs at Rilpa, and asked Mr. Gareau to immediately provide such authorization. He wrote that the parts could go to Schweizer or another authorized overhaul and repair centre, if Mr. Gareau was unwilling to use Rilpa. The claim included repair costs ($141,607.63), Heli-Max rental costs ($90,440), rental costs of Rilpa parts ($25,412.24), direct revenue loss between July 9 and August 5 ($40,723.20), bank charges ($2,056), and general damages on account of business interruption ($75,000). He deducted the $40,000 advanced in August. The Heli-Max invoice was attached. Mr. Higgin's evidence was that this invoice would not have been

paid individually in the context of a disputed claim, although this practice was not communicated to Mr. Skinner or his counsel.

[86] Simultaneously with the October 26 claim letter to Mr. Gareau, Mr. Skinner submitted a proof of loss to BA through Mr. Nobert, who recommended that BA settle the hull damage portion of the claim. BA questioned the purpose of the $40,000 advanced by RSA. In a fax dated December 3, 1999, Mr. Higgins informed the broker Mr. Conway that his understanding was that "these payments were made to assist Mr. Skinner with 'Cash-Flow' problems he was experiencing due to this loss." He also informed Martin Gyorky of BA, who inquired about the purpose of the advances on December 17, 1999, and again around January 11, 2000. Mr. Gyorky also inquired as to whether RSA would agree to a property damage figure, so as to settle the subrogation figure in advance. Mr. Higgins refused, and warned Mr. Gyorky that his "pencil would be very sharp" when he reviewed any subrogation claim from BA. He spoke with Mr. Gyorky again on February 21, 2000, and learned that the first-party claim was not proceeding because BA wanted to deduct the $40,000 from the property damage claim. He again said the advance was not for that purpose.

[87] Mr. Nobert's evidence was that BA wanted written confirmation that the advances were for property damage or loss of use before the proof of loss would be approved. He said Mr. Spence would not give such written confirmation. Mr. Nobert's evidence, which I accept, was that calling the advances "cash flow" was meaningless, and could jeopardize BA's ability to recover that portion of the claim from RSA in a subrogated claim. Mr. Nobert also made inquiries with RSA

as to the purpose of the advances. He denied that he attempted to convince Mr. Spence to change his position in order to designate the payments as being for property damage.

[88] On December 3, 1999, Mr. Gareau provided a further report to RSA, informing Mr. Spence that he had failed to locate a licensed Hughes helicopter mechanic. He volunteered that "verbal information" obtained from "mechanics we spoke to" suggested "very little chance" of component damage. He again denied that the components had been inspected and alleged that Mr. Skinner, supported by Mr. Nobert, was seeking an excessive recovery based on inflated repair and mitigation costs. It should be noted once again that Mr. Gareau did not expand his search to locate experts on assessing damage to helicopters; rather, he apparently based his views on cursory consultations with mechanics or people who maintained their own aircraft.

[89] Contrary to Mr. Gareau's insistence that Rilpa had done nothing with the components, as of December 3, 1999, Mr. Mizera testified, all of the components in his July 15 list had been evaluated. The only delay was in awaiting an assurance of payment. Rilpa had examined the components as the manufacturer's authorized representative. In Mr. Mizera's experience, the approach taken by Mr. Gareau was an unusual one.

[90] It was the defendants' position, and the repeated evidence of Mr. Spence, Mr. Higgins, and Ms. Hallman, that RSA could not issue a "purchase order" to Rilpa; only Mr. Skinner could do that. This avoids the real question, which is

whether RSA could have given Mr. Mizera an assurance that he would be paid for his work. The plaintiffs do not suggest that it was up to RSA to authorize the work. But it is clear on the evidence that it was a practical impossibility for Mr. Skinner to authorize Rilpa to proceed until RSA indicated that payment would be forthcoming. It is also clear that Mr. Mizera knew this. There was evidence from Mr. Higgins that such assurances were not unheard of. Ms. Hallman also testified that it was possible to issue joint cheques to a claimant and a service provider. Mr. Gareau also testified that he had obtained authorization to issue joint cheques in the past.

[91] While the evidence does not permit a finding that there was actual antagonism among Ms. Hallman, Mr. Spence, and Mr. Higgins that contributed to the ultimate failure to resolve the file, it is clear that there was a lack of communication within RSA. For instance, Mr. Spence and Mr. Higgins did not consult Ms. Hallman about her discussions with Mr. Skinner, even though she had indicated RSA's intention to resolve the claim, in writing and in detail. This inability to communicate clearly extended to their dealings with Mr. Skinner. Mr. Higgins agreed at trial that RSA's approach to the file changed after August 16. In effect, the plan formulated by Ms. Hallman was set aside. Nevertheless, he agreed that no one told Mr. Skinner this, and that Mr. Skinner's subsequent references in correspondence to commitments made by Ms. Hallman indicated that he did not understand RSA's change of position.

[92] At trial Mr. Higgins suggested that RSA's repeated demands to Mr. Skinner to have PHG repaired were, in fact, indications that he should have the property

damage claim processed by BA. No one ever said this, however, and in view of Ms. Hallman's statements and RSA's subsequent conduct, Mr. Skinner reasonably believed throughout August 1999 that RSA would deal with his claim comprehensively. It was not Mr. Skinner's responsibility to read the minds of RSA's representatives, nor could he be expected to decode their indirect signals that they were no longer committed to the process set out in Ms. Hallman's letter.

[93] It is also rather remarkable that, despite the clear language in Ms. Hallman's letter respecting the Heli-Max rental, the RSA witnesses - particularly Mr. Spence and Mr. Higgins - were unable to provide any explanation for why the invoice was never paid. Ms. Hallman testified that she was not even aware that it had not been paid, and stated that she would have paid it. She agreed that the Heli-Max charge should have been paid if it accorded to what she had committed to. She testified that she was also unaware that RSA had never advanced any funds towards repair costs. Mr. Higgins did not dispute that the payment was due, and could not explain why it was omitted from two subsequent RSA settlement offers.

[94] The defendants initially argued that there had been no obligation to pay the Heli-Max rental invoice because they never received it. Mr. Higgins at one point stated that he never received the invoice. It was established, however, that the invoice was attached to Mr. Skinner's October 26 settlement proposal. It also appears from Mr. Gareau's evidence that he had access to this invoice; he described a meeting with a Heli-Max official in which the invoices were reviewed. Mr. Skinner's evidence was that the invoice would have been forwarded to Mr. Gareau or RSA shortly after he received it, but there was no documentary

evidence to support this. The invoice was in RSA's hands no later than October 26, 1999.

Helico's decline

[95] In the course of late 1999, Mr. Skinner was forced to lay off staff. Creditors were calling, including BMO, which was becoming impatient. The ACOA funding was on hold, and the BDC had not advanced its funds. In the fall of 1999, with no remaining aircraft and its operations ended, Helico surrendered its Operator's Certificate. Mr. Skinner testified that this initially involved placing the certificate "on a shelf" for six months, at which point Transport Canada could grant a six-month extension for a number of years. Eventually, Helico permanently surrendered the Operator's Certificate. By early 2000, it became necessary to liquidate assets in order to pay the bank and other creditors. ACOA was owed $116,000. Mr. Skinner testified that it took ten years to repay the ACOA debt.

[96] Rilpa had not been paid for the parts cannibalized from GREA to make PHG airworthy again. PHG had been leased from Aeroco. In order to deal with liabilities owed both to Rilpa and to Aeroco, Mr. Skinner testified that he negotiated an arrangement whereby the plaintiffs would buy PHG from Aeroco (from whom it was leased) for $150,000 ($160,500 with GST.) A similar arrangement was made with Rilpa with respect to GREA, at a price of $130,000 ($139,100 with GST.) The plaintiffs also had to buy parts from Rilpa to replace those cannibalized from GREA, so that GREA could be sold. After these sales, the plaintiffs were left owing $77,554.08 to Aeroco and $46,288.05 to Rilpa. In the

course of these arrangements, Helico contributed certain parts from its own inventory to GREA, as well as providing the personnel and labour.

[97] After 1999, Mr. Skinner testified, he provided spraying services under wet leases, subcontracting aircraft from other operators, with insurance and pilot included. His capacity was limited by this arrangement. He was usually unable to have aircraft available to do standby work for Nova Scotia Power. This was also an expensive way to operate, since wet-leased aircraft generally had to be ferried from Quebec and required long lead times. As a result, Helico was limited to contracts of longer duration, since it was not economical to wet lease aircraft for short-term contracts. Mr. Skinner testified that these limitations led Helico to lose all of its charter customers. As for spraying, Helico's lack of its own Operator's Certificate limited the available spray work, since some contracts required it to have its own certificate, rather than operate under one held by the owner of a wet-leased aircraft. He said the lack of an Operator's Certificate also left Helico unable to do work for Nova Scotia Power, after a policy change that required bidders to hold their own certificates.

[98] Mr. Skinner eventually purchased a company called Radco, which specialized in motor vehicle drive shaft and radiator repairs, through a sale share. He testified that this purchase did not involve his personal funds or Helico funds, but was financed through the bank, together with the vendor holding back a portion of the purchase through a personal note paid from Radco revenues over a 16-month period.

[99] In short, Mr. Skinner's evidence was that Helico lost its Operator's Certificate; has never been reimbursed for the significant costs and losses associated with the 1999 accident; and has been unable to replace the personnel and financial capacity to rebuild the maintenance business. The planned facility expansion was never finalized, and significant expenditures up to 1999 have been rendered wasted expense. Helico's cash flow remains depleted, and its charter customer base was lost. Finally, the plaintiffs were forced to spend years paying back debts. Mr. Skinner stated that 2010-2011 was the first time the plaintiffs' obligations to the Canada Revenue Agency were current since 1999.

FINDINGS OF FACT

[100] It will be useful at this point to set out the central findings of fact upon which the legal determinations must be based.

> Helico had experienced a steady and almost uninterrupted growth in revenue, from about $493,000 in 1993 to about $831,000 in 1998.
>
> Helico experienced two accidents in 1998, neither of which was attributed to any fault of Helico or its personnel.
>
> ACOA approved financing for an expansion of Helico's Trenton facility for the purpose of expanding the aircraft maintenance and refurbishment aspect of the business. This approval was based on a business plan prepared after the 1998 accidents. The initial request was for $215,950. On May 31, 1999, this was reduced to $157,200. $116,000 was advanced before the accident.
>
> Mr. Skinner had also received verbal confirmation prior to the accident that a loan from the Nova Scotia Business Development Corporation would be approved, in the amount of $155,000. He received written confirmation of the BDC loan after

the date of the accident. The plaintiffs banked with the Bank of Montreal, through which a line of credit of $100,000 had been authorized. Mr. Skinner had also shown the ability to raise money from private sources, and had been extended credit by certain businesses with which the plaintiffs dealt.

The plaintiffs had a verbal agreement to purchase land for the expansion of Helico's facilities. Construction work on the facility was under way before July 8, 1999.

Helico had three aircraft refurbishment projects under way on July 8, 1999.

Helico controlled two helicopters at the time of the accident: PHG and FULL. FULL was being refurbished for use in the 1999 spraying season.

On July 8, 1999, Mr. Skinner was performing spraying work at Rainbow Farms in Rawdon. After landing, Mr. Skinner and Bruce Paige secured the Hughes 300 helicopter C-FPHG, which was undamaged when they left it in a location approved by the property owner. The rotor blades were tied down to the tailboom, and the skids were resting in ruts on the ground.

After Mr. Skinner and Mr. Paige left the aircraft, Russell Dalrymple attempted to manoeuvre a truck and haywagon past it, but his vehicle collided with one of the main rotor blades. The resulting force transmitted through the rotor hub and down to the skids.

On learning of the collision, on July 9, Mr. Skinner and Mr. Paige conducted an examination of the aircraft, including the rotor blades, and found no visible damage. This inspection was conducted in accordance with the manufacturer's guidelines for progressive inspection after a main rotor blade strike. After finding no damage on inspection, Mr. Skinner called Bill Walsh, Helico's maintenance director. After consulting with Mr. Walsh, Mr. Skinner started the engine, then conducted a brief test flight. Upon detecting vibration in the aircraft, he landed in a field alongside the original landing site. The hover was done in accordance with manufacturer's instructions, and on advice of an experienced maintenance director.

The damage to PHG was caused, firstly, by the collision, and secondly, by consequential damage arising from the test flight.

Composite Technology found that two of the three main rotor blades were damaged beyond repair and required replacement.

Rilpa Enterprises completed an estimate of the costs to complete inspection, repair and replacement, including pro rata considerations, by July 15, 1999, amended on July 29.

Gilles Nobert reduced the Rilpa estimate of component replacement, including pro rata considerations, and provided an estimate by August 2. Mr. Nobert advised BA that this was a reasonable basis for settlement.

Helico's insurance policy with British Aviation Insurance Group covered property damage to the aircraft, but did not include coverage for loss of use or business losses. Mr. Dalrymple was insured by Royal & SunAlliance Insurance of Canada.

RSA confirmed to Helico that Mr. Dalrymple had insurance coverage, and accepted liability. Mr. Spence indicated that RSA would waive the deductible on Helico's hull insurance coverage.

In the hope of more favourable terms and a more straightforward and all-inclusive settlement than would be available under the BA policy, Helico contacted RSA seeking a comprehensive settlement for rental of a replacement helicopter and for payment of damages for damage to PHG and business losses.

RSA contacted Heli-Max regarding rental of a helicopter for use by Helico for a three-week period. RSA agreed with Helico that it would fund the rental helicopter for a three-week period, and instructed Mr. Skinner to keep a record of his business losses.

In addition to renting a replacement helicopter from Heli-Max, Helico entered into a lease agreement with Rilpa for a second helicopter, which ultimately led to an agreement for components from the Rilpa helicopter to be leased in order to make PHG operational.

The plaintiffs had correspondence and discussions with Cindy Hallman of RSA between August 4 and 6, during which Ms. Hallman indicated that the claim

relating to the damaged blades should be easily resolved, that RSA would fund the Heli-Max rental and that she suspected that "this will be resolved to everyone's satisfaction." She also advised Mr. Mizera of Rilpa that the claim was close to settling.

Around August 10, 1999, RSA asked the plaintiffs to submit a proposal for an overall settlement of the claim, including property damage, helicopter rental and business losses. Mr. Skinner provided such a proposal. RSA then retained an outside adjuster, Pierre Gareau. RSA did not determine whether Mr. Gareau had the experience or competence to adjust a claim involving damage to an aircraft. Despite concerns raised by Mr. Skinner and Mr. Nobert, RSA refused to address Mr. Gareau's competence or objectivity.

On August 23, Mr. Spence told Mr. Skinner that RSA would not discuss the claim further until Mr. Gareau reported.

PHG was ready for use by August 25, 1999, but was removed from service by Bill Walsh, Helico's maintenance director, based on a mandatory service bulletin issued by the engine manufacturer. The grounding was eventually determined to be unnecessary.

In the period after August 6, RSA never advised the plaintiffs to pursue their damage claim through their own insurer, BA.

RSA was aware of the plaintiffs' (and particularly Helico's) precarious financial situation after the accident. Mr. Skinner communicated this to various RSA personnel, including Mr. Spence, Mr. Higgins, and Ms. Hallman.

The plaintiffs were required to direct their own funds to pay for the lease of the Heli-Max helicopter. RSA agreed to pay for this rental, but never did so. The invoice was delivered to Pierre Gareau with the plaintiff's settlement proposal of October 26, 1999.

The plaintiffs did not omit to provide any information to RSA that was required to investigate or settle the claim.

