Neutral Citation No. [2015] NIQB 106 | *Ref:* **STE9778**

Judgment: approved by the Court for handing down | *Delivered:* **21/12/2015**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

_____

BEECHVIEW AVIATION LIMITED

Plaintiff:

-and-

AXA INSURANCE LIMITED

Defendant:

_____

STEPHENS J

Introduction

[1] The plaintiff, Beechview Aviation Limited, brings this action pursuant to the Third Party (Rights Against Insurers) Act (Northern Ireland) 1930 against the defendant, Axa Insurance Limited. On Friday 12 August 2011 at 66 Belfast Road, Ballynure, County Antrim ("the premises") the plaintiff's helicopter, registration G-LHEL ("the helicopter"), which was owned by the plaintiff, was damaged by a lorry driven by Tony Barr, an employee of Mark Massey who traded as WM Contracts, when the lorry collided with the helicopter ("the collision"). Mr Massey's road traffic insurers are the defendant which by letter dated 6 January 2012 (2/202-204) repudiated liability in respect of its obligation to indemnify Mr Massey in respect of the collision and declared the policy to be void with effect from 12 August 2011. On 9 March 2012 the plaintiff sued both Mr Massey and Mr Barr for the damage caused to the helicopter and no appearance having been entered, judgment in default was obtained on 15 May 2012, with damages to be assessed. On 3 October 2012 Master McCorry assessed damages at £473,438.26 together with costs to be taxed in default (4/70). The plaintiff attempted to enforce that judgment but on 12 April 2013 Mr Massey was adjudged bankrupt (4/76). Having established liability against Mr Massey and Mr Massey having been adjudged bankrupt, the plaintiff was entitled to "step into the shoes" of Mr Massey in pursuit of the defendant on foot of the insurance policy that existed between Mr Massey and the defendant. Mr Massey's

rights on foot of his insurance policy (2/9-27) are transferred to and vest in the plaintiff and the defendant is under the same liability to the plaintiff as it would have been to Mr Massey.

[2] The defendant, whilst acknowledging that it insured Mr Massey "against legal liability … for damage to property … resulting from any accident involving" Mr Massey's vehicle (2/13), denies that it is under any liability to Mr Massey and accordingly denies any liability to the plaintiff. In summary the grounds for denying liability are:-

(a) The defendant alleges that the collision between Mr Massey's lorry and the helicopter was not an accident but was part of a fraudulent conspiracy to deliberately damage the helicopter in order to obtain substantial monies from the defendant on foot of its insurance policy or from the insurer of the helicopter, which conspiracy involved Mr Bryan George Orr on behalf of the plaintiff, Mr Barr, the driver of the lorry and Mr Massey, the owner of the lorry. In the defendant's undated but initial skeleton argument served just prior to the commencement of the trial, which was not signed by senior counsel, it was not only contended that "there was fraudulent conduct on the part of Massey, Barr and Orr" but it was also contended that there was fraudulent conduct "probably by two of their associates, Derek McGarrity and Dermot Fahy." Subsequently in the defendant's written submissions dated 5 May 2015, again not signed by senior counsel, the serious allegation of fraud against Mr McGarrity appears to have been withdrawn, though without any expression of regret or apology, in that it was stated that there "is no evidence of wrongdoing on the part of McGarrity." However the withdrawal was equivocal in that the defendant went on to make an assertion in relation to telephone calls which took place on the day of the collision between Mr Orr, who was then at the premises, and Mr McGarrity, which telephone calls occurred when Mr Massey was also at the premises. The assertion was that during the telephone calls between Mr Orr and Mr McGarrity "McGarrity apparently did not enquire whose skip did the damage or the identity of the person helping to dismantle the rotors which suggests to the Defence that he may already have known." This left open a potential inference that Mr McGarrity in some way had inappropriate knowledge on the day that the collision occurred. This written submission then contained a contention on behalf of the defendant that "the collision was deliberate and was arranged *by one or more* of the parties to make an unwarranted and fraudulent claim" (my emphasis) despite the fact that an arrangement, such as this, can only be made between at least two parties and in this case, unless the allegation is that Mr Barr was chosen on the basis that he would be an incompetent driver who could be relied upon to crash into the helicopter or unless the allegation is that Mr Massey was not involved

so that the arrangement was purely between Mr Orr and Mr Barr, then it must have been an arrangement between at least three parties. In its final written submission dated 19 October 2015, which was signed by senior counsel, the defendant contended that the "conspirators were Mr Orr, Mr Massey and Mr Barr." It was not suggested that Mr McGarrity was a conspirator.

(b) The defendant alleges that there was a second fraud which involved Mr Orr on behalf of the plaintiff and a Mr Fahy of Aero Helicopter Services Limited. It is alleged that they conspired together to inflate the amount of the loss caused by the collision by falsely claiming that the helicopter had been hired by the plaintiff to Mr Fahy. It is alleged that on foot of this conspiracy the plaintiff falsely claimed that it had lost the benefit of a valuable hire contract and thereby sought to obtain compensation for loss of profits which did not exist. Furthermore that this conspiracy involved Mr Fahy giving false evidence before Master McCorry when he was assessing damages against Mr Massey on foot of the default judgment and Mr Orr knowingly permitting such evidence to be given. This alleged fraud did not involve the insured, Mr Massey and therefore could not be a breach of his policy conditions or a reason for avoiding his insurance policy. If this fraud was proved on the balance of probabilities then the defendant did not refer to any authority as to the impact of such a fraud on other aspects of the plaintiff's claim if those other aspects were not part of an insurance fraud. In the event given the factual findings which I have made I do not have to consider the legal consequences if such a fraud had been established.

(c) A failure to co-operate with the defendant on the part of Mr Massey. It is a condition of the policy of insurance between the defendant and Mr Massey (2/20) that Mr Massey must give the defendant "all the help and information possible" and the defendant alleges that Mr Massey was in breach of that condition by, for instance, failing to give certain documents to the defendant.

(d) Another aspect of a failure to give "all the help and information possible" and of alleged breaches of the policy conditions in relation to failing to disclose or concealing a fact likely to influence the provision of indemnity or the extent of indemnity or to making a statement knowing it to be false in any respect, is that the defendant alleges that Mr Massey knowingly made false statements to the defendant after the collision occurred. If in fact the collision was not an accident but was part of a fraudulent conspiracy to deliberately damage the helicopter in order to obtain substantial monies from the defendant, which conspiracy involved amongst others Mr Massey, then it follows that Mr Massey's account to the defendant of the collision as an accident

was false. In that sense, the outcome of that allegation, depends on the outcome of the issue in (a) above. However in addition the defendant alleges that Mr Massey made false statements about, for instance, his acquaintanceship with Mr McGarrity. A question arises as to whether and if so which of those allegations as to making false statements are contained within the pleadings.

(e) The defendant contends that Mr Massey failed to disclose two fixed penalty notices in respect of the offences of using a mobile phone when driving and also failed to disclose a pending prosecution for that offence. It is asserted that this was a material non-disclosure which entitled the defendant to repudiate the policy of insurance.

(f) The defendant relies on an exclusion clause in its insurance policy in relation to airports and aerodromes (2/20). The policy of insurance states that "we will not insure you for claims arising under … this Policy while any vehicle insured by this Policy is being used in the parts of any airport or aerodrome to which aircraft have access." The defendant contends that the premises are an airport or an aerodrome and that Mr Massey's vehicle was being used in the parts of the airport or aerodrome to which aircraft have access. Accordingly it is submitted that there is no liability under the insurance policy.

[3] Mr Scoffield QC and Mr Park appeared on behalf of the plaintiff. Mr Ringland QC and Mr Michael Maxwell appeared on behalf of the defendant at the trial though the Defence was not settled by Mr Maxwell.

Fraud at common law and certain of the policy conditions

[4] At common law an insurance fraud is committed when a false representation is made to the insurance company about how the loss was sustained. In this case the burden is on the defendant to establish that Mr Orr, Mr Massey and Mr Barr, made a false representation to it, knowing the representation to be untrue, or being reckless as to whether it was true, and intending that the defendant should act in reliance on it. If the collision was the consequence of a deliberate conspiracy between Mr Orr, Mr Massey and Mr Barr to damage the helicopter so that an insurance claim could be made, then the subsequent representations which were made to the defendant would be false to the knowledge of all of them and they would be made with the intention that the defendant would rely on them. In such circumstances the defendant would have a valid defence to the entire claim.

[5] In addition to a defence based on the common law of fraud the policy also contains conditions which provide under the heading "Fraud", amongst other matters, that

> "(the insured) must not act in a fraudulent manner. If (the insured) or anyone acting for (the insured)
> …
> Fails to disclose or conceals a fact likely to influence the provision of indemnity or the extent of indemnity provided by (the insurer) or
>
> Makes a statement to (the insurer) or anyone acting on (the insurer's) behalf knowing the statement to be false in any respect
> …
>
> then in addition to any other rights or remedies which (the insurer) may have under (the) policy or otherwise the insurer will not pay a claim (or) may at (the insurers) option declare the policy void" (2/21)."

[6] A number of points arise in relation to those policy conditions:-

(a) It can be seen that the failure to disclose or the concealment of a fact is not relevant unless it is likely to influence the provision of indemnity or the extent of indemnity. Failing to disclose or concealing other facts does not permit the insurer not to pay the claim or to declare the policy void.

(b) There is no equivalent express qualification in respect of the insured making a false statement knowing the statement to be false in any respect. However I consider that there is by implication an equivalent qualification. This provision appears in the policy under the heading "Fraud." That requires the person committing the fraud to intend that the other should act in reliance on it. In the context of an insurance claim that would be an intention that the insurer would act on it so that it would be likely to provide indemnity either at all or to a greater extent. Furthermore the power not to pay a claim or to avoid the policy has to be exercised honestly and reasonably as a part of the insurers own obligation of good faith.

[7] The policy also places an obligation on the insured to assist the insurer. The relevant policy condition under the heading "Claims" provides that:-

> "(The insured) … must give (the insurers) all the help and information possible." (2/20)

The policy goes on to stipulate under the heading "Keeping to Conditions" that "(the insurer) will not provide insurance under this policy unless you have kept all the terms, conditions and endorsements in the policy" (2/21).

[8] No timescale is expressly imposed in the insurance policy within which the insured is to give "all the help and information possible" to the insurer. In those circumstances "all the help and information possible" should be given within a reasonable time and what is reasonable is a matter of fact in each case depending on all the particular circumstances (paragraph 9-025 *Colinvaux's Law of Insurance*, 10th Edition). There is no power in the policy for the insurer to impose a time limit or a deadline. What is a reasonable time may take into account as one of the facts whether a deadline or time limit has been imposed. The insurer's unilaterally imposed time limit or deadline is but just one factor to be taken into account in deciding whether the period is or is not reasonable. For instance if no time limit or deadline was imposed, if no warning was given or if no sense of urgency was generated then that would impact on the question as to what was a reasonable time.

[9] The plaintiff submits, the defendant does not join issue and I find that the requirement to give "all the help and information possible" does not enable the insurer to request "irrelevant" material. The reason why the insurer cannot request such material is because the power to require the insured to "give all the help and information possible" has to be exercised honestly and reasonably. The right of the defendant is limited to a right to act honestly and reasonably, see *Northern Ireland Housing Executive v Sloan* [1984] NI 29 at 37E-G and *Colinvaux's* paragraph 9-031 page 446. To require the insured to provide irrelevant material is not to act reasonably and could perhaps be acting dishonestly. Finally the right is to require the insured to provide "all the help and information *possible*". The right is qualified by the word "possible" which again incorporates the concept of reasonableness so that if it is not reasonably possible for the insured applying an objective test to help or to provide information either at all or within the timescale imposed by the insurer then the condition has not been breached. A question may arise as to whether the standard should be subjective but for the purposes of these proceedings it is not necessary to resolve that issue.

[10] What is reasonable depends on all the facts of the particular case including matters such as the information and explanations provided by the insurer to the insured for requesting the information, whether a time limit was imposed, whether the insured was lulled into a false sense of security, the stage at which the insurers requested the information, whether if the information was in the possession of a third party did the insurers suggest that it would obtain the information on the provision of a signed consent from the insured, the difficulty for the insured to obtain the information, whether the insurers have established on the balance of probabilities that the information could have been obtained by the insured, whether there was an expense in obtaining the information and whether the insurer agreed to pay that expense.

The pleading in relation to the allegation of fraud in relation to the collision

[11] The defence of this case involves allegations of fraud in relation to the collision. Those allegations should be distinctly alleged and should be pleaded with the utmost particularity. The Defence, which was settled by senior counsel, was served on 18 October 2013 some four months after the statement of claim had been served. There are three paragraphs in the Defence which are potentially relevant to the allegation of fraud.

[12] The first potentially relevant paragraph is numbered 3.2 in which the defendant pleaded that

> "if the said collision did occur in the circumstances or for the reasons or in the manner alleged, then the said damage was caused deliberately and not negligently."

Damage can be caused deliberately for different reasons and that pleading does not contain an allegation of fraud, let alone an allegation of fraud against Mr Orr, Mr Massey or Mr Barr.

[13] The second potentially relevant paragraph is 6 (e) which pleaded that

> "*Mark Massey* acted in a *fraudulent manner* and, *in particular*, failed to disclose or concealed facts likely to influence the provision of indemnity and made statements *knowing* the statements to be false *in some respect* (sic). The concealed facts and false statements related, *inter alia*, to the nature of Mark Massey's business, his involvement and association with other businesses, his driving record, the history of his dealings with the plaintiff and its sole director (Bryan Orr), the nature of his relationship with other parties with an interest or involvement in the incident, the circumstances in which the collision is alleged to have occurred and its fortuitous nature" (my emphasis).

The respect*(s)* in which the statements were false were not set out. It is not clear what facts are alleged to be false and what facts are alleged to have been concealed. The words "in particular" in so far as they suggest that particulars are being given are entirely inappropriate as nothing that follows could amount to proper particulars. For instance there is nothing pleaded to give any indication as to how any of the individuals that were eventually accused of fraud had knowledge of the true position. The words "inter alia" in relation to an allegation of fraud are entirely inappropriate suggesting as they do that there are other ways in which Mr Massey was guilty of fraud upon which the defendant would seek to rely at a later stage. How it is suggested that Mr Massey committed a fraud in relation to the nature of

his business is not explained. The same applies to his involvement and association with other businesses which are not identified. The other parties with an interest or involvement in the incident are not identified nor are their interest or their involvement. The same deficiencies are apparent in all the other so called particulars which are given. The allegation of fraud is against Mr Massey and there is no allegation being made against Mr Orr or Mr Barr. Finally to say that the collision was not fortuitous does not plainly allege that it was a fraudulent conspiracy to defraud an insurance company nor does it allege who participated in that fraud. The allegation of fraud was not distinctly made and was not pleaded with the utmost particularity. The deficiencies in the Defence were then compounded by the failure by the defendant to give adequate discovery at an appropriate stage by way of its list of documents dated 14 April 2014 (1/37). The same degree of care in relation to the pleadings should have been, but was not, applied to the discovery process.

[14] The third potentially relevant paragraph is 8.2 which alleges that the "losses allegedly suffered by the plaintiff were not accidental." That pleading does not allege fraud.

[15] The purpose of a defence being signed by senior counsel is, amongst other matters, to assure the client, in this case an extremely reputable and major insurer, that, at the highest level of legal expertise, the allegations have been considered, carefully analysed, that there is evidence to support the allegations and that the defence is properly and adequately drafted. It is also to protect the client both financially and at a reputational level. Furthermore it should also protect the other members of the legal team from making inappropriate or inadequately drafted allegations. As far as the person against whom fraud is being alleged it is to ensure that inappropriate allegations are not made against an individual, which even if subsequently proved to be incorrect, can cause very real harm and damage. An allegation of fraud calls for the utmost care.

