DAWSON’S FIELD AND CAIRO

EXCESS LOSS REINSURANCES

DECISION

WHEREAS

(A) The Claimants each wrote cover on or reinsured cover given in respect of two or more of the four aircraft which were ultimately destroyed at Cairo and at Dawson’s Field in September, 1970;
(B) The Respondent are reinsurers who reinsured the Claimants in respect of the liabilities of the Claimants under the aforesaid cover;
(C) A dispute has arisen between the parties as to the construction and effect of the Excess of Loss Clauses contained in the reinsurance treaties made between them;
(D) It was agreed between the parties that the said dispute should be submitted to me, the undersigned Michael R. E. Kerr, Q.C. as sole arbitrator on the terms and conditions hereinafter set out and I accepted this appointment;
(E) For the purposes of this submission alone the following assumptions were to be made, viz that
(i) Each Claimant has incurred liabilities in respect of two or more of the said aircraft,
(ii) Subject to the determination of the issue set out in (F) below each Claimant may be entitled to make a valid claim under the reinsurance treaty or treaties which he has entered into with one or more of the Respondents,
(iii) Each reinsurance treaty contained an Excess Loss Clause in one or other of the following terms, either:
(a) “Ultimate Nett Loss sustained in respect of each loss or series of losses arising out of one event”;
(b) “Ultimate Nett Loss sustained in respect of each and every loss and/or catastrophe and/or occurrence and/or series of occurrences arising out of one event”;
(F) On the foregoing assumptions I was requested to determine whether or not, or in what manner, any or all of the claims (T.W.A., Swissair, B.O.A.C. and/or Panam) are to be aggregated for the purposes of Excess of Loss Reinsurances containing either (i) Clause (a) or (ii) Clause (b) in (E) (iii) above;
(G) The parties were represented by Solicitors and Counsel and I have duly considered the evidence and arguments put before me and the authorities referred to
NOW I the said Michael R.E. Kerr, Q.C. HEREBY DECIDE as follows :
(1) The claims of T.W.A., Swissair, B.O.A.C. in respect of the aircraft destroyed at Dawson’s Field, but not the claim of Panam in respect of the aircraft destroyed at Cairo, are to be aggregated
(a) Under the said Clause (a) on the basis of Ultimate Nett Loss sustained in respect of a series of losses arising out of any one event,
(b) Under the said Clause (b) on the basis of Ultimate Nett Loss sustained in respect of each and every occurrence and/or series of occurrences arising out of one event.
In other words, and for the sake of clarity, I decide that the destruction of the three aircraft at Dawson’s Field (but not the destruction of the aircraft at Cairo) constituted total losses of these aircraft which are to be aggregated as (i) a series of losses arising out of one event, or (ii) losses arising out of one occurrence, or (iii) losses arising out of a series of occurrences arising out of one event.
(2) The Claimants are entitled to recover from the Respondents the Claimants' costs of the submission and reference to me to be taxed or agreed. I assess and tax the costs of this my Decision in the sum of £3,500 to be paid by the Respondents. If the Claimants shall in the first instance have paid the said sum

Dated the April, 1972

Witness to the signature (MICHAEL R.E. KERR, Q.C.)

Of the said Michael R.E. Kerr, Q.C. :

(Barrister's Clerk)

REASONS FOR DECISION

1. At the hearing of this arbitration it was left open whether I should give my decision in the form of the agreed “Submission To Arbitration” or on the basis of more detailed questions formulated by me which covered the various contentions and their possible permutations which were raised. No agreement was subsequently reached on this point and I therefore consider it right to give my “Decision” (as it was agreed it should be called) on the basis of the agreed Submission. I also agreed to give my reasons separately (the offer of a Special Case having been declined by both parties) and do so herewith on the usual terms, viz. that they form no part of the Decision and will not be referred to in subsequent proceedings without my consent. For the sake of completeness I also include at the end of these Reasons the questions which I had suggested and my answers to them.