> RSA advanced $40,000 in two installments of $20,000 each to assist with Helico's cash flow. RSA did not indicate that this advance was for any particular purpose at the time, and when BA subsequently inquired in order to determine whether the advance was directed at the property damage claim. On several occasions starting in December 1999, RSA informed BA that the advances were for cash flow purposes.
>
> Mr. Mizera and Mr. Skinner repeatedly advised RSA that Rilpa needed an assurance of payment before Rilpa would proceed with final inspection and repairs, as this would involve ordering new parts. RSA never provided such an assurance. It was a practical impossibility for the plaintiffs to direct Rilpa to proceed with the work without an assurance of payment. RSA was aware that the plaintiffs lacked the resources to have this work done.
>
> PHG was refurbished and sold in 2004.

Facts relating to the issue of business losses will be dealt with later.

LIABILITY

Breach of contract

[101] The plaintiffs advance a claim of breach of contract. The plaintiffs claim that in return for RSA agreeing to process their claim in an expedited manner, they agreed to forego advancing a claim through their own insurer. They say RSA induced them to forbear from partial reimbursement through BA, thereby saving itself the extra costs of claims adjustment and a subrogation claim by BA. Forbearance from pursuit of a claim constitutes valid consideration where the promise was "intended to create a legal relationship, was intended to be acted upon and was in fact acted upon by the plaintiff to whom it was given": *Peters v.*

Klassen (1993), 86 Man. R. (2d) 140 at paras. 47-48, varied without reference to this point, 92 Man. R. (2d) 245 (Man. C.A.)

[102] The plaintiffs say they acted upon RSA's representations when they rented a helicopter from Heli-Max, as well as by forgoing their claim through BA. They say there was a specific contract for RSA to pay the rental costs of the replacement helicopter, down to the specific amount required. I am satisfied that the language of Ms. Hallman's letter to Mr. Skinner amounted to an agreement to fund the Heli-Max rental. The defendants maintain that RSA was merely carrying out its duties and obligations to its own insured, and says there was no contract. They also say there was no forbearance, and that a subrogated claim is not correctly described as duplicative or overlapping. Furthermore, the plaintiffs have pointed to no case where a unilateral contract was found between a third party claimant and a liability insurer.

[103] Whether or not it can be said that the plaintiffs intended to forbear from the BA claim, I am not convinced that there was a contract between RSA and the plaintiffs, simply on the basis that the terms of any such contract are uncertain. While RSA and the plaintiffs were *ad idem* on the terms of the Heli-Max rental, as evinced by Ms. Hallman's letter, this was not the case with other issues. I am not convinced that this single aspect of the parties' discussions can be severed so as to create a contract. The overall terms of any such contract are uncertain. The claim is more properly framed under the law of negligence.

Negligence

[104] To prove negligence the plaintiff must establish "(1) that the defendant owed him a duty of care; (2) that the defendant's behaviour breached the standard of care; (3) that the plaintiff sustained damage; and (4) that the damage was caused, in fact and in law, by the defendant's breach": *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, at para. 3.

[105] The test for finding a duty of care originates in *Anns v. Merton London Borough Council*, [1978] A.C. 728. The Supreme Court of Canada restated the *Anns* analysis in *Cooper v. Hobart*, 2001 SCC 79. McLachlin C.J.C. and Major J. said, for the court, at para. 30 (citations omitted):

> … At the first stage of the Anns test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis … focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a prima facie duty of care arises. At the second stage of the Anns test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care...

[106] The term "proximity," generally characterizes "the type of relationship in which a duty of care may arise," and relationships of sufficient proximity will generally be identified by reference to categories. The categories are "are not closed and new categories of negligence may be introduced" in order "to meet the

needs of new circumstances" (paras. 31-34.) The court held that "proximity" refers to the type of "close and direct" relationship described in *Donoghue v. Stevenson*, [1932] A.C. 562, where Lord Atkin described the "neighbor principle" at 580:

> Who then, in law, is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question.

[107] To define a relationship of proximity, the court said, in *Cooper* at para. 34:

> may involve looking at expectations, representations, reliance, and the property or other interests involved. Essentially, these are factors that allow us to evaluate the closeness of the relationship between the plaintiff and the defendant and to determine whether it is just and fair having regard to that relationship to impose a duty of care in law upon the defendant.

Proximity is "a broad concept which is capable of subsuming different categories of cases involving different factors" (*Cooper* at para. 35, citing *Canadian National Railway v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021 at 1151, and *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, at para. 23).

[108] In considering the categories of negligence, the court in *Cooper* agreed with the observation of Lord Goff in *Davis v. Radcliffe*, [1990] 2 All E.R. 536, at 540, quoting *Sutherland Shire Council v. Heyman* (1985), 60 A.L.R. 1 at 43-44, that "the law should develop categories of negligence incrementally and by analogy with established categories." The existing categories included, for instance, foreseeable physical harm to the plaintiff's property, negligent misstatement, and

relational economic loss in the performance of a contract. Such cases would give rise to a *prima facie* duty of care (para. 36).

[109] As to the second stage of the *Anns* analysis - whether a duty of care should not be recognized despite proximity being established - the court discussed "residual policy considerations" in *Cooper*, at para. 37:

> … These are not concerned with the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally. Does the law already provide a remedy? Would recognition of the duty of care create the spectre of unlimited liability to an unlimited class? Are there other reasons of broad policy that suggest that the duty of care should not be recognized? Following this approach, this Court declined to find liability in Hercules Managements , supra, on the ground that to recognize a duty of care would raise the spectre of liability to an indeterminate class of people.

[110] The second step of the *Anns* analysis will generally only arise where an alleged duty of care is not within a recognized or analogous category (*Cooper* at para. 39). In a "novel situation" it is necessary to consider both steps of the *Anns* test in order to ensure that "not only are foreseeability and relational proximity present, but there are no broader considerations that would make imposition of a duty of care unwise" (*Cooper* at para. 39).

Duty of care of Mr. Dalrymple

[111] The plaintiffs submit that Mr. Dalrymple, whose vehicle struck the helicopter, owed a duty of care not to cause foreseeable damage to other persons or property while operating a vehicle. I accept that Mr. Dalrymple had such a duty,

under the *Anns* analysis. I further accept that RSA assumed a duty as Mr. Dalrymple's agent with respect to any damage he might have caused. I find that RSA is bound by the provisions of the Nova Scotia *Insurance Act*, as well as the general law of agency.

Duty of care of RSA

[112] The plaintiffs say RSA's duty of care arose when it voluntarily accepted responsibility on behalf of its insured, Mr. Dalrymple, and in its own right. Having assumed the adjustment of the claim, with knowledge of the plaintiffs' circumstances from Mr. Skinner, it was (the plaintiffs say) reasonably foreseeable that a failure to settle the claim in a prompt and timely manner would lead to a cash flow crisis for the plaintiffs. Mr. Skinner made RSA's representatives aware of the plaintiffs' financial situation. The plaintiffs submit that RSA effectively represented that they would be treated with the same entitlement to fairness and good faith as they could expect from their own insurer. Ms. Hallman's letter made it clear that RSA recognized that the plaintiffs were dealing with RSA in preference to their own insurer. She agreed at trial that she had told Mr. Skinner that his claim would receive priority attention, in the sense that she would ensure that it was followed up with Jim Higgins and finalized.

[113] RSA denies that it owed the plaintiffs a duty of care. They argue that RSA carried out its duty to its own insured, and that it owed no other duty. The RSA witnesses all maintained that their duty was to their insured, and appeared to take the view that this would relieve them of any duty to the plaintiffs. They argue,

correctly, that as a general principle, no duty of care arises out of a relationship between an insurer and a third party claimant. In *Warner v. Balsdon* (2008), 91 O.R. (3d) 124, [2008] O.J. No. 2005 (Ont. Sup. Ct. J. (Div. Ct.)), at paras. 37-38 (citations omitted), the court said:

> A duty of care between a third party liability insurer and persons who have made claims against the insurer's insured would create conflicts of interest. As an indemnity provider, a liability insurer is obligated to defend the interests of its insured and to limiting [sic] the liability of its insured. That translates into an effort by the insurer to avoid paying out on claims or minimizing the amounts paid. The insurer also owes a duty to its policy holders to minimize premiums and one way of satisfying that duty is to minimize the number of claims paid, and the amount paid on any claims…
>
> To place a duty of care on a liability insurer vis-à-vis the party making a claim, would require the insurer to breach the duties described above, placing the indemnity insurer in an impossible situation, which would not advance the law or the public interest…

[114] Similarly, in *1013952 Ontario Inc. (Silverado Restaurant and Nightclub) v. Sakinofsky*, 2009 CanLII 55317 (Ont. Sup. Ct. J.), the court said, at para. 32:

> There is no proximity and therefore no duty of care between an insurer and a party adverse in interest to the insured. Without a contractual relationship, there is no duty of care to a third party. The insurer's duty of care is confined to the insured. Were it not so, there would be far-reaching liability to third parties, making it impossible for an insurer to gauge its risk when agreeing to insure.

[115] The cases cited by the defendants address the general principle that an insurer does not categorically owe a duty of care to a third party claimant. However, these cases are distinguishable on the rather unusual facts of the present case. In Sakinofsky, a lawyer represented that a clerk would be covered by the

lawyer's liability insurance policy. There were no direct representations made by the insurer to the clerk. In *D.M. v. Alberta Lawyers Insurance Assn.*, 2006 ABQB 598, the insurer had no direct dealings with the victims. In *Balsdon* there was no direct relationship, and no representation or commitment, between the plaintiff and the tortfeasor or the tortfeasor's insurer. The court did not, however, exclude the possibility of a duty of care being owed to a plaintiff by a tortfeasor's insurer. In *Racco v. General Accident Assurance Co.* (1992), 9 C.C.L.I. (2d) 208 (Ont. C.J. Gen. Div.), there was no negligence claim against the insurer. Rather, the claim was framed as a statutory breach. The situation appears to have been a conventional adversarial one. In *Joe (Next friend of) v. Insurance Corp. of British Columbia* (1984), 11 D.L.R. (4th) 633 (B.C.C.A.), the claim was based on an alleged failure of an insurer to meet a duty to its own insured. In *Boucher v. McAllister* (1997), 33 O.R. (3d) 767 (Ont. C.J. Gen. Div.), there was no factual basis for a fiduciary relationship.

[116] In *Overload Tractor Services Ltd. v. British Columbia (Insurance Corp. of British Columbia)*(1988), 23 B.C.L.R. (2d) 182, [1988] B.C.J. No. 94 (B.C.S.C.), affirmed at 38 B.C.L.R. (2d) 259 (B.C.C.A.), a truck was insured by the defendant, ICBC, with a third party liability limit of $1 million. The owner leased the truck to the plaintiff, which had a general liability policy with its own insurer. The lease was not registered to provide the lessee with equivalent coverage to the owner. The plaintiff's employee had an accident with the truck, and the defendant settled a third-party claim for $1.2 million, of which the plaintiff's insurer paid the excess of $200,000. In a subrogated claim, the plaintiff alleged a breach of duty by the

defendant in failing to settle the claim reasonably. The British Columbia Supreme Court said, at paras 8-10:

> The Plaintiff says the Defendant's duty arises in contract or in tort. The duty claimed is that of acting reasonably to protect the Plaintiff's interest, here, to settle within the I.C.B.C. limit. The claim in tort is negligence in adjustment and defence of the claim.
>
> I am satisfied that no duty was owed the Plaintiff by the Defendant in Tort. No case has extended the Donoghue v. Stevenson [1932] A.C. 562 ratio that far...

[117] The plaintiffs say *Overload Tractor Services* has no similarity to this case. It turned on the factual finding that there was no nexus between the plaintiff and the defendant insurer, and therefore no duty arose. By contrast, RSA developed a relationship with the injured victim of its own insured in order to minimize the loss for which it would be responsible.

[118] The plaintiffs say there is precedent for an insurer to be liable for the manner in which it conducts direct dealings with a claimant against its insured. In *Alberta Lawyers Insurance Association*, for instance, the court found it unlikely that a third party claimant "generally would expect that a duty of care is owed to them in light of their adversarial relationship," but added that, in that case, no representations by the insurer to the plaintiffs had been argued or pleaded (paras. 53-54.) The parties in *Balsdon* agreed that "Canadian law has not recognized a duty of care to be owed by a tortfeasor or its insurer, to the plaintiff, in negotiating a settlement of the tort claim; nor has such a duty been specifically ruled out" (para. 28), and the court observed that it was "difficult to conceive how a duty of

care could exist" in the circumstances, but did not categorically exclude the possibility (para. 32.)

[119] The plaintiffs also cite *Gingara v. Przybylski*, [1998] 5 W.W.R. 671 (Alta. Q.B.) and *Ball v. Canada Safeway Ltd.*, 2004 MBQB 268. In *Gingara*, the defendant's insurer assured the plaintiff that he would be treated fairly. The insurer received a settlement offer several days before the expiry of a limitation period, and deliberately did not reply before the limitation period expired. The court applied the *Anns* test and found no detrimental reliance, but held that the insurer's behavior was part of a course of conduct of attempting to take advantage of opposing claimants. The defendants say the circumstances in *Gingara* were narrower than those here. They also argue that *Ball* - a slip and fall case where the defendant misled the plaintiff with bad advice - lacks the particular policy considerations found in insurance cases.

[120] The defendants say that no *Anns* analysis is required because the issue is settled. It is, they submit, "only if there is an open or unsettled issue that the *Cooper* analysis is required": *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41; A. Linden, *Canadian Tort Law*, 9th ed (LexisNexis, 2011) at 304. I am not convinced that a duty of care has been excluded in circumstances like these. The authorities establish that, in a conventional insurance context, a duty of care in negligence does not arise between a plaintiff and a defendant's insurer. But that is not what is alleged here. In this case, the plaintiffs claim that RSA took steps and made representations that altered the relationship to one in which RSA had undertaken to act in a

non-adversarial manner, assuming some of the duties that would arise in dealing with its own insured. I find it necessary to conduct an *Anns* analysis in order to determine whether a duty of care arose.

Application of the Anns test

[121] As noted earlier, the plaintiffs argue that this was not a conventional adversarial negotiation between an injured plaintiff and a tortfeasor's insurer. Instead, a duty arose based on an admission of liability by RSA and a non-adversarial commercial working relationship between parties who would otherwise be adverse. The plaintiffs say there were express representations by RSA that it would settle the claim in an expeditious manner, including paying specific mitigation expenses for rental costs, without BA's involvement. They say RSA made these representations, which included an explicit recognition that the plaintiffs would not pursue the claim through their own insurer, with knowledge of Helico's circumstances, including a time-sensitive expansion project, financial vulnerability resulting from the accident, the urgency of ensuring PHG was repaired, and the need for aircraft to service Helico's upcoming contracts. It is clear from the findings of fact that representations of this kind were indeed made, although I have not found that all of the RSA officials that Mr. Skinner dealt with possessed identical knowledge of Helico's situation.

[122] RSA's representations included clear statements in Ms. Hallman's letter indicating that the plaintiffs would drop their claim through BA, and a specific commitment to fund the rental of the Heli-Max aircraft. Further representations,

both by word and conduct, included the cumulative advances of $40,000 in August 1999, and Mr. Spence's direction on August 23 that Mr. Skinner should wait for a proposal from RSA. The plaintiffs say RSA's representations raised reasonable expectations of a reasonable and fair claims adjustment, conducted in good faith, through RSA. The plaintiffs say they relied on these representations, leading them not to process the property damage claim through BA, and to undertake a helicopter rental in mitigation, which their own cash flow was not in a position to support. It was only in the course of litigation that RSA witnesses claimed that their insistence that the plaintiffs arrange repairs was in fact a signal that the plaintiffs should seek recovery for hull damage from BA. It was reasonably foreseeable in the circumstances that if RSA failed to conduct itself in accordance with the various representations made by its officials, the plaintiffs would suffer harm.