The pleading of an alleged fraudulent conspiracy to inflate the amount of the loss caused by the collision by a false allegation that the helicopter had been hired by the plaintiff to Mr Fahy

[16] This serious allegation was not contained in the Defence.

[17] The allegation first emerged in reply 1 (a) (xii) to the plaintiff's notice for particulars, not as a separate free standing allegation of fraud but as a matter supporting the allegation that the collision was caused deliberately. It was alleged that

> "The plaintiff's sole director informed the defendant that there were no bookings or commitments relating to (the helicopter). However, a claim was later presented alleging loss of a helicopter hire agreement

> between Beechview Aviation Limited and Dermot Fahy, who is also associated with Mark Massey and Derek McGarrity through their involvement in rallying."

That pleading does not clearly and distinctly allege that a fraud was committed by Mr Orr and Mr Fahy.

[18] A skeleton argument is not a pleading. It is obvious that all relevant allegations should be contained in a pleading. Subject to that qualification some further information was provided by the defendant in relation to this allegation of fraud in its skeleton argument submitted just prior to the trial commencing. At paragraph 10 it was asserted under the heading "The Quantum dispute" that

> "Orr originally told (the defendant) that the helicopter had no bookings or current commitments for future hire or use. Subsequently a claim was made to the effect that Dermot Fahy of Aero-Heli had agreed to hire the helicopter for several months at a cost of £60,000. That claim is believed to be opportunistic, false and fraudulent. It is inconceivable that Orr could have simply forgotten that a lucrative contract was "in the pipeline" for the helicopter that was at the date of the incident "laid up," unused for several months, not airworthy, with a lapsed airworthiness certificate and which required more than £36,000 spent on it to bring it back to operational status. The fact that the client was Dermot Fahy, Massey's rallying friend and sometime co-driver, rather than a stranger increases the index of suspicion of collusion between Orr, Massey and Fahy with regard to the entire claim. The claim is opportunistic because Orr believed that the insurers would not enquire into it or alternatively that Massey would have no interest in challenging the claim and would allow judgment to be marked in default and would not defend proceedings to assess damages."

Those allegations start off by reference to a quantum dispute, so that the plaintiff would not be entitled to recover that part of the claim. However it then asserts that this increases the index of suspicion of collusion between Orr, Massey and Fahy with regard to the entire claim.

[19] This allegation was not appropriately pleaded.

The pleading in relation to the allegation of a failure by Mr Massey to co-operate by giving all the help and information possible in relation to documents

[20] In paragraph 6(4)(b) of its defence (1/12/6(4)(b)) the defendant alleged that:-

> "Mark Massey failed to give the defendant all the help and information possible. In particular, Mark Massey failed to provide records and information sought in letters dated 21 November 2011 and 28 December 2011 and associated emails. A deadline for the provision of this information (5 January 2012) passed without *any of the said information or documentation being provided*." (My emphasis).

It is inappropriate in a pleading to refer to letters and e-mails as containing the allegations rather than setting out exactly what is alleged. That is particularly so if as here the associated emails were not identified in the defence. The pleading was inadequate in that it did not identify the specific items of information and the specific documents that were sought and which it was alleged were not provided. It should have been a simple matter to have done so. A consequence of adopting this inadequate method of pleading is that in order to determine what the records were and information that had been sought one has to find the letters dated 21 November 2011 (2/274) and 28 December 2011 (2/270). In addition the pleading was that all the records and information sought in those two letters had not been provided. That was not the case being made by the defendant.

[21] The defendant's replies to the plaintiff's Notice for Particulars (1/31-32) also did not identify what had been provided and what it was alleged had not been provided though it did state that:-

> "Mark Massey failed to provide:
>
> (i) Valid Goods Vehicle Test Certificate in respect of vehicle YBO3 LWL;
>
> (ii) Telephone records including proof of relevant telephone calls;
>
> (iii) Purchase receipt for G-OVNR;
>
> (iv) Invoices for sale of scrap metal and cardboard allegedly collected from Beechview Developments."

[22] In the defendant's undated skeleton argument made available just prior to the trial commencing an example of lack of co-operation was given at paragraph 7 as follows:-

> "For example (Mr Massey's) failure to produce his phone records prevented AXA from investigating telephone contact between Massey and the other persons named in the period before and after the incident. This is an example of a failure to co-operate (in breach of a condition precedent) which may be linked with the fraud but to avoid the policy it is sufficient for AXA to prove simply the failure to co-operate without proving the fraud or motive."

This did not provide an exhaustive list of the information and documents which had not been provided though it did give some indication as to why the defendant considered that it was reasonable to request the phone records. However the skeleton argument did not specify who were the other persons named leaving it to implication from an earlier part of that paragraph that they were Mr Orr, Mr McGarrity and Mr Fahy.

[23] In closing the defendant then produced a paper dated 5 October 2015 entitled "written submission of AXA on the non co-operation issue." An analysis of that paper reveals the following information and documents which it was alleged had not been provided:-

(a) The provision of information by Mr Massey as to his involvement with helicopters and his involvement with rallying.

(b) The provision of information by Mr Massey as to his driving record and the number of penalty points.

(c) The provision of information by Mr Massey as to his knowledge of Mr Orr.

(d) The provision by Mr Massey of his phone records.

(e) The provision of information by Mr Massey as to the number of previous deliveries of skips to the premises by or on his behalf.

(f) The provision of information by Mr Massey as to whether he had quoted a price to Ms Murphy.

(g) The provision of information by Mr Massey as to whether the skip was delivered to the premises for the collection of bale cardboard.

(h) The provision of information by Mr Massey as to whether he told Mr Barr how and where to manoeuvre the lorry at the premises.

(i) The provision of information by Mr Massey as to whether he knew that the premises were used as a base for helicopters.

(j) The provision of information by Mr Massey as to whether it was raining at the time of the collision.

(k) The provision of information by Mr Massey as to the inter-relationship between the Massey family companies and whether Mr Massey had a connection with NI Skips.

(l) The provision of information by Mr Massey as to financial arrangements for the skip.

(m) The provision of information by Mr Massey as to the deduction of the value of the contents of the skips as part of the commercial arrangement.

[24] There are a number of points in relation to that closing submission as follows namely:-

(a) The defence incorporates two letters and in neither of them is it alleged that there has been a failure to co-operate in relation to any of these matters. Subject to what is set out in the next part of this judgment the pleaded case does not include those allegations.

(b) The closing submission conflates issues in relation to credibility with an alleged failure to give "all the help and information possible."

I have taken all of these matters into account in assessing the credibility of Mr Massey and indeed in assessing the credibility of all the witnesses in this case but in so far as a breach of the policy condition is concerned the defendant should be confined to its pleadings. It is inappropriate in closing to attempt to define the issues in a way which goes beyond the pleading and the earlier skeleton argument (though that is not a pleading). Subject to what is set out in the next part of this judgment I will proceed on the basis that the defendant is confined by its pleadings of an alleged breach of the policy condition to give all the help and information possible to the matters contained in the letters identified in the defence and in the reply to the Notice for Particulars.

The pleading in relation to the allegation that Mr Massey provided false information to the defendant

[25] I have already set out paragraph 6 (e) of the Defence. Question 1(a) of the plaintiff's Notice for Particulars requested the defendant to give full particulars of "the basis for alleging that the said damage was caused deliberately." In its reply to that question the defendant asserted that amongst the circumstances upon which it was relying to establish that the collision was deliberate were:-

> "(viii) The provision of false information by Mark Massey regarding his previous ownership and/or involvement with several helicopters.
>
> (ix) The provision of false information by Mark Massey relating to his involvement with the owners and/or interested parties related to helicopter G-LHEL.
>
> (x) The provision of false information by Mark Massey relating to his involvement in rallying and his relationship with Derek McGarrity."

[26] The particulars were completely inadequate in that for instance they did not identify what information Mr Massey provided in relation to his involvement with the owner of the helicopter, that is the plaintiff, Beechview Aviation Limited, how that information was false, who were the interested parties related to the helicopter and how they were interested.

[27] The particulars given in reply to question 1(a) were not particulars of breach of the policy condition to provide all the help and information possible but the reply to Question 2(a)(ix) did purport to incorporate those allegations as also being allegations relevant to the breach of that policy condition. That reply is in the following terms namely:-

> "(ix) The provision of false information by Mark Massey and/or denials relating to the extent of his involvement with other parties associated with this incident constitute a breach of Mark Massey's contractual responsibility to provide the defendant with all the help and information possible."

I proceed on the basis that this inadequate pleading refers back to and incorporates the three matters set out in the reply to question 1 (a).

[28] The pleading both in paragraph 6 (e) of the Defence and in the replies to particulars was inadequate. In relation to both the obligation to provide all the help

and information possible and in relation to the obligation not to make a statement knowing it to be false in any respect I will confine the defendant to the three matters set out in reply to question 1(a) of the plaintiff's Notice for Particulars.

The pleading of the airport/aerodrome policy exclusion

[29] The exclusion in the policy applies to a vehicle being used "in the parts of any airport or aerodrome to which aircraft have access." Accordingly it is necessary for the defendant to identify

a) whether it alleges that the whole or only a part of the premises is an airport or aerodrome and if only a part then which part and

b) the parts of the airport or aerodrome to which aircraft have access.

The Defence alleged at paragraph 6(d) that "the vehicle was being used in part of an aerodrome to which aircraft had access" without specifying either of the matters in (a) or (b). Question 6 of the plaintiff's notice for particulars dated 27 November 2013 and the reply to the notice dated 4 April 2014 did not address either of those matters. During the trial and on 1 May 2015 in relation to the dispute as to whether (the premises) is an aerodrome and that the collision occurred in a part to which aircraft have access I directed that the defendant is … "to identify by marking on a map, plan or photograph of the premises or alternatively by description all the "parts of (the) aerodrome to which aircraft have access." By an undated reply the defendant enclosed a Google Earth map (3/587) with a red line delineating the boundary of the entire premises. The defendant went on to state that "everything inside the parameter of the yard within the security gate are areas where the aircraft have access" (9/44). It can be seen that the defendant contends that the entire premises are an aerodrome and that aircraft have access to every part of the premises so that its exclusion applied as soon as the lorry driven by Mr Barr entered the gates of the premises.

Standard of Proof

[30] In *Breslin (Mark Christopher) and others v McKevitt (John Michael)* [2011] NICA 33 Higgins LJ stated at paragraph [22] that

> "In civil proceedings the seriousness of an allegation and the seriousness of the consequences for a defendant will be factors which underline the intrinsic unlikeliness of a party doing the disputed act. The court must apply good sense and exercise appropriate care before being satisfied of a matter which has to be established, but in civil proceedings the standard of proof remains proof on a balance of probabilities."

[31] In *re D (Secretary of State for Northern Ireland intervening)* [2008] 1 WLR 1499 at paragraph [22] et seq Lord Carswell considered the applicable standard of proof. He stated that only two standards are recognised by the common law, proof on the balance of probabilities and proof beyond reasonable doubt. The latter standard is that required by the criminal law and in such areas of dispute as contempt of court or disciplinary proceedings brought against members of a profession. The former is the general standard applicable to all other civil proceedings and means simply, as Lord Nicholls of Birkenhead said in In re H (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563, 586, that "a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not". At paragraph [27] and [28] he stated that:

> "27. Richards LJ expressed the proposition neatly in *R (N) v Mental Health Review Tribunal (Northern Region)* [2006] QB 468, para 62 where he said:
>
> > 'Although there is a single civil standard of proof on the balance of probabilities, it is flexible in its application. In particular, the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.'
>
> In my opinion this paragraph effectively states in concise terms the proper state of the law on this topic. I would add one small qualification, which may be no more than an explanation of what Richards LJ meant about the seriousness of the consequences. That factor is relevant to the likelihood or unlikelihood of the allegation being unfounded, as I explain below.
>
> 28. It is recognised by these statements that a possible source of confusion is the failure to bear in

> mind with sufficient clarity the fact that in some contexts a court or tribunal has to look at the facts more critically or more anxiously than in others before it can be satisfied to the requisite standard. The standard itself is, however, finite and unvarying. Situations which make such heightened examination necessary may be the inherent unlikelihood of the occurrence taking place (Lord Hoffmann's example of the animal seen in Regent's Park), the seriousness of the allegation to be proved or, in some cases, the consequences which could follow from acceptance of proof of the relevant fact. The seriousness of the allegation requires no elaboration: a tribunal of fact will look closely into the facts grounding an allegation of fraud before accepting that it has been established. The seriousness of consequences is another facet of the same proposition: if it is alleged that a bank manager has committed a minor peculation, that could entail very serious consequences for his career, so making it the less likely that he would risk doing such a thing. These are all matters of ordinary experience, requiring the application of good sense on the part of those who have to decide such issues. They do not require a different standard of proof or a specially cogent standard of evidence, merely appropriately careful consideration by the tribunal before it is satisfied of the matter which has to be established."

[32] I apply the civil standard of proof. I will look closely into the facts grounding the allegation of fraud before accepting that it has been established. The matters of ordinary experience include but are not limited to the following

(a) *The consequences*. The very serious consequences for amongst others, Mr Orr, is a factor to be taken into account as making it less likely that he would risk his business reputation by committing such a fraud.

(b) *Financial incentive and risks of detection*. Those perpetrating insurance frauds may calculate the risks of detection and may be influenced by the amount to be gained or saved by committing the fraud.

(c) *Financial pressure*. Those perpetrating insurance frauds may also be influenced by financial pressures. That is not to say that those who are not subject to financial pressures are not capable of committing insurance frauds but that one potentially strong motivating factor would not be present if there was no financial pressure.

(d) *Acquaintanceship of those involved*. It is not necessary for persons to be "well acquainted" with each other in order for them to conspire together to commit an insurance fraud and in a well-planned fraud the lack of a close personal connection may be an advantage in avoiding detection. Whether they are, or are not, "well acquainted" is one of the factors to be taken into account. The fact that persons are well acquainted could facilitate a fraud in that they would know that they could rely on the others to play their part and that they would know that the others would countenance serious criminal activity. However just because individuals are well acquainted does not necessarily lend support to the proposition that a fraud was committed and even if they are not, it does not exclude fraud, although it would remove an aspect of potential motivation of assisting a friend and would remove the element of each of them knowing that they would be able to rely on the others.

Circumstantial evidence

[33] There is no direct evidence that Mr Orr, Mr Massey or Mr Barr committed an insurance fraud. The case against each of them is circumstantial.

[34] Circumstantial evidence can be relied on in both civil and criminal cases. In the context of this civil case the defendant relies on circumstantial evidence to establish that Mr Orr, Mr Massey and Mr Barr were involved in an insurance fraud. This involves the defendant relying upon evidence of various circumstances relating to the case which taken together the defendant contends establishes that there is no liability on the part of the defendant because the proper conclusion to be drawn on a balance of probabilities is that there was an insurance fraud. In the context of criminal law the standard direction to the jury includes a direction that it is not necessary that each fact upon which the prosecution relies taken individually proves that the defendant is guilty. The jury must decide whether all of the evidence has proved the case. The standard criminal law direction goes on to point out that circumstantial evidence must be examined with care for a number of reasons. One of the reasons, adapted to the defence of this civil claim, is whether or not there exists one or more circumstances which are not merely neutral in character but which are inconsistent with the conclusion that Mr Orr, Mr Massey and Mr Barr conspired to commit an insurance fraud. The reason for this is because of the tendency of the human mind to look for and often to slightly distort facts in order to establish a proposition, whereas a single circumstance which is inconsistent with in this case the guilt of those individuals is more important than all the others because it destroys the conclusion of guilt on their part. Those principles apply equally in the context of a civil law claim subject to the modification that whereas the prosecution must prove its case beyond reasonable doubt the defendant in this case need only prove the case on a balance of probabilities albeit bearing in mind that in a case such as the present the evidence required must be sufficiently cogent to dispel the inherent unlikelihood of all three of these individuals involving themselves in a serious criminal offence of this kind.

