Claim No 2012 Folio 272

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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
AND IN AN ARBITRATION CLAIM

The Rolls Building
Fetter Lane
London EC4A 1NL
Date: 08/02/2013

Before :

MR JUSTICE FIELD

- -

Between :

Aioi Nissay Dowa Insurance Company Limited (formerly The Chiyoda Fire and Marine Insurance Company Limited) — **Claimant**

-and-

(1) Heraldglen Limited
(2) Advent Capital (No.3) Limited — **Defendants**

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Michael Crane QC and Patrick Goodall (instructed by **Addleshaw Goddard LLP**) for the **Claimant**
Alistair Schaff QC and Nicholas Craig (instructed by **Holman Fenwick Willan LLP**) for the **Defendants**

Hearing date: 23 November 2012

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Judgment

Mr Justice Field:

Introduction

1. This is an appeal under s. 69 of the Arbitration Act against an Award dated 26 January 2012 ("the Award") made by a Tribunal of three arbitrators, Mr Ian Hunter QC (Chairman), Mr David Peachey and Mr Richard Outhwaite.

2. One of the questions the Tribunal had to decide was whether the losses sustained by the Defendants on 10 ("inward") reinsurance contracts arising out of the 9/11 attack on the Twin Towers of the World Trade Center were caused by one or more occurrences or series of occurrences "arising out of one event" for the purpose of applying policy limits and deductibles in four retrocession excess of loss reinsurances written in favour of the Defendants by the Claimant[1].

3. With the agreement of the parties, the Tribunal relied for their findings of primary fact on the relevant findings in the Final Report of the National Commission on Terrorist Attacks upon the United States. The retrocession excess of loss reinsurances ("the outward XL reinsurances") were governed by English law and the Tribunal set out to apply to the facts the well-known test of the "unities" deriving from Mr Michael Kerr QC's award in the *Dawson's Field Arbitration* and applied and developed by Rix J in *Kuwait Airways Corporation v Kuwait Insurance Co SAK* [1996] 1 Lloyd's Rep 664.

4. In paragraph 83 of the Award the Tribunal concluded that the losses arising on the 10 inward reinsurances were caused by two separate occurrences arising out of separate events. It is that conclusion and how it was reached which is the subject of this appeal.

The outward XL reinsurance contracts

5. The four outward XL reinsurance contracts were subject to LSW (London Standard Wording) 351 and covered "all business underwritten by the Reinsured and classified by them as Aviation" for a stated limit (ranging from US $1 million to US $3 million) "each and every loss" in excess of US $100,000 where the "total original incurred aviation loss" (under the Original Aviation Loss Warranty Clause) exceeded the sum there specified (ranging from US $200,000,000 to US $500,000,000). The cover therefore only responded in the event of a major market catastrophe causing a loss of at least US $200 million to US $500 million depending on the contract under consideration.

6. "Hull War written as such" was excluded but war risk and allied perils losses were written back by the contracts providing cover for the risks set out in the London aviation market standard wording AVN 48B when assumed as part of some wider aviation account. Included in AVN 48B are claims caused by (d) any act of one or more persons, whether or not agents of a sovereign Power, for political or terrorist purposes and (g) hi-jacking or any unlawful seizure or wrongful exercise of control of the Aircraft in flight made by any person or persons on board the Aircraft acting without the consent of the Insured.

[1] Together with The Taisei Fire and Marine Insurance Company and The Nissan Fire and Marine Insurance Company Limited.

7. Article 4 of LSW 351 provided, inter alia, that the term 'each and every loss' shall be understood to mean 'each and every loss or accident or occurrence or series thereof arising out of one event'".

8. The fact that the outward reinsurances were whole account catastrophe excess of loss covers means that the losses flowing through to these covers were likely to be from a variety of original insurers and to represent a variety of different types of original loss, eg property damage, personal injury and liability claims.

The "unities" doctrine.