[123] The defendants submit that there are compelling policy reasons not to recognize a duty of care in these circumstances. They allege that the plaintiffs were in a position to foresee and avoid the loss. They cite *Design Services Ltd. v. Canada*, 2008 SCC 22, where the appellant subcontractors brought an action against Public Works and Government Services Canada (PW) after the department awarded a contract to a non-compliant bidder. The appellants had been associated with a contractor that submitted a compliant bid that should have been awarded the contract; that contractor had sued, but subsequently settled with PW. The subcontractors' claim did not fall within the existing category of relational economic loss, since there was no property damage. In applying the *Anns* test, the court held that there was no *prima facie* duty of care owed by an owner to a

subcontractor in the course of a tendering process. In particular, the subcontractors had not entered into a joint venture with the bidder, which would have brought them into privity of contract with PW. Rothstein J. said, at para. 57:

> There are certainly factors that indicate a close relationship between PW and the appellants…. Nonetheless, the appellants' ability to foresee and protect themselves from the economic loss in question is an overriding policy reason why tort liability should not be recognized in these circumstances. The appellants had the opportunity to arrange their affairs in such a way as to be in privity of contract …, but they chose not to do so and they are now trying to claim through tort law for lack of a contractual relationship with PW. Tort law should not be used as an after-the-fact insurer.

[124] The plaintiffs say their damage consisted of consequential (rather than pure) economic loss, because it involved physical damage to property. In any event, negligent misrepresentation is one of the categories of negligence for which a duty of care exists with respect to pure economic losses (*Design Services* at paras. 31-32). However, I do not find *Design Services* to be of particular assistance here. There is no parallel here with the ability of the plaintiffs in that case to enter into a contract in order to avoid the damages.

[125] The defendants say proximity must be grounded in the statute: *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, at para. 8. A consideration of the statute is relevant to any analysis of a potential duty of care, but it is not decisive. Sections 119 and 126 of the *Insurance Act*, R.S.N.S. 1989, c. 231, impose certain duties upon an insurer. All motor vehicle liability policies require the insurer, in the case of an accident causing damage to persons or property, to "make such investigations, conduct such negotiations with the claimant, and effect such

settlement of any resulting claims, as may be deemed expedient by the insurer" (s. 119(a)), as well as to defend any civil action on the insured's behalf (s. 119(b)). The insurer is deemed the insured's "irrevocable attorney" to defend such actions (s. 126). The Act contemplates a direct action by a third party in limited circumstances, pursuant to s. 133(1), which permits a claimant who is entitled to judgment against the insured to recover the amount payable under the policy. None of this provides a persuasive policy reason to exclude liability to a third party in all conceivable circumstances. I am satisfied that the initial liability of RSA arose as a result of its duty under the *Insurance Act*, and continued through the agency relationship that continued to exist while RSA's own conduct was causing consequential economic loss.

[126] As to the defendants' suggestion that RSA's statutory duty to its own insured negates any possible duty to the plaintiffs, the plaintiffs submit that had RSA been acting in Mr. Dalrymple's best interests, it would have dealt with the claim in the manner it represented it would do, in which case Mr. Dalrymple would not be facing a claim exceeding his policy limit. In other words, the objective of safeguarding Mr. Dalrymple's position by meeting its commitment to the plaintiffs was aligned with the plaintiff's legal objectives. If the pragmatic assumption of responsibility for processing and reasonably paying the claim does not give rise to a duty of care, a claimant against an insured tortfeasor will be at the mercy of an insurer acting in bad faith, with no legal recourse.

[127] In the narrow circumstances where a tortfeasor's insurer volunteers to negotiate a settlement directly, in an expedited manner, with knowledge of the

plaintiffs' financial emergency, and with knowledge that the plaintiffs were setting aside a claim with their own insurer, I am satisfied that a duty of care can be found. This duty arises from voluntary actions and representations made by RSA's officials, including specific commitments made by Ms. Hallman; the August 1999 advances of funds; Mr. Spence's direction to Mr. Skinner to await a proposal from RSA once Mr. Gareau finished his investigation; and the failure to inform the plaintiffs that RSA had effectively decided to abandon the course of action laid out by Ms. Hallman. There was no obligation on RSA to take any of these steps; it was entirely voluntary. RSA could simply have directed Mr. Skinner to claim through his own insurer, and await a subrogated claim.

[128] It is telling that the defendants suggested at trial that the repeated directions to Mr. Skinner to have PHG repaired were in fact a hint that he should take his claim to BA. Nothing in RSA's conduct after Ms. Hallman became involved supports this conclusion. To be clear, the duty arose from the point at which she became involved, not earlier. During the month of August 1999, RSA voluntarily led Mr. Skinner to believe that the plaintiffs' claim was being handled as a matter of priority by RSA, and that RSA was making efforts to settle the matter through an essentially non-adversarial negotiation process. RSA's representatives indicated, among other things, that RSA accepted the appraisals and inspections conducted by Mr. Nobert and Mr. Mizera as the basis for a settlement of the property damage aspect of the claim. They also told him that RSA would fund the rental of the Heli-Max helicopter. They made such representations with the knowledge that the plaintiffs' claim with their own insurer was being shelved so that the plaintiffs could deal directly with RSA. Furthermore, RSA advanced funds

to Mr. Skinner in order to address the plaintiffs' cash flow crisis. Having made such commitments, RSA placed itself in a position distinct from a third-party insurer dealing with a claimant in a conventionally adversarial situation.

Standard of care

[129] Major J. described the content of the standard of care analysis in a negligence case in *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201, at para. 28:

> Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury. In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards.

[130] Statutory obligations or prohibitions may provide evidence of what constitutes reasonable conduct, but do not displace the obligation of reasonableness; a party "cannot avoid the underlying obligation of reasonable care simply by discharging statutory duties" (para. 29.) The defendants say RSA was entitled to operate in accordance with industry custom and practice. This meant, they argue, that they could expect the plaintiffs - and specifically Mr. Skinner - to pursue their own interests and to advance their own claim in a reasonable and prudent manner. The evidence indicates that this is what Mr. Skinner was doing by dealing directly with RSA.

[131] I do not believe that expert evidence is required to determine a standard of care in this case. The standard is simply that of an ordinary, reasonable, and prudent insurer dealing with a third party who, to the insurer's actual knowledge, is in urgent need of settlement and proceeds and has been led by the insurer to expect a non-adversarial and non-negligent negotiation of the claim. By that standard, the evidence satisfies me that RSA was negligent in dealing with the plaintiffs. This negligence consisted in such acts and omissions as leading Mr. Skinner to believe that the plaintiffs would be dealt with in a non-adversarial manner, then failing to do so; failing to competently investigate the qualifications of Mr. Gareau, failing to supervise him, and accepting his theories and speculations without question even after being put on notice that his handling of the claim may be deficient; failure of the individual employees who dealt with the claim to communicate with one another and to act in accordance with Ms. Hallman's original plan, or failing that, their failure to convey to Mr. Skinner that RSA no longer intended to act in the manner set out by Ms. Hallman; and the failure to provide written confirmation of the purpose of the advances to BA. (I note that many of these issues also arise under the heading of negligent misrepresentation, to be discussed below).

[132] Acts and omissions such as those set out above were the result of a general attitude of carelessness and inattention, which led to damages for the plaintiffs. I emphasize that the duty and standard of care arose from the voluntary acts of RSA. As discussed earlier, no duty of care arises automatically between an insurer and a third-party claimant.

Negligent misrepresentation

[133] The elements of negligent misrepresentation as set out in *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1964] A.C. 465, were endorsed by the Supreme Court of Canada in *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 at 110: (1) a duty of care based on a "special relationship;" (2) the representation must be "untrue, inaccurate, or misleading;" (3) the representor acted negligently in making the misrepresentation; (4) the representee relied, in a reasonable manner, on the negligent misrepresentation; and (5) the reliance was "detrimental to the representee in the sense that damages resulted."

Special relationship

[134] The plaintiffs appear to argue that a special relationship arose out of RSA's voluntary commitment to pay the reasonably adjusted claim, with the knowledge that the plaintiffs were relying on that commitment. The defendants argue (as with negligence generally) that RSA merely undertook to negotiate, not to pay, in the context of an "adversarial or arm's-length relationship" with the plaintiffs, who had professional advice and were pursuing their own self-interest. RSA, meanwhile, was under statutory and contractual duties to its own insured. As such, the defendants say, there was no duty of care arising out of a special relationship. I am satisfied that a special relationship arose when Ms. Hallman indicated that RSA would take over the handling of the claim, with the knowledge that

Mr. Skinner understood this as a non-adversarial and cooperative effort to settle the matter quickly in all parties' interests.

The alleged misrepresentations

[135] The plaintiffs claim that RSA expressly represented that it did not contest Mr. Dalrymple's liability; that it would pay property damage on the helicopter of $165,000, less salvage; that it would reimburse reasonable rental costs for a replacement helicopter; and that it compensate for lost earnings. The plaintiffs say there were implied representations that RSA had an existing commitment to make such payments, and that the claim would be adjusted fairly, reasonably, and in good faith. In effect, they say, RSA represented that it would handle the claim in a similar manner to dealing with its own insured. This is how the plaintiffs interpret the phrase "one-stop shopping."

[136] An implied representation can provide a basis for actionable negligent misrepresentation: *Queen* at paras. 74-76. For instance, in *South Yukon Forest Corp. v. Canada*, 2010 FC 495, the statement by government officials that "if you build a mill, we will give you timber" amounted to an implied representation that "there was an existing commitment to provide a long-term adequate volume of timber to whoever built a mill … together with the ability to provide the timber…" (paras. 998-999.) The Federal Court of Appeal reversed the trial judge's decision on the basis that the plaintiffs could not reasonably rely on the assurances of the officials, since the actual decision was, by statute, in the hands of the Governor-in-Council. Furthermore, there was documentary evidence that "it was

far from certain that they would receive a long term Timber Harvesting Agreement that would authorize the harvesting of timber in the quantities needed": 2012 FCA 165 at paras. 56-65 (an application for leave to appeal to the Supreme Court of Canada was dismissed with costs on December 6, 2012). The parties agree, and I accept, that the reversal has no particular effect on the principles for which the decision is relied on in this case.

[137] The defendants say that RSA made no representations that were untrue, inaccurate, or misleading. Looked at in the most charitable light, however, even if Ms. Hallman's initial representations were not untrue, inaccurate, or misleading, the subsequent advances of funds, coupled with Mr. Spence's direction to Mr. Skinner to await a proposal once Mr. Gareau had reported back to RSA, were misleading. At the time these representations were made, RSA's officials had quietly edged away from the commitments made by Ms. Hallman, without informing Mr. Skinner, and were exercising no oversight over Mr. Gareau. As such, the representation that RSA remained committed to settling the matter in the manner described by Ms. Hallman was misleading. To make such representations in these circumstances was negligent.

Reliance

[138] As A.M. Linden and B. Feldthusen state in *Canadian Tort Law*, 9th ed. (Markham, Ont.: LexisNexis, 2011), at 452, a plaintiff "must take some action in reliance on the statement before any harm occurs… The reasonableness of the

plaintiff's reliance is central to the duty-of-care analysis; critical to the issue of causation in fact; and also relevant on the question of contributory negligence."

[139] The plaintiffs say they relied on RSA's representations that there would be a fair and timely valuation and payment of their losses. As a result, they did not pursue their own claim through BA, whose policy provided for a pro-rated discount of property damage claims and provided no coverage for lost profits or business interruption. By the time the plaintiffs concluded that RSA was acting contrary to its representations and was not going to settle the claim in a timely and reasonable manner, BA was in a position to deny coverage on the ground that its interests had been prejudiced by the plaintiffs' dealing with RSA, as well as by RSA's failure to clarify the purpose of the $40,000 advanced in August 1999.

[140] The plaintiffs say that RSA represented that it would pay the rental costs for the Heli-Max rental. Cindy Hallman phoned Heli-Max on Helico's behalf. Helico rented the aircraft in reliance on RSA to assume the costs. When RSA did not pay, Helico had to pay Heli-Max directly, assigning a major account receivable, leading to serious cash flow problems which the plaintiffs say ultimately caused the effective demise of the business. According to the plaintiffs, but for RSA's representations, they would not have taken this course of action. The defendants say that Mr. Skinner's own conduct compromised his position respecting the rental costs of GYTY, suggesting that the commitment was based on his own commitment to begin repairs on PHG, and alleging that he attempted to recover for a longer rental period than had been agreed. There is no reason to think, however, that the plaintiffs had any option but to rent.

[141] The defendants say reliance on RSA's representations would not be reasonable. Mr. Skinner was being advised by an insurance broker and a lawyer; he had hull insurance on the aircraft; he allegedly ignored RSA's advice to deal with his own insurer in a timely manner (I have found that no such advice was given after Mr. Skinner's conversation and correspondence with Ms. Hallman); he did not acknowledge the "conditional nature" of the "key representations" made by RSA; and he did not do what was necessary to advance his own claim. In essence, the defendants submit that the plaintiffs acted unreasonably after the accident, and are the authors of their own misfortune.

[142] As to the allegation that RSA's conduct led to the subsequent denial of liability by BA, on the basis that RSA had prejudiced its interests, the defendants say that Mr. Skinner approached RSA, not the reverse. This is of little relevance. The prejudice, if any, turns not on who made the first approach, but on who is responsible for subsequent events. If RSA's subsequent actions of omissions caused damage, it cannot wash its hands of the matter by saying that Mr. Skinner should have known better than to approach RSA in the first place.

[143] I conclude that the plaintiffs reasonably relied on RSA to conduct an adjustment and negotiation process in accordance with the statements made by Ms. Hallman in early August 1999. Mr. Skinner reasonably understood that a settlement was close and that RSA, being aware of Helico's circumstances, would treat the matter with priority and without negligence. RSA was aware that the plaintiffs were forgoing their right to seek an early partial payment from BA, and

that they were negotiating with RSA on the understanding that liability was admitted and that the matter would not be treated as an adversarial one. These were all representations and conduct upon which it was reasonable for the plaintiffs to rely in the circumstances. I emphasize again that RSA entered this arrangement entirely voluntarily. I am satisfied that the verbal and written representations made by RSA in the course of negotiation, as well as the representation by conduct of advancing the funds, were intended to communicate to the plaintiffs that the initial indication of an expedited settlement was still RSA's position.

[144] The plaintiffs relied on these representations reasonably, and to their detriment. This reliance induced Mr. Skinner to rent the Heli-Max helicopter, which he was forced to pay for out of Helico's own revenues, despite the representation that it would be funded by RSA. He was also induced to delay any attempt to return to BA for recovery of the property damage claim, which was ultimately undermined by the limited cash advances made by RSA. The ultimate result of this reliance was the collapse of the business as a result of the cash-flow crisis provoked by RSA's failure to conduct itself in the manner indicated by its representations.

