OUTER HOUSE, COURT OF SESSION

[2025] CSOH 28

CA16/20 & CA17/20

OPINION OF LORD RICHARDSON

In the causes

JONATHAN MARTIN GOUGH

Pursuer

against

CANNONS LAW PRACTICE

Defender

and

LEE MONTAGUE-TRENCHARD

Pursuer

against

CANNONS LAW PRACTICE

Defender

Pursuers: Smith KC, Black, C Smith; Thompsons
Defender: Springham KC, Tait, Lindsay; DAC Beachcroft Scotland LLP

13 March 2025

Introduction

[1] This opinion concerns two separate actions. Both actions are brought by former pilots against a firm of solicitors. Although some of the particular circumstances of each of the pilots differed, most of the issues and much of the evidence to be led in both cases was

common. Accordingly, I case-managed the cases together and heard evidence in both cases concurrently.

[2] In each case, the pursuer claims that he suffers from a number of chronic symptoms which have prevented him from continuing his work as a pilot. Mr Gough's flying medical certificate was suspended in 2005. In Mr Montague-Trenchard's case, his certificate was suspended in January 2012. Specifically, each pursuer claims to suffer from Aerotoxic Syndrome or "ATS". This is a controversial diagnosis. The condition is not recognised in the International Classification of Diseases and there are no generally accepted or validated diagnostic criteria for it. Each pursuer maintains that his condition has been caused by exposure to toxic fumes on a daily basis while he was employed as a pilot.

[3] In 2012, Mr Montague-Trenchard got in contact with Mr Frank Cannon of the defender. Subsequently, both of the pursuers became clients of the defender. Both pursuers were interested in pursuing claims for damages against their former employers. Ultimately, no such claims were brought by the defender on behalf of the pursuers.

[4] In each of the present actions, the pursuer sues the defender for breach of contract and reparation for the loss of a chance to have brought personal injury claims against their former employers.

[5] The defender admits breach of duty. In particular, the defender admits that a detailed precognition ought to have been taken from each of the pursuers within 3 months of being instructed. The defender also admits that it ought to have appreciated that the likely jurisdiction for any claim by the pursuers against their former employers would be England; that there was a material risk that limitation arguments might be raised by prospective defendants; and that it was important to take urgent steps to reduce that risk.

The defender admits that it ought to have advised each of the pursuers of these matters and that an English solicitor should have been instructed as soon as possible.

The proof

[6] I heard a proof in both actions over 14 days spread over 4 weeks. The evidence was extensive. I heard evidence from 21 witnesses: 9 factual and 12 expert witnesses including two sessions of concurrent evidence. The factual witness statements extended over 500 pages; the expert reports over 1,000; and there were more than 25,000 pages of productions.

[7] Accordingly, I have not sought to narrate all of the evidence I heard, but rather to focus on the issues identified by the parties in their submissions.

The pursuers

Jonathan Martin Gough

Background

[8] Mr Gough's date of birth was 21 September 1961. Prior to obtaining his pilot's licence, Mr Gough had been first a registered nurse and subsequently manager of a nursing home for a number of years. Mr Gough had also worked as a HGV driver. Having obtained his commercial pilot's licence in 1994, Mr Gough initially struggled to obtain employment as a pilot because of the recession in the early 1990s. In 1996, he obtained a position as a first officer for British Regional Airlines based at Manchester Airport. At that point, he flew a British Aerospace Advanced Turbo-Prop aircraft.

[9] Mr Gough commenced employment as a pilot with Airtours in 1998. Airtours was renamed MyTravel in the early 2000s before merging with Thomas Cook. (For ease

of reference, as was the case during the proof, in the remainder of this opinion I use the term "Thomas Cook" to refer to that company and its predecessors.) Mr Gough was initially employed as a first officer, before being promoted to captain in 2003. As a captain, Mr Gough was based at Birmingham Airport. He worked there until July 2005. Initially Mr Gough flew the Airbus A320 and A321. From October 1999, Mr Gough flew the Airbus A330.

Onset of symptoms

[10] Mr Gough first became aware of health issues during a skiing holiday in Canada in early 2003. He began to suffer from shortness of breath and ultimately collapsed. He was exhausted. He was taken to a first aid centre where it was discovered that his blood oxygen level was very low. He was immediately rushed to hospital. He underwent a series of tests but nothing could be found to indicate what was wrong. Prior to this, Mr Gough had enjoyed good health and had led an active life.

[11] Following his return to work, Mr Gough felt better again. He did notice that he had begun to take long gasping breaths during flights but otherwise seemed to be fine. However, in August 2003, Mr Gough suffered another incident where he experienced severe pain in his left arm and hand. Mr Gough missed 2 days of work but the problem disappeared in 2 days. In mid-April 2004, Mr Gough suffered from a severe headache. Following a visit to the GP, he was admitted to hospital. Tests were carried out but the results were inconclusive. Mr Gough remained in hospital for 2 days and was unwell for a number of weeks thereafter. As a result, his medical certificate was suspended until later in July 2004. In 2005, Mr Gough began to see flashing lights while flying. He began to feel

nauseous during flight. Mr Gough also noticed that when his body temperature increased he would suffer temporary blindness in his left eye.

[12] Eventually, having dealt with the symptoms for a period, Mr Gough sought medical treatment in the summer of 2005. Having been seen by both optical and nerve specialists, he was informed that he either had multiple sclerosis or a virus in the optic nerve or optic centre of the brain. Mr Gough's certification of medical fitness to fly was suspended and he ceased flying. Following further testing and treatment by a neurological consultant, Mr Mark Roberts at the Alexandra Hospital in Cheadle, Mr Gough was informed in November 2005 that he had the early presenting features of what might become multiple sclerosis.

[13] The defender sought to challenge the reliability of Mr Gough's recollection of his symptoms on the basis of what had been recorded during the regular medical examinations which he underwent in order to maintain his medical certification to fly. The defender sought to attach significance to the fact that such documentation as was available did not record the symptoms about which Mr Gough was now complaining. For two reasons, I do not consider that the defender's challenge is of much, if any, significance for present purposes. First, Mr Gough's position was that the various forms had been completed under the guidance of his medical examiner following disclosure of his symptoms by Mr Gough. Accordingly, on the basis of the evidence I heard, it is not clear to me that the discrepancy upon which the defender founds this point actually exists. But, secondly, it is not clear to me what difference it would make even if Mr Gough's chronology of the arrival of his symptoms were to be imperfect given that there would appear to be no dispute about what happened at the end of 2005. It was at this point that his symptoms resulted in the withdrawal of his fitness to fly and he was informed by Mr Roberts that he had the early

presenting features of multiple sclerosis. In any event, overall I was satisfied that Mr Gough's evidence as to the onset of his symptoms was broadly reliable.

[14] Following Mr Gough's ill-health retirement, he received payments from an income protection scheme with Scottish Equitable. It appeared from the documentation which Mr Gough retained that the income protection policy dated from the time of his employment with Airtours. The policy had been taken out by Mr Gough's then employers. Following his retirement, he had continued to receive payments under this policy from his former employers up until Thomas Cook went into liquidation. The payments Mr Gough had received were subject to deductions for tax and national insurance in the normal way. The payments had also included contributions to Mr Gough's pension and private medical insurance. At the point of liquidation, Mr Gough received a lump sum in lieu of the remaining payments due to him under the policy.

Exposure to fumes

[15] During his career as a pilot, Mr Gough was exposed to smoke and fumes in the aircraft. He remembered smoke being emitted by the auxiliary power unit situated at the rear of the aircraft fuselage. Smoke was also generated from the engines. This happened both when the aircraft was on the ground and in the air. Mr Gough thought that he had been exposed to fumes on every day of his career. In terms of specific "fume events", Mr Gough did not consider that he had had many significant ones. However, he remembered one occasion which had occurred in May 2005 on a flight from Birmingham to Larnaca. There had been visible blue smoke in the rear cabin and galley area. It could be smelt in the cockpit. Mr Gough remembered noting this in the aircraft technical log.

[16] Mr Gough was also exposed to smoke and fumes when carrying out the "walk around" of the aircraft before and after a flight. Mr Gough was required to carry out a close inspection of the aircraft engines which would, on occasion, still be hot and emitting blue smoke. Mr Gough described the quantity of smoke as similar in amount to the smoke emitted by a disposable barbecue after it is first ignited.

[17] Mr Gough understood that some of the fumes were generated by engine oil being burned. So far as Mr Gough was aware, additives in the oil included organophosphates which could be extremely toxic and harmful to the nervous system. The oil was not supposed to be burned but this would happen when the oil seals failed to control it. In Mr Gough's experience, this could happen, for example, when thrust was reduced when moving from the cruise portion of a flight to a descent. In Mr Gough's experience, older aeroplanes, such as those which he flew when based at Birmingham, were more prone to being "smoky".