9. The genesis of this doctrine was Mr Michael Kerr QC's award made in 1972 in the *Dawson's Field* arbitration which was cited to and quoted by Rix J in the *Kuwait Airways Corporation* case. One of the questions to be decided by Mr Kerr was whether the destruction of three aircraft hijacked by the PLO represented a loss or occurrence or series of occurrences arising out of one event for the purposes of an aggregation clause in an excess of loss reinsurance contract. Four planes in total were hijacked as part of a planned and co-ordinated operation. The objective was to use the aircraft and the hostages taken with them as bargaining counters to reinforce a demand for the release of Palestinian prisoners. One of the four aircraft was detained in Cairo, the other three were held at Dawson's's Field, a remote desert airstrip near Zarka, Jordan. The one aircraft at Cairo was blown up because the hijackers did not have sufficient control over it or the hostages on board for their ransom demand operation. This action also underlined the hijackers determination in relation to the three aircraft and hostages held at Dawson's's Field. As for these three latter aircraft, they were blown up together as one operation when no progress had been made in the negotiation of the hijackers' demands. Mr Kerr took the view that the aggregation clauses were 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 was used in the clauses, and that "occurrence" and "arising out of one event" must therefore be given a meaning which reflected this intention. He went on to say:

> 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.
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> I consider that I have to approach the present problem by putting myself in the position of an informed observer at Dawson's'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 a result of a single decision to do so without any one being able to approach the aircraft between the first explosion and their destruction.

10. In *Kuwait Airways Corporation* one of the issues Rix J had to decide was whether the seizure of 15 aircraft belonging to the plaintiff from Kuwait Airport by Iraqi forces in August/September 1990 was one "occurrence" for the purpose of an aggregation clause in a single direct war policy. Iraq invaded Kuwait in the early morning of 2 August 1990 and by mid-morning Iraqi forces were in control of Kuwait airport, which was one of the primary targets of the invaders. By 8 August 1990, 14 of the 15 aircraft had been flown to Iraq. The 15th, an Airbus in the colours of Egypt Air which had been re-delivered at the end of a lease, was the last to be removed since it was not initially airworthy. It was flown to Iraq some time later in August or September 1990. Having considered *The Alexion Hope* [1988] 1 Lloyd's Rep 311, *Forney v Dominion Insurance Co Ltd* [1996] 1 Lloyd's Rep 502, *Caudle v Sharp* [1995] L.R.L.R. 433 and quoted extensively from the *Dawson's Field* award, Rix J said (at p 686):

> It seems to me that these authorities justify the following propositions. An "occurrence" (which is not materially different from an event or happening, unless perchance the contractual context requires some distinction to be made) is not the same as a loss, for one occurrence may embrace a plurality of losses. Nevertheless, the losses' circumstances must be scrutinised to see whether they involve such a degree of unity as to justify their being described as or arising out of, one occurrence. The matter must be scrutinised from the point of view of an informed observer placed in the position of the insured.
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> I would suggest that as in the case of analysing a situation for the purpose of deciding whether a constructive total loss has occurred, the scrutiny must be performed on the basis of the true facts as at that time, and not simply on the facts as they may have appeared at the time (see *Polurrian Steamship Co. Ltd. v Young* [1915] 1 KB 922, *Marston Fishing Co Ltd v Beer* (1936) 56 LlL. Rep 163); and that, as in the case of frustration, the probabilities as to the true facts as at that time may be tested by reference to subsequent events (see *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435 at 454). In assessing the degree of unity regard may be had to such factors as cause, locality and time, and the intentions of the human agents. An occurrence is not the same thing as a peril, but in considering the viewpoint or focus of the scrutineer one may properly have regard to the perils insured against.

11. Applying these principles, Rix J found[2] that: (i) the aircraft were all lost on 2 August 1990 and accordingly there was unity of time; (ii) there was unity of location; (iii) there was unity of cause, for, whichever of the insured perils was appropriate – war and allied perils – it operated alike to all aircraft; (iv) there was unity of intent; and (v) since the contract was one of war risks it must be fair, if appropriate, to describe the relevant occurrence in broader, as distinct from narrow, terms. He then went on to say:

> How then does one describe an occurrence in and by reason of which KAC became dispossessed of all 15 aircraft standing at the airport at the time of the invasion and capture of the airport, in circumstances where the Iraqis intended to exercise dominion over those aircraft and to fly them out of Kuwait to Iraq as soon as they could logistically do so? In my judgment the occurrence is the successful invasion of Kuwait, incorporating the capture of the airport and with it KAC's aircraft on the ground; at its narrowest it is the capture of the KAC fleet at Kuwait airport. On either view, it seems to me, those matters are appropriately described as one occurrence.