Damage

[145] Establishing liability requires the plaintiff to prove that damage has been incurred. The defendants submit that the plaintiffs have not established that they suffered damage in respect of repairs, rental of parts or aircraft, or lost income. In

essence, the defendants maintain that the plaintiffs never provided the requisite proof to RSA, particularly in respect of lost income. (RSA did not request independent evidence, though Mr. Gareau suggested that the services of a forensic accountant would be advisable.) I am satisfied that damage is well-established on the facts. The evidence was clear that Mr. Skinner provided ample documentation respecting the damage and the required repairs to the aircraft, and with respect to the necessary rental of a replacement aircraft from Heli-Max. RSA was also on notice that the plaintiffs risked serious losses in future revenue if the damage was not promptly made good.

GOOD FAITH

Duty of good faith

[146] In the context of insurance bad faith alleged by a first-party insured, McLachlin C.J.C. and Abella J. said in *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, at para. 71:

> …an insurer will not necessarily be in breach of the duty of good faith by incorrectly denying a claim that is eventually conceded, or judicially determined, to be legitimate…. The question instead is whether the denial was the result of the overwhelmingly inadequate handling of the claim, or the introduction of improper considerations into the claims process.

[147] There was no formal relationship of insurer and insured in this case that would trigger the automatic application of the doctrine of *uberrima fides*, or utmost good faith, the breach of which may give rise to bad faith punitive

damages. However, the plaintiffs say the duty of utmost good faith rests on tort and contract foundations beyond insurance law. They maintain that the special relationship between RSA and the plaintiffs was tantamount to the duty of utmost good faith owed by an insurer to an insured. RSA, they submit, placed itself in a position tantamount to that of an insurer by promising to exercise utmost good faith in indemnifying the plaintiffs while asking them to waive their own entitlement to utmost good faith from BA. While RSA's representations created a special relationship for negligence purposes, I am not satisfied that it follows from this that there was a relationship of utmost good faith.

[148] The plaintiffs say more evidence of bad faith arose days before trial, when the defendants disclosed a claim note, which had previously been redacted. The note described a conversation between Jim Higgins and Martin Gyorky on January 11, 2000, recounting the "sharp pencil" warning Mr. Higgins gave to BA. According to the plaintiffs, bad faith is evident in Mr. Higgins's refusal to consider a subrogated settlement, accompanied by a veiled threat respecting the handling of any future subrogated claim. I am not convinced that this exchange, which took place after the bulk of RSA's relevant conduct, makes out a claim for bad faith damages.

APPORTIONMENT OF LIABILITY

[149] The plaintiffs frame this as a case of concurrent liability. They submit that there is no legal basis to separate the liability of Mr. Dalrymple and RSA. They say the wrongful conduct of both defendants caused the loss, and therefore both defendants are liable for all of their losses. The business losses, in their view, arose from the cumulative wrongful conduct of both defendants, suggesting that liability should be joint and several: see *A.C.A. Co-operative Assn. Ltd. v. Associated Freezers of Canada Inc.* (1992), 113 N.S.R. (2d) 1 (S.C.A.D.), at para. 115. According to the plaintiffs, any question of apportionment would be a matter between the defendants. In *A.C.A. Co-operative Assn.*, *supra*, Freeman J.A. said, at paras. 119-120:

> J.G. Fleming stated the proposition as follows in The Law of Torts, 7th ed. (Sydney: Law Book, 1987), at p. 179:
>
> > But such eventual contribution among the tort-feasors is a domestic matter between themselves, which in no way impairs the plaintiff's claim to full compensation from each ...
> >
> > Usually the interaction of several, though independent, wrongful acts produces a single indivisible result. They may have been simultaneous, as when two cars collide injuring a passenger; or successive as where one car is dangerously parked and another piles into it. The resulting harm (to which both contributed) being indivisible, each will be answerable for all the damage (in solidum) though the plaintiff is not entitled to more than a single satisfaction of his claim.

Lord Justice Devlin stated in *Dingle v. Associated Newspapers Ltd.*, [1961] 2 Q.B. 162, [1961] 1 All E.R. 897 (C.A.) at p. 916 [All E.R.]:

> Where injury has been done to the plaintiff and the injury is indivisible, any tortfeasor whose act has been a proximate cause of the injury must compensate for the whole of it. As between the plaintiff and the defendant it is immaterial that there are others whose acts also have been a cause of the injury and it does not matter whether those others have or have not a good defence. These factors would be relevant in a claim between tortfeasors for contribution but the plaintiff is not concerned with that; he can obtain judgment for total compensation from anyone whose act has been a cause of his injury. If there are more than one of such persons, it is immaterial to the plaintiff whether they are joint tortfeasors or not.

[150] Additionally, the plaintiffs say that Mr. Dalrymple is fully liable for RSA's actions on agency principles. The *Insurance Act* required RSA to "defend in the name, and on behalf of, the insured and at the cost of the insurer any civil action … on account of loss or damage to persons or property" (s. 119(b)). Furthermore, Mr. Dalrymple made RSA his "irrevocable attorney" (s. 126(c)). An insurance contract renders the insurer an agent for the insured: *Johal v. Gibson*, 1998 CarswellBC 1688 (B.C.S.C.) at paras. 30-31.

[151] According to the plaintiffs, the fact that RSA became involved through its insured does not diminish its culpability as a defendant in its own right. Both principal and agent may be liable for damages suffered on account of the agent's conduct: *Audio Works Production Services Ltd. v. Canadian Northern Shield Insurance Co.*, 2005 MBQB 209, at paras. 92-94, citing G.H.L. Fridman, *The Law of Agency*, 7th ed. (Toronto: Butterworths, 1996), at 304, 315, and 329.

[152] The defendants say there is no basis for joint and several liability with respect to RSA's liability alleged. I am inclined to agree. Mr. Dalrymple's contribution to the damage consisted of the physical damage, rental expenses, diminution of value, and direct economic loss resulting from the collision. This, I conclude, is the extent of his liability. RSA is liable for this component as a result of the insurance contract and through agency principles generally, to the extent of Mr. Dalrymple's insurance coverage. However, RSA's own subsequent negligence triggered a series of damages in the form of consequential economic loss that were distinct from the mere physical damage to the aircraft. I am not convinced that Mr. Dalrymple should be attributed joint and several liability for those damages.

DAMAGES

[153] The law does not apportion damages between tortious and non-tortious causes. The plaintiff is required to prove that the defendant's tortious conduct "caused or contributed to the plaintiff's injury. The causation test is not to be applied too rigidly. Causation need not be determined by scientific precision": *Athey v. Leonati*, [1996] 3 S.C.R. 458, at para. 16. The defendant need not establish that the defendant's conduct was the sole cause of the injury; it is only necessary that the defendant be "part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence": *Athey* at para. 17 (emphasis in original.) The analysis is often framed as a "but-for" test. As Major J. noted in *Athey*, "the essential purpose of tort law

… is to restore the plaintiff to the position he or she would have enjoyed but for the negligence of the defendant": *Athey* at para. 20.

Property damage

[154] In their pre-trial submissions, the plaintiffs sought damages of $150,000 on account of damage to PHG. This figure was derived from the amount referenced by Ken Spence when he suggested that RSA might pay cash value of $167,500, less salvage of $15,000. Alternatively, the plaintiffs anticipated that the evidence would show that their out-of-pocket repair costs exceeded $140,000. In post-trial submissions, however, they frame the property damage claim through the prism of their net liability to Aeroco and Rilpa after the sales of PHG and GREA in 2000: $77,554.08 to Aeroco, plus $46,288.05 to Rilpa, for a total of $123,842.13. The explanation for this change in approach appears to be that the failure of RSA to pay in 1999 led to higher actual losses.

[155] The plaintiffs also seek labour costs for disassembling PHG and GREA (to use parts on PHG); reassembly of PHG, as well as the engine change under the service bulletin; and reassembly of GREA for sale in 2000. The plaintiffs value this work at $47,060 (181 hours at $65 per hour, repeated four times). They also claim for the value of Helico parts used on the GREA rebuild, taking the difference between Rilpa's July 15, 1999, parts list ($112,765.19) and the parts Rilpa actually supplied in 2000 ($80,302.87), for a total of $32, 462.32. Added to the amounts above, the property damage claim is $203,364.45.

[156] The defendants do not agree that PHG was damaged, other than the main rotor, but say that if it was, an indeterminable part of the damage was caused by the test flight. I have found that the test flight complied with the applicable protocols. It was a reasonable action in the circumstances. The physical damage to PHG is entirely attributable in law to the negligence of Mr. Dalrymple (and RSA as his insurer and agent).

[157] Composite confirmed that two blades were damaged beyond repair. In the defendants' submission, the blades had a lifespan of 5500 hours, of which 1683 hours had been used by July 1999. They say the replacement cost should be prorated, resulting in a reduction of the replacement cost for new blades ($35,000) to $24,289.36. The defendants claim that the plaintiffs have not substantiated the damage to PHG; I disagree. In addition to the Rilpa estimates, Gilles Nobert's August 2, 1999, summary of repairs, based on the cost of parts and labour submitted by Rilpa, indicated a total for parts (including paint) of $113,488.48, less *pro rata* of $36,839.47, less the deductible of $2500, plus labour costs, for a net summary of $97,305.20. While these figures were slightly revised later, it was the original handwritten estimate that Mr. Skinner relied on during his discussions with Ms. Hallman. I would not permit the plaintiffs to recover costs arising from the engine replacement, although I likewise do not regard this as an unreasonable action to take in the circumstances. I would also allow the plaintiffs to collect the amount of the deductible, given that this would be essentially a contractual deduction between an insurer and insured. The result is that the plaintiffs are entitled to recover the amount as originally indicated on Mr. Nobert's estimate: $95,305.20, plus paint ($2000) and deductible ($2500), for a total of $99,805.20.

[158] I would also allow compensation of $15,000 to reflect the diminished value of the aircraft. I am satisfied that the extent of damage and of the necessary repairs justifies damages on this ground. I note that even Mr. Gareau conceded the principle of diminution of value, though he denied that it applied here.

Helicopter rental expenses

[159] In their post-trial brief the plaintiffs itemize their claim in relation to the Heli-Max rental. They claim costs of $75,400 to lease C-GYTY between August 6 and 31, 1999, at a rate of four hours per day, over 26 days, equaling 104 hours at $725.00 per hour. Added to this is $13,000 for spray gear and HST of $13,260. The plaintiffs claim incremental fuel costs of operating a Hughes 500 of $2712. Finally, the cost of drift insurance was $7500, plus HST of $1125. From these amounts they deduct the avoided operating costs of a Hughes 300C of $5076 (60 hours at $84.60 per hour). This results in rental costs of $107,921.

[160] The defendants say the purpose of rental was to fill the gap while PHG's components were being repaired by Rilpa, then reinstalled. Instead, Helico installed parts from the Rilpa-leased C-GREA on PHG, which returned to service on August 25. The defendants say the Heli-Max rental charges should stop on August 20. At a rate of $725 per hour, and four hours per day, this results in a cost of $40,600. Alternatively, they say, the revenues earned between August 20 and 27, when both PHG and the Heli-Max aircraft were in service, should be deducted from any damage award respecting the rental.

[161] The defendants say that the flying time for the replacement helicopter between August 6 and September 7 amounted to 36.9 hours, a rate (they say) of $2958.26 per hour. They say this expenditure was unjustified, and that RSA's agreement depended on the plaintiffs' claim that the value of contracts that would be lost in the absence of PHG was greater than $250,000. This appears to amount to an attempt to second-guess or micromanage the plaintiffs' business after the fact. I am satisfied that Ms. Hallman agreed to a three-week rental period. The fact that the aircraft actually flew fewer hours is of no relevance.

[162] The defendants also say RSA never approved the expenditure of $13,000 for spray gear on C-GYTY, and that this is not a cost associated with the collision. I am satisfied that it was a necessary expense to make the rental aircraft effective.

[163] I allow the cost of the rental for the period between August 6 and August 27, plus spray gear, drift insurance, and fuel, less the avoided operating costs.

[164] As to the leasing costs of Rilpa's Hughes 300C, the plaintiffs claim shipping costs from Calgary and back to Calgary of $5949.62 each way, and lease charges for components of $12,280.00 (61.4 hours at $200 per hour between August 19 and September 30, 1999). They also add Helico's leasing charges for a Lycoming replacement engine, in the amount of $1233 (41.1 hours at $30.00 per hour between August 26 and September 26, 1999). The plaintiffs' total claim on account of the Rilpa rental is $19,462.62.

[165] The defendants maintain that the rental of parts for temporary use on PHG was not reasonable mitigation. They say the plaintiffs have not established that the revenue generated by the subsequent use of PHG made this a reasonable expenditure. They say lease charge of $200 per hour is too high when the aircraft was "routinely charged out at $400.00 per hour," particularly when additional overhead expenses, such as the shipping costs to and from Calgary, are taken into account. Although the rental rate of $200 per hour was a result of negotiations between Helico and Rilpa, I would reduce the rental claim by 20 per cent.

[166] The defendants also suggest that the shipping cost to return C-GREA to Calgary was never incurred. I agree. Finally, they say that the lease costs charged by Helico for the replacement engine in PHG did not arise from the collision, and are thus not an allowable claim. I agree. Alternatively, they say there was no cost involved in its use (other than depreciation), since it was in Helico's own inventory. I agree.

Summary of damages

[167] To summarize, the plaintiffs are entitled to damages in the following amounts, prior to the assessment of damages for lost revenues:

PHG components/repairs and replacement	$99,805.20
Diminished cash value of PHG	$15,000.00
Heli-Max Rental (August 6-27, 1999)	$75,400.00
Spray gear	$13,000.00
HST	$13,260.00
Incremental Fuel Cost	$2,712.00
Drift insurance	$7,500.00
HST	$ 1,125.00
Less avoidance operating costs	($ 5,076.00)
GREA shipping costs (Calgary-Trenton)	$ 5,949.62
GREA rental	$ 9,824.00
Total	$238,499.82

I will now consider the evidence respecting lost revenues.

Lost revenues

Expert reports on business losses

[168] The plaintiffs and the defendants each submitted an expert accountant's report dealing with the plaintiffs' losses arising out of the defendants' conduct in 1999 and after. Both experts measured the claim on the basis of economic loss, as

opposed to business valuation. The experts agree that economic loss should be calculated to the point in time at which Helico had the resources and capacity to be made operationally whole. The defendants say this was October 31, 2004, while the plaintiffs maintain that this point has not yet been reached, and that damages should be measured as of the date of judgment. The experts' disagreement is rooted in their respective view of whether Helico had reached its full level of business potential and profitability by July 8, 1999. They appeared to agree that there was no call for discounts or mark-ups on account of negative or positive contingencies. They agreed that the 1998 crashes were an issue from which Helico would have recovered, and which would not have affected Helico's fortunes going forward from 1999. They disagreed, of course, on the application of these principles to the facts.

The plaintiffs' expert report

[169] In her report, the plaintiffs' expert, Susan D. MacMillan of the accounting firm Grant Thornton, projected lost profits to Helico and All-Up between the date of the accident, July 8, 1999, and October 31, 2008, as $3,285,763. She compared projected income if the incident had not occurred with actual income for the same period. MacMillan's calculations of loss were updated to October 31, 2010, based upon more recent Helico financial statements.

[170] Ms. MacMillan assumed in her report that Helico would have had a second operational aircraft by August 1, 1999. Mr. Skinner's evidence was that he intended to make C-FULL airworthy for the summer spraying season.

Ms. MacMillan understood that the BDC loan (which was not finalized after the accident) would have funded part of this project, supplemented by parts in inventory. She also assumed that a second pilot would have been hired at that point. (Mr. Skinner's evidence was that he had hired a second pilot prior to the accident, and Ms. MacMillan took this into consideration.) Her assumption was that C-FULL would be owned by Helico and All-Up, while PHG would continue to be leased on the existing terms (adjusted for inflation) until 2008. In addition, she assumed that Helico would wet lease two aircraft for 60 flight hours during the peak spraying season in August and September.