Health

[18] Mr Gough continues to suffer from a number of symptoms both mental and physical including disturbed vision, balance issues, migraines, depression, mental and physical fatigue, and nausea. In particular, Mr Gough's evidence was that he could become very tired, both physically and mentally, very suddenly. When these symptoms arise, Mr Gough has found that it is best to give in to them and to rest. Mr Gough's evidence was that after the first 5 or 6 years from his ill-health retirement, his symptoms had plateaued but since then they had worsened and that his health has been in gentle decline from that point.

[19] Mr Gough was of the view that he would not be able to hold down paid employment. This was because of the level of exhaustion afflicted him. If he had been able

to obtain a part-time job, he would have done so because of the undoubted benefits that would have had for his mental health. Notwithstanding Mr Gough's own view, he was found to be capable of work by the Department of Work and Pensions in December 2017 and then again in February 2020.

Career aspirations

[20] Mr Gough's evidence was that once he had gained enough flying hours (3000), it was his intention to re-locate to the Middle East as Mr Montague-Trenchard had done. Mr Gough also intended to carry on as a simulator instructor after retirement.

[21] Mr Gough's position was also that, but for the effect his ill health had had on his career, he would have continued to invest money in buying properties for rental purposes. His aspiration had been to acquire ten properties but he had never got beyond five. At the time of the proof, he had two. He knew of many other pilots who had invested in property including both Mr Montague-Trenchard and Mr Mark Atherton (the pursuer in another action against the defender and from whom I also heard evidence). By contrast, I heard expert evidence from Lloyd Watson, a former pilot and current technical director of HKA Global, leading the HKA Aviation and Space department. His evidence, based on his own experience in training pilots, was that it was not common for pilots to self-invest in property in order to use that as a pension pot. His opinion was based on the typical career path of pilots and, in particular, the costs involved in training.

[22] It was clear to me that Mr Gough had plainly loved his job as a pilot and still, many years later, greatly missed not being able to fly. As he put it, it was more of a lifestyle to him than a job.

Knowledge of ATS

[23] Mr Gough first became aware of ATS following a conversation he had with his friend, Mr Montague-Trenchard. Mr Gough thought that this conversation took place in November 2011. Mr Montague-Trenchard had a former colleague who had not flown for a number of years as a result of ill health (see [46]). This colleague had made Mr Montague-Trenchard aware of the issue of toxic cabin air. Following this conversation, Mr Gough began to look into ATS himself.

[24] Mr Gough first became aware of having a potential personal injury case against his former employer in 2012. Again, that was as a result of speaking to Mr Montague-Trenchard. In August 2012, Mr Gough travelled with Mr Montague-Trenchard and two other former pilots to the Netherlands. One of the other former pilots was Mark Atherton. This trip was for certain DNA tests to be carried out relating to the detoxification of organophosphates together with brain activity tests as well as a specific EEG test. The tests were carried out by Dr Michel Mulder. Dr Mulder was himself a former pilot who had been medically retired. Mr Gough received his test results in September 2012. Mr Gough understood that the DNA test results showed that he fell into a part of the population which do not detoxify organophosphates, resulting in them being stored in body fat. Mr Gough dated his own certainty that his symptoms were as a result of ATS from his receipt of the test results.

Lee Montague-Trenchard

Background

[25] Mr Montague-Trenchard's date of birth was 30 April 1961. Mr Montague-Trenchard had a keen interest in flying from an early age. When he was 12 years old, he used to cycle to Heathrow to watch aircraft including Concorde taking off. When he left school, he went

to work in industry in order to save sufficient money to be able to pay for his flight training. In his mid-20s, he moved to Canada and while there undertook his initial flying qualification. He returned to the UK in 1990 and, having re-qualified here, tried to look for work as a commercial pilot. It was a difficult time. There was a recession underway. Mr Montague-Trenchard sought employment in a number of countries before eventually in 1996 obtaining a job with British Regional Airlines as a first officer. He initially flew a British Aerospace Advanced Turbo-Prop plane based at Glasgow before moving to Manchester.

[26] In 1998, Mr Montague-Trenchard joined Airtours as a first officer. He was initially flying the Airbus A320/321. After a year, he was trained on the A330 long-range aircraft. By 2003, Mr Montague-Trenchard decided that he wanted to move on. He had failed his command assessment and, in any event, was eager to attain captaincy on a long-haul aircraft and this option was not available to him at Airtours. Accordingly, he resigned his position and in 2004 obtained a short-term contract flying A330s for Lauda Italy.

[27] In 2005, Mr Montague-Trenchard moved to Etihad Airways, the national carrier for the United Arab Emirates, as a first officer. He took on responsibilities as a ground instructor in 2005 and was promoted to captain in 2006. He was then promoted again to being a flight instructor and simulator instructor and then again to being an airline examiner. He was flying long-haul flights on A330s and ultra-long-haul flights (longer than 13 hours) on A340s.

Onset of symptoms

[28] When he first became a pilot, Mr Montague-Trenchard described himself as "enormously fit". He would swim and cycle long distances every week. He also skied at a high level.

[29] Mr Montague-Trenchard's evidence was that he was frequently unwell after he started work for Airtours. This consisted mainly of chest and stomach infections which were treated with antibiotics. He also noticed that his sleep pattern started to become interrupted and that his athletic performance decreased sharply after more intensive blocks of work. However, it was notable that his wife, Rachel Cox, who first met him at this time, thought he appeared to be a normal energetic guy.

[30] During the brief period between jobs in 2003/4, Mr Montague-Trenchard noticed a general resurgence in his health. However, while working for Etihad, Mr Montague-Trenchard felt that his health really began to deteriorate. He began to suffer from diarrhoea and bad headaches during flights. He continued to suffer from multiple infections. He developed coping strategies to try to address the symptoms he was suffering from including keeping a very careful check on what he ate and drank and monitoring his sleep. Although with the benefit of hindsight, he considered it should have been obvious that the flying was causing his ill health, Mr Montague-Trenchard felt that at the time he was in denial as to the cause. As his symptoms worsened, Mr Montague-Trenchard was off sick for periods. This was attributed to "burn out".

[31] As with Mr Gough, the defender sought to challenge the reliability of Mr Montague-Trenchard's evidence as to the onset of his ill health. The defender sought to highlight what it asserted were discrepancies between Mr Montague-Trenchard's recollection and the records of his aeromedical examinations. The defender also pointed

to the evidence of Ms Cox that her husband's health declined significantly in late 2011 or early 2012. For reasons similar to those which I have set out above in relation to Mr Gough (see [13]), I do not consider the defender's criticisms of Mr Montague-Trenchard's evidence to be of any real moment. It is true that Mr Montague-Trenchard's position as to the onset of his symptoms depends upon his own evidence rather than what is documented in his medical records. His wife, Rachel Cox, said that she noticed a change in him in the later years of living in the UAE. She thought this was after their first child was born which was in June 2008. It is also fair to say, as Mr Montague-Trenchard himself accepted, that he was inevitably looking back at his medical history informed by his present understanding of his condition. However, neither of these factors cause me to consider that the broad thrust of Mr Montague-Trenchard's evidence as to the development of his symptoms is in any material way unreliable. In this regard, I consider that it is important to bear in mind that at the time he was experiencing these symptoms, Mr Montague-Trenchard did not attribute them to a common cause, let alone ATS.

[32] In January 2012, Mr Montague-Trenchard completed his final flight. It lasted only 20 minutes and was internal to the UAE but afterwards his chest hurt and felt tight. He subsequently developed acute sinusitis and bronchitis which incapacitated him for 3 months. Following a meeting with the Etihad company doctor, Mr Montague-Trenchard's fitness to fly was withdrawn. At this point, a dispute arose between Mr Montague-Trenchard and Etihad. Mr Montague-Trenchard felt that the company doctors were not helping him recover. Mr Montague-Trenchard was also subject to disciplinary procedures because his attendance record was bad. In the end, Mr Montague-Trenchard chose to return to the UK at the beginning of April 2012. He never returned to Abu Dhabi.

[33] Etihad were clearly unhappy about the way in which its relationship with Mr Montague-Trenchard had come to an end. Etihad considered that Mr Montague-Trenchard had been absent without leave and had essentially absconded to the UK in breach of contract. The company sought to recover a payment of 342,501 dirhams which it characterised as an advance on Mr Montague-Trenchard's salary and subsequently obtained a UAE court decree in this sum.