2. It is convenient to summarise the main facts and the inferences which I have drawn from the evidence before me, consisting mainly of press cuttings, two films relating to the events at Dawson’s Field, and a statement made by the Captain of the hijacked B.O.A.C. V.C.10.

On 6th September 1970 three aircrafts were hijacked on international flights by members of the “Popular Front for the Liberation of Palestine” (P.F.L.P.). They were a T.W.A. Boeing 707 on a flight from Frankfurt to New York, a Swissair D.C.8 on a flight from Zurich to New York and a Panam 747 on a flight from Amsterdam to New York. On the same day the P.F.L.P. attempted to hijack an El Al 707 at London but failed, in the course of which Miss Leila Khaled, a member of the P.F.L.P. was arrested The T.W.A. 707 and the Swissair D.C.8 were forced to fly to and land at Dawson’s Field, an airstrip in Jordan under the control of the P.F.L.P. The Panam 747 was forced to fly to Beirut where it was refuelled, explosives were placed on board and it was then flown to Cairo. It was there blown up and destroyed soon after landing, no attempt being made to hold the passengers. On 9th September 1970 a B.O.A.C. N.V. 10 was hijacked over the Middle East whilst on a flight to London and also taken to Dawson’s Field. The passengers of the aircraft at Dawson’s Field were held as hostages. The P.F.L.P. or persons claiming to speak for them repeatedly declared that they would blow up the aircraft with the passengers inside unless the governments holding P.F.L.P. prisoners as the result of previous attempted hijackings and shooting incidents released such prisoners, in particular the Swiss, German and British Governments. The Red Cross offered to negotiate with the P.F.L.P., urgent Cabinet and top-level inter-governmental discussions took place, and the situation and probable outcome were very confused and quite uncertain. Many of the passengers, in particular the woman and children, were released and moved to Amman, but the men remained as hostages at Dawson’s Field. The aircraft there were undamaged and could have been flown out; the Captain of the B.O.A.C. V.C. 10 initially expected that agreement would be reached and that the aircraft would be flown out. I draw the inference that if the governments concerned had agreed to the unconditional release of the prisoners at this early stage, then the probability was that the passengers as well as the aircraft would have been released, because to honour their declaration to do so would have been regarded by the P.F.L.P. as the best course to impress public opinion about their political responsibility and to create sympathy for their cause. But the negotiations involved were extremely complex, particularly since there was no clear-cut agreement between the Governments and no single identifiable spokesman for the guerrillas. From the point of view of the P.F.L.P. no real progress was being made, and on the 12th September they blew up the three aircraft at Dawson’s Field but kept the remaining passengers as hostages in order to continue to press their demands. The press cuttings before me do not tell the end of
the story, but as far as I remember the Governments concerned ultimately released the prisoners, and the remaining passengers were certainly subsequently released by the guerrillas.

In so far as it is possible to draw inferences about the P.F.L.P.'s motives and their reasons for the actions taken and when these were taken, my conclusions are as follows. The plan to hijack the three aircraft on 6th September (and the fourth referred to below) was of course concerted and carefully laid. Apart from the general political motives of the P.F.L.P. in their relations with the Jordanian Government and their disapproval of the Egyptian Government's soft line (as they regarded it) towards Israel, as well as their general desire to attract maximum publicity for their political objectives, they wanted to obtain control over the aircraft and passengers as a lever to procure the release of the various guerrilla prisoners. They blew up the Panam 747 at Cairo because their relations with the Egyptians were such that they could not have maintained control over the passengers or aircraft so as to make them part of the ransom operation. Staging the blowing up of an American Jumbo Jet in Cairo was therefore the most effective thing to do in relation to that aircraft and served to underline their determination in relation to the passengers and aircraft at Dawson's Field. When the hijacking of the EL Al 707 failed at Heathrow and resulted in the capture of Leila Khaled, the fourth concerted hijacking planned for 6th September, they decided to hijack a B.O.A.C. aircraft and to take this to Dawson's Field in order to obtain a lever against the British Government, as they did on 9th September. Having obtained control of the passengers and aircraft at Dawson's Field I think that there was probably no definite plan or policy as to what they would do next, except the overall plan to obtain, the release of the prisoners as quickly as possible. The person or persons in control of the P.F.L.P. actions at Dawson's Field were probably "playing it by ear" and proceeding from day to day. When no progress had been made in the negotiations between 6th and 12th September they decided to blow up the three aircraft there, while retaining the male passengers as hostages, in order to show their determination and to instil a greater sense of urgency into the governments who were holding the guerrilla prisoners.