[171] Ms. MacMillan further assumed that Helico would have had a third operational aircraft, and hired a third pilot, by July 1, 2002. This was based on Mr. Skinner's advice that the intention would have been to buy a Robinson 44 (R44) helicopter at an estimated cost (used) of $175,000. Mr. Gain and the defendants challenged this assumption, noting that the business plan submitted to ACOA had not referred to a third aircraft. Ms. MacMillan maintained at trial that the proposal to ACOA was intended for a limited time and a limited purpose. She also testified that she was satisfied that Mr. Skinner could manage a larger number of aircraft.

[172] Ms. MacMillan assumed that the market would be sufficient to meet Helico's resulting increased capacity. She was satisfied that there was limited competition in the region and that Mr. Skinner was capable of increasing the plaintiffs' spraying capacity. She also assumed that expenses would only change with inflation between 2000 and 2008.

[173] Ms. MacMillan assumed that the BDC loan of $155,000 would have been drawn down by August 1, 1999. She assumed that the expansion of the Repairs and Maintenance Centre would have been finished by December 31, 1999, and the three maintenance projects under way on July 8, 1999, would have been completed and sold in 2000. She further assumed that between 2001 and 2008 Helico would complete three refurbishment projects per year, with an average profit of about 35 per cent. She was guided by the 2004 sale of PHG at a profit of 39.8 per cent.

[174] Working from these assumptions, Ms. MacMillan projected revenues between 1999 and 2008 at $16, 426,735, of which about $9.4 million would come from spraying, $3.4 million from charters, $3.3 million from refurbishment work, and the remainder from other activities. She assumed that total flight hours would rise from 495 in 1999 to 1020 in 2008, at an ongoing ratio of about 70 per cent charter to 30 per cent spraying. She projected charter revenue per hour at $552, while spraying revenue per hour would vary between a low of $2677 and a high of $4216.

[175] Ms. MacMillan projected Helico's expenses between 1999 and 2008 as $11,163,276, including aircraft leasing costs, fuel, insurance, the cost of refurbished aircraft, and wages and salaries.

The defendants' expert report

[176] The defendants rely on an expert report prepared by Mark Gain of the forensic accountants Matson, Driscoll & Domico. Mr. Gain relied on the two-year projections in the Business Plan submitted to ACOA for 1999 and 2000, as well as Helico's performance between 1996 and 1998. In Mr. Gain's view, Helico's revenues had plateaued, other than a projected one-time revenue growth in maintenance and refurbishment of $40,000 per year, carried forward from year to year, with no further growth. Other than this marginal growth in the first year, Mr. Gain projected no further growth, other than a CPI adjustment to account for inflation. He took the view that the market in Atlantic Canada did not offer the opportunity for revenue growth beyond the level Helico reached between 1996 and 1998.

[177] In his report of November 29, 2010, Mr. Gain projected income loss of between zero and $257,118. In a March 2011 addendum he acknowledged an error in methodology and amended these figures to a range of between $177,600 and $444,180. He assumed that the business plans and forecasts prepared in the months before the accident reflected "the direction and priorities of the business at the time of the accident" and that they therefore indicated "the manner in which the business would have proceeded if not for the accident." He posited two scenarios: scenario 1 assumed that any lost income resulting from the inability to expand as planned "should have ceased once Helico returned to a same or similar position as it experienced immediately prior to the accident." He concluded that this point was reached in 2004, "when the combined shareholder equity of Helico and [All-Up] returned to positive position." Ms. MacMillan's comment was that this conclusion failed to account for the facts that by 2004 the plaintiffs had no

aircraft, no operating certificate, no skilled work force, and were unable to obtain financing.

[178] In the alternative, scenario 2 assumed that losses continued until 2008, as stipulated in Ms. MacMillan's report. Among Mr. Gain's other assumptions were that C-FULL would not have been available for the 1999 spraying season, but would have been available in 2000; that Helico would have operated PHG and C-FULL from 2000 to 2008; that Helico would wet-lease additional helicopters for 60 hours per spray season between 1999 and 2006, rising to 120 hours in 2007; that Helico would have sprayed about 6583 hectares per year, as it did between 1996 and 1999 (though his report also uses the figure 6516); that Helico sprayed about 45 hectares per flight hour; that no spraying contracts were lost in 1999 due to shortage of aircraft, due to use of wet leases; and that the rate Helico would have realized on any lost spraying contracts between 2000 and 2008 would have equaled the pre-accident average of $52.38 per hectare realized in 2000, adjusted for inflation.

[179] In addition to these assumptions about the spraying portion of Helico's business, on the charter side, Mr. Gain assumed that Helico would have flown 538.28 charter hours per year, at an average rate of about $400 per hour, excluding fuel recovery and landing fees, consistent with pre-loss averages for a Hughes 300C helicopter, adjusted for inflation.

[180] As to maintenance, Mr. Gain assumed that Helico would have earned revenues in 2000 and 2001 that equaled its business plan forecasts for 1999 and

2000, adjusted through a comparison of budgeted to actual revenues for the three years before the accident. After 2001, he assumed, maintenance and repair revenue would have grown at a rate equal to inflation.

[181] Mr. Gain based his estimates of losses on the business's "expected level of operations taking into consideration its historical operations and industry trends." He projected spraying revenue on the basis of 6516 hectares sprayed per year, the average of 1996 to 1999. He acknowledged that there had been growth - albeit "relatively small growth" - in Helico's revenue per hectare sprayed, which he attributed to higher billings on account of higher overhead required to spray in Newfoundland. Noting that "the composition of Helico's spraying customers following the accident is significantly different from the composition of the customer base prior to the accident," but that there had been "no significant increase in the rates charged to any particular customer," Mr. Gain projected revenue per hectare for any hectares not sprayed as a result of the accident on the basis of average revenue per hectare realized during the fiscal years 1996 to 1999, that being $52.38 per hectare, adjusted for inflation.

[182] Mr. Gain projected flight hours according to averages from the years 1996 to 1998, which he "adjusted for non-recurring items such as the Tussock moth outbreak of 1998 and pesticide spraying." Ms. MacMillan was of the view that the hours spent on such a "one-off" project could still have generated revenue with other work. He reached a figure of charter hours but for the accident of 538 hours per year, but qualified his opinion by noting that it rested on the assumption that Nova Scotia Power would have continued to use Helico's services, which he

regarded as uncertain. He went on to project revenue per hour on the basis of rates for Hughes 300 aircraft, which he pegged at $400 per hour in 1999, rising with inflation thereafter, plus fuel recovery of 60 litres per hour based on average fuel prices. On this basis he projected charter revenue between 1999 and 2008 at $2,797,785.

[183] Mr. Gain calculated maintenance and refurbishment revenue in accordance with the figures Mr. Skinner submitted to ACOA, but delayed the projections by a year (e.g. applying the 1999 figure to revenues for 2000.) He reduced these figures by 20 per cent in order to reflect a variance of about 20 per cent between budgeted and actual revenues between 1996 and 1998, achieved by Helico on non-maintenance and refurbishment revenues. On this basis, he projected maintenance and refurbishment revenue between 1999 and 2008 of $2,037,392.

[184] Mr. Gain asserted that Ms. MacMillan's projections were based on assumptions that did not correspond to Mr. Skinner's plans at the time of the accident. He based his assessment of Mr. Skinner's plans on the business plans and projections in the ACOA and BDC financing applications. Referring to plans that had apparently been prepared at the end of the 1998 fiscal year, Mr. Gain took the view that "the main component of the plaintiffs' anticipated revenue growth lay in the maintenance and repair service facility expansion." He asserted that the Grant Thornton projection of $370,000 per year in revenue was too high, in view of the business plan projection of $273,000 in the business plan, as well as Mr. Skinner's own 2009 reference (in an e-mail to Grant Thornton) to the figure of $208,000 as the appropriate figure. Mr. Gain said it was clear that Mr. Skinner did not

contemplate three refurbishment projects annually, as assumed by Ms. MacMillan. He suggested that this only became plausible to Mr. Skinner when a "helipod" manufacturing venture that had been contemplated in the business plan was dropped from Grant Thornton's forecasts. Similarly, he suggested that the expansion of Helico's fleet was not, in fact, Mr. Skinner's intention when the business plan was formulated. Ms. MacMillan's evidence was that she did not take the helipod proposal into account.

[185] Mr. Gain went on to criticize Ms. MacMillan's assumptions about the spraying and charter market capacity available to Helico. He said there was no basis for Ms. MacMillan's projection of a market capacity in Atlantic Canada of between 720 and 1020 flight hours per year. Mr. Gain reviewed statistics from the commercial helicopter industry indicating that firms tended to remain smaller if they could not sufficiently utilize their fleets so as to become profitable. The profitable operators tended to be those with larger helicopter fleets. As such, he concluded, it was not possible to assume that Helico would have been able to expand its market to the projected number of flight hours.

[186] The second aspect of Mr. Gain's criticism of the Grant Thornton market projections was based on statistics in the National Forestry Database "relating to the annual spraying of both pesticides and herbicides by helicopters in Atlantic Canada." He concluded from his review that there was no significant pesticide spraying in Nova Scotia or Newfoundland between 1993 and 2009, aside from a Tussock Moth outbreak in 1998. He also concluded that the area of provincial Crown forest lands sprayed with herbicides by helicopter had declined since the

mid-1990s. He added that he was unable "to obtain details as to the area of private forest lands sprayed by helicopters in Nova Scotia," but qualified this by adding that "based on the levels of spraying on provincial lands it seems likely that there is little reason to expect significant market growth in this area." He attributed this to "the overall decline in the forestry industry in Atlantic Canada" as well as unspecified regulatory changes that had apparently encouraged ground-based, rather than aerial, application of chemicals and public resistance to spraying. Mr. Skinner testified, however, that the private forest industry comprised some 70 per cent of the spray business in Nova Scotia.

[187] As to the Grant Thornton assumptions about growing charter work, Mr. Gain suggested that nearly half of Helico's charter revenue between 1997 and 1999 related to the stagnant forest industry, while another quarter of revenues was generated monitoring power lines for Nova Scotia Power. He opined that it was "unlikely that Helico would have achieved significant growth from this customer," adding that NSP had stopped using Helico's services in 1998, pending a safety audit that apparently never happened. As such, he questioned “the extent to which Helico could reasonably have anticipated growth within its existing market niches.”

[188] Mr. Gain went on to say that there appeared to be no direct relationship between the number of helicopters operated by Helico and the number of hours flown, or the revenues generated. Nor was there evidence, in his view, that Mr. Skinner had been short of aircraft to fulfill his spraying contracts in the years after the accident.

[189] Mr. Gain also took the view that the Grant Thornton projections respecting charter rates did not take into account different rates for different types of helicopter. Ms. MacMillan testified that correcting this had no material impact on her opinion. He also found the Grant Thornton projections to be "extremely sensitive to slight changes in assumptions." Overall, he took the view that it was wrong to assume that Mr. Skinner "would have operated his business in such an optimal manner and with such a degree of financial success as projected in the Grant Thornton Report." He considered the nine-year period of losses contemplated by Grant Thornton to be excessive, given that Mr. Skinner had estimated that the two accidents of 1998 would only set the company back by one year. He also suggested that the actual fair market value of the business at the time of the accident was "minimal."

[190] Mr. Gain rested his opinion heavily on Helico's pre-accident operations, the business plan Helico submitted to ACOA, and his understanding of the spraying industry. In reply to Mr. Gain's report, Ms. MacMillan's view was that his analysis reflected "a lack of understanding of Helico's existing business … and its going forward strategy." She also queried his decision to include the year 1998 in his analysis, given that this was "a particularly difficult period for Helico and not representative of Helico's forward looking plans." Her evidence was that the ACOA projections were prepared for the specific purpose of obtaining a loan, and could only provide a starting point in predicting where the business was going. They did not, therefore, indicate that Mr. Skinner planned to continue operating at the same level in the future.

[191] The plaintiffs assert that, unlike Ms. MacMillan, Mr. Gain "chose not to assess Helico as being on the cusp of a major expansion, of having restructured and right-sized to achieve the full potential that the aviation market offered in the Atlantic Provinces." Mr. Gain agreed on cross-examination that the main difference between his analysis and Ms. MacMillan's was that she concluded that Helico could have grown its business, while his opinion was that the business would essentially remain at the level it reached between 1996 and 1999.

[192] The plaintiffs maintain that in finding limited growth potential in the region, Mr. Gain ignored the charter aspect of the business, which grew by 56 per cent between 1996 and 1998. Helico's clients included Nova Scotia Power, for line inspections; the Department of Natural Resources, for fire watch; and companies requiring aerial film work. They say Mr. Gain inappropriately focused on the decline in charter work in 1999, which they say was attributable to the need to wait for the results of the Transport Canada investigations of the 1998 accidents. Mr. Gain agreed on cross-examination that the short-term effect of the accidents should not be projected forward.

[193] The plaintiffs attack Mr. Gain's methodology on several grounds. They say he relied on an unsourced projection of maintenance revenue that he found in the Grant Thornton file as a basis to reduce projected revenue. They criticize his projections of spraying revenue, noting that he agreed on cross-examination that this projection was amended to reflect the fact that Mr. Skinner had in fact out-performed the original projection.

Discussion of business losses

[194] The quantum of damages is a question of fact. As noted by Viscount Haldane L.C. in *British Westinghouse Electric and Manufacturing Company Limited v. Underground Electric Railways Company of London, Limited*, [1912] A.C. 673(H.L.), at 688-689, the fact-specific nature of the inquiry mandates that "the only guidance the law can give is to lay down general principles which afford at times but scanty assistance in dealing with particular cases." A trial judge is required to determine a quantum of damages even when ascertainment is difficult. In cases where the plaintiff claims business losses arising from negligent misrepresentation, the quantum of damages can take into consideration opportunities that were lost as a result of the defendant's conduct, provided that the plaintiff has proved this loss on the balance of probabilities. Although general principles, expert evidence, and counsel's submissions may assist in determining the amount of damages, in the end the question must be resolved by the trier of fact.

[195] Damages for negligent misrepresentation are intended to "put the plaintiff in the position he would have been in had the misrepresentation not been made": L. Rainaldi et al. eds., *Remedies in Tort*, Vol. 2 (Toronto: Thomson Carswell, 2012) 16.IV at §36. Damages for negligent misrepresentation are therefore distinct from damages in contract, which are intended to "put [the plaintiff] in the position it would have been in had the contract been performed as agreed": see, e.g., *BG*

Checo International Ltd. v. British Columbia Hydro and Power Authority, [1993] 1 S.C.R. 12, S.C.J. No 1 at para 39.

[196] The determination of damages is particularly difficult when the plaintiff seeks recovery for business losses, which "must always be more or less matter of estimate, because it is impossible to ascertain, with arithmetical precision, what in the ordinary course of business would have been the amount of the [plaintiffs'] sales and profits": *United Horse-Shoe and Nail Company, Ltd. v. John Stewart & Co.*, (1888), 13 App. Cas. 401 (H.L.), at 413, cited in S.M. Waddams, *The Law of Damages* (Toronto: Canada Law Book, looseleaf) at 5.890. Waddams notes, at 13.30, that Canadian courts

> have consistently held that if the plaintiff establishes that a loss has probably been suffered, the difficulty of determining the amount of it can never excuse the wrongdoer from paying damages. If the amount is difficult to estimate, the tribunal must simply do its best on the material available, though of course if the plaintiff has not adduced evidence that might have been expected to be adduced if the claim were sound, the omission will tell against the plaintiff.