Exposure to fumes

[34] During his time with Thomas Cook, Mr Montague-Trenchard felt that his exposure to fumes was commonplace. On many flights he encountered waxy, oily smells and, on some, visible smoke. His evidence was that it happened so frequently that it was generally not reported. He noted a number of incidents in his log book even though it was not mandatory to do so, for example an incident which occurred on 5 June 2001 while flying from Florida to Acapulco. Mr Montague-Trenchard was also exposed to fumes while carrying out "walk arounds", these being detailed inspections of the aircraft.

[35] While flying A340s for Etihad, Mr Montague-Trenchard again frequently experienced fume events albeit, again, not all were so serious that he recorded them in his log book. The A340 had four engines and two air conditioning systems each fed separately by two engines. Mr Montague-Trenchard experienced several fume events where he found it possible to decrease the quantity of fumes in the cabin by controlling the air input from particular engines. He inferred that the fumes and smoke were being caused by an oil leak in the engines. Mr Montague-Trenchard remembered a particular fume incident which occurred on an ultra-long-haul flight to Melbourne, Australia on 27 September 2009. During the flight, the oily-smelling smoke had been apparent both to the passengers and crew.

Mr Montague-Trenchard had tried to reduce the fumes by shutting down one engine's air output. On this occasion, Mr Montague-Trenchard noted that when the flight landed he was no longer aware of the smell of the fumes but it was very obvious to the engineers who attended the aircraft.

[36] Mr Montague-Trenchard highlighted the fact that the issue of fume ingress into the cabin in A340s occurred sufficiently frequently that an Operational Engineering Bulletin was issued by the manufacturer Airbus in order to provide a "work around" to address the problem.

[37] On his flight home to the UK in April 2012, Mr Montague-Trenchard wore a brand new white shirt. After the flight, the shirt was tested and organophosphates were detected.

[38] Mr Montague-Trenchard's understanding was that, in simple terms, these fumes were entering the cabin as a result of pressurised air generated by jet engines being used to supply high-pressure breathing air into the cabin air conditioning system. The pressurised air was becoming contaminated by engine oil leaking into the compressor section of the engine through older and defective seals. Like Mr Gough, Mr Montague-Trenchard was aware that jet engine oil contained tricresyl phosphate and its isomers as additives. These are organophosphates.

Health

[39] Mr Montague-Trenchard considered that his health significantly declined from 2009 until 2012 when he stopped flying. His symptoms included frequent severe headaches, vision problems, numbness, reduction in mental processing and problem-solving ability, permanent diarrhoea, long-term chest infections and chronic fatigue.

[40] Since 2012, Mr Montague-Trenchard has made considerable efforts to address and rectify his health problems by taking supplements and modifying his diet and lifestyle. His headaches and migraines have reduced in frequency. The issues with both his digestive system and his susceptibility to infection appear also to have improved. His chronic fatigue has improved to some degree. However, he is unable to remain active either mentally or physically for prolonged periods. If he attempts to do too much, he tends, subsequently, to have a bad day. He was formally diagnosed with chronic fatigue syndrome in April 2018.

[41] Although Mr Montague-Trenchard managed his own property portfolio, he did not consider it would be possible for him to do this professionally given the demands this would place on him. His wife also assisted him with the necessary paperwork.

Career aspirations

[42] But for his ill health, Mr Montague-Trenchard was firmly of the view that he would have, at least, remained as a training captain at Etihad until the age of 65. He may have tried to secure a promotion to the role of training manager. In 2011, he had discussions with a training manager at Etihad about promotion to this role.

[43] As Mr Montague-Trenchard had his youngest child when he was 50, he anticipated working until he was 72 in order to continue to provide for this family. But for his ill health, he considered that he would have continued to work as a ground trainer.

[44] Like Mr Gough, Mr Montague-Trenchard's position was that, but for his ill-health retirement, he would have continued to develop his property portfolio.

Mr Montague-Trenchard's evidence was that there was a culture of pilots investing in property. This was particularly the case for ex-pat pilots working abroad where no pension

provision was made. He had purchased six houses in the UK while he was working which were rented out.

[45] Also like Mr Gough, it was clear to me from his evidence that Mr Montague-Trenchard loved his job, which he found to be stimulating, glamorous and extremely well remunerated. He described it as being more of a vocation or a passion than simply a form of employment. He also plainly enjoyed living in the UAE, at least until his ill health worsened significantly.

Knowledge of ATS

[46] Mr Montague-Trenchard traced his first knowledge of ATS to a meeting he had had in Malaysia towards the end of 2011 with his friend Andrew Birtle, a former pilot. Mr Birtle had failed his medical certification and had had to retire in his late 40s. Although Mr Birtle's symptoms seemed similar to his own, at that time Mr Montague-Trenchard did not think it could be his job which was causing his ill health.

[47] Later, in early 2012, Mr Montague-Trenchard was in contact with another medically retired former pilot, John Hoyte, who was part of an organisation called the Aerotoxic Association. This was both a campaign group that was trying to obtain wider recognition for ATS and a support group for those who had the condition. Mr Hoyte put him in touch with Dr Mulder. Through these contacts, Mr Montague-Trenchard was put in touch with Mr Cannon as Mr Cannon was in communication with Mr Hoyte. Along with Mr Gough and others, in August 2012, Mr Montague-Trenchard travelled to the Netherlands so that tests could be undertaken by Dr Mulder (see [24] above). Mr Montague-Trenchard considered that the results of the tests carried out in the Netherlands were a "diagnosis" of ATS.

[48] Separately, Mr Montague-Trenchard also had tests carried out by a Dr Jenny Goodman in London. Dr Goodman conducted a battery of tests including multiple blood tests, a fat biopsy and a cognitive interview. Following these tests, in November 2012, Mr Montague-Trenchard received a diagnosis from Dr Goodman that his illness was caused from exposure to engine fumes.

Engagement with Mr Cannon

[49] Mr Montague-Trenchard first spoke to Mr Cannon by telephone on 28 June 2012. At that point, Mr Montague-Trenchard required legal advice for two reasons. The first was the potential personal injury claim and the second was certain employment law issues arising from his treatment by Etihad. After their initial conversation, Mr Montague-Trenchard emailed and spoke with Mr Cannon on a number of occasions, providing him with information. Mr Montague-Trenchard was clear in his recollection that during the course of this initial conversation, he had informed Mr Cannon that, prior to his employment with Etihad, he had been employed by Thomas Cook. Mr Montague-Trenchard remembered this because he recalled Mr Cannon saying that he should file a case against Etihad and Thomas Cook as well as the airline and engine manufacturers.

[50] Although Mr Gough had not met Mr Cannon at the time of the trip to the Netherlands in August 2012, he knew that Mr Montague-Trenchard had been in touch with him. Mr Gough understood that the results of Dr Mulder's testing were to be sent to Mr Cannon. Subsequently, on 23 April 2013, Mr Gough and Mr Montague-Trenchard met Mr Cannon along with Mr Atherton at the Premier Inn near Preston. Both pursuers remembered this meeting had involved each of the former pilots sitting down with Mr Cannon in turn for between 30 to 40 minutes and giving him a complete history of

their circumstances. Mr Gough's recollection was that Mr Cannon had told the pilots that he would be able to obtain compensation for them from their former employers. Mr Montague-Trenchard remembered Mr Cannon describing his case as being "stonewall".

[51] Subsequently, in the summer of 2013, Mr Gough and Mr Montague-Trenchard had blood samples taken so that further tests could be carried out at Duke University, North Carolina by an American academic, Professor Abou Donia. The pursuers understood that the purpose of these tests was to differentiate between nervous system damage caused by the body's own immune system and that caused chemically. They received the results of these tests directly from Mr Cannon in July 2013.

[52] The final occasion that the pursuers met with Mr Cannon was on 27 October 2015 at the Cartford Arms, Little Eccleston. The meeting was attended by Mr Cannon, Mr Gough, Mr Montague-Trenchard, Mr Atherton and two other former pilots. The pursuers both remembered that the meeting had lasted for most of the day. There had been a lot of discussion about the ongoing work being carried out by Mr Cannon into ATS. Mr Gough remembered Mr Cannon telling the pilots at this meeting that he had settled other ATS claims. Mr Montague-Trenchard remembered Mr Cannon saying that an ATS claim he was running was close to settling. Mr Gough also recollected that Mr Cannon had been somewhat evasive at this meeting when asked about the time frames for raising proceedings. Both pursuers remembered that, by the time of the meeting, Mr Cannon's estimate of what the claims might be worth had reduced from an earlier view which was in the millions to in the region of £300,000. Overall, the impression of both pursuers was that Mr Cannon's advice to them had not been particularly negative. He had not advised their claims might be difficult or have less than reasonable prospects of success. Albeit, Mr Montague-Trenchard felt that Mr Cannon's attitude to their cases had changed.