12. As the Tribunal observed in paragraph 37 of the Award, the utility of the unities analysis has been subsequently affirmed by the Court of Appeal in *Mann v Lexington Insurance Co* [2001] 1 Lloyd's Rep 1 and *Scott v Copenhagen Reinsurance Co (UK) Ltd* [2003] Lloyd's Rep IR 696. In the latter case Rix LJ said (at para 81):

> Are the losses to be aggregated as all arising from one event? That question can only be answered by finding and considering all the relevant facts carefully, and then conducting an exercise of judgment. That exercise can be assisted by considering those facts not only globally and intuitively and by reference to the purpose of the clause, but also more analytically, or rather by reference to the various constituent elements of what makes up one single unifying event. It remains an exercise of judgment, not a reformulation of the clause to be construed and applied.

The Tribunal's findings of fact in respect of the attack on the Twin Towers of the World Trade Center.

13. These findings are set out in paragraphs 41 – 57 of the Award.

> 41. <u>The four flights</u>
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> Four flights were hijacked within minutes of each other (or at least that was the plan) in what was the execution of a terrorist conspiracy inspired and organised by members of the Al Qaeda. The targets were the Twin Towers of the WTC, the Pentagon and the Capitol Building or the White House.
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> 42. <u>American Airlines Flight 11</u>

[2] At p.689

Two of the terrorists, Atta and Omari, boarded a 6:00 flight from Portland to Boston's Logan Airport. They arrived at 6:45. Seven minutes later Atta took a call from Marwan and Shehhi, a long-time colleague, who was at another terminal at Logan. They spoke for three minutes. Atta was the presumed team leader on flight AA11 and Shehhi is presumed to have discharged the same function on flight UA 175.

43. Between 6:45 and 7:45 Atta and Omari, together with three other terrorists checked in and boarded Flight 11 bound for Los Angeles. The security check points, through which passengers, including Atta and his colleagues, gained access to the American 11 gate at Terminal 8, were operated by Globe[3] under a contract with American Airlines.

44. Flight 11 provided a nonstop service from Boston to Los Angeles. In addition to the Captain and First Officer, the aircraft carried its full capacity of nine flight attendants. There were 89 passengers on board, including the five terrorists.

45. Based on the evidence available to it the Commission concluded that the hijacking began at 8:14 or shortly thereafter. Reports from two flight attendants in the coach cabin indicate that, as the hijacking began, two of the hijackers who were seated in first class stabbed the two unarmed flight attendants who would have been preparing for cabin service. Atta was the only terrorist on board who was trained to fly a jet. Somehow the terrorists gained access to the cockpit. Sitting in the row behind Atta and Omari was a passenger, Daniel Lewin, who happened to have served four years as an officer in the Israeli military. It may be that he made an attempt to stop the hijackers in front of him not realising that another terrorist was sitting directly behind him. The latter then stabbed Mr Lewin.

46. Shortly afterwards the two flight attendants in coach made telephone contact with the ground to report an emergency on board. At 8:26 one of them reported that the plane was flying erratically and a minute later it changed course and started to fly south. The other reported that the plane had been hijacked, a man in first class had had his throat slashed, two flight attendants had been stabbed, one being seriously hurt and the other suffering from what seemed to be minor wounds.

47. At 8:44 the same attendant reported that the plane was in a rapid descent and that it was flying far too low. The phone call ended. At 8:46 Flight 11 crashed into the North Tower of the WTC in New York City. All on board, along with an unknown number of people in the tower, were killed instantly.