[35] The insurance fraud is alleged to have been committed by three individuals. On the facts of this case I consider that the insurance fraud would necessarily involve all three of those individuals. Accordingly if, having reviewed all the evidence in the case, I accept the evidence of one of those individuals that he did not participate in an insurance fraud, then the defendant's allegation of an insurance fraud fails.

Credibility

[36] As Gillen J stated in *Thornton v NIHE* [2010] NIQB 4 the "credibility of a witness embraces not only the concept of his truthfulness i.e. whether the evidence of the witness is to be believed but also the objective reliability of the witness i.e. his ability to observe or remember facts and events about which the witness is giving evidence." In assessing credibility I seek to pay attention to, amongst others, the factors set out by Gillen J in that case which included the following;

a) the inherent probability or improbability of representations of fact;

b) the presence of independent evidence tending to corroborate or undermine any given statement of fact;

c) the presence of contemporaneous records;

d) the demeanour of witnesses e.g. does he equivocate in cross examination;

e) the frailty of the population at large in accurately recollecting and describing events in the distant past;

f) does the witness take refuge in wild speculation or uncorroborated allegations of fabrication;

g) does the witness have a motive for misleading the court; and

h) weighing up one witness against another.

[37] I also remind myself of the approach set out in criminal cases in *R v Lucas* [1981] Q.B. 720; [1981] 3 W.L.R. 120; (1981) 73 Cr. App. R. 159; [1981] 2 All ER 1008. A number of criteria should be considered in relation to lies. In the context of civil cases I consider that those criteria as adapted are (a) whether the lie was deliberate; (b) whether the lie relates to a material issue; (c) what was the motive for the lie that is whether it was a realisation of guilt and a fear of the truth or whether there was some other reason for lying. That criteria is to be considered in the context that people may lie for many reasons, for example, in an attempt to bolster up a just cause, or out of shame or out of a wish to conceal disgraceful behaviour or out of panic or

confusion; and (d) the statement must be shown by evidence on the balance of probabilities to be a lie.

[38] I will consider the credibility of a number of the persons involved in this action. That consideration also involves an analysis of a number of specific points raised in relation to some of the individuals.

(a) The effect on the credibility of Mr Orr of a previous insurance claim

[39] The defendant relies on a previous insurance claim made by Mr Orr on behalf of Beechview Developments Limited in order to undermine Mr Orr's credibility. This issue was developed on behalf of the defendant during the trial in an unstructured manner. It was originally alleged that Mr Orr should have, but failed to, disclose the incident on subsequent insurance proposal forms including a proposal form to the defendant. It was eventually alleged that Mr Orr had committed a fraud in respect of the previous insurance claim or alternatively that his evidence in relation to that incident was inaccurate and unreliable.

[40] I will set out how this allegation developed at trial and in the pleadings. For various reasons the trial was interrupted on a number of occasions. The trial commenced on 27 April 2015 on which day the defendant made discovery of an underwriting guide which should have been disclosed at an earlier stage.

[41] On the morning of Tuesday 28 April 2015 and approximately 5 minutes before the hearing commenced, the defendant gave further discovery of documents which were subsequently contained in lever arch file 7 at pages 1-239. Further documents were discovered on Thursday 30 April 2015 which documents were subsequently contained in lever arch file 7 at pages 240-281 and in lever arch file 8. Yet further documents were discovered to the plaintiff on 6 May 2015 which documents were subsequently contained in lever arch file 7 from page 281 onwards. Lever arch files 7 and 8 were then first made available to the court on 7 May 2015. Those files contained in total some 800 pages and included the underwriting file in relation to Mr Massey. The explanation afforded on 28 April 2015 in relation to the failure to discover the underwriting file at an earlier and appropriate stage was that the view was formed that there was "little or nothing of relevance in that file" and that if they "had any significance they assist the defendant and not the plaintiff" and that senior counsel for the defendant had seen nothing of any significance in those documents to support the plaintiff's case and that he had looked at them within "a couple of minutes and that was as much as he needed." The significance of the documents in files 7 and 8 both in relation to the previous insurance claim and in relation to the renewal of Mr Massey's insurance policy for, amongst other years, 2011, should have been, but had not been appreciated, at that time by the defendant. The sequence continued in that on 28 May 2015 further documents for inclusion in File 7 from pages 308 -311 were produced under the Civil Evidence (Northern Ireland) Order 1997.

[42] Mr Orr commenced giving evidence on Tuesday 28 April 2015 and his cross-examination was completed on Wednesday 29 April 2015. His re-examination was to take place on Thursday 30 April 2015. During the course of the cross examination of Mr Orr the contents of a letter dated 12 May 2004 (2/1) was put to him by Mr Ringland. That letter related to the previous insurance claim and it had been discovered by the defendant at an appropriate time. That letter did not accuse Mr Orr of fraud in relation to the previous insurance claim but stated that the facts as established were contrary to the evidence given *"by your client and/or his agent(s) and/or his employee"* (my emphasis). At the most Mr Orr was in the pool of a number of persons who the defendant considered had given inaccurate evidence though the degree and the circumstances of the inaccuracy is be seen in the context that the letter also stated that the defendant reserved "the right to refer this matter to police for investigation."

[43] On 29 April 2015 Mr Ringland when cross-examining Mr Orr informed the court that he did not accuse Mr Orr of fraud in relation to the previous insurance claim. Upon enquiry from the court as to what the stain on Mr Orr's character was, as far as the previous insurance claim was concerned, Mr Ringland stated that "this gave rise to events that had to be declared in subsequent applications for insurance."

[44] On the morning of 30 April 2015 and before Mr Orr was re-examined by Mr Scoffield, Mr Maxwell applied to put some further matters to Mr Orr in cross examination. I also enquired of Mr Maxwell as to the reason why the previous insurance claim had been put to Mr Orr in cross-examination. I asked how it was relevant to credibility if someone did something in 2004, but that there was no evidence that would identify that person as Mr Orr. I enquired as to what was the allegation being made against Mr Orr. Was it being alleged that Mr Orr had done something in 2004 which the defendant was suggesting should lead the court to form an adverse view of his credibility? There was no response at that stage.

[45] On 3 May 2015 the defendant then submitted an analysis of the documents in relation to the previous insurance claim which documents it had just discovered and which were contained in file 7. The analysis stated that Mr Orr had "represented to AXA that he had the only two keys which was untrue" and that he had "made a claim providing false information to the insurer." It was not alleged that the untruthfulness or falsity was to his knowledge or was reckless. None of the documents referred to in that analysis had been put to Mr Orr in cross examination.

[46] When the trial resumed on Thursday 7 May 2015 Mr Ringland informed the court that it was being alleged that Mr Orr had "lied" about the number of keys for the van. That Mr Orr knew that there were three keys for the van but he informed the defendant that there were two keys. That Mr Orr had knowledge that the van had a key in it at the time when it was stolen and that he lied about that. When asked about the evidence that Mr Orr "knew" that there were three keys the response was that it was "his van" but it was accepted there was no evidence that Mr Orr had collected the van or any or all of the keys upon its being purchased. It

was also acknowledged that Beechview Developments Limited had a number of vehicles in the region of at least 17. It was suggested that Mr Orr "knew" not only by virtue of ownership but also by "usage" though there was no evidence that Mr Orr had ever used the van himself. Mr Ringland informed the court that the documents in relation to this issue had not been discovered at an earlier stage because it was believed that no issue would be taken with the accusations that were being made. Mr Ringland referred to paragraph 1(xi) of the defendant's replies to particulars dated 4 April 2014 which alleged that:

> "the plaintiff's sole director, Brian Orr (Incorporating Beechview Developments Limited) (sic) made a claim to the defendant in respect of the loss of a vehicle insured by AXA. Mr Orr claimed that the vehicle (Ford Transit DKZ 4543) had been stolen on 17th January 2004 and that the keys had not been left in the vehicle. The vehicle was recovered with an original key and there was no evidence of unauthorised entry to the vehicle or damage to the ignition, immobiliser or steering lock. The defendant repudiated liability, referred the matter to PSNI and refused to offer renewal."

There is no allegation within that reply that Mr Orr "knew" that there were three keys or that Mr Orr had "lied" about the number of keys or that he had knowledge that the van had a key in it at the time when it was stolen and that he lied about that. That pleading, which was not called in aid on 29 April 2015, did not meet the exacting standards required when making an allegation of fraud.

[47] On 7 May 2015 Mr Ringland applied to call evidence to contradict the answers given by Mr Orr in the witness box as to the previous insurance claim. Those answers had been that "we never had three keys" that they had recovered the van and that he did not consider it worthwhile suing AXA in those circumstances. Answers as to credit are final, not in the sense that they have to be accepted, but in the sense that no evidence can be called to contradict the answers without the leave of the court. I declined to give leave.

[48] In arriving at a view in relation to Mr Orr's credibility in relation to the previous insurance claim I have taken into account all of the documents contained in file 7 despite the fact that they were not put to him in cross examination and despite the assertion when he was being cross examined that he was not being accused of fraud in respect of the previous insurance claim. I also take into account all of the evidence that I have heard in relation to this and all the other issues in the case. I now set out and consider some of the documents in relation to this issue which are contained in file 7.

[49] On 9 March 2000 Lindsay Cars Limited registered a white Ford Transit van registration number DKZ 4543 (7/243).

[50] On 23 February 2001 the van was purchased by Beechview Developments Ltd from S S Logan & Son (7/244) at which stage the recorded mileage was 8,826 miles.

[51] On 27 July 2001 the van was registered to "Brian Orr, Beechview Developments Limited, 37 Upper Road, Greenisland, Carrickfergus, Co Antrim."

[52] On 22 January 2004, some 3 years after the van had been purchased by Beechview Developments Limited, a claim was made by "Brian Orr/Beechview Devs Ltd" against the defendant, who were then the insurers of Beechview Developments Limited, that the van had been stolen at noon on 17 January 2004 at a site at Victoria Road, Ballyclare, Co Antrim (7/241). On the claim form it was stated that the person who was using the vehicle immediately prior to the loss was Robert McGookin. It was also stated that

> "van stolen by person/persons unknown. Van securely locked at time of incident"

and that the police at Ballyclare PSNI Station had been notified at 1 pm on 17 January 2004. The claim form was signed by Mr Orr who estimated that at the date of the theft the recorded mileage of the van was 30,000-40,000 (7/249). Accordingly it would have done approximately 20,000 to 30,000 miles over the 3 years since it had been purchased by Beechview Developments Limited.

[53] On 11 February 2004 at 4 pm Mr Andrews on behalf of the defendant rang Lindsay Cars Ballymena who stated that the vans came with 2 or 3 keys. Mr Andrews explained that he had 3 tags and they stated that it is likely that the van would have come with 3 keys. The van was fitted with an immobiliser system "so taking without a key would be extremely difficult." Mr Andrews concluded that the case called for further investigation and statements. Though there is no note to this effect Mr Andrews suspected that the key had been left in the van which had facilitated its theft. If that was so then the defendant would be entitled to refuse to indemnify Beechview Developments Limited and the account contained in the claim form that the van was securely locked at the time of the incident would be incorrect and could be so to the knowledge of at least the person who allegedly secured it. There could also be the potential that that individual was induced by another, which might include Mr Orr, to make a false statement so that a payment could be secured on the insurance policy.

[54] On 11 February 2004 at 4 pm Mr Andrews took a signed statement (7/246) from Mr McGookin who gave his occupation as a "trainee site foreman". He stated that he had been working "for Brian Orr for about 6 years in property developing." He described the sites upon which he was currently working and that on the morning of Saturday 17 January 2004 he drove the van, which he described as "my

work van" to the Gateside site. He stated that he personally locked the van and checked all the doors. That he returned at about 12:30 pm and found that the van had gone. He stated that he still had the keys to the van in his possession. He stated that he reported the theft to police together with the theft of the contents being various tools and equipment valued in the region of £5,000.

[55] On 11 February 2004 at 4:15 pm Mr Andrews took a signed statement (7/248) from Mr Orr who stated that the van was in the custody of Robert McGookin to use for personal and business use. That he was the owner of the van and had purchased it from Logans and when he had done so it had only two keys. He also stated:

> "No keys have ever been lost or stolen and I have never had a spare or additional key cut for this vehicle. I have now passed the 2 vehicle keys to AXA Insurance in relation to my recent claim."

He further stated that:

> "The van was being used by Robert McGookin prior to the theft and he has advised me that it was fully secured at the time. Robert returned his key to the van to me, which I have since passed to AXA Insurance."

[56] On 11 February 2004 Mr Andrews obtained written confirmation from the PSNI that the theft had been reported to them (7/250). Mr Andrews wrote to the PSNI seeking further information (7/251).

[57] On 9 March 2004 Mr Andrews wrote to the plaintiff's then insurance brokers, Bartholomew and James Ltd (7/252) referring amongst other matters to the "bunch of keys" forwarded to the defendant which included 2 original Ford transponder keys together with 3 key-code ID tags. The letter went on to state that it appeared to the defendant likely that a third key existed, to which the third ID tag relates. The letter stated:

> "We note that the vehicle was purchased second-hand and *appreciate that this third key might not have been passed to the policy holder*." (my emphasis)

Mr Andrews also stated that the two keys submitted to the defendant had been forensically examined. There are no details as to who carried out this forensic examination or how it was carried out. In any event it is recorded that the outcome of whatever forensic examination had been carried was that both of the keys had been used but it was asserted that "these keys are not worn or soiled consistent with the age and recorded usage of the subject vehicle." Accordingly it was asserted that there was a third and main key which had been left in the van.

[58] On 21 April 2004 the PSNI informed Mr Andrews that the van had been recovered in Ballymoney on 1 March 2004 (7/254).

[59] On 11 May 2004 Stephen Cordner, Motor Engineer employed by the defendant, inspected the van at Coleraine PSNI Station (7/258). The van showed no sign of a forced entry. There was one key which opened all the doors, operated the steering lock and started the engine. It was well worn both on the plastic handle and also the metal cut section. It was stated that photographs had been emailed onto the system but these have not been produced in evidence in this trial.

[60] On 12 May 2004 Mr Andrews wrote to the solicitors who had then been instructed on behalf of Beechview Developments Ltd (7/260) stating:

> "After taking account of all of the available evidence, we must conclude that the subject vehicle was stolen and driven away using the key that had been in regular use by the insured prior to the loss."

The letter goes on to say:

> "You will appreciate that this is contrary to the evidence given by *your client and/or his agent(s) and/or his employee*" (my emphasis).

Again this was an allegation of a potential pool of persons and not a specific allegation against Mr Orr. However on 17 May 2004 Mr Andrews completed a police statement in which he alleged that he had "reason to believe that Brian Orr attempted to deceive Axa Insurance with regards to the state of security of the vehicle immediately prior to the theft and/or the number of keys held by him prior to the theft." Mr Andrews also supplied documentation to Detective Constable Crawford (2/262). So the allegation to the police was specifically about Mr Orr though the correspondence stated that Mr Orr was in a pool of potential perpetrators.

[61] The police interviewed Mr Orr but did not consider that there was sufficient evidence to pursue criminal charges. The police file was closed (2/263) (2/265).

[62] On 8 September 2004 Mr Andrews wrote to Mr Reed of the defendant's underwriting department (2/264) stating:

> "I attach copies of relevant correspondence for your records. You will note that the above claim was repudiated *on the grounds that the policy holder had deliberately misrepresented the circumstances surrounding the theft*" (my emphasis).