[53] So far as the pilots were concerned, Mr Cannon's appearance at the meeting at the Cartford Arms was broadly consistent with how he had presented throughout the period of their engagement with him. He had been positive about their claims. It appeared to them that he had and actively cultivated a media persona in this field. He had appeared on television and had been quoted in the press. The pursuers were also aware that Mr Cannon had subsequently published a lengthy article entitled "Aircraft cabin air contamination and aerotoxic syndrome – a review of the evidence" in June 2016.

[54] Mr Cannon, on the other hand, referred to the Cartford Arms meeting in his statement as the "bad news" meeting. His evidence was that, at that time, he considered that despite having personally expended considerable efforts in investigating ATS, the two issues of medical mechanism of injury and airline fault presented significant obstacles to progressing the pursuers' claims. Mr Cannon's recollection of the meeting was that, despite the fact that it lasted for 4 or 5 hours, it had involved a brief introductory chat by him followed by a mainly social discussion among Mr Cannon and the pilots who were present. He denied saying that he had settled any ATS claims. Initially, Mr Cannon's position in evidence was that, at the end of the meeting, he had told the pursuers that they had no case. Following cross-examination, Mr Cannon's position became that what he had told the pursuers at the meeting was that they were not yet in a position to sue.

Mr Cannon

[55] As noted, I also heard evidence from Mr Cannon himself. He is a solicitor who has been qualified in Scotland since 1968. During the period he was dealing with the pursuers he was a partner of the defender. He also explained that he was the only solicitor at the firm who had any dealings with the pursuers. Mr Cannon qualified as a pilot in 1965. He had

extensive experience in the field of aviation including having owned and operated an airline during the 1980s. Given this background and interest in aviation, Mr Cannon has built up a practice in aviation law.

[56] Mr Cannon had first become aware of ATS in 2011 as a result of meeting Dr Mulder and it was through this connection that, according to Mr Cannon, he subsequently met the pursuers.

[57] Having heard Mr Cannon's oral evidence and carefully considered the four witness statements that he had prepared, I have significant concerns as to the credibility of his account. In this regard, it is notable that, in submissions, senior counsel for the defender herself submitted that his evidence ought to be approached with "considerable care, checking it where possible against contemporaneous materials."

[58] Being as charitable as I can be to Mr Cannon, I consider that he has sought to portray past events in the most favourable light possible for both himself and the defender. As such, in his witness statements, Mr Cannon sought to depict himself as playing a key role in an international effort to investigate ATS from as early as 2011. This included his initial involvement in the inquest following the death of pilot Richard Westgate. Furthermore, notwithstanding the defender's admission of liability, Mr Cannon was clearly very defensive of the approach he had adopted in dealing with the pursuers.

[59] Mr Cannon heavily emphasised how, apparently, throughout the process of investigation, he remained sceptical of the pursuers' prospects culminating in his account of the Cartford Arms meeting. However, I find it impossible to reconcile Mr Cannon's evidence with the contemporaneous documents in a number of respects.

[60] First, Mr Cannon's evidence as to his views of the pursuers' cases, expressed at the Cartford Arms meeting on 27 October 2015, is simply not consistent with his

contemporaneous email correspondence with Harminder Bains of Leigh Day solicitors. Mr Cannon had been in correspondence with Ms Bains on 26 October 2015 about the ongoing ATS claims. From this correspondence, it appears clear that Mr Cannon was keen to get Leigh Day involved but, at the same time, Mr Cannon wished himself to remain involved in directing the progress of the claims. This clearly led to tension between Mr Cannon and Ms Bains. The tone of Mr Cannon's contemporary correspondence was very different from Mr Cannon's description of the views he expressed at the Cartford Arms meeting. Far from indicating that the pursuers had no case or were not in a position to sue, Mr Cannon represented to Ms Bains that he had a team of experts who had been working in the field of ATS for some time and who were ready to "swing into action."

[61] It is also notable that in the course of the correspondence with Leigh Day, Mr Cannon made a number of statements which he described in evidence as "gilding the lily" but which were, in fact, simply untrue. In the email correspondence, Mr Cannon implied that Professor Vyvyan Howard was part of a group of experts he had formed. This was not true. Mr Cannon had also said: "I am now beginning to settle cases myself under pre-action protocol. The airlines are running scared." Mr Cannon accepted in cross-examination that this was also simply false. Rather to my surprise, while conceding that this was unacceptable behaviour, Mr Cannon felt that making false statements in an email to another solicitor could, in his own words, be "mitigated" because they had followed a contentious telephone call with Ms Bains.

[62] Ultimately, it appeared from the file that Leigh Day were not prepared to become engaged. Mr Cannon spoke to being told during a telephone call with Ms Bains that she had consulted with leading counsel, Rob Weir QC (as he then was), junior counsel and Professor Jim Bridges (who was a witness in this case). Mr Cannon had been told that, following the

consultation, Ms Bains was of the view that there was less than a 30% chance of success in proving an ATS claim and they were not worth pursuing.

[63] Second, Mr Cannon's position regarding what he had told the pursuers in October 2015 is inconsistent with what Mr Cannon was reported as saying in an article published on 28 January 2016 in the Glasgow Herald. In that article, Mr Cannon is reported as follows:

> "Glasgow-based aviation lawyer Frank Cannon, who represented Westgate and currently has 'hundreds more' cases on his books, said he recently settled one pilot's case out of court for €250,000.
>
> Mr Cannon cannot name the airline involved, but said his client has been left unable to work due to a neurological disorder."

When this was put to him, in examination-in-chief, Mr Cannon's response was vague and unsatisfactory. He did not deny making the reported remarks. His only explanation appeared to be that he remembered when he met the journalist it had been noisy and "if I said that, I was exaggerating". He accepted that he had, in fact, never settled any ATS case. Mr Cannon thought this might have been a reference to the resolution of workers' compensation claims in Germany which he knew of albeit was not directly involved in.

[64] Mr Cannon was also asked about the lengthy and detailed article he had written in 2016 entitled "Aircraft cabin air contamination and aerotoxic syndrome – a review of the evidence". This had been submitted in April 2016 and published in June 2016. In the conclusion of the article, Mr Cannon stated:

> "The industry and its regulators are well aware of the organophosphate contamination of bleed air. They are also aware of serious symptoms reported by aircrew, and that such symptoms are consistent with organophosphate poisoning. Their defence, without a shred of evidence to support it, is that the detected low levels of toxicity could not possibly cause the reported symptoms.
>
> Such a defensive hypothesis is untenable for four reasons: [the article goes on to set out the four reasons in detail]."

When asked why he had written this article given his apparent view of the pursuers' claims 6 months earlier, he described the article as a "swan song". In short, I do not consider this to be a satisfactory or convincing answer. Mr Cannon's authorship of the article appears far more consistent with the pursuers' evidence as to Mr Cannon's position. Notably, in cross-examination, Mr Cannon accepted that the article did reflect his opinion at the time.

[65] Overall, in light of the serious reservations I have concerning Mr Cannon's credibility, I am, as a matter of generality, not prepared to rely on his evidence unless it is corroborated by contemporaneous documentary evidence.

Engaging Thompsons, England

[66] After the Cartford Arms meeting, neither of the pursuers heard anything further from Mr Cannon. As a result of their concern about the apparent lack of progress, in December 2015, Mr Montague-Trenchard got in contact with a firm of English solicitors, Thompsons. Mr Montague-Trenchard was introduced to this firm by Charlie Bass, who was the father of Matt Bass. Matt Bass was a member of British Airways cabin crew who had died after experiencing similar symptoms. Charlie Bass was also frustrated by the lack of progress in progressing his case and had moved his instructions to Thompsons.

[67] The first meeting was in March 2016 at Thompsons' Manchester office with a solicitor called David Robinson. Mr Robinson had first become involved in ATS claims in about March 2015.

[68] The pursuers were informed initially that Thompsons, together with input from barristers, would look at their cases and would do so on a "no win, no fee" basis. From the

outset, the pursuers were advised by Thompsons of the possibility of there being a time bar problem in relation to their cases. Thompsons then began to work on both pursuers' cases.

[69] Subsequently, on 11 July 2016, the pursuers had a consultation with Mr Robinson and senior counsel, Michael Rawlinson QC (as he then was). In the case of Mr Montague-Trenchard, it was apparent that steps were taken initially to investigate the possibility of pursuing Etihad and, thereafter, to consider pursuing the successors to Airtours.