[3] Globe Aviation Services Corporation

48. When Flight 11 flew into the upper portions of the North Tower it cut through floors 93 to 99. Hundreds were killed instantly by the impact. Hundreds more remained alive but trapped since the stairwells became impassable from the 92nd floor up. Within ten minutes of impact, smoke was beginning to rise to the upper floors in debilitating volumes and isolated fires were reported. Faced with insufferable heat, smoke and fire, and with no prospect of relief, some jumped or fell from the building.

49. At 10:28 the North Tower collapsed, killing all civilians alive on the upper floors, an undetermined number below and scores of the first responders.

50. United Airlines Flight 175

In another Logan terminal, Terminal 8, following his telephone conversation with Atta, Shehhi together with four other terrorists checked in for United Airlines flight 175 also bound for Los Angeles. The flight was scheduled to depart at 8:00. The single checkpoint through which they passed was controlled by United Airlines which had contracted with Huntleigh[4] to perform the screening.

51. The aircraft pushed back from its gate at 7:58 and departed Logan at 8:14. In addition to the Captain and the First Officer there were seven flight attendants and 56 passengers on board.

52. By 8:33 the aircraft had reached its assigned cruising altitude of 31,000 feet. The flight had taken off just before American Flight 11 was being hijacked At 8:42 the Flight 175 air crew completed their report on a "suspicious transmission" overheard from another plane (this turned out to be Flight 11). That was United 175's last communication with the ground.

53. The Commission Report concludes that the hijackers attacked sometime between 8:42 and 8:46. They used knives and Mace. They stabbed and killed both pilots and stabbed a flight attendant. The report states as follows:

> "Given similarities to American 11 in hijackers seating and in eye witness reports of tactics and weapons, as well as the contact between the presumed team leaders, Atta and Shehhi, we believe the tactics were similar on both flights."

54. At 8:51 the flight deviated from its assigned altitude and a minute later New York air traffic controllers began repeatedly and unsuccessfully trying to contact it. At 8:58 the flight took a heading towards New York City.

[4] Huntleigh USA Corporation

> 55. At 9:03 flight 175 struck the South Tower of the WTC. All on board along with an unknown number of people in the tower were killed instantly.
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> 56. When the plane struck the South Tower it crashed through the 77th to 85th floors. It banked as it hit the building leaving portions of the building undamaged on the impact floors. As a consequence, and in contrast to the situation in the North Tower, one of the stairwells remained passable at least from the 91st floor down, and likely from top to bottom.
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> 57. At 9:58 the South Tower collapsed in ten seconds, killing all civilians and emergency personnel inside as well as a number of individuals in the concourse in the nearby Marriott hotel and in neighbouring streets. The building collapsed into itself, causing a ferocious windstorm and creating a massive debris cloud. The Marriott hotel suffered significant damage as a result of the collapse of the South Tower.

14. The Tribunal also dealt in less detail with the two other hijackings that took place on 9/11. The first of these involved American Airlines Flight 77 which took off at 8:20 from Dulles International Airport in Virginia and crashed into the Pentagon at 9:37. The second involved United Airlines Flight 93 which took off from Newark Liberty International Airport at 8:42 and, due to brave resistance from some of the passengers crashed in an empty field in Pennsylvania rather than into one of its two possible targets, the Capitol building or the White House.

The original claims arising out of the attack on the World Trade Center and how they fed into the outward XL reinsurances.

15. Following the four hijackings on 9/11, a large number of actions were started against United Airlines, American Airlines, Huntleigh and Globe. The personal injury and wrongful death claims resulting from these flights were settled for amounts approved by District Judge Hellerstein in the Southern District of New York. Property and business interruption claims were the subject of a US $1.2 billion global settlement the liability for which was allocated in different amounts between United Airlines, American Airlines Huntleigh and Globe. The wrongful death and personal injury claims were split between each airline and their respective security companies on a 50%/50% basis.

16. Each of the claims under the 10 inward reinsurances was settled on the basis that the attacks on each of the Twin Towers were separate events. Some of the inwards contracts were written on a “one event” basis; others were written on an “each aircraft” or “each insured” or “one event” basis at the discretion of the reinsured.

17. All of the inwards claims to the First Defendant were settled on a two event basis. It was the Claimant’s contention that their liability under the outward XL reinsurances was on a one event basis that led to the arbitration.