As regards the actual blowing up of the aircraft at Dawson's Field, I find the following facts and draw the following inferences. Either before or shortly after the aircraft arrived at Dawson's Field they each had explosive charges of some kind put into them. They were parked in close proximity to each other and there may have been electric wires running between them, as the B.O.A.C. Captain says he saw between the V.C. 10 and the T.W.A. 707. A decision was then taken by the person or persons in control to blow up all three aircraft and to blow them up together insofar as the explosive charges and whatever was the system for detonation enabled this to be done. The necessary arrangements intended to detonate the charges in all three aircraft were made, and everyone then left the immediate vicinity. It was clear from the film which I saw, and conceded on behalf of the Respondents, that the plan was to blow up all three aircraft without the necessity for human intervention from the start of the blowing up until their destruction. In the event, however, the charges in the Swissair 707 detonated later than those in the other aircraft, and it may be that it was found necessary to detonate them by means of small arms fire because they had failed to detonate as planned. There were a number of explosions in all three aircraft, probably four or five more or less alternating on the B.O.A.C. V.C. 10 and the T.W.A. 707 before the first explosion on the Swissair 707. The precise time scale cannot be established on the evidence before me, particularly since the film involved a number of lens changes and one cannot be sure how long these took. My impression, however, is that the charges in all three aircraft detonated within a period of about five minutes and probably a shorter rather than a longer period. All three aircraft were certainly on fire at the same time and were destroyed by explosion and fire beyond repair within a time scale which anyone would measure in minutes and which was almost certainly less than ten minutes.

3. I now turn to the various legal issues involved on the basis of the foregoing facts and the Agreed Submission.

4. The first, and to my mind the most difficult on the authorities, is the question whether the aircraft became total losses before they were destroyed by explosion. It was contended on behalf of the Respondents that they became total losses either when they were hijacked or at the latest when they landed at Dawson's Field. The Claimants disputed this and further contended that in any event the prior events could only constitute a constructive total loss but that the Claimants could in that event still rely upon, and aggregate, the destruction of the aircraft by explosion as actual total losses.