[197] The Supreme Court of Canada endorsed such an approach in *Wood v. Grand Valley Railway Company* (1915), 51 S.C.R. 283, holding, per Davies J. at 289, that although "[i]t was clearly impossible under the facts of that case to estimate with anything approaching to mathematical accuracy the damages sustained by the plaintiffs," the trier of fact "must under such circumstances do 'the best it can' and its conclusion will not be set aside even if the amount of the verdict is a matter of guess work." This principle was again cited by the Court in *Penvidic v. International Nickel*, [1976] 1 S.C.R. 267, at 278-280.

[198] As noted above, in the simplest terms, damages for negligent misrepresentation should attempt to place the plaintiffs in the position they would have been in had the misrepresentations not been made, though not in the position he or she would have been in had the defendant's representations actually been true: *Remedies in Tort* at §36.1. This principle is anything but simple to apply. Courts have held that the plaintiff may be entitled to more than relatively straightforward "out-of-pocket loss, such as the difference between the price paid and the actual value at the time of the misrepresentation….": *Remedies in Tort* at 36. The damages can be extended beyond this type of loss to take into account "foreseeable consequential losses, such as liabilities incurred to third parties because of the misrepresentation, or expenditures to mitigate damages," and, in some cases, "indirect losses in the nature of forgone opportunities or gains": *Remedies in Tort* at 36 and 36.2.

[199] I am satisfied that the consideration of foregone opportunities or gains permits the court to entertain a claim for lost profits "as a means of assessing what the plaintiff would have earned elsewhere and has lost as a result of the misrepresentation": *Remedies in Tort* at 36.2. For instance, in *V.K. Mason Construction Ltd. v. Bank of Nova Scotia*, [1985] 1 S.C.R. 271, S.C.J. No. 12, the Supreme Court of Canada overturned the trial judge's calculation of damages, which subtracted anticipated profit from the total award. Wilson J. said, for the court, at para. 29:

> I agree with the submission of counsel for Mason that the trial judge was wrong in subtracting profit. I believe that in principle one is entitled to assume that Mason would have found a profitable means of employing itself had it not been induced

> to work on the Courtot project by the Bank's misrepresentation. This in my view is a reasonably foreseeable head of damage…. In equating Mason's lost profit with the profit estimated on the Courtot project we are simply saying that this is a reasonable estimate of what Mason would have been likely to have made if it had decided to abandon the Courtot project and find other work. That is to say, the lost profit on this contract represents the lost opportunity for profit on any contract. If Mason had made an exceptional profit on the Courtot project it might be disentitled to an award of the entire amount of that profit in tort damages, but this would be so only because it was not reasonably foreseeable that it would have made a similarly exceptional profit on some other contract.

[200] Although in *V.K. Mason Construction* the defendant's misrepresentation induced the plaintiff to enter into a contract, I see no principled reason why the court cannot consider foregone opportunities or gains in the absence of a contractual relationship between the parties if a special relationship leading to a duty of care has arisen. In either situation, the plaintiff may establish that if not for the defendant's misrepresentation, the plaintiff would have acted on other opportunities that would likely have improved its position beyond its status at the time of the misrepresentation.

[201] Of course, the court will avoid speculation when evaluating a claim for business losses. Both out-of-pocket losses and the more hypothetical foregone opportunities or gains must be established by the plaintiff on a balance of probabilities. The plaintiff must adduce "reasonable proof of the damages allegedly suffered": *Remedies in Tort* at 36.1 and 36.3. There is no requirement that the plaintiff adduce expert evidence on damages. As Waddams notes, "the uncertainties of business must be taken into account and the plaintiff's optimistic estimate cannot be accepted at face value": Waddams, *The Law of Damages*, at §5.920.

[202] Although the test for damages in tort is often expressed rather simply as the quantum that will restore the plaintiff to his or her pre-tort position, in practice the analysis is more complex and requires consideration of consequential losses and what opportunities or gains have been lost. As such, it appears that the court, in determining the extent of damages for negligent misrepresentation, can take into account not only circumstances present at the time of the tortious conduct, but also hypothetical factors that could have arisen subsequent to the tort. (It has also been suggested that the trial judge should consider hypotheticals arising not only after the tort was committed, but up until the date of trial and even beyond it: see, for instance, Peter T. Burns, Q.C., and Joost Blom, Q.C., *Economic Interests in Canadian Tort Law* (Markham: LexisNexis, 2009), at 409.)

[203] It is clear that where the plaintiff has established that damage was suffered on a balance of probabilities, the court must assess damages even where mathematical precision is impossible to achieve. This remains the case even where the court rejects the expert evidence, or finds it necessary to treat it with caution.

[204] The plaintiffs' claim for lost profits rests primarily on the loss of most of their aviation business as a result of RSA's actions and omissions. The original physical damage to PHG is a secondary factor. The plaintiffs say they have never received a financial contribution towards their repair costs or funds to repair PHG or to obtain a replacement. They say the financial consequences of the resulting deprivation of capital continued over a long period, as they warned the defendants would happen. That said, the plaintiffs say it is moot whether a payment of

$225,000 on account of property damage would have salvaged their business by mid-2000 or after. They say the defendants deliberately allowed the foreseeable consequences, declining even to pay the proven parts of the claim when the plaintiffs' business began to collapse.

[205] The plaintiffs submit that the consequences of the defendants' actions were not too remote to establish consequential economic loss. RSA, they say, was in a special relationship with the plaintiffs. Mr. Skinner warned RSA of the plaintiffs' ongoing recovery from the 1998 accidents, and the fragility of the cash flow situation. As such, RSA knew that an interruption of cash flow, aggravated by a failure to pay for the property damage, could irreparably harm the plaintiffs. Additionally, RSA knew of the importance of maintaining the confidence of the plaintiffs' clients and bankers, as well as the relevant regulatory authorities.

[206] The evidence establishes that RSA was willing to make the commitments it did because of its knowledge of the plaintiffs' circumstances. It is clear, for instance, that Mr. Skinner informed Ms. Hallman of the risk to Helico's ability to service its upcoming spraying contracts if it did not have two aircraft available. Mr. Skinner's correspondence with Mr. Spence, Mr. Higgins, and Mr. Gareau is replete with references to Helico's precarious financial situation, arising from the damage to PHG.

[207] Despite Mr. Skinner's warnings, RSA backed out of its commitment to move quickly in order to prevent further adverse financial consequences to the plaintiffs. RSA initially assumed liability on a non-adversarial basis, despite

Ms. Hallman's subsequent disclaimer in her evidence. Whether or not the phrase "one-stop shopping" was used, this was the essence of the approach proposed by Mr. Spence and Ms. Hallman in their initial contacts with Mr. Skinner. RSA's failure to act in accordance with its initial representations aggravated the plaintiffs' situation. Mr. Skinner's evidence was that there were other measures that could have been taken, but for the plaintiffs' reliance on RSA. For instance, he could have processed his claim through BA, and possibly received an early advance against the damages. The harm resulting from RSA's reversal, the plaintiffs submit, was foreseeable and was the direct and proximate cause of their subsequent damages.

[208] Foreseeability of damage relates to the nature, not the extent, of the damages. In assessing foreseeability, "it is enough to fix liability if one can foresee in a general way the class or character of injury which occurred ": *R. v. Côté et al.*, [1976] 1 S.C.R. 595 at 604; see also *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at 454-455, and *Bingley v. Morrison Fuels*, 2009 ONCA 319 at para. 21. It is "sufficient if the parties contemplated the type of damage without being required to have predicted the extent of it": Harvin D. Pitch and Ronald M. Snyder, *Damages for Breach of Contract*, 2d ed. (Carswell looseleaf) at 7§2(a), p. 7-5. In *Houweling Nurseries Ltd. v. Fisons Western Corp.* (1988), 49 D.L.R. (4th) 205 (B.C.C.A.), application for leave to appeal dismissed, [1988] 1 S.C.R. ix (note), McLachlin J.A. (as she then was) said, at 212:

> [it] is my view that the alleged loss which occurred … were losses of a type which might be supposed to have been in the contemplation of the parties as a serious possibility in the event of the breach of contract which occurred. The fact that the

> actual amount of lost sales may have exceeded the parties' expectations does not … appear to render the damages too remote. Nor does the fact that the losses may relate to business with customers about whom the defendant may have been unaware at the time of contracting. To put it another way, while the defendant may not have known or had reason to know of the particular business opportunities which the plaintiff had in Alberta, the existence of some such opportunities was "to be reasonably expected", justifying an award of damages. [Emphasis in original.]

[209] In determining the extent time for which the breach is the effective cause of loss, the court said in *Sunnyside Greenhouses Ltd. v. Golden West Seeds Ltd.* (1972), 27 D.L.R. (3d) 434, 1972 CarswellAlta 51 (Alta. S.C.A.D.), affirmed [1973] S.C.R. v, at para. 23, that "[w]hen such loss is a direct and natural consequence of the breach … it may be assessed for such period of time as it is incurred before reasonable steps in mitigation of loss can become effective."

[210] It is necessary to avoid overcompensating plaintiffs for losses that are not established on the evidence. This principle was recently stated in the following terms in *Agribrands Purina v. Kasamekas*, 2010 ONSC 166, where Quigley J. said, at paras. 147-149:

> … The general principle in both contract and tort is "that the injured party should receive compensation in a sum which, so far as money can do, will put him in the same position as he would have been in if the contract had been performed or the tort had not been committed." … [B]oth focus on the real loss sustained measured against the economic probabilities had the wrong not occurred.
>
> … Whether the impugned conduct is tortious or contractual, the loss that is claimed to have been sustained by the plaintiff must be directly traceable in a causal sense to the conduct of the defendants. The conduct must either be the cause or a cause. In the absence of a direct link, the loss will not be compensable…

> Similarly, the loss sustained by the plaintiff from the defendant's conduct must be foreseeable in both contract and in tort. Foreseeability in this context embraces two distinct concepts. The first is that the defendant or defendants have been able to see the likelihood that the losses claimed to have been sustained by the plaintiff, whether in breach of contract or in tort, were a natural product of the wrong that was perpetrated. The other more subtle aspect is that even defendants who have committed contractual or tortious wrongs ought not to be saddled with a potentially onerous burden of having to compensate for losses that materialize out of a plaintiff's speculation about future economic prospects. The alleged loss by a plaintiff of future economic opportunities can itself 'snowball' into claims for compensation for even more remote opportunities that it is claimed would have grown out of earlier ones.

[211] The court noted that, while "it would be wrong to assess damages for lost opportunity as though it were a certainty," nevertheless "liability should not be escaped because the amount of loss cannot be proven with precision once a defendant has been shown to have caused the loss": *Agribands Purina* at para. 177. The court also expressed concern about the potentially "punitive" effect of awarding damages over a lengthy period, as "the reliability of the assumption starts to diminish and the potential impact of the contingencies starts to grow as time passes from the initial breach of contract and tort. Its likelihood and reliability starts to diminish as a mere matter of mathematical probability as time passes from the original commission of the compensable wrongs": *Agribands Purina* at para. 202.

[212] The court also expressed a view on the method of calculation, preferring a "multiple of earnings" approach by which the damage quantum is "determined at a time and using assumptions that were operative at a time that is roughly contemporaneous with the infliction of the damage, but that takes into account the plaintiff's realistic expectancies at that time and looking forward into the

foreseeable future, as supported by the evidence adduced at trial": *Agribands Purina* at para. 205. This approach derived from *Ronald Elwyn Lister Ltd. et al. v. Dayton Tire Canada Ltd.* (1985), 52 O.R. (2d) 88, [1985] O.J. No. 2633 (Ont. C.A.), appeal allowed on other grounds, [1982] 1 S.C.R. 726, where the plaintiff's business was destroyed as the result of the acts of the defendant, and lost profits were measured over a 30-year period. The court accepted a valuation of the business according to "going concern value", relating to "the capitalization of the future anticipated income of the business": *Lister* at paras. 49 and 64.

[213] The plaintiffs say that the evidence establishes that mitigation was not possible prior to December 31, 2008, and that the inability to return the plaintiffs to their starting point continued to the time of trial. They say the "domino effect" of non-payment of property damage and eroding working capital is only the beginning; as a consequence of the defendants' actions, they lost tangible assets, including aircraft and equipment, experienced mechanical and engineering staff, inventory and supplies, their customer base and Helico's Transport Canada Operator's Certificate. They submit that they will not be reinstated by a payment of $225,000, but only by recovery of lost profits since 1999.

[214] As noted earlier, the plaintiffs' expert, Ms. MacMillan, projected losses to Helico and All-Up for the period July 8, 1999, to October 31, 2008, as $3,285,763. The plaintiffs call this a conservative, but reasonable, probable and reliable, quantification of their losses resulting from the defendants' conduct. They contrast Ms. MacMillan's analysis to actuarial reports overly reliant on underlying assumptions supplied by the client. Ms. MacMillan, they say, avoided these issues,

and performed a forensic loss of profit valuation in which she examined the underlying assumptions that form the basis of the opinion.

Impecuniosity

[215] The defendants claim that any damage assessment must reflect the "precarious" nature of the plaintiffs' business, particularly with respect to Mr. Dalrymple. In *Liesbosch Dredger v. SS Edison*, [1933] A.C. 449 (H.L.), the plaintiff's dredger was lost, and, lacking funds to purchase a suitable replacement, the owners rented a dredger in order to complete a contract. Despite the defendant's admission of liability, the plaintiff was not entitled to damages on account of special losses arising due to its financial position. Subsequent English caselaw has held the *Liesbosch Dredger* decision to be limited to its facts, and "not of general application": *Perry v. Sidney Phillips & Son*, [1982] 1 W.L.R. 1297 (C.A.) at 1302, cited in Waddams, *The Law of Damages* at 15:360. I am satisfied that the recoverability of damages caused by impecuniosity is now a question of remoteness and foreseeability: Waddams, *The Law of Damages* at 15:330-390.

Mitigation

[216] In addition to denying that the claimed losses occurred, the defendants maintain that the plaintiffs failed to mitigate their damages. The plaintiffs were, of course, required to mitigate their damages. The right to compensation for pecuniary losses is qualified by a duty upon the plaintiff to take "all reasonable

steps to mitigate the loss consequent upon the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps": *British Westinghouse Electric and Manufacturing Company Limited v. Underground Electric Railways Company of London, Limited*, [1912] A.C. 673 (H.L.) at 689. The burden to prove a failure to reasonably mitigate, however, is with the defendants: *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324, at 331. As Waddams comments, in *The Law of Damages* (Canada Law Book, looseleaf) at 15.140:

> The plaintiff is barred from recovering in respect of loss that could have been avoided by acting reasonably. What is reasonable has been called a question of fact depending on the particular circumstances of the case. However, as with remoteness, a finding that the plaintiff ought to have mitigated is not a simple question of fact because it involves a legal conclusion. In case of doubt, the plaintiff will usually receive the benefit, because it does not lie in the mouth of the defendant to be over-critical of good faith attempts by the plaintiff to avoid difficulty caused by the defendant's wrong…

It has been said that the measures which a plaintiff

> may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticize the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken.

See *McGregor on Damages*, 16th ed (London: Sweet and Maxwell, 1997) at 326, cited in *North Sydney Associates v. United Dominion Industries Ltd.*, 2005 NSSC

206, at para. 116, affirmed at 2006 NSCA 58. I see no reason why this principle should not govern damages for negligence.