[70] A statement from Mr Montague-Trenchard was prepared and letters of claim were issued to Etihad on 26 September 2016 and to MyTravel Group (Thomas Cook's predecessor) on 27 September 2016. Etihad responded on 2 November 2016, disputing jurisdiction, asserting that any claim Mr Montague-Trenchard had was time-barred and highlighting that were any proceedings to be raised it would counterclaim in respect of sums it claimed were owed by Mr Montague-Trenchard. Subsequently, in 2017, Etihad also commenced debt recovery proceedings.

[71] Mr Rawlinson's evidence was that, at the time, he was of the view that bringing claims in the UAE against "state" bodies such as Etihad was highly problematic. He also had concerns about the applicable law in respect of a claim against Etihad and, in particular, that English law would not apply. However, his view was that, notwithstanding the position of Etihad, Mr Montague-Trenchard could bring a claim against Thomas Cook for all of his loss and damage. This was because Mr Rawlinson considered that ATS was an indivisible outcome of Mr Montague-Trenchard's cumulative exposure to toxic fumes. Overall, Mr Rawlinson's evidence was clear – he would not have litigated on Mr Montague-Trenchard's behalf against Etihad on a "no win, no fee" basis when he had the possibility of pursuing Thomas Cook in England.

[72] Mr Rawlinson also did not accept that his views as to the indivisibility or otherwise of ATS arose only after he had received Professor Howard's report. He explained that during the time he had been advising Mr Montague-Trenchard he had had expert evidence pointing to ATS being a cumulative condition coming from what he described as the "campaigning experts". This was evidence which informed his views but which he did not wish to deploy in litigation.

[73] Mr Gough prepared a statement and a letter of claim was intimated to Thomas Cook on his behalf on 18 January 2017.

[74] Subsequently, in March 2017, the pursuers had another consultation with both Mr Robinson and Mr Rawlinson QC. It was apparent from the discussion at this consultation that the pursuers' legal team and, in particular, Mr Rawlinson, had concerns about some of the experts who had been previously involved by Mr Cannon in his investigations into ATS. These concerns arose in the context of the Westgate inquest and appeared to relate to Dr Mulder and Professor Abou Donia.

[75] Following this consultation, Thompsons recovered the pursuers' medical records. It is also apparent from the files that during this period the pursuers and their legal team were, in addition, considering the possibility of pursuing a claim against Mr Cannon.

[76] In September 2017, Mr Robinson wrote to the pursuers advising that a pre-hearing had taken place in the inquest of Mr Bass. In these circumstances, Mr Robinson was of the view that it made sense for the pursuers to await the outcome of the Bass inquest which was likely to take place in 2018. This was because, in Mr Robinson's view, the inquest hearing provided an opportunity for issues of toxic cabin air, together with relevant expert evidence, to be exposed to scrutiny.

[77] In October 2017, the pursuers were advised that the 3 year limitation period was a problem and that their best course of action was to pursue Mr Cannon. This followed a consultation attended by Mr Robertson and Mr Rawlinson.

[78] In relation to limitation, Mr Rawlinson's evidence was that, in his view, the pursuers fell into a special and problematic category because of their instruction of Mr Cannon. As a result, they could not, unlike some others in the cohort, argue that they did not consider that their condition was work related, because they had gone to the lengths of instructing Mr Cannon. Furthermore, the involvement of Mr Cannon was also a significant factor in considering the balance of prejudice test under section 33 of the Limitation Act 1980. That was because a potential defendant could argue that the pursuers would not be prejudiced by limitation because they had a claim against their former adviser, Mr Cannon.

[79] Accordingly so far as Mr Rawlinson was concerned, in mid-2016, the pursuers were faced with a situation in which limitation had already passed. Mr Rawlinson's view was the pursuers' date of knowledge could not be later than August 2012 following the trip to the Netherlands. Viewing the matter from the perspective of the cohort of claims, it would not have been prudent to issue claims on behalf only of the pursuers. The remainder of the cohort was not, at that point, ready to proceed. Raising proceedings in a piecemeal way would have increased the risk that the defendants would have sought to make the determination of limitation a preliminary issue. In Mr Rawlinson's view, not only would this have drawn unhelpful prominence to the issue of limitation but it would also have necessitated the claimants deploying evidence which was not, at that point, ready, in order to persuade the court to exercise its discretion in terms of section 33 of the Limitation Act 1980. For all these reasons, Mr Rawlinson advised the pursuers that their claims did not have sufficient prospects of success and, instead, to pursue Mr Cannon.

[80] Mr Rawlinson was very clear in his evidence in rejecting the proposition that the pursuers' cases had been weeded out of the cohort on the grounds that there were problems with them. His evidence was that no claims had or have been excluded from the cohort on the basis of their merits. As he put it, the claimants' advisers were simply not there yet. He also considered that, on the merits, neither of the pursuers' cases could be described as "weak". Both pursuers spoke to both fume events and chronic exposure to fumes. Neither of the pursuers had countervailing co-morbidities.

Unite the Union

[81] In March 2017, the pursuers both joined Unite who agreed to fund their claims retrospectively. Mr Gough had been a member of BALPA from around 1996, but it was considered simpler from the point of view of handling the cases if this was done solely by Unite. It also appeared that Mr Gough was not happy with the way in which BALPA had been dealing with his case. Mr Montague-Trenchard understood that the reason that Unite were keen for the pursuers, as pilots, to join the cohort of claimants was that the pursuers would have access to documentation which the majority of the other claimants, as cabin crew, would not. The approach of the pursuers in joining Unite essentially as a means of funding their claims was also adopted by other former pilots who had engaged Thompsons.

[82] The legal department of Unite had first become aware of toxic cabin air cases in or around late 2014. Later, in early 2015, the union became involved in the inquest into the death of Richard Westgate. Mr Westgate was a pilot who had died and whose family alleged that this had been caused by ATS. Representatives of the union also contacted Michael Rawlinson QC (as he then was) who indicated that he would accept instructions.

It appeared that Mr Cannon had been unhappy about the way in which he considered that he had been replaced as the legal representative in the Westgate inquest.

[83] At the end of 2015, a decision had been taken by the union at that point to advertise that legal support was available to members who considered that they had suffered injury as a result of exposure. A dedicated helpline was set up. The union decided to use Thompsons to advise and represent all members who made enquiries about pursuing a claim on this basis. In accordance with its general approach, the union provided advice and representation to members even if the incident giving rise to the personal injury claim occurred prior to the member joining the union. Unite provides a personal injury service at no cost to the member and, if successful, the member receives 100% of their compensation.

[84] Insofar as Thompsons considered that, as a result of the time bar, the pursuers' claims did not have reasonable prospects, the union would not have continued to fund the litigation.

Counterfactual

[85] It was suggested to the pursuers that had they been advised of the possibility of bringing proceedings against their former employers notwithstanding the expiry of the limitation period by seeking an extension of the 3 year period, they would have done that. The position of both pursuers was that, first, they had never received that advice and, secondly, they had always followed the advice which they had, in fact, been given.

[86] As to the outcome had the defender promptly advised the pursuers to bring proceedings in England, Mr Hayward considered that there was only a negligible risk that Thompsons would have failed to raise proceedings timeously. Mr Rawlinson was of the same view.

[87] It was suggested to Mr Robert Lemon, a solicitor employed by Unite, that prior to 2015, the union would not have supported ATS claims based on chronic exposure. He did not accept that. So far as he was aware, the union had supported claims made by members at an earlier stage. These were claims by cabin crew which had originally been brought by a law firm called O H Parsons. He did accept that these earlier claims were likely to have been based on fume events as opposed to chronic exposure. However, he considered that, had the pursuers approached Unite in 2013 seeking to advance a claim based on ATS, the claim would not have been dismissed by the union. As had happened with the early cabin crew cases, his view was that the claims would have been looked into.

[88] I also heard expert evidence from Keith Barrett. He is a partner in the firm of Fieldfisher and specialises in catastrophic injury cases. Mr Barrett had been a partner at the firm for 7 years and had previously been a partner in the firm of Irwin Mitchell. He qualified as solicitor in England and Wales in 1997. Mr Barrett explained that Fieldfisher is a specialist personal injury firm which also practises in the fields of clinical negligence and human rights.