That was not what the policy holder had been told (see 2/260). Mr Andrews went on to recommend to the Underwriting Department:

> "In the circumstances, I can only recommend that we *formally refuse to offer renewal*. The evident moral hazard presents an unacceptable risk. *The broker should also be notified that this refusal is a material fact and should be disclosed during proposal negotiations with other insurers*." (My emphasis).

[63] Some 7 days earlier and on 1 September 2004 Bartholomew James had requested renewal terms from the defendant (8/112). On 9 September 2004 the defendant's Underwriting Department replied (8/108) stating:

> "Unfortunately, due to the claims history, *we will not be offering renewal terms for this policy*" (my emphasis).

The Underwriting Department did not adopt the recommendation of Mr Andrews that the language of "refusing" to offer renewal terms be adopted or that the brokers should be informed that this "refusal" was a material fact and should be disclosed during proposal negotiations with other insurers. Instead they *declined to offer renewal terms for the policy*.

[64] In conclusion the correspondence to the brokers informed them that the facts were contrary to the evidence of someone within a pool of individuals but it could not be established who was responsible (7/260). They had not been told that the claim was repudiated on the basis that Mr Orr had deliberately misrepresented the circumstances surrounding the theft (2/264). They had been told by the underwriting department that due to claims history the defendant would not be offering renewal terms (8/108). They had not been told that this was a "refusal" or that the refusal was a material fact and should be disclosed during proposal negotiations with other insurers.

[65] The primary facts are that a van was owned by Beechview Developments Limited. It was one of a significant number of vehicles owned by that company. It was driven not by Mr Orr, but by Mr McGookin. There is no evidence that, nor was it suggested to Mr Orr that, he collected the van and the keys in 2001 when the van was purchased. There is no evidence that, nor was it suggested to Mr Orr that, he was present on site when the van was stolen. I consider that it is possible for Mr Orr to have believed that there were two keys to the van and I accept this evidence that he did believe this. If Mr Orr wished to hide the existence of the third key he would not have given the third tag to Mr Andrews. Mr McGookin, if he had left the key in the van may have wished to exculpate himself. In short the incorrect evidence may have been the incorrect evidence of Mr McGookin. Furthermore the van was second hand and the third key could have been kept by another person who previously had access to it as suggested by the defendant in the letter dated 9 March 2004 to

Bartholomew and James Limited. I do not consider, on the balance of probabilities, that the primary facts lead to the inference that Mr Orr was guilty of any dishonourable conduct in 2004 though there were reasons to be suspicious and Mr Orr was one of those about whom suspicions could be entertained. However having assessed his demeanour in the witness box I accept his evidence in relation to this incident.

[66] I do not consider that I should take any adverse view of the credibility of Mr Orr in that this incident was not disclosed to subsequent insurers given the careful use of language by the defendant's underwriting department in its letter dated 9 September 2004.

(b) The effect on the credibility of Mr Orr and of Mr Fahy of the loss of hire claim

[67] One of the allegations made by the defendant is that Mr Orr and Mr Fahy were involved in a fraud to falsely inflate the amount of compensation by stating that there was a consequential claim for the loss of the hire of the helicopter to Mr Fahy.

[68] On 15 August 2011 Mr Orr was recorded as having informed Mr Andrews that Beechview Aviation Limited's business was to hire "out aircraft for hire" and that "current market fairly quiet" (2/37). He was also recorded as having said that the helicopter had "been for sale and available for hire but no commitments" (2/40). Mr Orr confirmed in evidence that that was the position in relation to the helicopter on 15 August 2011 but that the position could change on a weekly or daily basis.

[69] Mr Orr stated that Mr Dermot Fahy subsequently contacted him seeking to hire a twin-engined helicopter but as the helicopter had been damaged and the other helicopter owned by the plaintiff was a single engine aircraft he was unable to hire the helicopter to Mr Fahy who then hired from a different person in England at an increased price. If the helicopter had not been damaged then it would have been hired to Mr Fahy that this would have involved the plaintiff having to service the helicopter prior to the hire commencing.

[70] The potential agreement with Mr Fahy of Aero Helicopter Services Limited was for the hire of the helicopter for 100 hours over the period 1 October 2011-31 December 2011 at a rate of £600 per hour (4/45) (4/51).

[71] Mr Orr states that the request from Mr Fahy to hire the helicopter was by a telephone call to him which he thinks was in August 2011 and that after the phone call he asked Mr Fahy to confirm that he had been *prepared* to hire the helicopter. Mr Fahy then sent an undated letter addressed to whom it may concern stating that "we had *agreed* to hire the said aircraft at a rate of £600 per hour" (my emphasis) (2/179). This was not an accurate account of what had occurred, in that Mr Fahy did not *agree* to hire the aircraft as it was not available for hire, having been damaged. A similar

assertion was made in Mr Fahy's affidavit (4/51) which was considered by Master McCorry. I have given consideration as to whether the appropriate inference to be drawn is that this was loose use of language by Mr Fahy which was then not corrected by Mr Orr. Having seen Mr Orr in the witness box I consider that is the appropriate inference to be drawn.

[72] I accept that Mr Fahy wished to hire the helicopter and I accept the evidence of Mr Orr which I have just set out that he would have hired the helicopter to Mr Fahy but for the collision. I reject the defendant's allegation that Mr Orr and Mr Fahy were involved in a fraud to increase the amount of the plaintiff's consequential loss or that either of them was acting dishonestly in relation to that aspect of the plaintiff's claim. I am of the view that there was loose use of language though I note that it was not tested in cross examination before Master McCorry. In assessing Mr Orr's evidence in this case, which evidence was closely scrutinised in cross examination, I have at all times kept in mind that there was loose use of language on this previous occasion.

(b) Assessment of the credibility of Mr Orr

[73] Mr Orr conducts successful businesses though he is not meticulous in relation to the records that he keeps or in his use of language. At times he was understandably perplexed by the manner in which the case being made against him changed. There were matters which he could not recollect with accuracy or certainty and I have given careful consideration as to whether this was a convenient method of not addressing issues. I had the opportunity of seeing his responses in the witness box over a number of days and I accept that he was doing the best he could in the circumstances and that he was an honest and reliable witness.

(c) Assessment of the credibility of Mr Massey

[74] Mr Massey did not give evidence at the trial. In these proceedings he is accused of committing an insurance fraud. The allegation that Mr Massey had committed a fraud was never put to him during the interviews which were conducted by Mr Andrews on 17 August 2011 (3/491) and on 2 November 2011 (3/543). Furthermore no suggestion was made to him during those interviews as to what his motivation was for committing this insurance fraud, whether it was out of friendship with Mr Orr or whether it was for a financial motive and if so what that motive was. Indeed, rather than being alerted to the very serious nature of the interviews I find that he was lulled into a false sense of security by positively misleading comments from Mr Andrews such as

> "our underwriters have just sought to clarify a couple of wee points in relation to the policy" (3/543)

whereas in reality he was being interviewed in relation to a potential insurance fraud which could have and in the event did have serious implications for his business.

[75] The major attack on the credibility of Mr Massey comes in relation to the answers that he gave to Mr Andrews at interview in relation to his acquaintanceship with Mr Orr, Mr Fahy and Mr McGarrity. The defendants state that Mr Massey was "well acquainted with Orr, McGarrity and Fahy" (paragraph 7 of the defendants' undated skeleton submitted immediately prior to the trial). The defendant goes on to assert that:

> "… there are gross inconsistencies in relation to Massey's friendships with and a claimed limited knowledge of other *key figures* that point to dishonesty and an attempt to distance Massey from the other *key players*, who were in fact closely associated through rallying and an interest in helicopters" (my emphasis).

It was not explained how a close acquaintanceship between Mr Massey and Mr McGarrity was relevant when the defendant stated that there "is no evidence of wrongdoing on the part of McGarrity" and there was no explanation as to how Mr McGarrity was one of the "*key figures*" or one of the "*key players*." However in view of the allegation that has been made it is necessary to examine what Mr Massey said about his acquaintanceship with these individuals, what my findings are about his actual acquaintanceship and if there is any disparity then what my conclusions are about the credibility of Mr Massey. There can be a range of conclusions, for instance that he is unreliable or dishonest in relation to some of his answers but not other answers or alternatively that he is a generally dishonest individual or finally that he was lying in order to cover up an insurance fraud.

[76] I will deal with the each of the individuals concerned in turn starting with the acquaintanceship between (a) Mr Massey and Mr Orr and then between (b) Mr Massey and Mr McGarrity and finally between (c) Mr Massey and Mr Fahy.

[77] In relation to the acquaintanceship with Mr Orr, Mr Massey told Mr Andrews "I know Brian" (3/497). He then said "I knew of him" (3/497). In his second interview he was asked whether he knew Brian Orr and he said "Not personally, no" (3/551). He was then asked when did he first meet Brian Orr and he referred to an earlier contract which was probably the time when he first met him although he thought "another boy" was Brian Orr at that job (3/556).

[78] I turn to consider the evidence that Mr Massey was well acquainted with Mr Orr. The defendant asserts that they were well acquainted as they both had an interest in helicopters. That fact, which I clearly accept in relation to Mr Orr and I accept to a more limited extent in relation to Mr Massey, does not mean that Mr Massey "was well acquainted with Mr Orr." In addition to their shared interest in helicopters the defendant relies on the fact that Mr Massey had previously worked for companies owned by Mr Orr. However having done some work for

those companies does not mean that Mr Orr and Mr Massey were "well acquainted." Mr Andrews in cross-examination accepted that there was no evidence of a close friendship between Mr Massey and Mr Orr; and that there was nothing going beyond a business relationship. I consider that he was correct to make that concession.

[79] I find as a fact that Mr Massey was not "well acquainted" with Mr Orr.

[80] I do not consider that the answers given by Mr Massey during interview as to his acquaintanceship with Mr Orr are materially inaccurate especially given the context that Mr Massey was running a fairly unsophisticated skip hire business and he was doing business with a wide variety of individuals predominantly on a mobile telephone. I do not consider that Mr Massey gave an inaccurate, let alone a dishonest account of his relationship with Mr Orr.

[81] Similarly, I do not consider that Mr Orr gave an incorrect or unreliable account of his relationship with Mr Massey.

[82] In relation to the acquaintanceship between Mr Massey and Mr McGarrity and on 2 November 2011 (3/543) Mr Massey was asked by Mr Andrews as to whether he knew Mr McGarrity. Mr Massey replied "Yeah, I would *know of him*, yeah". He was then asked "And who do you mean, you know of him?" Mr Massey replied "Well, I'd know of him. He rallies and stuff." The interview then moved on to Mr Massey's involvement in rallying. Mr Andrews asked Mr Massey "Do you rally?" and he replied "*I used to, years ago*". He was subsequently asked "Well, how long is it since you've done rallying?" and he replied "*About a year I would say*". (3/558-559). Mr McGarrity is referred to during the course of this interview as the "Circuit of Ireland guy" and Mr Massey was asked "would you have been in the Circuit of Ireland?" He replied "Oh no, no I wouldn't have been" and then referring to Mr McGarrity he said "I only know the name, and know of him like, but I would have been nowhere near that"(meaning the Circuit of Ireland standard). He was asked "Now, would you know him to talk to?" to which he replied "yeah" and he was then asked "… Like and he would know you?" to which he replied "he'd … yeah probably."(My emphasis).

[83] It can be seen from those questions and answers that Mr Massey was amongst other matters asserting:-

(a) That he did not know Mr McGarrity very well having said that he *knew of him*.

(b) That Mr McGarrity would *probably* know Mr Massey rather than a clear categorical statement that Mr McGarrity actually knew Mr Massey.

(c) That he was not involved in the Circuit of Ireland.

(d) That he initially said that he stopped rallying years ago and then said that he was last involved in rallying about one year ago that is in or about November 2010.

[84] In fact there was evidence, which I accept that Mr Massey was involved in rallies on 18 January 2010, 3 February 2010, 3 February 2011, 20 February 2011, and 30 July 2011. He is also recorded as being, and I find that he was, the co-driver of Mr McGarrity in relation to an event which commenced on 3 February 2011 (3/470) (2/315). So I consider that he did know Mr McGarrity and that he knew that Mr McGarrity knew him.

[85] There is a disparity between what Mr Massey said about his acquaintanceship with Mr McGarrity and my findings about his actual acquaintanceship. The next questions are what impact this has on my assessment of the credibility of Mr Massey and what relevance it has to any issue in this case given that there "is no evidence of wrongdoing on the part of McGarrity."

[86] The answers given by Mr Massey are to be seen in context, a part of which is that it was never suggested to him that he was being accused of a fraud nor was it suggested to him that because he knew Mr McGarrity and because Mr McGarrity knew Mr Orr that this was evidence, for instance, of the means by which Mr Orr was put into contact with Mr Massey for the purposes of committing an insurance fraud. Also the facts as introduced in evidence to contradict his answers were never put to Mr Massey and he had no opportunity to give an explanation. Further parts of the context are that the defendants do not accuse Mr McGarrity of any wrongdoing, these answers were not given on oath and Mr Massey did not have the benefit of legal advice. His answers are also to be seen in the context of a fairly unsophisticated businessman and his likely degree of intelligence.

[87] I consider that the defendants have established that Mr Massey's account is unreliable in relation to Mr McGarrity and rallying and that Mr Massey was not forthcoming or open. Furthermore, that those answers were untrue to his knowledge though they were given relatively casually by an unsophisticated individual. I accept that he did lie about these matters during the interview but he was given no opportunity to explain the reasons for doing so. I find that the most likely reasons would have been that he did not know or understand the significance of the questions and his natural response was therefore to impart as little information as possible even if it was untrue, see *R v Lucas* [1991] 2 All ER 1008. I do not conclude that he is a fundamentally dishonest individual. I will treat the rest of his answers during interview with caution on the basis that he was prepared to put some matters forward that he knew were incorrect.

[88] In relation to the acquaintanceship between Mr Massey and Mr Fahy no issue arises as to Mr Massey giving an inaccurate description of it because no questions were asked of Mr Massey about this by Mr Andrews during either of the two interviews.

[89] I turn to consider the evidence that Mr Massey was "well acquainted" with Mr Fahy. I find that they had co-driven a rally car together on one occasion. I also find that Mr Fahy 'signed off' Mr Massey's pilot training in his capacity as Chief Flying Instructor of the Aero Heli registered training facility in which capacity he is likely to have signed off many persons. I find that Mr Massey's actual training was provided by other examiners. I find that Mr Massey knew Mr Fahy to some degree but I do not consider that it has been established that they were "well acquainted" with each other in any sense and particularly not in the sense that they would conspire with each other to commit a criminal offence (though it always has to be borne in mind that no allegation is being made by the defendant that Mr Fahy was involved in the insurance claim in respect of the collision except in that he is alleged to have committed a fraud by supporting a false claim for consequential losses which conspiracy was allegedly between Mr Orr and Mr Fahy and did not involve Mr Massey).

[90] In conclusion I find that Mr Massey was well acquainted with Mr McGarrity but not with Mr Orr or Mr Fahy. I also find that his acquaintanceship with Mr McGarrity has nothing to do with the insurance claim.

(d) Assessment of the credibility of Mr Barr

[91] My assessment of Mr Barr is that he presented as a straightforward, uncomplicated and honest witness. He was quite prepared to be and was interviewed by Mr Andrews. His evidence has been consistent.