[217] The defendants maintain that the plaintiffs failed to mitigate their damages by failing to promptly seek recovery from their own insurer, BA. In other words, RSA takes the position that the plaintiffs should never have approached it.

[218] RSA agreed to deal with the property damages, Heli-Max rental, and business losses early in the process. Ms. Hallman's letter, and her other evidence, clearly establishes this. Starting with the approach by Mr. Skinner and his representatives on August 5, Ms. Hallman discussed the costs of repairs with Kim Mizera at Rilpa, and she spoke to Heli-Max about the helicopter rental. She directed Mr. Skinner to keep records of Helico's business losses. She also indicated that Mr. Skinner should deal with Mr. Spence on the issue of depreciation. Moving forward, on August 10, Mr. Spence requested a settlement proposal from Mr. Skinner, which Mr. Skinner provided within a day. Nothing in RSA's conduct up to this point could reasonably be taken as an indication that the plaintiffs should stop dealing with RSA and advance a claim with BA. Nothing to this effect was communicated to Mr. Skinner.

[219] After receiving Mr. Skinner's proposal, RSA informed him that it was retaining Mr. Gareau to adjust the claim on its behalf, with the indication that there would be no offer until Mr. Gareau reported. There was no suggestion that Mr. Skinner should stop dealing with RSA, however. A meeting with Mr. Gareau, Mr. Higgins, Mr. Spence, and Mr. Skinner followed on August 16. At this

meeting, RSA provided Mr. Skinner with a cheque for $20,000. While RSA's representatives instructed Mr. Skinner to ensure that repairs were done on PHG without delay, they had been made aware that the plaintiffs did not have the resources to pay for the parts and components that Mr. Mizera had determined were necessary. At this point, there was still no reasonable basis to conclude that RSA wanted the plaintiffs to take their claim back to BA.

[220] Things did not change with RSA's ongoing correspondence. Mr. Gareau's letter to Helico of August 19 pledged to give the matter "preferred attention", while calling on Mr. Skinner to see that repairs were done and PHG returned to service quickly. RSA made a second advance of $20,000 around the same time. Mr. Spence's letter to Mr. Skinner of August 23 refers to Mr. Skinner's request that RSA assume adjustment of the claim, without any suggestion that RSA had declined this responsibility, and goes on to instruct Mr. Skinner to wait for a proposal upon RSA's receipt of repair figures. Nothing in this course of conduct could have put Mr. Skinner on notice that RSA privately wanted him to take his claim back to BA. During Mr. Gareau's subsequent period of relative inactivity, when the service bulletin issue was canvassed, there was still no indication that what was happening was anything other than an ongoing attempt to reach a settlement, however difficult and contentious the negotiations might be. This was the course of events that went on until Mr. Skinner concluded that RSA would not make a substantial offer. Having reached this conclusion, the plaintiffs did return their claim to BA.

[221] None of the RSA witnesses can be heard to say that they were unaware of Helico's financial position during this time period. Starting well before the first contacts with Ms. Hallman, Mr. Skinner advised every RSA official he dealt with - as well as Mr. Gareau - of the plaintiffs' precarious financial situation, orally (in person and by telephone) and in writing. This information prompted RSA to advance a combined $40,000 between August 16 and 19.

[222] I am satisfied that the course of action pursued by Mr. Skinner - specifically, attempting to reach a settlement directly with RSA, with RSA's active encouragement and apparent co-operation - was a reasonable mitigation effort. Mr. Skinner fully apprised RSA of the plaintiffs' circumstances. I am not persuaded that it was a failure to mitigate for the plaintiffs to not seek payment directly from BA. While it is true that the plaintiffs maintained the BA claim while negotiating with RSA, I am not persuaded that it was unreasonable to rely on RSA's agreement to expedite the process. In other words, it was not a failure to mitigate to hold the BA claim in abeyance. Nor was it a failure to mitigate for the plaintiffs not to direct Mr. Mizera to proceed with repairs. They were in no position to do so without being able to assure payment. RSA did not deny liability; Mr. Spence had gone so far as to pledge to waive the deductible on the BA policy. Ms. Hallman had indicated to Mr. Skinner that the claim could be settled, and told Mr. Mizera that a settlement was close.

[223] More broadly, the plaintiffs argue that Mr. Skinner took reasonable and even extraordinary mitigation efforts, attempting to stabilize and preserve the business, and to preserve the potential for expansion. These efforts included

pursuing work out of the region, away from his family, over an extended period. Lacking working capital to acquire new helicopters and rehire staff, as well as to renew Helico's Operator's Certificate, the plaintiffs could only realize income and profit levels proportionate to that of an individual pilot, rather than an "established and mature aviation business" of the type that existed before the accident. The mitigation measures taken by the plaintiffs included the lease of a helicopter from Heli-Max in order to perform Helico's spraying contracts and the leasing of parts from GREA in order to make PHG airworthy again. The three-week term of the Heli-Max rental (approved by RSA) was reasonable in view of Mr. Mizera's estimate of the time required for Rilpa to carry out the necessary work, once he had received an assurance of payment.

[224] While it is true that Ms. Hallman, Mr. Spence, and Mr. Gareau all told Mr. Skinner that he should direct Rilpa to carry out the repairs, his consistent reply was that he did not have the means to do so and that Rilpa required an assurance of payment. At trial, Mr. Higgins suggested that "having the repairs done" meant going back to BA; but this was never communicated to Mr. Skinner. Similarly, Mr. Gareau suggested at trial that his insistence that Mr. Skinner should have the parts repaired actually meant having them inspected.

[225] To compound matters, the plaintiffs' cash flow problems arose from RSA's failure to pay for the Heli-Max rental. While Mr. Higgins stated that he never received the invoice, it was in fact attached to counsel's letter to Mr. Gareau of October 26, 1999. It was also clear from Mr. Gareau's evidence that he had access to this invoice; he described a meeting with a Heli-Max official in which the

invoices were reviewed. He then suggested that this payment had to wait for the settlement of the property damage claim; but this was not what Ms. Hallman had indicated, and he pointed to no basis in practice or law for withholding payment on this basis.

[226] RSA also suggests that the plaintiffs were made whole by 2004, and that Mr. Skinner should then have acquired another helicopter. This ignores the plaintiffs' circumstances in 2004, with no operating certificate or financing. RSA also suggests that instead of investing in Radco, Mr. Skinner should have invested in Helico; however, Ms. MacMillan noted that the "investment" in Radco came from a bank loan, the bank took a security interest in Radco's assets, and the former owner took back a promissory note for the balance of the purchase price. Mr. Gain disagreed, and maintained that it should be considered an investment. I accept Ms. MacMillan's view that there is no parallel between what was done with Radco and a hypothetical investment in Helicon.

Quantification of damages for lost revenue

[227] In quantifying the plaintiffs' damages, it is necessary to consider the factors that would have improved the plaintiffs' situation between the accident and the date of trial, such as the likelihood that the plaintiffs would have expanded Helico's helicopter fleet, that there was room for expansion of spray and charter revenue, and increased revenue from the expanded maintenance and refurbishment centre.

[228] The differences of opinion between Ms. MacMillan and Mr. Gain on these points have been described. Ms. MacMillan projected growing spray revenue even before the addition of more aircraft. Mr. Gain, by contrast, concluded that conditions in the relevant industries during the period of claimed loss would have meant there would be no such increase. There was some evidence that there has been stagnation of the pulp and paper industry in Newfoundland and Nova Scotia, resulting in less herbicide spraying. Fungicide spraying - such as for blueberries - had limited growth potential due to the relatively low rates per hectare for this type of spraying. Nonetheless, I am satisfied that Mr. Skinner would have been able to generate spraying revenues at a greater rate of increase than Mr. Gain's projection of a flat market. This is evident from the 2007 and 2008 revenues, which notably exceeded Mr. Gain's hypothetical projections, but were generated by operating essentially as a subcontractor through wet leases. Mr. Gain had no convincing explanation for the way in which the 2007 and 2008 spraying figures departed from his projections.

[229] It is reasonable to infer that these revenues would have been higher had Helico been operating its own helicopters under its own operating certificate, with less depleted capital. Mr. Gain suggests that wet leases were in fact a preferable way to operate. I accept the plaintiffs' position on this point as more reasonable. Mr. Skinner could not simply wet-lease helicopters with no assurance of revenue, and wet leases were impractical for charter work, where there was often little lead time. I accept Mr. Skinner's evidence that Helico's lack of its own helicopters made it a less likely candidate for contracts, particularly those arising on a short-term basis. As such, I believe there would have been additional revenue

available for Helico if it had controlled its own helicopter fleet. I find that there would have been additional revenue with a two-helicopter fleet until 2002, and thereafter with at least three aircraft, supplemented, where necessary, by wet leases.

[230] It is true that Mr. Skinner's ACOA documents did not call for an increased number of aircraft. In fact, the number was being reduced from five to two at that time, at least for the purposes of then-existing charter markets (according to his May 31, 1999, correspondence with ACOA.) Ms. MacMillan took the view that the ACOA proposal should not be regarded as a long-term plan, but was framed merely to support the near-term plan to expand the refurbishment and maintenance facility. I am satisfied that Ms. MacMillan accurately viewed the pre-accident Helico as an organization with a skilled workforce and a capable leader in Mr. Skinner, an experienced pilot and businessman. I accept that Mr. Skinner intended to expand Helico's fleet, and I believe it is reasonable to conclude that he would have grown it to three aircraft by mid-2002. I also accept that Helico's market share would have increased with a larger fleet.

[231] I accept that Mr. Skinner was in the process of revising Helico's operations, for instance, by closing the training school, in order to maximize profitability and by expanding maintenance and refurbishment capacity. In this regard, I accept the evidence of Mr. Skinner and Mr. Walsh that significant progress had been made on the physical facility. I am satisfied that the construction and renovation work would have been completed.

[232] As to the amount of additional revenue that might have been available, I am not satisfied that Ms. MacMillan's highly optimistic estimate of growth of spray revenue is well-founded. Ms. MacMillan appeared to take the view that if Helico had greater resources, the market would present itself. Mr. Gain described this, in essence, as a theory that "if you build it, they will come." I do not accept that greater spraying capacity would have necessarily led to increased revenue to the extent Ms. MacMillan theorizes. Nor can I accept Ms. MacMillan's extremely optimistic projections of charter revenues, which are not supported by any extensive market study.

[233] That said, I do not accept Mr. Gain's projection of essentially flat revenue, but for inflation. This is a case where the experts' projections, in both cases, correspond to the positions of the respective parties in a way that makes them less persuasive. The comments of MacAdam J. in *Edwards v. Edwards Dockrill Horwich Inc.*, 2005 NSSC 308, at para. 126, are apposite:

> Both experts represented what has become common in litigation, namely, the preparation of reports and the testifying to opinions and positions that are more extensions of the principal's arguments than articulations of opinions and positions independently made and held. Perhaps in this day of extremely adversarial litigation nothing more can really be expected. I have considered all of their reports in reaching my conclusions on the various issues raised in this proceeding. The weight I have given to the reports, as well as the evidence of the two experts, varies depending on the issue being considered and the extent to which the factual underpinning of the expert opinion is supported by other credible and reliable evidence, both oral and documentary.

[234] I conclude that an attempt to impose mathematical precision on the estimate of damages for lost profits in this case is unhelpful. I am, however, satisfied that

the occurrence of damages as a result of the defendants' conduct has been proven. This is a situation where the *Penvidic* approach provides a reasonable approach. *Penvidic* has been considered or applied in various cases in Nova Scotia: see *Sydney Cooperative Society Ltd. v. Coopers & Lybrand*, 2003 NSSC 35, at paras. 222-224; *Edwards v. Edwards Dockrill Horwich Inc.*, 2005 NSSC 308, at paras. 159-162; and *McAsphalt Industries Ltd. v. Chapman Bros. Ltd.*, 2008 NSSC 324, at paras. 71-73 and 92.

[235] Ms. MacMillan projected revenues of around $578,232, charter revenues of $278,000, and maintenance, repair and overhaul revenues of $370,000, for the fiscal period ending October 31, 2000. In the case of spraying and charter, this represented an increase of 30 per cent over the actual increase as of October 31, 1999. The maintenance revenue represented a new income stream.

[236] In Helico's ACOA proposal, Mr. Skinner projected spraying and charter revenues for 2000 in amounts substantially less than those projected by Ms. MacMillan for the same period. She explained this variation by the claim that the amounts were attainable by properly attributing the ratio of spraying to charter work, taking into account Mr. Skinner's experience and knowledge and Helico's other assets, such as its skilled workforce. She takes the view that the ACOA projections were geared to obtaining the desired funding and should be viewed in that light, rather than as firm figures going forward. Ms. MacMillan also projected the addition of a third helicopter in 2002, and a constant three refurbishments annually.

[237] As noted earlier, Mr. Gain was of the view that a downturn in the forestry industry and limited growth opportunities would have made it impossible to achieve the results projected by Ms. MacMillan. He allowed for some increase in manufacturing revenue, though not in the amounts projected on behalf of the plaintiffs. Mr. Gain questioned the possibility of completing the maintenance and repair centre, even with the benefit of ACOA and BDC funding. He understood that the plaintiffs' bank had declined to offer bridge financing, although this is a questionable assertion in view of Mr. McCracken's evidence that bridge financing would have been a possibility while Helico awaited the ACOA funding. In any event, Mr. Skinner had been able to raise private finance in the past, and I conclude that this would likely have been an alternative source of financing. Moreover, by the time of the accident, a significant portion of the expansion work had already been done.

[238] I disagree with Mr. Gain's assertion that the plaintiffs intended to maintain spraying and charter revenue on a level basis. It was the plaintiffs' intention to attempt to increase both spraying and charter revenue, and they had the capacity to do so. I am satisfied that in the circumstances that existed before the accident, the addition of C-FULL would have put Helico in a position to increase its spraying and charter market share. It does not follow from this that a third helicopter would have automatically provided yet more market share. I tend to agree with Mr. Gain's view that a third aircraft would not have led to additional markets to the extent projected by Ms. MacMillan. But this does not detract from the conclusion that a fleet of two owned or leased helicopters, supplemented by two wet-leased aircraft, would have given Helico the ability to gain a wider share of

the existing market. Helico was doing all of the helicopter spraying in Newfoundland, but there was still room to grow its 60 per cent share of the Nova Scotia spray market. Helico's later performance operating only wet-leased aircraft is further evidence of this reasonable potential. I reject Mr. Gain's view, which was based entirely on the annual roundwood harvest, that the level of herbicide spraying by helicopter on private woodlots would remain as stagnant as it was on provincial lands.

[239] I have considered Mr. Gain's opinion that the ratio of charter to spraying should be in the range of 20/80 or 25/75, as opposed to Ms. MacMillan's proposed ratio of 30/70. I accept Ms. MacMillan's reasoning. I also reject Mr. Gain's suggestion that there was no scope for growth on the charter side of the business. I am persuaded by the growth of Helico's charter business between 1996 and 1998, and the evidence of Mr. Skinner's efforts to expand the charter side, that there was room for growth in this area.

[240] In considering Mr. Gain's calculation of lost profits for the period between 2000 and 2008, as set out in the schedule attached to his report of March 18, 2011, I would increase the total spray revenue by $500,000, representing opportunity for the plaintiffs to increase their share of the Nova Scotia market by using their own helicopters rather than operating through wet leases. I would also allow for increased charter revenue of $500,000. I am satisfied that the plaintiffs would have recovered from the 1999 performance; Helico had previously seen significant increases in charter revenue, as was the case in 1998. I would allow 20 per cent profit on the additional spray and charter revenue, amounting to $200,000.