The Tribunal’s approach and reasoning

18. In paragraphs 30 to 37 of the Award, the Tribunal referred to *Dawson's Field* and *Kuwait Airways Corporation* for the purpose of identifying the test of the "unities" and in doing so expressed the view in paragraph 34 that the facts that are regarded as having a bearing on the final conclusion – one event or two – have to be considered in the round and in the context of the particular contractual wording and the overall contractual purpose. In paragraph 39, the Tribunal accepted that the unities test was the correct way to proceed and stated:

> We accept that the matter is one to be assessed from the viewpoint of an informed observer having regard to the facts as they are now known to have been rather than as they might have appeared at the time to an observer not fully aware of what was in fact happening.

19. Having set out the facts of the four 9/11 hijackings the Tribunal proceeded in paragraphs 71 to 84 to evaluate the unities as to: (i) the circumstances and purposes of the persons responsible; (ii) cause; (iii) timing; and (iv) location.

20. Dealing with the circumstances and purposes of the persons responsible, the Tribunal acknowledged in paragraph 73 that the hijackings were the result of a co-ordinated plot paid for by Al Qaeda but observed that it was clear from the authorities that a conspiracy or plan cannot of itself constitute an occurrence or an event for the purposes of clauses in insurance contracts which refer to each and every loss, occurrence or event. The position was different where originating cause is the criterion determining aggregation of a plurality of losses. That unifying factor is of a much broader reach than the aggregation clause in the inwards and outwards XL reinsurance Contracts. It was this that was the reason for the decision of the US Court of Appeals, Second Circuit in *World Trade Center Properties v Hartford Fire Insurance Co* [2003] 345 F. 154 that the damage caused to the World Trade Center on 9/11 was the result of a single "occurrence", the definition[5] of which in the relevant insurance contract referred to losses attributable directly or indirectly to one cause or one series of similar causes.

21. In paragraph 75 the Tribunal considered the unifying factor of cause by asking what was the cause of the losses in the present case. Their answer was that "there were two separate causes …. because there were two successful hijackings of two separate aircraft, admittedly in execution of a dastardly plot to turn each into a guided missile each directed at one of the two signature Towers of a single property complex." The Tribunal were not satisfied that there was any basis, at least in the context of analysing unity of cause, for concluding that there was any factor amounting to an event of sufficient causative relevance to override the conclusion that two separate hijackings caused separate loss and damage.

22. When dealing with unity of time, the Tribunal took the view (paragraph 79) that it was right to look at the whole period from check-in and passenger scrutiny to the collapse of each Tower and not just from the time each flight took off. They held that

[5] The full definition was: '"Occurrence" shall mean all losses or damages that are attributable directly or indirectly to one cause or to one series of similar causes. All such losses shall be added together and the total amount of such losses will be treated as one occurrence irrespective of the period of time or area over which such losses occur.'

there were clearly similarities in the timing of the events from the commencement of the flights to contact with the Towers but these were not such as to lead to the conclusion that there was either one occurrence or two occurrences arising out of one event. So far as timings were concerned there were two occurrences and two events: infliction of personal injury and death started in the case of each aircraft shortly after they were hijacked and continued until at least the collapse of each of the Towers, a period of 134 minutes in the case of Flight 11 and 72 to 76 minutes in the case of Flight 175.

23. The unifying factor of location was dealt with in paragraph 82. The Tribunal held that the fact that the Twin Towers were located in close proximity to one another and were part of a single property complex did not give rise to a sufficient degree of unity for them to conclude that there was a single occurrence or two occurrences arising out of one event. Each Tower was a separate building, albeit connected by a single mall. They did not stand or fall together. If only one of the hijackings had succeeded, only one Tower would have been destroyed. The fact that both Towers were destroyed was attributable to the fact that there were two successful hijackings directed at separate buildings forming part of the World Trade Center.