[92] The major attack on the credibility of Mr Barr comes in relation to the manoeuvre which was performed by the lorry which he was driving in the premises prior to the collision. The defendant asserts that the manoeuvre undertaken by Mr Barr of turning the lorry between the sheds and then reversing back down the rest of the premises was illogical in that he could have driven up to the end of the premises and turned at that point. If he had done that then that he would have seen the helicopter and would have avoided the collision. The inference that the defendant seeks to draw on the balance of probabilities from what is asserted to be an illogical manoeuvre was that he was performing this manoeuvre with the object in mind that it would provide an explanation as to why he did not see the helicopter prior to the collision. However, Mr Barr stated that the reason why he manoeuvred the lorry as he did and also why Mr Massey, having visited the site previously, would have suggested to him to do so, was to avoid him driving to the far end of the premises, not being able to reverse into the position where the skip was to be placed, and then possibly having to reverse all the way back down. I accept that Mr Barr is the expert in driving heavy goods vehicles and that he was the only witness who had driven a lorry of the type that was being manoeuvred on this particular day. However I consider that in assessing the different manoeuvres I am entitled to and obliged to bring to that assessment my own knowledge of the world, see *Clarke v Brown; Barclay 3rd Party* [1986] 2 NIJB 1. As Lord Lowry stated in that case "In these days most

judges, …, can identify at least as readily with the man behind the wheel as with the man in the street or with the man on the factory floor or with his employer." I accept that there could be different manoeuvres employed and having considered the explanation given by Mr Barr I accept that he chose the particular manoeuvre he adopted for valid and proper reasons. I reject that attack on the credibility of Mr Barr.

[93] My assessment remains that Mr Barr gave reliable evidence as to the circumstances in which the collision occurred.

(e) Assessment of the credibility of Mr Andrews

[94] Mr Andrews was chiefly responsible for investigating the circumstances of the collision on behalf of the defendant and solely responsible for the decision dated 6 January 2012. I consider that from the very start he came to the investigation in 2011 remembering his dealings with Mr Orr in 2004 with a pre-determined attitude that Mr Orr had committed an insurance fraud in 2004 and that it was highly likely that he had committed one in 2011. I consider that where it was possible for Mr Andrews to draw an unfavourable inference or conclusion in preference to some other conclusion, he chose to do so. I consider that this attitude has led Mr Andrews to have demanded an unrealistic level of detail and precision, supported by documentation, to have been retained by the various parties. At the time of making the various arrangements for the delivery of the skip, or in respect of previous work, Mr Massey, Mr Barr, Mr Orr and Ms Murphy would not have had any reason to pay particular attention to precisely what was said or contemplated. Furthermore I find that Mr Massey's business administration was extremely rough and ready and that Mr Andrews would have been aware of that. In such circumstances a balanced approach to inconsistencies as between the accounts should have been but was not adopted by Mr Andrews. Rather he sought to establish that there were inconsistencies and then that those inconsistencies should be explained, on the balance of probabilities, on the basis that there was a conspiracy to commit an insurance fraud. I consider that the attitude of Mr Andrews to Mr Orr led to that lack of balance and also led to various inaccuracies being introduced by Mr Andrews. I will give some examples of those inaccuracies

(a) Mr Andrews interviewed Mr Orr on 15 August 2011 (2/36) and on 23 August 2011 (2/78). Mr Andrews made handwritten notes of those interviews following which he drafted a typed statement (2/88) for Mr Orr to sign which purported to record what Mr Orr had informed him. Paragraph 9 of that statement included the assertion that the helicopter "was undamaged, well maintained and airworthy immediately prior to the collision…." The first point to make is that the assertion was not recorded in the handwritten notes. The second is that subsequently the defendant contended that the assertion was misleading and that the true factual position was that the helicopter "was not undamaged, well maintained or airworthy immediately prior to this incident" (see the replies to the notice for particulars dated 4

April 2014 at 1/35/7(a)(v)). I find that the assertion did accurately reflect the position, in that the helicopter was undamaged and was well maintained. It was, also in substance, airworthy. The previous certificate of airworthiness had expired around 6 - 7 weeks before the accident on 15 June 2011 (2/124; 3/409). That did not mean that it was completely un-airworthy but rather that it required to be serviced. Furthermore I find that Mr Jackson of Charles Taylor Aviation by letter dated 12 December 2011 (2/277) informed Mr Andrews that Mr Orr "could have at any time engaged the services of London Helicopter Services to return the aircraft to service." I consider that Mr Andrews knew that the helicopter was undamaged and was well maintained but despite that knowledge the allegation that it was not was still made. Also I find that the plaintiff had commenced the process of returning the helicopter to service in advance of the collision by obtaining a quotation dated 29 July 2011 (4/151) for the service of the helicopter. This was again to the knowledge of Mr Andrews. There was simply no evidence to make the allegation that the helicopter was damaged or was not well maintained. The allegation that the helicopter was not airworthy immediately prior to the collision was technically correct but in substance incorrect. If it is being suggested that the helicopter was a wasting asset which had been neglected to the point of being incapable of being flown so that it was of limited if any value, then I reject that suggestion.

(b) Mr Andrews interviewed Ms Murphy on 23 August 2011 and made handwritten notes at that time (2/80). The handwritten notes record Ms Massey as saying in relation to her conversations with Mr Massey that she had "*No recollection* of giving instructions about location of skip" (my emphasis). Mr Andrews then subsequently prepared and sent to Ms Murphy a typed statement (2/86) for her to sign which purported to record what she had told him. Mr Andrews did not ask her to check the statement for inaccuracies nor did he suggest that she could change it, but simply said "trusting this is in order, please arrange signature and return…" (2/83). In fact Mr Andrews had materially changed what he had recorded Ms Murphy as saying in his contemporaneous handwritten note to a *categorical denial* in her draft statement that she had given any instructions about the position of where the skip should be parked, (see paragraph 5 of that statement). Thereafter in the defendant's reply to the plaintiffs notice for particulars it was alleged that one of the circumstances establishing that the damage to the helicopter was caused deliberately was that "*contradictory accounts* have been given by Mark Massey and Beechview Aviation's employee, Carol Murphy, in respect of the area at which the skip was to be deposited" (1/29/1(a)(iii)) (my emphasis). So Mr Andrews sought to establish that there was *a contradiction* or alternatively *an inconsistency* between what Ms Murphy said in her statement about instructions as to where the skip was to be left and what Mr Massey said that he had been told by Ms Murphy which was to leave the skip at the same place as the last time (3/506; 3/554). Furthermore that this contradiction or inconsistency was of a nature or degree to establish

that there was an insurance fraud rather than that different people may give inconsistent accounts for perfectly ordinary and valid reasons. I find as a fact having seen Ms Murphy in the witness box that the most accurate account is what she originally told Mr Andrews, which was that she had no recollection. I find that there was no contradiction between the accounts that had in fact been given to Mr Andrews by Mr Massey and Ms Murphy. One of them could remember and the other could not. The change between the handwritten notes and the typed statement reflects Mr Andrews attitude towards the investigation and is a matter of regret.

(c) The defendant alleged in the reply to the notice for particulars that "contradictory accounts have been given by Mark Massey and the lorry driver (Tony Barr) in relation to the instructions provided to the latter in respect of the delivery of the skip …" (1/30/1(a)(v). This is a suggestion that there is an inconsistency between the accounts of Mr Massey and Mr Barr as to whether Mr Massey gave Mr Barr instructions about the manoeuvre he should undertake at the premises. At interview Mr Massey was not categorical that he did not provide instructions to Mr Barr as to how to drive at the premises. He accepted that he gave Mr Barr instructions as to where to park the skip (3/505). When asked about giving more detailed instructions, he said in his first interview "I don't think so" (3/507). He also said "I don't think… I don't think so" when asked about this further in his second interview (3/555). I consider that Mr Massey did not rule out that he may have provided instructions, but did not recall this. On the other hand Mr Barr both in his evidence at trial and during interview (3/529) was clear that he had been given instructions by Mr Massey. I do not consider that there is the inconsistency which is asserted by Mr Andrews and in any event I consider that even if there was then on the balance of probabilities, there could be the innocent explanation of a difference in recollection. Another explanation might be that it was Mr Barr's account which was incorrect on the basis that he was responsible for the collision and he may have wished to shift the blame onto someone else by indicating that he had been told how to manoeuvre the lorry, when the actual instructions provided to him fell short of that.

(d) In evidence Mr Andrews suggested that the skip used at the time of the collision was not suitable for cardboard and that Mr Massey had told him so. There was no evidence of this and Mr Andrews was unable to point to where Mr Massey explained that the skip used was not suitable. Rather Mr Massey told Mr Andrews in his first interview that a "big bulk skip" was for "cardboard and wood" (3/494).

(e) Mr Andrews sought to establish a contradiction or inconsistency between what he was informed by Mr Orr and by Mr Massey in relation to whether the cardboard which was to be placed in the skip was baled or loose. I do not consider that the inconsistency has been established on the balance of

probabilities. Mr Massey said that he "had no interest in baling" by which he meant in undertaking the baling. He described that as "… not my work" (3/500). He did not say that he had no interest in lifting baled cardboard. He did say, "Well, if I can get money for it, I would sell it" (3/500). He also said that he didn't know what sort of cardboard it was which would be put in the skip (3/501) although, when pressed by Mr Andrews, he didn't "think" it would have been baled. In his second interview, Mr Massey noted that baled cardboard is "worth a bit more" (3/557). I find that he was interested in lifting it if he could sell it. Mr Orr informed Mr Andrews that "all waste cardboard from several businesses, licensed trade and building" would be collected (2/78) so that there would be a variety of materials left in the skip. In his evidence (in cross-examination) Mr Orr said that there would be baled cardboard and loose cardboard, although it would mostly be baled, explaining that, if there was not enough baled cardboard, his employees would have filled the skip with loose cardboard. This is consistent with what Mr Massey said in his first interview which was "And whenever you send the lorry to lift it, they put all sorts of stuff in it" (3/501). It is also consistent with what he said in his second interview which was "Well, he would put in it whatever he wanted, you know?" (3/546). I consider that Beechview Developments Limited would mostly put baled cardboard into the skip but felt free to put loose cardboard and other waste in as well and that Mr Massey was content with this. He would assess what the waste was worth, and how much he would charge, once he had seen how profitable the collection was. I reject the suggestion that there was an inconsistency.

[95] In conclusion I approach the evidence of Mr Andrews with commensurate caution and consider that the decision dated 6 January 2012 has also to be viewed with the same caution and in the context of his attitude.

Factual background

[96] I set out my factual findings under a number of distinct headings.

(a) Beechview Aviation Limited, its helicopters, the damage to the helicopter and the amount of the plaintiff's claim

[97] Beechview Aviation Limited is a limited liability company incorporated in Northern Ireland on 31 October 2006 (3/363). The industry type is stated to be "non-scheduled air transport" and its principal activity is the provision of helicopters for hire (3/370). It owns and hires out helicopters. The hire of helicopters by Beechview Aviation Limited are what are termed "dry hires" that is hire of helicopters without a pilot and without fuel. The rates of hire of the helicopter varied from £575 to £750 per hour (4/44).

[98] The Director and controlling shareholder of the company is Mr Orr whose occupation is given as a property developer (3/371). Mr Orr is a helicopter pilot and he flies the helicopters which are owned by Beechview Aviation Limited.

[99] On 12 August 2011 the plaintiff owned two helicopters, namely:-

(a) The helicopter, namely a Eurocopter registration G-LHEL which was the helicopter damaged in the collision. It had been purchased for approximately £600,000. Part of the purchase price was funded by way of a loan from Lombard which was secured by a charge.

(b) A single engine helicopter registration N 35 DAY ("the other helicopter").

The helicopter is a twin-engined helicopter which is 40-50% more expensive to run per hour than the other helicopter which is a single engine helicopter. A twin engine helicopter is safer, particularly over water. The single engine helicopter had floats attached to it. The other helicopter was a three bladed aircraft. It was kept inside one of the sheds as it was more expensive than the helicopter. The helicopter could have been stored inside along with the other helicopter but only if the blades were removed and I accept the plaintiff's explanation as to why this would have been impractical.

[100] Beechview Aviation Limited had an insurance policy with QBE Insurance (Europe) Limited ("QBE"). After the collision the damage to the helicopter was reported by Beechview Aviation Limited to QBE who in turn appointed Clyde & Co, solicitors to act on its behalf. QBE have not paid out to the plaintiff on foot of its own insurance policy, but it is in the interests of QBE to establish liability against the defendant. Accordingly QBE is funding the plaintiff's proceedings against the defendant.

[101] At the time of the collision the helicopter was insured for ground cover only though this would have included 15 hours of flight time. The last occasion on which it was used prior to the collision on 12 August 2011 was 6 months previously on 5 February 2011 (4/463). It was then "ground run only" on 1 March 2011, 30 March 2011, 25 April 2011, 20 May 2011, 12 June 2011 and 8 July 2011 (4/464-469).

[102] On 29 July 2011 Mr Souster of London Helicopter Centres Ltd provided to the plaintiff for the attention of Mr Derek McGarrity, a quotation for a 500 hour service of the helicopter costing £36, 376.27 inclusive of VAT. It was stated that "aircraft will have to be trucked to Enniskillen" (4/151) though Mr Orr stated and I find that the service could have been undertaken at the premises. It would have taken approximately 2 weeks for this service to be carried out.

[103] Mr Orr would frequently fly the other helicopter from the premises to his home on a Friday night so that he could use it on a Saturday morning.

[104] Mr Orr's evidence was that all the helicopters owned by Beechview Aviation Limited were at all times for sale. My assessment of Mr Orr was that he viewed the helicopters owned by Beechview Aviation Limited as assets upon which he could either make a profit or recover his outlay. He is a commercially minded individual and I accept his evidence that both the helicopters and in fact all of the helicopters ever owned by Beechview Aviation Limited were available for sale at the right price at all times. I consider that the report from Baker Tilly which states that "the helicopter was listed for sale in early 2011 but a sale was not achieved and it was decided to recommence hiring the helicopter in July 2011" does not accurately reflect the correct position (4/44). Furthermore I find that the fact that the helicopter had been for sale but had not been sold does not lead to the conclusion that it had no value or that it had a greatly reduced value or that it was diminishing in value. Rather I find that the helicopter was in broad terms retaining its value.

[105] On 20 June 2009 Beechview Aviation Limited had a negative net worth of £329,827 (3/366) though on 30 June 2010 the negative net worth was less at £240,294. However given that Beechview Aviation Limited and Beechview Developments Limited were owned and controlled by Mr Orr and given the ability to make inter-company loans, Mr Ringland, on behalf of the defendant accepted, and in any event on the basis of the evidence of Mr Orr I find, that there was no financial pressure on Beechview Aviation Limited at the date of the collision or indeed at any other time.

[106] I find that there had been no income from the helicopter for 6 months before the collision. It was an expense in that the plaintiff had to pay the mortgage, the insurance premiums and the maintenance costs. However I find that all these costs did not put any appreciable financial pressure on the plaintiff given the ability of Mr Orr to make inter-company loans. I also find that there was no financial pressure on Mr Orr or on Beechview Developments Limited.

[107] After the collision Mark Souster, Managing Director of London Helicopter Centres Limited was requested by the plaintiff to assess the damage to the helicopter and the cost of repair (2/81). On 23 August 2011 he carried out an initial inspection of the damage to the helicopter. A further inspection was then undertaken and concluded by Mr Robinson, again of London Helicopter Centres Limited, on 7 September 2011. On 30 August 2011 Mr Souster provided a repair quotation in the amount of £544,766.82 plus VAT of £108,953.54 a total of £653,719.54 (2/129).

[108] Mark Jackson, Senior Surveyor and Adjuster of Charles Taylor Aviation completed a survey report in relation to the helicopter on behalf of QBE. The report concluded that "a detailed review of the estimate" provided by London Helicopter Centres in the amount of £544,766.28 exclusive of VAT "confirms that betterment contributions are applicable for the life limited components and these total £107,434.84 thus reducing the final repair costs for underwriters' consideration to £437,331.44" which Mr Jackson considered fair and reasonable (4/471). Accordingly after betterment has been taken into account damages in respect of the helicopter

have been agreed between the parties in this action in the amount of £437,331.44 (4/10/6). In addition the plaintiff claims for the loss of hire of the helicopter, interest, and the costs of pursuing the action against Mr Massey and Mr Barr. The figure of £437,331.44 was agreed between the parties. It was also agreed that the calculation of the loss of hire claim and other aspects of the plaintiff's claim for damages would await judgment in relation to liability.