5. An initial question which arose was accordingly whether or not the doctrine of constructive total loss applies to the insurance of aircraft in the same way as to ships. To some extent this question might depend on the wording and nature of the original policy; I have for instance seen aircraft cover written on the basis of marine policy wording. But one of the essential features of the Agreed Submission in the present case was that I was simply asked to assume that the original insurers had incurred liability in respect of two or more of the aircraft, but without making any assumptions about the basis of this assumed liability. Further, for the reasons explained below, I do not believe that it makes any difference whether or not the doctrine of constructive total loss falls to be applied. Generally speaking, it only applies to ships and would in my
view not apply to aircraft; see Moore v. Evans [1918] A.C.185 at p. 191 to 198 in which the House of Lords criticised the marine approach taken in Mitsui v. Mumford [1915] 2 K.B. 27 and followed in Campbell v. Denham (1915) 21 Com. Cas. 357. But no one (and rightly) suggested in the present case that it was necessary for notices of abandonment to have been given between the time when the aircraft were hijacked and when they were destroyed. The relevance of the issue as to whether or not the doctrine of constructive total loss applied turned on the difference between unlikelihood of recovery and uncertainty of recovery. Before the Marine Insurance Act 1906 the common law position was that in cases of losses flowing from deprivation of possession (to use a general term) there was a constructive total loss if recovery was uncertain. When constructive total loss came to be defined in section 60 of the Act the test of unlikelihood was substituted for uncertainty and the law was thereby altered to this extent: see Polurrian v. Young (1915) 1 K.B. 922 and Marstrand v. Beer (1936) 56. L.L.Rep. 163. If I had to decide between these two tests for present purposes I would, like Porter J. in the latter case, hold that after the aircraft had been hijacked their recovery was clearly uncertain, but I would not hold that it was unlikely. I would say, as he there said, that if I had been asked the question at the time I would have replied: “I don’t know”. Indeed, the facts of that case were stronger that in the Judge found (at p.173) that “The master and crew had determined to deprive the owners of her possession and I think of her ownership” whereas in the present case the attitude of the P.F.L.P. had been, up to the time when the aircraft were blown up, that they would be returned if the guerrilla prisoners were released. Although that case also decides that the prospects of recovery must be judged on the basis of what were the true facts at the time, and not on the facts as they then appeared to the owners, I cannot say on the evidence that as from the time when the aircraft were hijacked or landed at Dawson’s Field the P.F.L.P. had definitely decided to destroy them in any event. I do not suppose that they themselves then knew what the outcome was going to be. I do not accept the Respondents’ contention that the aircraft were then irretrievably doomed in any event. But if I had taken the view that it was necessary to decide whether or not the doctrine of constructive total loss and section 60 of the Act of 1906 apply and whether the test is unlikelihood or uncertainty of recovery, I should have felt bound to hold on the basis of Moore v. Evans that the doctrine and the Act do not apply and that the test is accordingly merely uncertainty of recovery.

6. In my view, however, these are not considerations which are or ought to be decisive of this case or any similar factual situation. If a lorry is hijacked on the M1

near London and the driver is forced to drive the hijackers to Scotland, then the position under an insurance policy on the lorry should in common sense be the same as if a similar incident happened in relation to a yacht off the South Coast and the crew were ordered to take the hijackers (whether or not they be called pirates) to France. If the person in control then refused to releaser the lorry and yacht and their crews unless and until certain demands were met then again the position should not in common sense be any different. Nor do I believe that there is any difference in law between these two situations. If the owners of the lorry or of the yacht claimed for a total loss in this situation, while the ultimate fate of their property was still uncertain, then the test must in each case be whether or not a Court would be bound to give judgment for them if a writ had been issued at once (a notice of abandonment having been given in relation to the yacht) and the action had come on for trial before the outcome was known. In my view such an action would not succeed.

7. The argument for the Respondents, and accepting for this purpose that the test is merely uncertainty of recovery, was essentially that a deprivation of possession in itself gives rise to a total loss being adeemed or reduced to a partial loss as the result of subsequent events. They relied on the numerous cases reviewed by Mr Eustace Roskill Q.C. (as he then was) in his Reasons for an award made in 1960 relating to a theft of an aircraft which was subsequently confiscated by authorities who took the aircraft out of the control of the thief. He there held that there had been a loss by theft and not by confiscation and that the proximate cause of the loss of the aircraft had in any event been the theft. The substance of the Respondents’ submission is well summarised in two passages from the authorities on which they relied by way of illustration. In Cory v. Burr (1883) 8 A.C. 393 at p.398 Lord Blackburn was dealing with “the ordinary enumeration of the perils against the loss from which the underwriters undertake to indemnify the assured”. He said:

“Many of these, as for instance men-of-war, enemies, pirates, rovers, and I may add barratry of the master and mariners, do not in themselves necessarily occasion any loss; but when by one of those the subject assured is taken out of the control of the owners there is a total loss by that peril, subject to be reduced if by subsequent events the assured either do get, or but for their own fault might get, their property back”.

Lord Blackburn then referred to Dean v. Hornby (1854) 3 E & B 180 at p. 190 where Lord Campbell said in a case of dispossession by pirates:

“The cases referred to establish this principle: that if once there has been a total loss by capture, that is construed to be...
a permanent total loss unless something afterwards occurs by which the assured either has the possession restored, or has the means of obtaining such restoration”.