[241] As with spraying and charter revenue, I conclude that Mr. Gain underestimates the likely revenue from maintenance and overhaul work, which he projected at approximately $2 million between 2000 and 2008, compared to an amount in the area of $3.3 million projected by Ms. MacMillan. In general, Mr. Gain's view of the amount of the plaintiffs' losses, and particularly his emphasis on the fact that the plaintiffs operated at a net loss between 1993 and 1998, is not sufficiently qualified by consideration of such factors as the closure of the flight training side of Helico's business, and the expansion of the maintenance and refurbishment facilities.

[242] I do not agree with the higher calculation because I am not convinced that Helico would have produced this level of revenue consistently over the entire time frame in question. However, I also reject Mr. Gain's figure. The evidence showed that Helico had three refurbishment projects under way at the time of the accident. It also showed that PHG was successfully overhauled and sold at a profit. I believe that refurbishment and overhaul revenue over this period is reasonably estimated at $2.6 million, representing additional revenues of $600,000. I would allow profit at a rate of 20 per cent, or $120,000.

[243] I must also consider the relevant period of loss. The defendants maintain that the period of loss should terminate at 2004, alleging that the plaintiffs were returned to their pre-accident financial position at that time. I conclude that the loss should be calculated effective October 31, 2010. Thus the revenue figure will be increased by $1.4 million per annum over the additional two years, for an

additional $2.8 million. In arriving at this calculation I have reviewed the projected total revenue as set out in Mr. Gain's report between 2005 and 2008, and I find the appropriate level of net income to be 20 per cent on the additional $2.8 million, amounting to $560,000.

[244] In his original report, Mr. Gain concurred with Ms. MacMillan's approach to "extraordinary losses" in respect of claimed losses arising from accident-related property damage, concluding that such expenses should be excluded from the calculation of actual income in 1999 and 2000. In an addendum dated March 18, 2011, however, Mr. Gain changed his view, stating that since the extraordinary losses included expenses that allegedly resulted from the accident, they should be included in the calculation. Aside from a sum of $40,600 relating to the replacement helicopter rental, Mr. Gain said, all other "extraordinary" costs should be counted as operating costs during the loss period and deducted from the calculation of actual income. This resulted in a revision of Mr. Gain's calculation of income loss to the end of fiscal 2004 from $0 to $177,600, and to the end of fiscal 2008 from $257,118 to $444,180. Although I do not conclude, as suggested by plaintiffs' counsel, that this adjustment was made simply to accord with the defence position, I nevertheless am not convinced by it. I am satisfied that Ms. MacMillan's position (and Mr. Gain's original position) is more supportable. As Ms. MacMillan explained, the expenses in question, which corresponded closely to the special damages claimed in the statement of claim, would not have arisen but for the accident.

[245] As such, I establish the plaintiffs' economic losses based on the following calculations:

MDD loss calculations:	$1,090,688
Additional income loss, 2000-2008 (spray and charter):	$200,000
(maintenance and repair):	$120,000
Additional income loss, 2009-2010:	$560,000
Total loss:	$1,970,688

From this amount I deduct the amount actually earned by the plaintiffs between 1999 and 2010. According to Ms. MacMillan, between 1999 and 2008, Helico and All-Up had net income of $833,570, plus $200,000 in 2009 and 2010, for total earned income of $1,033,570 for the period 1999-2010. The figures up to 2008 are similar to those referenced in Mr. Gain's report. Consequently, total damages on account of lost income are in the amount of $937,118. I note that I have given minimal weight to company book value in making this determination.

FURTHER ISSUES RESPECTING DAMAGES

General and aggravated damages

[246] The plaintiffs Helico and All-Up claim general and aggravated damages. In particular, they say the defendants' conduct calls for an award of aggravated damages. They say the scope of their injury is not limited to the liquidated economic loss aspect, but that additional intangibles enhanced and aggravated their damages, such as loss of market share and damaged reputation. The Plaintiffs say their reputation has been "all but eradicated" in parts of the industry where they previously "participated and thrived." They say this damage was aggravated by the defendants' long-term denial of compensation. The plaintiffs' submissions on this point are very general, and essentially amount to an attack on the "high-handed" manner in which the defendants conducted themselves.

[247] Both general and aggravated damages have compensatory purposes. I am not satisfied that the plaintiffs have made out a basis for such additional compensation. I cannot award general damages simply to supplement an award of damages for economic losses. I make no comment on the somewhat uncertain state of the law respecting the availability of aggravated damages to a corporate plaintiff (see, for instance, *Plazacorp Retail Properties Ltd. v. Mailboxes Etc.*, 2009 NSCA 40, at paras. 56-59), but, assuming that such damages could theoretically be available, I am not satisfied that the plaintiffs have made out a specific basis for an aggravated award.

Punitive damages

[248] The plaintiffs say RSA's bad faith conduct included "deliberate disregard for the consequences of its breached promises and misrepresentations," and a "continuing refusal to monitor and oversee the flawed and improper investigation of its adjuster." These were the actions and failures that led to findings against RSA in negligence. The plaintiffs say this conduct also calls for punitive damages. According to the plaintiffs, whether RSA's misconduct is characterized as bad faith or "unacceptable business conduct," there should be an award of punitive damages to reflect the court's disapproval of such conduct.

[249] The plaintiffs rely on *Kings Mutual Insurance Co. v. Ackermann*, 2010 NSCA 39, where a jury awarded punitive damages of $55,000 against an insurer after finding bad faith arising from the denial of a property damage claim respecting a barn. The insurer hired an engineer, who did not properly investigate, and the insurer ignored relevant information. On appeal, the court held that the propriety of the punitive damage award largely rested on whether the finding of bad faith could stand. Affirming that "punitive damages are only awarded in rare and exceptional circumstances where a party's actions are deserving of punishment, deterrence or denunciation," (para. 38) the Court of Appeal nevertheless held, at para. 46:

> The jury's answers to the questions put to it clearly indicate its findings of bad faith in relation to Kings' denial of coverage under the policy and that King's conduct offended its sense of decency. This indicates the jury was satisfied Kings'

> conduct of its investigation was outrageous. My review of the record satisfies me that this was a conclusion a reasonable jury could reach and that an award of punitive damages was a rational response on the jury's part to its findings. It was not an inevitable or unavoidable response, but it was a rational response to what the jury saw and heard. Without an award of punitive damages, Kings would not have been required to pay more than its policy required it to pay and there would be nothing to deter it from acting similarly in the future; by not following up on all of the evidence relevant to a claim, withholding critical information from the adjuster engaged to investigate a claim and allowing the adjuster to present the results of his or her investigation in a partisan, biased and unobjective manner. The actions of Kings were exceptional, justifying an exceptional remedy.

[250] The plaintiffs say that, although the dispute in *Ackermann* was directly between the insurer and the insured, the issues of claim adjustment and good faith that arose were similar to those in present case. The insurer's conduct included inadequate investigation of the state of the barn as it was before the hurricane; the withholding of relevant evidence during the investigation; inadequate instruction regarding the investigation; and permitting its adjuster to take a partisan position against the insured. It was specifically noted that the insurer took no steps to distance itself from its adjuster's bias, resulting in an approach to the claim characterized by "tunnel vision" (paras. 42-43). There was also evidence that the insurer sought to take advantage of the insured's financial disadvantage (para. 44).

[251] The plaintiffs also cite the well-known case of *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, where the insurer's improper denial of a fire damage claim, combined with allegations of arson and an attempt to take advantage of the insured's financial situation, led the jury to award punitive damages of $1,000,000, which was reduced on appeal but restored in the full amount by the Supreme Court of Canada. Binnie J. said, for the majority, at para. 103:

> The "train of thought" … kept going long after the requirements of due diligence or prudent practice had been exhausted. There is a difference between due diligence and wilful tunnel vision. The jury obviously considered this case to be an outrageous example of the latter. In my view, an award of punitive damages (leaving aside the issue of quantum for the moment) was a rational response on the jury's part to the evidence. It was not an inevitable or unavoidable response, but it was a rational response to what the jury had seen and heard. The jury was obviously incensed at the idea that the respondent would get away with paying no more than it ought to have paid after its initial investigation in 1994 (plus costs). It obviously felt that something more was required to demonstrate to Pilot that its bad faith dealing with this loss claim was not a wise or profitable course of action. The award answered a perceived need for retribution, denunciation and deterrence. [Emphasis in original.]

[252] In *Whiten* the insurer's conduct in maintaining the arson allegations exceeded the requirements of prudent practice and due diligence, the insurer exploited the insured's reliance and vulnerability, and the insurer's senior management failed to curb the behavior of middle management. The plaintiffs say RSA's conduct was similar, exacerbated by inadequate handling of the claim, bias, and tunnel vision, as well as by the plaintiffs' vulnerability and reliance, which were known to and acknowledged by senior representatives of RSA in its initial co-operative response. This was followed by "deliberate and callous disregard" (in the plaintiffs' words) for the consequences that Mr. Skinner warned of. They submit that RSA's "inflexible withholding of any payment towards property damage, notwithstanding its early admission of the strike and its resulting acceptance of liability, must be placed in proportion to the adverse consequences that flowed from such callous refusal to pay."

[253] The plaintiffs say the quantum of punitive damages should be proportional to the harm that was done to the plaintiffs. They cite *2703203 Manitoba Inc. v. Parks*, 2007 NSCA 36, where Saunders J.A., for the majority on this point,

emphasized that in addition to purposes of retribution, denunciation and deterrence, punitive damages must be proportional to the end to be achieved. He noted that in *Whiten*, Binnie J. explained that the consideration of proportionality is not limited to "proportionality relative to the blameworthiness of the defendant's conduct. Other factors will include proportionality with respect to: the degree of vulnerability of the plaintiff; the harm or potential harm directed specifically at the plaintiff; the need for deterrence; a consideration of other penalties; and the advantage gained by the defendant from the impugned misconduct" (para. 128). Further, punitive damages are only awarded where all other penalties are "inadequate to accomplish the objectives of retribution, deterrence, and denunciation" (para. 129, citing *Whiten* at para. 123).

[254] The plaintiffs submit that RSA's reputation as a reputable insurer, combined with its financial power and resources as an insurer, caused them to be confident that the claim with their own insurer could be safely relinquished in order to deal directly with RSA. They add that RSA's retention and use of the funds which should have been paid to them in 1999 is a further aggravating factor going to punitive damages. Without a significant punitive damage award, they say, RSA and other insurers "may continue to view such bad faith misconduct as a financially and strategically sound approach, particularly where there is a strong possibility that such long term, obstructionist strategy may lead to the eventual insolvency or bankruptcy of the victimized claimant."

[255] The defendants say this is not a case for punitive damages. They cite *Honda Canada Inc. v. Keays*, 2008 SCC 39, where the majority, per Bastarache J., held

that "punitive damages are restricted to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own" (para. 62). They say there is no parallel here to *Whiten*, emphasizing the cases in which it has been held that failing to pay a meritorious claim is not in itself bad faith. They also submit that punitive damages are unusual in contract cases, and in commercial disputes generally.

[256] I am not satisfied that the conduct in this case rose to the level of advertent behavior that would necessitate an award of punitive damages. This is not a case where a violation of a duty of utmost good faith owed by an insurer to an insured has been found. RSA's negligent conduct was characterized by incompetence, inattention, and sloppiness, as opposed more than by actual malice. As blameworthy as RSA's handling of this matter was, it was nevertheless fundamentally characterized by negligence rather than by intent.

PREJUDGMENT INTEREST

[257] Where damages are awarded at trial, the *Judicature Act*, R.S.N.S. 1989, c. 240, requires the court to "include in the sum for which judgment is to be given interest thereon at such rate as it thinks fit for the period between the date when the cause of action arose and the date of judgment after trial…": s. 41(I).

[258] The plaintiffs seek prejudgment interest at a rate of five per cent per annum, for the entire period from the time the cause of action arose until the date of judgment. They cite *Civil Procedure Rule 70.07*, which provides that "[t]he rate

and calculation to be used for prejudgment interest on a liquidated claim is five percent a year calculated simply, unless a party satisfies a judge that the rate or calculation should be otherwise."

[259] The defendants claim that the plaintiffs have been responsible for undue delay in bringing the case to trial. Where such a finding is made, the rate or period of prejudgment interest may be reduced: *Attorney General (Nova Scotia) v. Marriott*, 2008 NSSC 160, at para. 66. Accordingly, they say that interest should be awarded over a reduced period, not the nearly 12 years the matter required to come to trial. The defendants do not provide particulars on the alleged delay caused by the plaintiffs, although the plaintiffs submit that any delay was the result of their financial inability to fund an expert opinion, which was, in turn, the direct and foreseeable consequence of RSA's refusal to pay their claim.

[260] The defendants also argue that the plaintiffs' damages are not liquidated damages, or at least are not, in the majority, liquidated. Liquidated damages are "a pre-estimate of damages, agreed upon in advance by the parties to a contract, as to what damages will be paid in the event of a breach of that contract": *Pick O'Sea Fisheries Ltd. v. National Utility Service (Canada) Ltd.* (1995), 146 N.S.R.(2d) 203 (C.A.), at para. 34. They have also been described as claims "for specific amounts due and payable, capable of being ascertained as a mere matter of arithmetic": *Widmeyer v. Atlantic Pipeline Resources Inc.*, 2000 NSCA 22, at para. 15. These definitions would not fit the claim for damages for business losses.

[261] As noted, the plaintiffs seek prejudgment interest at a rate of five per cent. The defendants suggest simple interest, at a rate of 3.12 per cent, based on rates on one-year treasury bills, over a period of four to six years after the accident. The rates they cite range from January 1, 2001, to January 1, 2006.

[262] There is "no presumptive rate for damages on an unliquidated claim": *Giffin v. Soontiens*, 2012 NSSC 2, at para. 33. The defendants cite the old Practice Memorandum No. 7 as a basis for their own interest calculations. There may be some basis for applying the former Practice Memorandum in situations like *Awan v. Cumberland Health Authority*, 2009 NSSC 295, affirmed at 2010 NSCA 50, where virtually the entire period for which prejudgment interest is due, as well as virtually all of the actual litigation activity, took place while the *Civil Procedure Rules 1972* were still in effect. The matter settled prior to scheduled trial in 2009, shortly after the current *Civil Procedure Rules* came into force. In *Giffin*, Moir J. stated that "the practice memorandum ought not to be a guide in cases that are primarily litigated after the New Rules were made in June of 2008" (para. 39). Where the parties cannot agree, the court will be left to rely on evidence to fashion an appropriate rate. For instance, in *Giffin*, Moir J. considered the circumstances of the claim and the plaintiff's financial circumstances in concluding that an appropriate rate would balance savings and borrowing rates, and concluded the four per cent would accomplish this goal (paras. 40-41.)

[263] I find the reasoning of Moir J. to be applicable to the matter before me, and I award interest at a rate of four per cent per annum. As to the period for which prejudgment interest should be awarded, I am not satisfied that there has been

inordinate delay caused by the plaintiffs, and allow prejudgment interest for the entire period prior to judgment.

CONCLUSION

[264] On the basis of the foregoing findings, the plaintiffs are entitled to damages in the amount of $238,499.82 for direct damages arising from the damage to the aircraft, and $937,118.00 in damages for economic loss, for a total of $1,175,617.82, with prejudgment interest at a rate of four per cent for the entire period up to the date of the release of the judgment.

[265] The parties will have until April 30, 2013 to submit their written positions on costs.

J.