(b) Beechview Developments Limited

[109] Mr Orr is also a Director and controlling shareholder of Beechview Developments Limited, a limited liability company incorporated in Northern Ireland on 15 June 1999 (3/373). The industry type is stated to be "general construction and civil engineering" and its principal activity is "holding company and general builders" (3/384). Beechview Developments Limited had a net worth in 2009 of £6,989,354 and in 2010 of £7,295,838. In 2009 it had cash at bank of £1,340,336 and in 2010 of £1,674,895. It has a good credit rating being assessed as "very low risk".

[110] There is no question of Mr Orr having fallen on hard financial times but rather Beechview Developments Limited is and remains a highly successful and solvent company.

(c) Other companies owned and controlled by Mr Orr

[111] Mr Orr is not only a Director and controlling shareholder of Beechview Aviation Limited and of Beechview Developments Limited but he is also a Director and controlling shareholder of a number of other limited liability companies (3/360). Those other companies include Linen Room Leisure Limited and Adeje Properties Limited.

[112] Linen Room Leisure Limited carries on business running bars, restaurants and nightclubs. In the course of its business that company has to discard and to pay for discarding a considerable volume of waste cardboard packaging. Rather than paying to discard the cardboard Mr Orr learnt that he could obtain money for it, if it was baled. Accordingly on 16 November 2010, some 9 months prior to the accident, Linen Rooms Leisure Limited purchased from C K International Limited a baling machine (4/153). Baling of the waste cardboard was undertaken at the premises.

(d) The premises

[113] The premises are owned by Mr Orr or by one of his companies. They are used by a number of companies which Mr Orr owns and controls. Primarily the premises are used for storage by the construction business. In so far as the construction businesses are concerned the premises are used to store machines, scaffolding, site huts, welfare facilities and forklift trucks. In so far as Linen Room Leisure Limited is concerned a small portion of the premises is used as a cardboard baling facility. The premises also have an agricultural use. They are also used by Beechview Aviation Limited in relation to its business.

[114] There is a secure fence around the entire premises.

[115] There is no sign saying that there is an aerodrome or airport at the premises. There is no sign stating that Beechview Aviation Limited carries on business at the premises. There is no sign proclaiming that helicopters are on the premises or are available for hire. There was no large "H" painted on the surface of the premises to indicate a touchdown or lift off area. There was no inset lighting on the surface of the premises to indicate a touchdown or lift off area. There was no demarcation of any touchdown or lift off area.

[116] The access to the premises is off the Old Belfast Road via a short access road. That road gives access to one end of the premises. There is a gate at the start of the access road which is locked. The surface of the premises is concreted. There are two large sheds at the premises which are detached with a large gap between them. Both of the sheds are on the opposite side of the premises to the access road. On the same side of the premises as the access road and down the fence line there is an area that can be used for storage. On the side of the premises on which the sheds are constructed, starting from a point opposite the access road, there is first an open area which can be used either in whole or in part for storage, followed by the first shed followed by another open space which again can be used in whole or in part for storage, followed by the second shed, which in turn is followed by another open area. It was in this final open area ("the final open area") that the helicopter was stored.

[117] There are no separate divided off areas within the premises. It was not suggested to Mr Orr that as a matter practice different parts of the premises had been used for different purposes or by different companies. I infer that the purpose for which all the areas of the premises were used was not fixed but that all the areas could be used on different occasions for different purposes depending on variations in the convenience of those storing or removing items from the premises. However I consider that the far end of the premises was habitually used for landing and take-off of helicopters, that a part of the second shed was used to store the other helicopter and that the helicopter was usually stored in the final open area. The final open area was just as accessible to individuals and lorries as all the other areas of the premises.

[118] The premises comprise a small industrial estate being typical of commercial premises which are used as a storage yard and as storage buildings.

[120] As the premises are used by a number of different companies for a number of different purposes different vehicles and different individuals come to the premises for a whole range of reasons.

(e) WM Contracts, Mr Massey, Mr Barr and the lorry

[121] Mr Massey carried on business as a haulage contractor under the trade name of "WM Contracts" (2/288) from premises situate at and known as 15 Bog Road, Ballygowan, County Down. He had previously carried out work for companies owned by Mr Orr (4/156-159).

[122] On 12 August 2008 Mr Massey completed a motor fleet insurance proposal form which was submitted to the defendant (3/584). One of the driver's referred to on the proposal form was Mr Barr (3/586).

[123] The insurance policy between the defendant and Mr Massey was renewed on a number of occasions and was finally renewed on 1 August 2011 (2/245) just prior to the collision on 12 August 2011. The defendant issued a motor cover note 393562 with effect from 4 August 2011 in respect of the lorry involved in the collision (2/8).

[124] Mr Barr, the lorry driver, who has a class 1 HGV licence, was, in 2011, 35 years of age. He had a clear driving record. He had not been involved in any previous motor accidents and had no previous insurance claims (3/522-523).

[125] The lorry involved in the collision, registration number YBO 3 LWL, was carrying a large skip.

[126] The lorry had a taco graph.

[127] After the collision and on 16 September 2011 Mr Massey collected the skip from the premises. It contained cardboard and metal and he charged £120 (4/161).

(f) Motive

[128] The defendant has failed to establish any compelling or strong motive for Mr Orr to commit an insurance fraud. The defendant's skeleton argument submitted just prior to the trial commencing alleged that the plaintiff "is in dire financial straits…" That allegation has emphatically not been established at trial. As I have indicated there is no question of Mr Orr having fallen on hard financial times but rather Beechview Developments Limited is and remains a highly successful and solvent company and given the ability to make inter-company loans, there was no financial pressure on Beechview Aviation Limited at the date of the collision or indeed at any other time. This is not a case of a businessman succumbing to financial pressures or being driven by a financial imperative to commit a fraud. I have also found that the helicopter was retaining its value and that all the costs associated with keeping it did not put any appreciable financial pressure on the plaintiff. The helicopter was in good condition. There was no flaw with it that prevented it from being sold or hired. The hire market was quiet but this could change and subsequently did change when Mr Fahy wished to hire it. My

assessment of Mr Orr is that he would be quite prepared to wait until he obtained what he considered to be an appropriate price for the helicopter before selling it.

[129] I accept that some individuals would commit a fraud as a convenient method of disposing of an asset which was not then being used and which was costing money to keep, especially if the asset was also decreasing in value (which I do not consider that it was). In considering that level of motivation I also consider how Mr Orr would have weighed the consequences. In the event and having seen Mr Orr give evidence I consider it unlikely that he would be motivated to risk his reputation, livelihood, career, family and liberty by deliberately arranging for the helicopter to be damaged in order to fraudulently to obtain money from an insurance company.

[130] At no point has the defendant alleged any motive for Mr Massey's involvement in an insurance fraud. The unarticulated but implicit suggestion is that Mr Massey was to obtain some financial payment from Mr Orr. As a matter of ordinary experience I accept that such payments would be hard to discover or to prove. However it was never suggested to Mr Orr in cross examination and was never put to Mr Massey during the course of the two interviews conducted by Mr Andrews that a payment was to be or had been made by Mr Orr. In fact rather than receiving any financial benefit Mr Massey has been made bankrupt by Mr Orr as a consequence of the collision.

[131] It was also asserted that Mr Orr and Mr Massey were "well acquainted" and that this may have provided a motive for Mr Massey to assist Mr Orr. However the allegation that they were "well acquainted" has not been proved it having been accepted by Mr Andrews in cross-examination that there is no evidence of a close friendship between Mr Massey and Mr Orr.

[132] On the balance of probabilities no motive has been established by the defendant for Mr Massey to put himself at risk by participating in an insurance fraud to benefit the plaintiff.

[133] At no point has the defendant alleged any motive for Mr Barr's involvement in an insurance fraud. Again the unarticulated but implicit suggestion is that Mr Barr was to obtain some financial payment from either Mr Orr or Mr Massey. Again as a matter of ordinary experience I accept that such payments would be hard to discover or to prove. However it was never suggested to Mr Orr or to Mr Barr in cross examination and was never put to Mr Massey during the course of the two interviews conducted by Mr Andrews that a payment was to be or had been made to Mr Barr. There is no suggestion that Mr Barr was "well acquainted" with Mr Orr. The unarticulated but implicit suggestion is that Mr Barr would do whatever was requested of him by Mr Massey, his employer, up to and including deliberately driving into the helicopter in order to commit an insurance fraud. There was no evidence that would support any such conclusion and that was not in any event my assessment of Mr Barr.

[134] On the balance of probabilities no motive has been established by the defendant for Mr Barr to put himself at risk by participating in an insurance fraud to benefit the plaintiff.

[135] At no point has the defendant alleged any motive for Mr Fahy's involvement in relation to the alleged fraudulent manufacturing of a claim for loss of profits. Again the unarticulated but implicit suggestion is that Mr Fahy was to obtain some financial payment from Mr Orr. Again as a matter of ordinary experience I accept that such payments would be hard to discover or to prove. The defendant did not seek to establish any financial imperative on Mr Fahy. Also it was never suggested to Mr Orr in cross examination that a payment was to be or had been made to Mr Fahy. Mr Fahy was "well acquainted" with Mr Orr but I consider it unlikely that a businessman such as Mr Fahy would risk his reputation, livelihood, career and liberty on a fraudulent escapade such as the defendant alleges, particularly when there was no financial imperative for him to do so.

[136] On the balance of probabilities no motive has been established by the defendant for Mr Fahy to put himself at risk by participating in an insurance fraud to benefit the plaintiff.

(g) The evidence of Ms Murphy and the arrangement for the delivery of the skip

[137] Carol Murphy undertakes secretarial and administrative work for Mr Orr by whom she is employed though the work she does is for a number of his companies. The offices at which she works are at Larne Road, Ballynure rather than at the premises.

[138] On Wednesday 10 August 2011 Ms Murphy rang Mr Massey to obtain a quote for delivery of a skip to the premises. She was told that it would be "*about*" £300-£350. She then spoke to Mr Orr and rang back to order the skip Mr Massey had been to the premises before and she did not need to nor did she give him any further instructions. In evidence she stated that she had a poor recollection of the conversation which had occurred some four years before.

[139] On 23 August 2011 Ms Murphy was interviewed by Mark Andrews of the defendant (2/80). He then drafted and sent a typed statement to her for her signature which she signed on 5 September 2011 (2/86).

[140] The defendants do not make any allegation that Ms Murphy was involved in any fraudulent or underhand conduct. What is being suggested is that she was an unwitting tool used by Mr Orr to give commercial legitimacy to the transaction. That Mr Orr had made or was in the process of making a clandestine arrangement with Mr Massey to secure that the lorry would collide with the helicopter. That Mr Orr recognised that as well as making that clandestine arrangement that ordinary

commercial practices had to be followed so that there was an audit trail of a genuine arrangement comparable to other such arrangements. The defendant asserts that any differences in the account given by Ms Murphy and Mr Massey are significant as the proper inference to be taken either in isolation or in combination with all the other differences that it is alleged have emerged is that whereas the genuine financial arrangement was of interest to Ms Murphy it was of no interest to Mr Massey. That any inference from any difference of recollection is not that the memory of one or other or both was deficient, or that the business arrangements or records of one or other or both were vague, but rather that Mr Massey was involved in a fraud and accordingly that he had no reason to record or to accurately remember the genuine business transaction.

[141] The first question is whether there is any difference between Ms Murphy's account of how the booking came to be made and the account given by Mr Massey and, if so, the degree of that difference. If there is a difference then the second question is whether on the balance of probabilities either on its own or in combination with all the other aspects of the case it leads to, for instance, any other inference but that accounts of different people of the same events can and do vary, but rather to the inference that Mr Massey was disinterested in and had a lack of memory as to the genuine transaction because he had already or was about to enter into a clandestine transaction.

[142] In relation to the first question I consider that there was a difference between Ms Murphy's account of how the booking came to be made and the account given by Mr Massey to Mr Andrews. The evidence of Ms Murphy, her account on 23 August 2011 to Mr Andrews and her signed statement were all to the effect that she obtained a quote from Mark Massey of "*circa*" or "*about*" £300/£350. Mr Massey informed Mr Andrews that there was no fixed price as the cost would vary depending on the resale value or scrap value of what the customer put inside the skip. Mr Massey says that the business he operated was not based on a price per day or a price for the weekend. Those are different accounts of the same commercial transaction.

[143] However I do not consider that this difference was of the degree suggested by Mr Andrews to Mr Massey during interview. Mr Andrews when questioning Mr Massey stated:-

> "Now, the girl in Beechview indicated that there was a price agreed, a *fixed price agreed* for the skip. Is that not right?" (my emphasis).

That was overstating the evidence of Ms Murphy in that she had stated that she was given an *approximate* price not a *fixed* price. An approximate price means that there could be a variation though the basis of that variation was not articulated by her or I consider to her by Mr Massey. What was missing from her evidence was being told by Mr Massey that the price varied depending on what was put into the skip. The

degree of the difference between Ms Murphy's account and Mr Massey's account is not to the extent asserted by Mr Andrews during his interview with Mr Massey.

[144] I do not consider that the difference which has been identified taken on its own or in combination with all the other factors in this case leads to any other inference but that Mr Massey was not clear or articulate or had a good memory. As Mr Massey informed Mr Andrews he could not recall telling Ms Murphy that it was £300 to £350. He went on to say:-

> "Maybe that's the case, but you know yourself everyday my phone's going."

The business which Mr Massey was running was not a sophisticated business and I consider that a lot of the arrangements were made by mobile phone with plenty of scope for confusion and without any written records or notes being made.

[145] I accept the evidence of Ms Murphy subject to the qualification that the consideration payable to Mr Massey would vary depending on what was placed in the skip.

(h) The evidence of Mr Barr

[146] On 12 August 2011 Mr Barr was told by Mark Massey in a telephone call to his mobile phone (3/526) to deliver a bulk skip to the premises. He had not been to these premises before and it was usual in such circumstances to be given and he was given instructions. He was told by Mark Massey over the phone how to get to the premises and he was instructed where to leave the skip which was in the space at the far end of the premises after the second shed and on the side of the premises opposite the entrance road. He was also told how to manoeuvre down the yard to where the skip was to be left. He was told that it would be advisable to turn halfway down the yard using the area between the two sheds and then reversing the rest of the way down the yard. He drove the lorry carrying a large bulk skip which was to be left in the premises. The bulk skip could not be filled with rubble or clay because it would make the skip too heavy and then the lorry driving it away would be unstable. The bulk skip is suitable for lighter material such as wood, paper and cardboard. It protruded over the back end of the lorry by some three feet. The skip obscured the driver's rear view and accordingly his rear view visibility was dependent on both of his wing mirrors. However the off-side wing mirror on the lorry had been damaged in an accident on another building site earlier that morning and accordingly he had bad visibility in that there was only approximately 30% use out of that mirror. It was also raining at the time of the collision and this made the use of the mirror more difficult as beads of water were sitting on the mirror and further distorting the image. He was in a rush (3/532) to get back across town to Ballygowan before "the traffic started".

[147] On arrival at the premises Mr Barr opened the gate. If he had not been given instructions he would have driven the lorry forwards to the end of the premises and turned at that point but in view of the fact that he had been given instructions as to where to turn he followed them by turning in the gap between the two sheds and then reversing down the rest of the premises. He saw a tractor at the gable end of the second shed. He reversed the lorry around the tractor and as he did so he heard a crunching noise but felt no jolt. He thought that the lorry had hit the fence. It was only after he got out of the lorry that he appreciated that it had reversed into and had collided with the front of the helicopter. It subsequently transpired that the forward main rotor blade of the helicopter had been broken, the lorry had contacted the cabin nose and pushed the helicopter ten feet backwards into a mud bank. The lower vertical stabiliser was sheared off, the tail boom was creased and the tail rotor impacted the mud (2/81).