Having reconsidered all the relevant authorities I am convinced that passages such as these cannot be applied literally to facts such as those in the present case, for the following reasons. First, they all occur in the context of a loss resulting from a specifically defined peril such as “capture” or “pirates”, and in situations in which the persons who deprived the owners of possession clearly intended there and then to deprive him of possession and ownership forever, if they could. “Deprivation of possession” as such was not an insured peril, let alone a term of art to describe a case of total loss. This expression only took on the semblance of having this effect when it was used as part of the definition of a constructive total loss in section 60 of the Marine Insurance Act 1906. It is therefore dangerous to treat deprivation of possession simpliciter as a cause of total loss subject only to being turned into a partial loss by subsequent recovery. Secondly, even in the Act of 1906 this concept is only a prima facie basis for a case of total loss. It is qualified by unlikelihood of recovery (for which I substitute uncertainty of recovery in the present context) and, as shown by Bolurrian v. Young, this in itself is qualified by the notion of non-recovery within a reasonable time. “Wait and see” is therefore to some extent always an essential ingredient of a claim for a total loss in circumstances involving deprivation of possession, unless

(perhaps) there is a deprivation within the terms of specifically enumerated perils such as “capture” or one can infer from the circumstances that there was a clear intention at the time of the dispossession permanently to deprive the owner of possession and ownership. This is quite different from a “ransom situation” such as in the present case. It also distinguishes the present case from the case dealt with by Mr Roskill, which was a case of theft, with the aircraft being flown away to an unknown destination, only being traced subsequently, and where he held that the proximate cause of the loss was the theft. In my view, as was said by Parker J. (as he then was) in Webster v General Accident [1953] 1 Q.B. 520 at pp. 531/2, every case in which there has been a dispossession must depend on its own facts as to whether and at what stage a total loss has occurred. One must consider the facts concerning the dispossession, the apparent intention of the person or persons concerned, whether or not or to what extent the whereabouts of the subject-matter are known, and allow for the lapse of some period of time to form a view about the prospects of recovery; i.e. whether the loss is total or only partial. In the circumstances of the present case I do not believe that any Court could properly have held that the owners of the high-jacked aircraft at Dawson’s Field were entitled to recover for a total loss if such an action had been brought to trial between 6th and 12th September 1970. I therefore reject the contention that these aircraft were total losses before they were blown up.

8. Next, it was argued on this aspect of the case that if the hijackings did not in themselves constitute total losses, they were the proximate causes of the ultimate total losses of the aircraft. I am bound to say that I have no hesitation in rejecting this as a matter of common sense. When the aircraft were at Dawson’s Field they were undamaged and could have been flown away. They were destroyed by explosion and fire, and these were the proximate causes of their total loss.

9. I now turn to the question of aggregation by reference to the wording of the Excess Loss Clauses set out in (3) (a) and (b) of the Submission. It is first necessary to say something about the words “loss” (particularly in connection with Clause (a)), “occurrence” in connection with Clause (b), and “arising out of any one event” (or “out of one event”) which makes no difference) in relation to both Clauses.

When one reads the cases one finds again and again how difficult and dangerous it is to attempt to define a “loss” in the context of insurance. But in the present case the words “each loss” occur in the context of “ultimate nett loss” and “series of losses”. In this context, and in the context of a policy insuring two or more aircraft which I am asked to assume, I consider that the words “each loss” are best construed by relating them to the units insured, i.e. to single aircraft. I therefore conclude that one cannot on any view aggregate the destruction of the three aircraft on the basis of the words “each loss” by treating the destruction as a single loss for the purposes of Clause (a). In Clause (b) the word “loss” appears in the context of “occurrence” (“catastrophe” can be treated as irrelevant for present purposes), and it is reasonably clear that “occurrence” is (rightly, in my view) treated as a wider term than “loss”. Here again I accordingly consider that “loss” is more properly to be related to single aircraft. Any aggregation on the basis of “loss” simpliciter in these Clauses therefore passes out of the picture.