24. In paragraphs 83 and 84 of the Award, the Tribunal concluded as follows:

> 83. Having examined separately the various different potential unifying factors, we find that none is sufficiently compelling to lead us to conclude that there are in the present case two occurrences arising out of a single event. The task we have in the present analysis is to weigh all these factors together giving each appropriate weight. We have done that and are fully satisfied that the hijackings, consequent death and personal injury on board before contact with each tower, and then further death, injury and property damage consequent on the towers being separately struck constitute two separate occurrences which did not arise out of one event. An independent objective observer watching each of the hijackings and then death and personal injury on board would have concluded that there were two separate hijackings. The same observer then hypothetically transported to the proximity of the WTC would have observed two aircraft flying into the Twin Towers and would clearly have in his mind two incidents.
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> 84. It seems to us that this conclusion is consistent with what we perceive to be a common sense result. All four hijackings led to death, injury and (in three of the four cases) third-party property damage. They were carried out within the space of couple of hours on the morning of the same day. It has never been suggested on the evidence presently available that these constitute four occurrences arising out of a single event. It would seem to us that it would be a strange result if we were to conclude that the loss resulting from the hijackings of Flights 77 and 93 each constituted separate occurrences but Flights 11 and 175 resulted in two occurrences arising out of one event, with the result that for reinsurance purposes in the context of

> the present Outward XL Reinsurance Contracts, there are in fact three loss events as AIOI contend, rather than four.

The Claimant's contentions in this appeal

25. Mr Crane QC for the Claimant contended that instead of confining their analysis to whether the attacks on the Twin Towers constituted one event, the Tribunal in paragraph 84 wrongly focussed on, and were wrongly influenced by, their conclusion as to the number of loss events arising out of the hijackings of all four flights -- AA 11 (which crashed into the North Tower); UA175 (which crashed into the South Tower); AA77 (which crashed into the Pentagon); and UA93 (which crashed in a field in Pennsylvania). In Mr Crane's submission, whether or not the Pentagon and Pennsylvania arose out of the same event was irrelevant.

26. I reject this contention. In my judgement, the Tribunal made it clear that their focus was on the attacks on the Twin Towers. In paragraph 84 they were simply carrying out "a sense" check on the conclusion they had reached in the previous paragraph. Thus: (i) in paragraph 38 they said "In considering the attacks on the Twin Towers on the morning of 9 (sic) September 2001 we approach the task of deciding whether there was one event or two events in the following way …."; (ii) in paragraph 40 they said "the issues in the present case require us to focus on the destruction of the Twin Towers as a result of the hijackings of the two aircraft performing Flights AA 11 and UA 175"; (iii) in paragraph 58 they said "the focus in the present case is on the Twin Towers"; (iv) when considering each of the unities of cause, time and location they had regard only to the Twin Towers flights and made but one reference to the four flights when dealing with the other unity when they said there could be no doubt that the four hijackings were the result of a co-ordinated plot; and (v) in reaching their conclusion in paragraph 83 that the objective independent observer would have concluded that there were two events, they focussed exclusively on the Twin Towers attacks.

27. Further, in my judgement the Tribunal committed no vitiating error in carrying out the sense check they undertook in paragraph 84. The fully informed observer possessed of the true facts on 9/11 would have been aware that four flights were hijacked within minutes of each other pursuant to a co-ordinated plan to turn them into guided missiles loaded with aviation fuel to be used in attacks on the Twin Towers, the Pentagon and the Capitol Building or the White House, and the Claimant was placing great emphasis on the fact that the Twin Tower attacks had been deliberately co-ordinated. One can see therefore why the Tribunal might have wanted to test the strength of this part of the Claimant's case by having regard to all four attacks and noting that it had "never been suggested on the evidence presently available that [the four hijackings] constitute four occurrences arising out of a single event."

28. It was also submitted on behalf of the Claimant that the Tribunal erred when it considered the unifying factor of cause in paragraph 75. Citing Rix J's judgement in *Kuwait Airways Corporation* at p. 689[6], Mr Crane argued that unity of cause is unity of operative peril and maintained that the Tribunal accordingly erred in asking generally what was the cause of the losses. I cannot accept this submission. In *Kuwait*

[6] "There is unity of cause, for, whichever of the insured perils is the appropriate one, it operates alike in respect of all aircraft."