[89] Mr Barrett's view was that, given the controversial nature of the pursuers' claims, the vast majority of law firms would have declined to represent them. In his opinion, the pursuers' claims would not have passed the initial risk assessment stage carried out by such firms. Mr Barrett considered that the only reasonable prospect of the pursuers obtaining both representation and funding would have been by approaching a larger firm such as Thompsons, with both a specialist interest in occupational illness litigation and union affiliation. He explained that unions tended to have a less conservative view of risk assessment in controversial cases such as the pursuers' because of the interest the union would have in being seen, as he put it, to fight their members' corner. In Mr Barrett's

opinion, the only alternative realistic funding option would have been for the pursuers to try to enter into a conditional fee agreement with the firm representing them in conjunction with an after-the-event insurance policy. In Mr Barrett's opinion, obtaining such arrangements would have been difficult – because of the need for a risk assessment – and expensive in terms of the after-the-event insurance policy premium. He also highlighted the particular difficulties that would have arisen for Mr Montague-Trenchard on this hypothesis as a result of the threat of a counter-claim by Etihad.

The collective proceedings

[90] During the course of the evidence, I heard on a number of occasions about the personal injury claims being brought by approximately 220 pilots and cabin crew at the High Court in London on the grounds of ATS. This group of claimants includes 51 claims which were issued by Thompsons in March 2019 involving pilots and cabin crew working for EasyJet, British Airways, Thomas Cook, Jet2 and Virgin Atlantic. The cohort of claims also includes some that were issued in October and November 2014. These claims were originally raised by other firms but had been taken over by Thompsons.

[91] This evidence came principally from Tim Hayward of Thompsons and Michael Rawlinson KC who are both acting for the claimants in those proceedings. Both were careful not disclose anything which might result in the disclosure of information which was the subject of legal privilege to the claimants in the ongoing proceedings. I should note that Mr Smith KC, senior counsel for the pursuers, is also acting for the claimants.
Mr Rawlinson explained that, whilst theoretically possible, it would be very unlikely that any other independent proceedings could be pursued in the English courts in respect of ATS.

[92] The proceedings are being managed collectively and are at a relatively early stage procedurally. Five lead claimants have been identified and the lead defendant is British Airways. The insurers of Thomas Cook Airlines Limited are also a defendant. Etihad is not.

[93] The lead cases have been selected to give a fair spread of facts. They include some cases based on fume events and some based on chronic exposure. At present, the process of disclosure is ongoing. The remaining cases are being held in abeyance. Mr Hayward thought that the trial in the cases would be likely to take place at the end of 2025 or early 2026. He estimated the trial would last 6 weeks.

[94] So far as the claimants are concerned, the proceedings are being funded by Unite. Like the pursuers in the present case, the claimants have retained Professor Howard as an expert witness.

[95] Mr Hayward was of the view that there was a reasonable prospect that had the pursuers timeously raised claims in England, they would have become part of the collective proceedings. Mr Rawlinson shared this view. He considered that had the pursuers contacted Thompsons, England or any English solicitor within the limitation period, they would have formed part of the cohort.

[96] As to the overall merits of the collective proceedings, Mr Hayward was content for it to be inferred that they would not be being pursued if it was considered that they did not have reasonable prospects of success but felt he could not comment further given the issues of privilege. Mr Rawlinson's view was that, as a cohort, the collective proceedings enjoyed a chance of success substantially above 50%. This was the test for Mr Rawlinson personally to consider it worthwhile to engage in the litigation and for Unite to support it. He recognised that there would be both stronger and weaker cases within the cohort but also pointed out

that it was often the case that a defendant would make a global offer to settle without the necessity of the individual circumstances of each case being tested.

Litigation in the US

[97] I also heard evidence about civil litigation relating to ATS in United States. This evidence came from Zoe Littlepage, one of the principals of the firm of Littlepage and Booth. Ms Littlepage had pursued claims on behalf of those who alleged that they had been harmed by exposure to toxic cabin air on board Boeing aeroplanes. The cases with which she had dealt included claimants who alleged chronic exposure, some who alleged exposure to particular fume events and some who alleged both types of exposure. Her clients included cabin crew, pilots and some passengers. She explained that, in her experience, pilots were reluctant to pursue claims for fear of losing their medical certification.

[98] Ms Littlepage's firm had been involved in these litigations for the past 10 years. She estimated that her firm invested somewhere between half a million to 1.5 million dollars in each case. She had acted and was acting for a number of claimants and had resolved approximately 21 cases. However, to date, none of her cases had proceeded to trial.

[99] Ms Littlepage confirmed that amongst the expert witnesses retained by her firm in respect of these litigations was Professor Howard. He was retained in order to give evidence as to his research about ultra-fine particles and general causation. Ms Littlepage confirmed that Professor Howard's expertise had never been challenged by Boeing.

[100] Ms Littlepage explained that she was significantly restricted in the evidence she could give as a result of the strict protective orders which governed the disclosure of information concerning the litigations in which she was involved. However, based on her

involvement in the litigations she had conducted, her understanding was that the following matters had been established:

- Contaminated air events occur in which contaminated air enters the cabin.
- There was evidence that Boeing has known about these issues for a significant period of time.
- There was also evidence that Boeing considered that contaminated air events were a health and safety issue.
- The organophosphate chemicals found in contaminated cabin air are neurotoxic.
- There was published scientific and medical literature which noted that toxic cabin air can cause acute symptoms and chronic health effects.

[101] Ms Littlepage understood that when contaminated air events occur, airlines routinely reach out to Boeing to report the events and to seek assistance.

[102] The defender objected to Ms Littlepage's evidence primarily on the combined grounds of relevancy and fairness. Her evidence was heard under reservation and then, in submissions, the defender insisted on its objection. In relation to the relevancy of Ms Littlepage's evidence, the defender's position can be summarised as follows: evidence as to settlements in another jurisdiction, relating to a different type of action, on a different basis and relating to a different type of aircraft, was simply irrelevant. As to fairness, the defender's position was that were Ms Littlepage's evidence to be admitted, it would be prejudiced because it had been unable properly to prepare and challenge Ms Littlepage. The defender's difficulty arose from the fact that Ms Littlepage had been unable, as a result of confidentiality obligations, to disclose much of the basis of her understanding. So, for example, Ms Littlepage had referred in her statement to passages quoted from deposition evidence but had been unable to provide copies of the depositions.

[103] In the event, the pursuers relied upon the evidence of Ms Littlepage in two principal respects. First, her evidence was supportive of the existence of contaminated cabin air as a phenomenon. Second, for what it was worth, Ms Littlepage spoke to the resolution of claims which proceeded on the basis of chronic exposure to contaminated cabin air. Importantly, the pursuers did not seek to rely on Ms Littlepage as an expert witness in relation to the toxicity of contaminated cabin air.

[104] Although there is considerable force in the defender's objection, it cannot be said that Ms Littlepage's evidence was entirely irrelevant. I consider, based on her undisputed experience as a litigator in this field, she could speak to the phenomenon of contaminated cabin air albeit only in relation to Boeing aircraft. Furthermore, in relation to the question of fairness, when the true extent to which the pursuers actually rely on Ms Littlepage's evidence is borne in mind, any potential prejudice to the defender is alleviated by its ability effectively and forcefully to make submissions as to the limited weight to be attached to this evidence. Ultimately, the absence of the details which Ms Littlepage was unable to give in respect of much of her evidence, significantly reduces the weight which I can attach to that evidence.

[105] Accordingly, I will repel the defender's objection.

The underlying claims

English law

[106] Each party led expert evidence from an English King's Counsel in relation to various questions of English law that arose in relation to the pursuers' underlying claims:
Sarah Crowther KC for the pursuers and Katherine Deal KC for the defender. Ms Crowther called at the bar in 1999 and took silk in 2018. In October 2021, she was appointed as a

Deputy High Court Judge. Ms Crowther explained that, as a barrister, the overwhelming majority of her practice was in the field of personal injury and that, within that field, she had a particular specialism in international or cross-border cases in which questions of jurisdiction and applicable law arose. Ms Deal called at the bar in 1997 and took silk in 2019. She was appointed as a recorder in 2015. Like Ms Crowther, Ms Deal specialised in high value personal injury work particularly those involving an international dimension.

[107] Both of these witnesses had previously prepared a number of reports in relation to each of the cases. They had also helpfully met and agreed a lengthy joint statement in respect of each pursuer's case significantly narrowing the issues in dispute between them. Ms Crowther and Ms Deal then gave their evidence concurrently.

Jurisdiction

[108] In respect of Mr Gough, the experts were agreed that the English courts would have had jurisdiction.