[148] After discovering that the lorry had collided with the helicopter Mr Barr went up the premises to see if there was "a sign of anybody about" but there was not. He then phoned Mr Massey. He waited at the premises and a man arrived in a jeep who he assumed was the owner of the helicopter or of the yard (3/538). Mr Massey also arrived at the premises after some 30-45 minutes.

[149] On 18 August 2011 Mr Barr was interviewed by Mark Andrews on behalf of the defendant. The interview was recorded (3/520-541).

[150] Mr Barr denies being involved in any insurance fraud or deliberately damaging the helicopter.

[151] I accept the evidence of Mr Barr.

(i) The evidence of Mr Orr

[152] Mr Orr denied any involvement in an insurance fraud. I have summarised his evidence in relation to a number of issues in other parts of this judgment.

[153] Mr McGarrity was a friend of Mr Orr's and they had known each other for 6 or 7 years. The plaintiff entrusted Mr McGarrity with the sale of the helicopter. Mr Orr had previously been in business with Mr McGarrity in "Helicopter Training and Hire Limited". Mr Fahy is a helicopter instructor and a shareholder in a training school in Newtownards. Mr Orr stated that Mr Fahy would have flown for him in about 2006/2007 though he had no regular contact with Mr Fahy. Mr Orr denied and I find that he did not know that Mr Massey knew Mr McGarrity.

[154] Mr Orr has no interest in or involvement in rallying.

[155] I accept the evidence of Mr Orr.

Defence based on an allegation of fraud in relation to the collision

[156] I do not intend to analyse every factual issue or every one of the circumstances upon which the defendant relies. They included for instance that the plaintiff was in "dire financial straits", that the helicopter required expenditure of about £36,000 to render it airworthy and that the plaintiff did not have the money to achieve this, that the helicopter had been on the market for sale and had not been sold, that the plaintiff was unable to sell the helicopter and was unable to render it airworthy, that the helicopter had not been hired for some 6 months, that there were substantial continuing cost involved in keeping the helicopter, that there was contact between Mr Orr and Mr Massey prior to the collision, that the helicopter had been kept outside in an area where it could be damaged when there was no reason why it could not have been placed inside in a shed, that the instructions given to Mr Barr, if they were given, facilitated a collision, that the manoeuvre adopted by Mr Barr in the premises was inappropriate, that there were numerous inconsistencies between the various individuals, that the various individuals were "well acquainted" with each other and had a mutual interest in helicopters and in rallying, that the Mr Orr had been involved in the previous insurance claim which it is alleged was fraudulent and that the plaintiff made a fraudulent claim for loss of profits. I have considered all of the alleged circumstances. I have already set out a substantial number of my factual findings. I reject the defence of this claim in so far as it relates to an allegation that the collision was deliberate or that there was an insurance fraud. I do so for the following reasons:-

(a) Mr Barr would be a necessary co-conspirator. He gave evidence that the collision came about in effect by his own negligence. He denied any involvement in a conspiracy. I accept his evidence.

(b) The defendant has failed to establish on the balance of probabilities any motive for Mr Massey or Mr Barr to have been involved in a conspiracy to commit an insurance fraud.

(c) The defendant has failed to establish any compelling motive for Mr Orr to have been involved in an insurance fraud.

(d) The alleged inconsistencies in the accounts given by the various witnesses either have not been established on the balance of probabilities or alternatively if they have been established they are more likely to be the result of differences in recollection or some other innocent explanation.

(e) I accept that the manoeuvre adopted by Mr Barr to reverse the lorry in the premises was adopted for genuine and valid reasons.

(f) I have had the opportunity of seeing Mr Orr in the witness box. He denies any involvement in an insurance fraud. I accept his evidence.

(g) The allegation that Mr Massey was involved in an insurance fraud was never put to him at interview. I have expressed reservations about some of Mr Massey's answers at interview but I accept the essential account which he gave.

(h) I do not consider that Mr Orr was well acquainted with Mr Massey.

(i) I accept the evidence of Mr Orr that the telephone calls which occurred before the collision between himself and Mr Massey were work related.

(j) I accept the evidence of Mr Orr that he was not involved in any insurance fraud.

Defence based on an allegation that the amount of the claim was fraudulently inflated

[157] For the reasons that I have already set out I reject this part of the defendant's defence.

Defence based on an alleged failure by Mr Massey to co-operate by giving all the help and information possible in relation to documents

[158] I start by setting out a sequence of events in relation to the contact between Mr Massey and the defendant after the collision.

[159] The collision occurred on 12 August 2011 and the defendant was informed on that date by Mr Massey. On 15 August 2011 Mr Massey was told that when he had his first interview with the defendant its representative "would take down everything" (2/32). On 17 August 2011 Mr Andrews met with Mr Massey at his premises (3/491) (2/41). He was asked to and did provide the tachograph for the lorry (2/47).

[160] On 20 September 2011 Mr Andrews phoned Mr Massey and asked him to produce his driving licence, job diary and "historical invoice docs showing previous dealings with TP" (2/15). Mr Massey's driving licence was subsequently produced as was the job diary (2/108) and historical invoices (2/106-110).

[161] On 22 September 2011 Mr Andrews again met with Mr Massey at his premises (2/106) amongst other matters Mr Andrews requested further tachograph discs.

[162] On 28 October 2011 and in advance of another meeting, Mr Andrews phoned Mr Massey (2/176) stating that the defendant "needed to go through the claim to ensure (the defendant) had covered all areas of the policy and claim". He also advised that he would call Mr Massey beforehand and advise what records and

documents (the defendant) needed him to bring with him. There was no evidence that Mr Massey was informed prior to the interview which in fact took place on 2 November 2011 as to any records or documents that he needed to bring with him. I find that he was not so informed.

[163] On 19 October 2011 Mr Massey, without seeking to impose any charge, arranged for Mr Barr to attend the premises with the lorry to allow the defendant to conduct a reconstruction of the collision.

[164] On 2 November 2011 Mr Andrews and Mr Mercer both of the defendant met with Mr Massey and interviewed him (3/542). This was the interview that commenced with the positively misleading statement that "our underwriters have just sought to clarify a couple of wee points in relation to the policy." The interview concluded without any reference being made by Mr Andrews or Mr Mercer to any outstanding information or documents and in the context of the phone call of 28 October 2011 I find that it would have been reasonable for Mr Massey to conclude and that he did conclude that "all areas of the policy and claim" had been covered.

[165] Some 3 months after the collision on 12 August 2011, some 3 weeks after the interview on 2 November 2011, some 6 weeks before its repudiation on 6 January 2012, which 6 weeks included a holiday period and by letter dated 21 November 2011 (2/274) Mr Andrews requested Mr Massey to provide seven categories of documents and to provide the name of the foreman who was the original point of contact with Beechview Developments. This was the first request in writing. There was no deadline imposed by the defendant. The letter does not suggest that there was any previous failure to co-operate by Mr Massey but rather it "acknowledges your assistance on this occasion." It did not provide any explanation as to the reason why the documents were being requested save to say that it was trusted that Mr Massey would understand the need for the defendant to thoroughly validate all the information provided to it. Mr Massey was not warned to seek legal or broker advice, nor warned of any consequence of non-compliance. The letter has also to be seen in the context of what occurred at Mr Massey's second interview on 2 November 2011, at which Mr Mercer had confirmed there were no further issues to be covered from a policy point of view (3/568); and Mr Andrews had said "I'll be going through this with John (Mercer) and if we need anything more like that I'll drop you a wee e-mail confirming if there's anything outstanding" (3/562). I find that even if it was reasonable to request the insured to provide these documents that the request could and should have been made within at most one month of the date of the collision. All the investigations could and should have been carried on within an earlier timescale by the defendant. It was unreasonable for the defendant to have allowed time to pass and then to make demands for information that could have been made at an earlier stage.

[166] On 28 November 2011, within one week of a letter dated 21 November 2011 (7/181), Mr Massey provided the defendant with "copys of invoices and copy of dockets etc relating to work with Brian Orr and relevant companies" together with

the name of the foreman that he dealt with. He also stated that he was working on phone statements and that he would send them in asap.

[167] Approximately 2½ weeks later and by e-mail dated 15 December 2011 (2/187) Mr Andrews informed Mr Massey that the defendant "was coming under considerable pressure to reach a decision in this matter". He acknowledged receipt of various documents from Mr Massey. In relation to telephone records he stated:-

> "Please urgently forward the telephone records previous requested or advise the status of your request from the service provider."

In relation to the sale of the content of the skip he stated:-

> "Please forward receipts or other documents confirming the sale of cardboard and/or scrap metal to clear way arising out of the above mentioned skip collected on 16 September 2011."

This e mail is to be seen in the context that Mr Andrews was difficult to contact at this time of year. That Mr Andrews knew that it was the "holiday season" and that Mr Massey's "business is likely to be closed throughout the holiday period."

[168] By letter and e-mail dated 28 December 2012 (2/279-280) sent in the midst of the Christmas holiday period, Mr Andrews sought Mr Massey's immediate attention and response to a number of points which were stated to be "essential." A deadline was also imposed in that Mr Andrews stated

> "We regret to advise that your failure to reply fully by 04/01/2012, or provide a reasonable explanation for not doing so, will be considered a breach of policy conditions."

This was the first time that Mr Massey was told that failure to reply fully ("or provide a reasonable explanation for not doing so") would be considered a breach of policy conditions. No explanation of the relevance of the various requested documents or information (some of which had already been provided) was given. Mr Massey was also told that the defendant "… acknowledge your assistance" and he was told this was "in anticipation of your continued cooperation…." Mr Massey was entitled to consider that he had provided the required assistance up to this point.

[169] On 3 January 2012 Mr Massey telephoned Mr Andrews (2/281) he stated that there was no valid Goods Vehicle Test Certificate for the lorry on the date of the incident. In relation to the request for phone call statements he stated that

> "The documents provided do not show the itemised calls. He had been calling his dealers Phonetics, but they aren't answering. He will chase this up".

His phone call was confirmed by an e-mail (2/201). In relation to the telephone records the e-mail stated:-

> "I was waiting mobil fone company sending itemised bills as u require which I did not receive but I got in contact today to try and get asap."

The e-mail also stated:-

> "I will also chase documentation for recycled cardboard, paper, scrab metal prob be nx week before I can send in."

[170] On 4 January 2012 (2/200) Mr Andrews replied extending the deadline to 5.00 pm tomorrow Thursday 5 January 2012. In relation to the telephone records Mr Andrews stated:-

> "On 28/11/2011, you confirmed that you had requested various telephone records from your telephone service provider(s). You now say that the records provided to you were incomplete. Please urgently forward me copies of the communication you have had with the relevant service providers in this regard."

I consider that these deadlines over a holiday period were manifestly unreasonable.

[171] Then by letter dated 6 January 2012 Mr Andrews wrote repudiating the policy (2/2-204). By that date and in relation to the matters pleaded in the defendant's replies to the plaintiff's notice for particulars:-

(a) Mr Massey had confirmed that there was no Goods Vehicle Test Certificate in respect of the lorry.

(b) The phone records had not been produced.

(c) The purchase receipt for helicopter GOVNR had not been produced.

(d) The invoices for the sale of scrap metal and cardboard collected from Beechview had not been produced.

[172] This is not a case of the insured not co-operating at all. He was formally interviewed on two occasions with the interviews being recorded. There were telephone calls with Mr Andrews. He facilitated a reconstruction of the collision. He made his employee Mr Barr available to the defendant. In addition to the information provided at the interviews Mr Massey did provide documentation as follows

(a) On 17 August 2011 tachograph records in relation to the lorry (2/47);

(b) On 22 September 2011 the original docket relating to the collision (2/106 and 197);

(c) The job diary relating to the accident on 22 September 2011 (2/106 and 108);

(d) Copy invoices relating to previous skip delivery to Beechview Developments Limited on 22 September 2011 (2/106 and 109-110);

(e) A copy of Mr Barr's driving licence on 28 November 2011 (B2/187);

(f) The lorry's goods vehicle test certificate and information about the state of play at the time of the accident on 28 November 2011 (2/187), with further information about this provided on 3 January 2012 (2/198);

(g) Further invoices in relation to previous work for Beechview related companies on 28 November 2011 (2/187 and 7/181) and confirmation that these were all of the relevant business carried out, with this confirmation repeated (on request) on 3 January 2012 (2/198);

(h) An explanation on 28 November 2011 (7/181) and 3 January 2012 as to the position with mobile phone bills and a commitment to chase this up (2/198);

(i) A commitment on 3 January 2012 to provide further information about the purchase of helicopter G-OVNR when his accountant returned to work (2/198);

(j) A commitment on 3 January 2012 to provide further documentation in relation to onward recycling of collected materials (2/198)

(k) Information in relation to the Beechview foremen with whom he had had contact on 28 November 2011 (7/181) and confirmed on 3 January 2012 (2/198);

(l) A sale receipt for G-OVNR on 9 February 2012 (2/237 and 240); and

(m) His own driving licence on 9 February 2012 (2/237 and 241).

[173] The time limit imposed by the defendant on Mr Massey was unreasonable in all the particular circumstances of this case. The defendant permitted a substantial period of time to lapse before it formally requested any documents and when it came under pressure from the solicitors for QBE it sought to impose a similar time constraint on Mr Massey without any regard to its own failure to act expeditiously at an earlier and more appropriate stage. Furthermore the defendant lulled Mr Massey into a false sense of security and it failed to explain the relevance of the documents to Mr Massey. There was no failure by Mr Massey to provide information and documents within a reasonable period of time and accordingly there was no breach of the obligation to give "all the help and information possible".

[174] Furthermore the defendant did not seek to prove in evidence that it was "possible" for Mr Massey to have provided his telephone records. Mr Massey asserted that he had been calling his dealer "Phonetics". There was no attempt by the defendant to establish the identity of the dealer. No doubt some telephone companies' respond appropriately to such requests but that is not the position with all telephone companies. I am not persuaded on the balance of probabilities that it was possible for Mr Massey to have produced his telephone records from whatever telephone company he had engaged.

[175] Also the defendant did not seek to prove in evidence that it was "possible" for Mr Massey to obtain from Clearway the invoices for the sale of the scrap metal and cardboard which were in the skip involved in the collision. Clearway had been identified to the defendant (2/187). I am not persuaded on the balance of probabilities that it was possible for Mr Massey to have produced those invoices.

[176] In addition I consider that by early December 2011 Mr Andrews had concluded that the claim would not be paid. On 13 December 2011 Mr Andrews informed QBE that it would be "prudent to contact me before issuing any recommendations for payment(s) in this matter", with the email to be treated "in strictest confidence" (2/182). He was also asking if there was "any chance you can stall until (late December) and give me a ring before processing payment" (2/184). I consider that Mr Andrews had decided at that time that the defendant would not be making a payment to Mr Massey on the basis that the collision was part of an insurance fraud. I consider that the only reason why he wished to discuss the matter in the strictest confidence was that he wished to impart his view that the claim was a fraudulent claim perpetrated by virtue of a conspiracy involving Mr Orr, Mr Massey and Mr Barr. I consider that after that date the requests for further documentation and the defendant's reliance on their non-provision were an attempt to obtain another reason for declining cover and were not a genuine attempt to obtain information for the purposes of the investigation of the claim. In short, that the power in the policy was not being used reasonably or for any genuine purpose but

rather with a closed mind to bolster an established decision. The use was arbitrary to achieve a desired outcome.