Airways Corporation the underwriters argued in support of their case that the losses were all part of one occurrence that the operative peril was war and I regard this as the explanation for Rix J's consideration of the unity of cause in terms of operative peril. In *Scott v Copenhagen Reinsurance Company (UK) Limited* at first instance, Langley J approached the question of unity of cause generally without reference to the insured perils and no quarrel was taken with this approach by Rix LJ when the case came before the Court of Appeal. In any event, in the instant case the attack on the World Trade Center fell within both the terrorism and the hijacking perils set out in AVN 48B and for this reason I can see no error in the Tribunal approaching the question of causation generally, rather than through the prism of operative peril.

29. It was further submitted by Mr Crane that the Tribunal erred in that they: (i) failed to appreciate that it did not follow from the fact that both hijacking and terrorism were operative perils that the losses did not arise out of the same event; and (ii) focussed too much on the hijacking peril. In my view (i) gets the Claimant nowhere since the question remains, was the attack on the World Trade Center one event or two. As to (ii), I can find nothing in the Award to substantiate this complaint. The Tribunal found that there were two events not one, but it does not follow from this that they must have made the error contended for.

30. Next it was submitted that the Tribunal erred in assessing the situation from the standpoint of "an objective independent observer" rather than from the standpoint of an objective independent observer in the position of the insured under the outward XL reinsurances. In *Dawson's Field* Mr Kerr adopted the approach of putting himself in the position of the "informed observer" watching the relevant events leading to the blowing up of the aircraft. In *Kuwait Airways Corporation*, however, Rix J said that "the matter must be scrutinised from the point of view of an informed observer placed in the position of the insured." It would seem that he adopted this formulation having in mind a passage in Donaldson J's judgement in *Forney v Dominion Insurance Co Ltd* [1969] 1 Lloyd's Rep 502 at 508 which he cited at pp. 683-684.

31. In my judgement, it is tolerably plain that the Tribunal had well in mind that they had to assess the facts through the eyes of an objective observer in the position of the insured. I say this having in mind: (i) the Tribunal's citation in paragraph 35 of the passage of Rix J's judgement where this approach is articulated; (ii) the Tribunal's detailed description of the outward XL reinsurances (paragraphs 7-12) and their account of how the original claims arose and fed through into those insurances (paragraphs 13-27); and (iii) the Tribunal's conclusion in paragraph 34 that the *Dawson's Field* approach meant that the facts "bearing on the final conclusion have to be considered in the round and in the context of the particular contractual wording and the overall contractual purpose".

32. Accordingly, I am not satisfied that the Tribunal's reference to the independent observer, rather than to the independent observer in the position of the insured, constitutes an error of law that vitiates their conclusion that there were two events, rather than one for the purposes of aggregation. It is perhaps to be noted that Mr Crane did not attempt to demonstrate that the Tribunal's stated approach had led to an erroneous conclusion. Instead, the highest he put it was that the yardstick the Tribunal adopted *may* account for "an overly restrictive approach".

33. Mr Crane next submitted that one of the purposes of the aggregation formula in Article 4 is to corral together losses resulting from the same catastrophe and that accordingly "event" ought to be given a broad meaning. He cited Rix J's view in *Kuwait Airways Corporation* that, since the contract there was one of war risks, it was appropriate to describe the relevant occurrence in broad terms, and argued that that approach applies to the instant case *a fortiori* since here we have at the retrocession level a war risk insurer protecting a whole account distant from the original loss which will receive a miscellany of losses in the event of a catastrophe. Implicit in these submissions was the suggestion that the Tribunal had not properly construed the aggregation clause, but it is clear from the comparison they drew in paragraph 73 between the wording of Article 4 and the wording in *World Trade Center Properties v Hartford Fire Insurance Co* (above) that the Tribunal did have carefully in mind the wording of Article 4. Also, an arbitral tribunal is not obliged to spell out every step in its reasoning and it cannot in this case be inferred from the Tribunal's conclusion on the ultimate issue that they misconstrued Article 4 by construing it too narrowly.