[109] In respect of Mr Montague-Trenchard, the experts were agreed that the English courts would have had jurisdiction in respect of any claims made against Thomas Cook. In relation to Etihad, the experts were agreed that, in the event that Thomas Cook were the anchor defendant, the English courts would potentially have accepted jurisdiction. However, Ms Deal considered that there were strong arguments that could have been deployed to argue that England was not the forum conveniens. It was also apparent from the available correspondence that Etihad did not appear to be accepting of English jurisdiction. Ms Crowther considered that there might well have been countervailing arguments based on the existence of parallel proceedings but she agreed that the route to jurisdiction against Etihad in England was a risky one.

Applicable law

[110] In respect of Mr Gough, the experts were agreed that English law was applicable law for Mr Gough's claims against Thomas Cook.

[111] In respect of Mr Montague-Trenchard, the experts agreed both that English law would be applicable to his claims against Thomas Cook and that the law of Abu Dhabi as part of the law of the UAE would apply to his claims against Etihad.

Limitation

[112] The experts agreed that the primary limitation period was 3 years from the later of either the accrual of the cause of action or the claimant's date of knowledge. As a matter of English law, this was governed by sections 11 and 14 of the Limitation Act 1980. In the case of both pursuers, the experts agreed that the cause of action had accrued as soon as either pursuer had suffered any damage. As noted above, the experts were agreed that so far as Mr Montague-Trenchard's potential claim again Etihad was concerned, the applicable law would be that of the UAE and therefore that law would determine any questions of limitation.

[113] Accordingly, so far as English law was concerned, the critical question for each pursuer was the date of knowledge. The experts agreed that, for these purposes, what was required was knowledge (a) that the injury was significant (ie the person in question would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment); (b) that the injury was attributable in whole or in part to the act or omission alleged to constitute negligence, nuisance or breach of duty; (c) of the identity of the

defendant; and (d) if it is alleged that the act or omission was that of a person other than the defendant, of the identity of that person and the additional facts supporting the bringing of an action.

[114] Against this background, Ms Crowther was of the view that the date of knowledge arose when Mr Gough and Mr Montague-Trenchard received the results of the testing carried out by Dr Mulder in the Netherlands in the second half of 2012. So far as she was concerned, the key part of the test was whether the pursuers knew that injury was attributable in whole or in part to the act or omission alleged to constitute negligence. The question which the court would require to ask itself was – were the pursuers reasonably sure that the injury was attributable? That meant was the injury capable of being attributed as a possible as opposed to a probable cause of the damage (*AB* v *Ministry of Defence* [2013] 1 AC 78, per Lord Mance at paragraph 79). In her view, it was important not to be too legalistic in this analysis.

[115] Ms Deal, on the other hand, observed that in *Balls* v *Reeve* [2021] EWHC 751 (QB), the court at first instance had noted that actual knowledge needs a diagnosis. However, she explained that she did not understand "diagnosis" to be used in a technical medical sense. What was needed was the claimant to be given an explanation of the cause of the symptoms that they were suffering. Ms Crowther accepted this and pointed to *Adams* v *Bracknell Forest Borough Council* [2004] UKHL 29 as an example of a case from the House of Lords where this explanation had been very informal – a conversation at a party.

[116] One further point of difference between the two experts was whether, in Mr Montague-Trenchard's case, the two potential defendants – Thomas Cook and Etihad – fell to be treated differently. The starting point for Ms Deal was that the question of knowledge had to be approached on a defendant-specific basis. She considered that it

was potentially significant that it appeared from the papers that Mr Montague-Trenchard had not considered Thomas Cook as a potential defendant until a much later stage – possibly 2015. Until that point, Mr Montague-Trenchard's emphasis seemed to have been on Etihad and the aircraft it flew. She also highlighted that his focus seemed to be on fume events rather than low-level exposure. Ms Crowther, on the other hand, accepted that the test in section 14 required to be approached on a defendant-by-defendant basis. However, she did not consider that in Mr Montague-Trenchard's case there was any basis for distinguishing between the two defendants. Ms Crowther emphasised that what the court requires to consider is the gist of the claimant's case. In that regard, she considered that once one reached the stage of the claimants considering that they had been harmed by wrongful exposure to cabin air, that was probably sufficient for the purposes of section 14. She also considered that it was highly relevant that it appeared that Mr-Montague-Trenchard was part of a group of pilots who were all investigating their symptoms.

Section 33 of the Limitation Act 1980

[117] The experts agreed that in the event that the limitation period had expired, it was possible for the court to dis-apply limitation in terms of section 33 of the Limitation Act.

[118] Ms Crowther was of the view that it was very difficult to predict the outcome of this type of application. However, she also thought that there were three factors which would be significant in the court's consideration. These were, first, whether Thomas Cook could show any prejudice caused by the elapse of time: for example, were Thomas Cook to be able to point to the death of a key witness. The second factor was the absence of a good reason for the pursuers not having brought their claims in time. The third was the proportionality of

allowing an out-of-time claim. In relation to this third factor, Ms Crowther considered that the court would attach significance to the fact that the pursuers would have a claim against their former adviser, the defender.

[119] Ms Deal was of the view in relation to Mr Montague-Trenchard's case that an application to extend time against Thomas Cook under section 33 would probably have been successful at least if made before the end of 2016 and possibly later, depending on the facts.

The pursuers' claims for lost property investment

[120] Both experts were asked for their opinions as to how the English courts would approach the claims advanced by both pursuers seeking to recover the losses they claimed arose because, as a result of their illness, they had been unable to invest in property.

[121] Ms Crowther approached the issue on the basis of general principles. She explained that the English courts would tend to approach this question from a tortious perspective as opposed to damages arising from breach of contract. She considered that the English courts would consider whether the type of loss claimed was foreseeable or not. She described this as a "ticklish" question. On the one hand, it was obviously foreseeable in a personal injury action that if someone were injured to the extent that they lost their earning capacity that there would be a financial loss. Equally, if you approached the question from the perspective of what the injured person did with their income, that would not seem to be foreseeable to the tortfeasor. She understood that these claims were being advanced in a way which was akin to a pension claim. Ms Crowther accepted that she had never come across claims of this sort being advanced.

[122] Ms Deal's evidence on this point was clear: she considered that these claims were unsustainable. She considered it to be a double recovery – claiming both the full loss of

earning and the loss of use of the earnings. Ms Deal considered that it was notable that like Ms Crowther, she had ever come across such a claim in personal injury litigation. She did not consider that the pursuers' property claims could be considered analogous to a claim for pension losses. Like Ms Crowther, she considered that the English court would approach the issue as one of tort.

Mr Gough's income protection policy

[123] The experts were asked about how the English courts would approach the deductibility or otherwise of the payments received by Mr Gough under the Scottish Equitable Group Income Protection policy.

[124] The experts agreed that the general principle was that an injured person is entitled to recover only their net loss. Accordingly financial gains accruing which the claimant would not have received but for the event which constitutes the cause of action are *prima facie* to be taken into account in mitigation of the loss which that event occasions. Both experts also agreed that this general principle was subject to a number of exceptions. The experts agreed that there is a well-established exception that where a claimant has paid the premiums for an insurance policy, the insurance proceeds are not deducted because generally a defendant should not get the benefits of a claimant's prudence. For this exception to apply, the claimant must have paid or contributed to the premium directly or indirectly. In other words, the provision of the insurance must not have been without cost to the claimant.

[125] Ms Crowther also highlighted a further category of third party benefit which the English courts have treated as not being deductible. These are "as of right" contractual ill-health pensions. In the case of *Smoker* v *London Fire Authority* [1991] 2 AC 502, the House of Lords made clear that payments of this type were not deductible from claims of loss of

earnings but they would be deductible from any future claim of pension loss. In respect of this exception, no distinction fell to be drawn between schemes in which the employee contributed and non-contributory schemes. The proper view was that the ill-health pension represented a reward for past services. Ms Crowther emphasised that, for her, the particular label applied was less important than the reality of the situation.

[126] Ms Deal did not understand that Mr Gough claimed that the payments he had received related to an ill-health pension. She considered that the available documentation indicated that the payments Mr Gough received were income protection. Ms Deal was also clear that it was necessary to distinguish between payments received in lieu of salary, on the one hand, and payments received in lieu of pension. The case of *Smoker* concerned an ill-health pension. Whereas she considered that Mr Gough's case was indistinguishable from *Hussain* v *New Taplow* [1988] AC 514.

Quantum

[127] The experts were in agreement about how the English courts applied interest in respect of past losses.

The law of the United Arab Emirates

[128] The defender led evidence from Rami Obeid. Mr Obeid is a lawyer qualified in the UAE. He was a senior legal consultant with Hadef & Partners, a law firm with offices in Abu Dhabi and Dubai. Mr Obeid had prepared a report and gave evidence about a number of aspects of the law of the UAE including: the law of limitation for personal injury claims; the UAE courts' approach to the issue of indivisible damages; and their approach to the assessment and quantification of damages.