I turn next to “occurrence”. As a word this is more or less interchangeable with “event”. Both denote something which happens, a happening. The reasons why these two words are used in the Clauses in this way are no doubt stylistic or traditional or both, and no one suggested that anything turned on any difference that there might be between “occurrence” and “event.” But I will deal with “occurrence” and “arising out of one event” separately in the way in which
they are used in Clause (b).

Two preliminary matters, obvious as they are, must in my view be borne in mind throughout. First, in the present context the Clauses envisage a situation in which there may be liability under a policy because more than one aircraft may have been lost or suffered damage. This is the assumption which I am asked to make in paragraph (1) of the Submission in relation to the underlying policies. This is also the reason why “each loss” in Clause (a) and “each and every loss” in (b) are respectively contrasted with “series of losses” and “occurrence and/or series of occurrences”, the latter expressions being in each case deliberately wider. I have also already mentioned that in my view “loss” is in the present context best confined to single aircraft. I therefore agree with the submission made on behalf of the Claimants that “occurrence” must be given a reasonably wide meaning and, despite the context of “series of occurrences”, should be regarded as prima facie capable of including situations in which more than one aircraft is lost or damaged at the same time.

The second important consideration to be borne in mind is that these Clauses are intended to deal with cases in which a single cause or factual situation may lead to a plurality of loss and/or damage, i.e. a plurality of “losses” in the sense in which this word is used in the Clauses, and that “occurrence” and “arising out of one event” must therefore be given a meaning which reflects this intention.

Taking “occurrence” first, both sides gave numerous examples of matters which would or would not in their view be regarded as loss or damage resulting from a single occurrence, such as damage resulting from an air raid, the losses of several ships in an attack on a convoy by a single submarine, a ship breaking loose from her moorings and colliding with a number of other ships, damage from an earthquake, or from the Fire of London, etc., etc. (The same examples were also used in the context of “arising out of one event”). On which side of the line each of these is to be placed depends in my view on the position in which the person who has to make the determination is placed and on the way in which he will therefore approach the question. The crews of a submarine and of ships which are attacked and sunk in a convoy would no doubt regard each attack and sinking as a separate occurrence. An admiral at Naval Headquarters might regard the whole attack and its results as one occurrence, a historian almost certainly would. An earthquake may have a number of tremors producing different damage at different times and in different places; the victims would no doubt regard each tremor as a separate occurrence but others might not. Whether or not something which produces a plurality of loss or damage can properly be described as one occurrence therefore depends on the position and viewpoint of the observer and involves the question of degree of unity in relation to cause, locality, time and, if initiated by human action, the circumstances and purposes of the persons responsible.

I consider that I have to approach the present problem by putting myself in the position of an informed observer at Dawson’s Field on 12th September 1970, watching the preparations for the blowing up of the aircraft, the evacuation of the immediate vicinity and the blowing up of the aircraft. During this period he would of course have seen a multiplicity of actions and events including a number of separate explosions which destroyed the aircraft. Would he then say that the destruction of the aircraft was one occurrence or a series of occurrences? The answer must be subjective. No one contended that each explosion was a separate occurrence. In my view there was one occurrence, one event, one happening, the blowing up of three aircraft in close proximity, more or less simultaneously, within the time span of a few minutes, and as the result of a single decision to do so without anyone being able to approach the aircraft between the first explosion and their destruction. I cannot regard this as a “series of occurrences” any more than the example of a mass execution by a firing squad which was one of the illustrations put forward on behalf of the Respondents. It seems to me, with respect, an excellent illustration, but I cannot begin to see how anyone could sensibly contend that the victims died in a series of occurrences.