34. Mr Crane further argued that when considering the unities the Tribunal failed to have sufficient regard to the purpose and intent driving the hijacks and the crashes. He accepted the correctness of the Tribunal's observation in paragraph 73 that a conspiracy of itself cannot constitute an "occurrence" or an "event" but submitted that the Tribunal should have gone on to consider whether, given that the hijackings of Flights AA11 and UA175 and the deliberate crashing of those planes into the Twin Towers were indisputably incidents of a terrorist operation directed at the World Trade Center, those incidents were "a series" of "occurrences" "arising out of one event".

35. Indeed, Mr Crane went so far as to submit that if the Tribunal had properly construed Article 4 and properly analysed the unities by giving appropriate weight to the purpose and intent of the hijackings and crashes there was only one conclusion which they could have properly reached: the insured losses caused by those incidents arose out of one event and not two.

36. I do not accept these submissions. Having observed that a plan in itself cannot be an occurrence the Tribunal did not, as suggested by Mr Crane, take no account of the underlying terrorist plot when they came to analyse how that plan was implemented. Thus, in concluding that there were two separate causes for the insured losses the Tribunal acknowledged that: (a) the hijackings were "in execution of a dastardly plot to turn each [aircraft] into a guided missile each directed at one of the two signature Towers of a single property complex"; and (b) "the methods by which those hijackings were carried out were in many respects similar, no doubt because of the pre-existing planning."

37. In my judgement, the Tribunal accurately summarised the law relating to the unities and proceeded fairly and properly to undertake the exercise in judgement that that analysis involves. They were entitled in my view to find that there were two separate causes for the insured losses because there were two successful hijackings of two aircraft. It was also open to the Tribunal to find in paragraph 75 that there was no basis for concluding that there was "any factor amounting to an event of sufficient causative relevance to override the conclusion that two separate hijackings caused separate loss and damage".

38. The Tribunal was also entitled to find for the reasons they gave that there was no sufficient unity of time or location for the losses to have arisen out of one event, notwithstanding that the Twin Towers were part of an overall complex and notwithstanding the relative closeness in time between the commencement of each flight and the subsequent crashes. The Towers were separate buildings; they did not stand or fall together. As for the time factor, it was justifiable for the Tribunal to take account of the whole period of time from check-in and passenger scrutiny to the collapse of each of the Towers because the Tribunal were dealing with airline and/or security company liabilities in respect of the hijacks. It is also the case that on board the two aircraft the timing of the personal injuries or deaths on Flight AA11 was independent of the timing of events on Flight UA175 and vice versa; and the timing of the collision into the North Tower (with subsequent fatalities and collapse) was likewise independent of the timing of the collision into the South Tower (and its subsequent fatalities and collapse). And even when viewed in terms of the time of impact: (a) the time at which Flight UA175 struck the South Tower was not related to the time at which Flight AA11 struck the North Tower; and vice versa; (b) the timing of the deaths of people on Flight AA11 or in the North Tower was not related to the timing of the collision of Flight UA175 with the South Tower or the deaths of the people in the Flight UA175 aircraft or the South Tower; and vice versa; and (c) the time of the collapse of the North Tower was not related to the time at which Flight UA175 struck the South Tower or the South Tower collapsed.

39. The Tribunal were well aware of the Claimant's contentions as to the significance of the fact that the hijackings and subsequent deliberate crashes into the Twin Towers were acts committed in the implementation of a terrorist plot against the World Trade Center. Notwithstanding those contentions, the Tribunal reached the decision on aggregation that it did -- a decision that was open to it on the evidence applying the unities approach they adopted.

Conclusion

40. In the result, notwithstanding the skill with which Mr Crane argued this appeal, I find that the Tribunal made no error of law in reaching their conclusion that the insured losses caused by the attacks on the World Trade Center arose out of two events and not one. They accurately identified the applicable law pursuant to which they undertook an exercise of judgement. The decision they came to was one which was open to them to reach and in making it they: (i) correctly applied the law; (ii) had regard to all materially relevant matters; and (iii) did not take into account impermissible considerations. The Award accordingly stands and this appeal is dismissed.