Defence based on the alleged provision by Mr Massey of false information

[177] The "false information" said to have been provided by Mr Massey in the Defendant's Replies to question 1(a) are (viii) to (x) [B1/30]) relates to:

(viii) his previous ownership and/or involvement with several helicopters;

(ix) his involvement with the owners and/or interested parties related to helicopter G-LHEL; and

(x) his involvement in rallying and his relationship with Derek McGarrity.

I will deal with each in turn.

[178] I am not persuaded that Mr Massey gave false information about his ownership of helicopters or that he gave false information about his involvement with helicopters. In relation to rallying Mr Massey did not deny that he had been involved. The suggestion is that Mr Massey ought to have been more forthcoming as to the extent of rallying which he undertook. No explanation was given to Mr Massey as to the reasons for this line of questioning and accordingly I consider that it was likely that he considered the questions in relation to rallying not to be a part of the formal interview but a brief informal digression or conversation in the course of the interview, between topics. I have already analysed the allegation that Mr Massey was "well acquainted" with a number of individuals and the only inaccurate response was in relation to Mr McGarrity in relation to whom the defendant states that there "is no evidence of wrongdoing" on his part. The answers in relation to Mr McGarrity did not influence the provision of indemnity or the extent of indemnity provided by the defendant. There was no fraudulent conspiracy and these answers were not made to conceal a fraudulent scheme. I also repeat my findings in paragraph [176].

[179] I am not persuaded that there has been any breach of the policy conditions.

Defence based on an alleged non-disclosure by Mr Massey in relation to penalty points and a pending prosecution

[180] The proposal form which was completed by Mr Massey (3/584-586) in Section 4 contained a schedule of drivers, of which there were 7. In Section 5 under the heading "Drivers" Mr Massey was asked a series of questions including:-

(i) Have you or any person who, to your knowledge, will drive … Been disqualified from driving or convicted or any motoring or

> criminal offence within the last 5 years or is any prosecution pending?

The reply was "yes" and the following handwritten particulars were given

> "Mark Massey 3 points Jan 08 using mobile phone whilst driving" (3/586).

A further question was as follows:-

> "(iii) Do you check drivers licence at least annually?"

To which the answer was "No" which answer is to be seen in the context of there being 7 drivers any of whom for instance prior to renewal could have had terms imposed on their driving licence by DVLNI in respect of some physical or mental disability or could have had penalty points endorsed on their driving licence.

[181] The defendant accepts that there was full disclosure at inception of the policy but they contend that Mr Massey failed to make disclosure at renewal in early August 2011. The defendant asserts, and I find that at renewal in early August 2011 Mr Massey had had the following penalty points on his driving licence:

(a) January 2008. 3 penalty points for using a mobile phone whilst driving. This had been disclosed to the defendant (3/586).

(b) 8 October 2009 3 penalty points for using a hand held mobile phone (2/241). The endorsement on Mr Massey's driving licence refers to an offence code of 5013272 which is described as "using a hand-held mobile phone" as opposed to code 5013265 "using a mobile phone whilst driving." The defendant did not seek to explain the difference between these two codes. The defendant asserts that Mr Massey did not disclose these penalty points at renewal.

(c) 21 April 2010 3 penalty points for using a handheld mobile phone (2/241). Again the defendant did not seek to explain the difference between these two codes. The defendant asserts that Mr Massey did not disclose these penalty points at renewal.

In addition I find that on 7 November 2011 which was after renewal Mr Massey was convicted of the offence of using a handheld mobile phone which offence was committed on 29 June 2010 prior to renewal (2/241). He was disqualified from driving for 2 months. The defendant asserts that on the balance of probabilities this prosecution was "pending" at renewal and that Mr Massey did not disclose it.

[182] A fixed penalty and a conviction are different concepts. A fixed penalty rather than being a conviction discharges the individual's liability to conviction see

Article 58(1) of the Road Traffic Offenders (Northern Ireland) Order 1996. The defendant in its proposal form asked Mr Massey to disclose whether he or any driver had been "convicted" of any motoring or criminal offence within the last 5 years. The defendant by its question on the proposal form asked Mr Massey to disclose whether he or any driver had been "convicted" of any motoring or criminal offence within the last 5 years. The defendant by its question limited the information which it required Mr Massey to provide. There was no obligation to disclose penalty points and any failure to do so cannot amount to non-disclosure.

[183] The outstanding issue is as to whether a prosecution was pending in early August 2011. The offence was committed on 29 June 2010 and the conviction was some 1 year and 5 months later on 7 November 2011. The defendant called no evidence as to the date upon which the complaint was laid or the date upon which the summons was issued or the date of the first appearance in the Magistrates' Court. I was not referred by the defendant to the provisions of *Article 19 of the Magistrates' Court (Northern Ireland) Order 1981* which requires a complaint to be laid within 6 months of the offence if the offence is a summary offence not an indictable or hybrid offence. I was not referred by the defendant to *Article 56(A) of the Road Traffic (Northern Ireland) Order 1995* or *Regulation 125A of the Motor Vehicles (Construction Use) Regulations (Northern Ireland) 1999*. I was not informed as to whether the offence was a summary only offence, which I consider it to be. There was no submission as to what was the proper construction of pending prosecution. As a matter of criminal law the prosecution commences with a complaint and the summons may be issued and served at a later date though delay may amount to an abuse of process. In the context of an insurance proposal I consider that a prosecution is pending when the summons has been served on the insured unless it can be established on the balance of probabilities that the insured knew that the complaint had been laid at an earlier date.

[184] On the basis of the date of the offence, the requirement for the complaint to be laid within 6 months and the obligation to issue and serve the summons within a reasonable period thereafter I am prepared to hold, on the balance of probabilities, that the summons had been served on Mr Massey prior to renewal in early August 2011 and that there was a prosecution pending at that time. The question then becomes whether the defendant has established that he failed to disclose that pending prosecution.

[185] There is no record in the defendant's possession that it was informed of the pending prosecution and on that basis I am prepared to accept that there was a failure by Mr Massey to disclose the pending prosecution.

[186] The next question is whether if Mr Massey had disclosed the pending prosecution and also assuming that disclosing that prosecution meant that the defendant would then have known about the six further penalty points in addition to the three about which they already knew would this have resulted in any change to the offer of insurance. There was a considerable volume of evidence as to the

defendant's guides one which was produced on discovery late during the trial. I heard evidence from Ms Cambridge on behalf of the defendant together with expert evidence from Mr McGrath.

[187] I do not intend to rehearse all the evidence as to negotiations on renewal but rather to summarise some of it. In August 2011 the defendant renewed Mr Massey's policy at a premium of £3,975 including insurance premium tax ("IPT") (7/11). This was significantly less than their 'target' figure of £4,505 including IPT (7/16); and less expensive even than the authority given by the Headquarter office in Dublin to shave money off the target (that was £4,000 plus IPT (7/16)). This renewal had already been referred to Headquarters in Dublin and a very keen rate agreed; which was then reduced even further in order to keep Mr Massey's business. This was partly as a result of a desire to beat other competing providers but principally because, in defendant's words, the policy was "running well prior to recent claim" (7/16 and 18). In 2010, they had noted that they were "getting good rates on vehicles + claim free!" (7/31).

[188] I consider that the defendant had consistently shown a very strong willingness to accommodate Mr Massey in order to keep his business. They had significantly reduced their 'target' renewal price in 2010 (7/31), 2009 (7/161), and 2008 (7/120, 117 and 114). They had insured Mr Massey notwithstanding payment difficulties with his account in August 2010 (7/25). They had also added a number of young drivers; and a number of premium performance vehicles.

[189] Mr McGrath concluded that had Mr Massey made the disclosures "this case would have been renewed without any different terms being imposed at renewal" (1/144J) and the driving offences "would not result in special terms being imposed" (1/144M).

[190] I accept Mr McGrath's evidence.

[191] The defendant was not entitled to repudiate the policy on the basis of non-disclosure.

Defence based on the Aerodrome/Airport exclusion

[192] The exclusion in the defendant's policy is as follows:

> "We will not insure you for claims arising under Section 1 of this Policy while any vehicle insured by this Policy is being used in the parts of any airport or aerodrome to which aircraft have access" (2/20).

An airport or aerodrome is not defined in the policy. The defendant relied on the definition of "aerodrome" which is contained in Wikipedia which is in the following terms:-

> "An aerodrome or airdrome is a location from which aircraft flight operations take place, regardless of whether they involve air cargo, passengers, or neither. Aerodromes include small general aviation airfields, large commercial airports, and military airbases. The term airport may imply a certain stature (having satisfied certain certification criteria or regulatory requirements) that an aerodrome may not have achieved. That is to say, all airports are aerodromes, but not all aerodromes are airports. Usage of the term 'aerodrome' remains more common in the UK and Commonwealth nations, and is conversely almost unknown in American English."

It can be seen from that definition that an essential feature is flight operations and that a distinction is drawn between aerodromes and airports on the basis of size or stature. The essential feature of an aerodrome is that it is a location from which aircraft flight operations take place.

[193] The defendant also relies on the *International Civil Aviation Organization (ICAO) Documents, Annex 14 to The Convention on International Civil Aviation (Chicago Convention), Volume I- Aerodrome Design and Operations* which under definitions defines an aerodrome as

> "A defined area on land or water (including any buildings, installations, and equipment) intended to be used either wholly or in part for the arrival, departure, and surface movement of aircraft."

Again the defendant states that an essential feature is the arrival and departure of aircraft.

[194] The Oxford English Dictionary defines an "aerodrome" as

> "Originally: a tract of open ground set aside for aircraft to fly over in flight trials and flying contests (now disused). Later: a large tract of open level ground together with runways and other installations for the operation of aircraft; a small airfield, esp. a private or military one."

It defines an "airport" as a

> "place where civil aircraft may land in order to discharge and receive passengers, refuel, or undergo

> maintenance; (in early use) a town or city where such a facility is located; (now esp.) a complex of runways and buildings for this purpose, with facilities for passengers."

So it is apparent that the distinction between airport and aerodrome using the definition in the Oxford English Dictionary depends on the distinction between the civil nature of the flights on the one hand and the private and military nature on the other, together with size.

[195] Wikipedia defines a heliport as

> "a small airport suitable only for use by helicopters. Heliports typically contain one or more helipads and may have limited facilities such as fuel, lighting, a windsock, or even hangars. In larger towns and cities, customs facilities may be available at a heliport."

Under this definition a heliport is a small airport as opposed to an aerodrome.

[196] In *Rolls Royce plc and another v Heavylift-Volga DNEPR Ltd and another* [2000] 1 All ER (Comm) 796 one of the issues for decision was as to the meaning of aerodrome within the provisions of the *Warsaw Convention* (the convention) (as incorporated by the *Carriage by Air Act 1961*) which limited liability where damage was caused without wilful default or recklessness 'with knowledge that damage may result' (arts 25 and 25A). The plaintiff argued that the convention did not apply on a number of grounds including a submission that at the time of the accident, the place where the accident happened was not within the aerodrome. The convention uses the word aerodrome as opposed to airport. Morison J rejected the submission that the word aerodrome had a different meaning from the word airport holding that the

> "word aerodrome is simply an old-fashioned word for what is now called an airport."

So in the context of the convention there was a different construction than that contained in Wikipedia and in the Oxford English Dictionary in that aerodrome and airport were held to be synonymous.

[197] The features which the defendants call in aid to establish that this was an aerodrome or airport are:-

(a) The use which the plaintiff makes of the premises for landing and take-off of helicopters.

(b) The shed which is used to store the other helicopter which is referred to as a "hangar" (2/257) in a statement prepared for Mr Orr by Mr

Andrews and signed by Mr Orr on 5 September 2011. There was no evidence that the shed was constructed as a shed for accommodating aircraft but rather I infer that it was initially constructed as a facility for the other businesses but was subsequently used to accommodate a helicopter.

(c) A windsock. This is not a necessary item of equipment for the landing and take-off of helicopters but there was a windsock at the premises.

(d) Helimovers. There are two helimovers at the premises one of which was operational at the time. They are items of ground handling equipment which, for instance, are used to move the other helicopter in and out of the second shed.

(e) Refuelling facilities consisting of tanks for aviation fuel.

[198] The features which the plaintiff calls in aid to establish that this was not an aerodrome or airport within the meaning of the policy are the overall ambiance of the premises and their dominant use. It is accepted that helicopters take off and land at a part of the premises, that they are stored there and that there is associated equipment in that part of the premises. That the part of the premises from which helicopters took off and landed was not exclusively used for that purpose in that for instance it was also used for the storage of an agricultural tractor and trailer. That Mr Andrews when he visited the premises did not immediately recognise the premises as an airport nor did the defendant call in aid this exclusion at the earliest stages of investigation from which it is suggested that I should infer that the defendants did not themselves consider that it was an airport or aerodrome. The plaintiff's first contention is that this was and remains a commercial storage yard rather than an airport or aerodrome. In the alternative it is contended that there is no airside division and even if a part of the premises can be described as an airport or aerodrome, despite the overwhelming dominant use for other purposes, then that there is not that type of airdrome or airport envisaged on the true construction of the insurance policy which would require an airside division.

[199] Whilst the definitions that have been set out, are of some general assistance as to the true construction of the policy, I consider that greater assistance can be obtained from the proposal form (3/584). This asks "will any vehicle be used "Airside" or in close proximity to aircraft?" The word Airside is in inverted commas as a term with a specific meaning. I consider that the relevant feature of an airport or aerodrome within the policy is that there has to be an "Airside" division. The sense of such a construction is apparent when one considers the impact that the defendant's construction would have on numerous insurance policies because the aerodrome/airport exclusion is not just an exclusion in policies issued by the defendant, but I find as a fact, that it is also an exclusion in almost all road traffic insurance policies issued by other insurance companies. On the defendant's construction the entire premises are an aerodrome and aircraft have access to every

part of the premises. If that was correct, then every single motor vehicle that enters or which has entered the premises would in effect be uninsured regardless as to whether a collision involved an aircraft, regardless as to whether the driver knew or ought to have known that the vehicle was entering an aerodrome and regardless as to whether the driver knew or ought to have known that he was in a part of the premises to which aircraft had access. If there is a requirement that there be an "Airside" division then those gaining access would have to pass through a security check a condition of which could be that the vehicle had insurance that covered such entry.

[200] A part of the premises, though not the whole of the premises, was used in relation to the take-off and landing of helicopters with some associated features. However I do not consider that this minor use of the premises makes it an airport or an aerodrome. Rather I find that the premises are a commercial storage yard rather than an airport or aerodrome. That is the dominant and overwhelming use of the premises.

[201] If I am incorrect in that conclusion and if a part of the premises, though not the whole of the premises, was an aerodrome or airport then I find that there were no clear boundaries to the part of the premises which was an aerodrome or airport and the other parts of the premises which were not. The exact boundaries between those two parts have never been defined by the plaintiff or by Mr Orr and it is not possible for the court to say exactly where the boundary was between the part of the premises which was an aerodrome or airport and the rest of the premises apart from finding in a general way that the part of the premises which was an aerodrome or airport was the part which was furthest from the entrance gate and that it also comprised part of the second shed. Nothing was marked on the ground. There was no dividing fence or structure. The part of the premises which was an aerodrome/airport was not exclusively used for that purpose in that for instance it was also used for the storage of an agricultural tractor and trailer. Accordingly I find that if a part of the premises was an airport or aerodrome then that part was not an airport or aerodrome within the meaning of the policy as there was no "Airside" division.

[202] The defendant is not entitled to rely on the airport/aerodrome exclusion.

Conclusion

[203] I find that the defendant is liable to the plaintiff. As part of the damages have been agreed there will be an immediate judgment for the plaintiff for that part. I will adjourn the remaining part of the assessment of damages to a further hearing upon a date now to be fixed.

[204] I will also hear from counsel in relation to costs, the appropriate basis of taxation of costs and interest.