I confess that I had even less difficulty with the words “arising out of one event”. Having regard to my view about “occurrences” this does not matter in relation to Clause (b), but it is vital in relation to Clause (a) because of the restrictive construction which should in my view be put on “loss”. Both parties agreed that on my view the blowing up of the aircraft consti-
Royal Exchange Assurance v. Kingsley Navigation [1923] A.C. 235. But I think that in the present context it is probably wider, because the Clauses envisage that one event may cause a plurality of loss and/or damage affecting more than one aircraft. I have already dealt with the Respondents’ contention that the proximate cause of the destruction of the aircraft were the hijackings, which I cannot accept. I accept, their contention that if the aircraft became total losses by hijacking (which I reject) then the hijackings could not be aggregated for any purpose under the Clauses. Since the aircraft were hijacked by different persons and in widely separated localities it would be impossible to treat the hijackings as a single occurrence. I also reject the contention faintly and more or less formally advanced by the Claimants that the hijackings arose out of one event, viz. the P.F.L.P’s overall plan. I agree that a plan cannot by itself constitute an event. But it was then said on behalf of the Respondents that the destruction of the aircraft at Dawson’s Field could also not be said to have arisen out of one event, because the only unifying event could have been the decision or order to blow up the aircraft. But in my view this approach is much too narrow, though this view must be admittedly be coloured by my view about “occurrence”. The destruction of the aircraft arose from the decision or order to detonate the explosive charges in them which was thereupon carried out in the way described above. If three aircraft become total losses because a decision or order to blow them up together is carried, out, why is the carrying out of that decision or order not one event?

Putting the matter more generally, it was throughout conceded by the Respondents that there would be aggregation under these Clauses in relation to the destruction of the aircraft at Dawson’s Field if they had all been destroyed by a single aerial bomb or the detonation of a single explosive charge. Now, having regard to the nature and size of aircraft such as these it is probably not very easy to blow them all up together simultaneously and by a single means. However, given the means available, the P.F.L.P. made a pretty good job of carrying out what I take to have been their decision, viz. to blow up the three aircraft together as nearly as they could. I cannot accept that the small extent to which simultaneity failed to be achieved is any answer to the contention that the destruction of the aircraft must be aggregated under these Clauses.

10. For the sake of completeness I now set out the questions which I had proposed to cover all the matters in issue and my answers to them.

(1) (a) Were any of the four aircraft a total loss by deprivation of possession before they were destroyed by explosion? No, for the reasons explained above.

(b) If so, can the Claimants nevertheless rely on their destruction by explosion as a total loss? This does not arise because of my answer under (a), but if my view about (a) had been different I should have answered “no”. I think that this would follow from Anderson v. Marten [1908] A.C. 334 (ship captured and then wrecked; held total loss by capture) and because I do not consider that the doctrine of constructive total loss has any application: see Moore v. Evans (supra). I would therefore have rejected the Claimants’ contention that they could have relied upon an actual total loss by explosion notwithstanding a previous constructive total loss by hijacking.

(2) If the four aircraft were a total loss by deprivation of possession was there

(a) one loss

Or (b) one occurrence

Or (c) a series of losses or occurrences arising out of one event.

Or (d) none of these within the meaning of the Clauses in the Submission?

This does also not arise because in my view the aircraft were not total losses by deprivation of possession. If my conclusion had been different then the answer would have been (d) because the hijackings could not in my view be aggregated on any basis.

(3) If the Claimants can rely on the destruction of the aircraft by explosion as total losses, and it not being contended that the aircraft destroyed at Cairo can be aggregated with the aircraft destroyed at Dawson’s Field for this purpose, did the destruction of the three aircraft at Dawson’s Field constitute

(a) one loss
Or (b) one occurrence

Or (c) a series of losses or occurrences arising out [of] one event

Or (d) none of these

Within the meaning of the Clauses in the Submission? My answer is: both (b) and (c).

11. Although this was an unusually informal and friendly arbitration no one asked me not to deal with costs or to deal with costs otherwise than in the usual way. The Claimants having succeeded I have therefore awarded them costs in the usual way.

4, Essex Court

Temple, E.C.4. 29th March 1972