[129] The pursuers objected to the relevancy of Mr Obeid's evidence and I heard it under reservation. The pursuers did not cross-examine Mr Obeid.

Neuropsychology: Professor Sarah Mackenzie Ross

[130] The pursuers led evidence from Professor Mackenzie Ross who is a clinical neuropsychologist and chartered clinical psychologist. Professor Mackenzie Ross completed her PhD at University College London. She explained that neuropsychology was a specialism of clinical psychology dealing with the relationship between psychological functions and the structure and functioning of the brain. She had studied the long-term effects of low-level exposure to organophosphates. From 1998, she had been retained by a firm of solicitors to investigate the potential toxic effects of pesticides on people. While carrying out this work, she had reported to a number of government bodies, including the Committee on Toxicity. She had been commissioned by DEFRA to carry out research into low-level exposure to organophosphates.

[131] In around 2006, she had been approached by BALPA who raised concerns about ATS. She had assessed a number of pilots and found what she thought was alarming evidence of cognitive impairment among them. As a result, she had approached the Department of Transport and the Civil Aviation Authority (CAA).

[132] In her CV, Professor Mackenzie Ross described herself as an internationally recognised expert in neurotoxicology. When asked to justify this statement, Professor Mackenzie Ross pointed to her professional experience, to her publications in peer-reviewed learned journals, to her appointment in 2020 as a professor at UCL and to the award she had received from the British Psychological Society. She described toxicology as a multi-disciplinary field encompassing medicine, biology, chemistry, environmental

science, pharmacology and psychology. What links these different specialisms is an interest in the adverse effects of chemicals in the environment.

[133] Professor Mackenzie Ross had interviewed and assessed the pursuers. She had subsequently prepared a report in respect of each of them. The focus of her reports was the cognitive functioning and mental health of each pursuer. In respect of both Mr Gough and Mr Montague-Trenchard, Professor Mackenzie Ross' assessment did not find evidence of global intellectual decline. However, in each pursuer, her testing revealed patchy under-functioning in tests of auditory memory and verbal fluency. In Mr Montague-Trenchard's case, there was also evidence of under-functioning in respect of processing speed.

[134] Professor Mackenzie Ross considered that it was difficult to draw firm conclusions in relation to causation based solely on performance in psychometric testing. The results of this testing had to be considered in the context of the clinical information acquired from other sources and other medical tests. However, Professor Mackenzie Ross noted that neurotoxic conditions were frequently misdiagnosed or not diagnosed at all. She attributed this to the fact that few healthcare professionals received training in toxicology. She considered that neuropsychological assessment was the most sensitive means of examining the effects of toxic exposure. But she also recognised that, given the wide range of factors that can influence performance, caution was required in the absence of corroborating results from other medical disciplines.

[135] Professor Mackenzie Ross sought to apply the Bradford Hill criteria to assist in the interpretation of the pursuers' cases. These criteria were formulated by Sir Austin Bradford Hill and are used in the public health field to establish epidemiological evidence of a causal relationship between a presumed cause and effect. In considering the pursuers'

cases, Professor Mackenzie Ross noted that each gave a history of repeated and continuous exposure to engine oil fumes. In both cases, that exposure was connected in time with their initial symptoms of ill health. She considered that in the case of both pursuers their reported symptoms and neuropsychological profiles were consistent with those which had been reported in previous studies of aircrew. These included respiratory, cardiovascular, gastrointestinal, eye, nose and throat irritation, dermatological, systemic symptoms (fatigue, arthralgias) and neurological problems (sensory changes and cognitive impairment), following exposure to contaminated air.

[136] Professor Mackenzie Ross recognised the fact that the studies of cabin air quality which had been carried out to date had not detected chemicals at levels which were considered to be a concern from an occupational medicine perspective. However, she considered that there were methodological weaknesses in the studies which had been carried out. She noted that none of the cabin air studies had captured a so-called "fume event". Furthermore, she also pointed out that consideration of particular chemicals had not taken account of either the effect of combining the chemicals which had been identified or the fact that those chemicals had been preheated to a very high level. In her view, one also had to be very careful comparing the unique hypoxic environment of an aircraft cabin with other working environments. Professor Mackenzie Ross highlighted the fact that the cabin air studies did not, in her opinion, consider the risk to health posed. They did not look at the effect of cumulative low-level exposure and they did not seek to correlate the data with health effects.

[137] On this basis, and in light of her research, Professor Mackenzie Ross considered that it would be premature to conclude that aircraft cabin air did not pose any risk to aircrew. However, she recognised the limits of her expertise. In the cases of the pursuers she

considered that the opinions of both a clinical toxicologist and a neurologist should be sought.

[138] Professor Mackenzie Ross was asked about the diagnosis of the pursuers by the consultant neurologist, Dr Davenport. His view was that both of the pursuers were suffering with chronic fatigue syndrome (see below at [141] and [143]). So far as Professor Mackenzie Ross was aware, this diagnosis was more of a description of the symptoms each pursuer had. It did not assist with identifying the cause. However, Professor Mackenzie Ross did recognise that the results of her testing of both pursuers might also be found in someone who had been diagnosed with chronic fatigue syndrome.

Neurology: Dr Richard Davenport

[139] The defender led evidence from Dr Richard Davenport. Dr Davenport is a consultant neurologist based at the Edinburgh Royal Infirmary. He has been a consultant since 1999. From that date, he has also lectured in neurology at the University of Edinburgh where he holds the post of honorary senior lecturer. At the time of giving evidence, Dr Davenport was also the president of the Association of British Neurologists.

[140] Dr Davenport had prepared two reports in respect of each of the pursuers. In each case, Dr Davenport examined the pursuers in person before preparing his first report, dated June 2021. He subsequently had an online consultation with each pursuer before preparing supplementary reports in January 2024. Dr Davenport did not undertake a detailed cognitive assessment of the pursuers. The carrying out of such an assessment would, in Dr Davenport's experience, be something carried out by a neuropsychologist.

[141] In relation to Mr Montague-Trenchard, Dr Davenport's primary diagnosis was that he was suffering from chronic fatigue syndrome. Dr Davenport could not find a specific

neurological diagnosis to account for Mr Montague-Trenchard's neurological symptoms. Dr Davenport explained that chronic fatigue syndrome is considered a "functional" disorder, meaning that there is no identifiable structural disease to explain the symptoms. Its diagnosis does not imply any known underlying definitive mechanism.

[142] In relation to the other symptoms which Mr Montague-Trenchard complained of, such as the irritation of the lower gastric tract, Dr Davenport considered that these symptoms would also be recognised as being consistent with a functional disorder.

[143] In relation to Mr Gough, Dr Davenport had, when preparing his first report, diagnosed Mr Gough as suffering from a functional neurological disorder along with both a migraine disorder and a mental health disorder. Dr Davenport did not consider that Mr Gough was suffering from multiple sclerosis. Dr Davenport considered that Mr Gough's visual symptoms were being caused by migraines albeit he considered that the way in which the migraines manifested themselves was unusual. Subsequently, in preparing his second report, Dr Davenport altered his opinion. He considered that chronic fatigue syndrome was the best explanation for the fatigue from which Mr Gough was suffering and which appeared to be his dominant symptom. Dr Davenport stressed that there were overlaps in these diagnostic areas which should not be regarded as silos. Dr Davenport was of the view that Mr Gough's case was more neurologically complex than that of Mr Montague-Trenchard as could be demonstrated from the many interactions with neurologists which Mr Gough had had during the course of his treatment.

[144] Dr Davenport accepted that chronic fatigue syndrome was a descriptive term and that its cause was not known. However, he considered that it remained a meaningful diagnosis. Although, ultimately, Dr Davenport had diagnosed both pursuers with chronic fatigue syndrome, he considered that it would be slightly circular to regard this as a pattern.

Although the principal disabling problem was the same in both cases, there were important differences between them. Furthermore, chronic fatigue could be seen to affect a very wide group of individuals from many different areas of employment and backgrounds.

[145] As to ATS, Dr Davenport noted that the condition had yet to be accepted as a condition, was not recognised by most doctors and did not feature in the International Classification of Diseases. Dr Davenport also noted that, so far as he was aware as a neurologist, there were no accepted diagnostic criteria for this syndrome. Insofar as criteria had been put forward, these were very broad and, in any event, it was not apparent to Dr Davenport that either pursuer satisfied these criteria. Overall, Dr Davenport considered that there was insufficient evidence in the medical literature to support the notion of a specific aerotoxic syndrome. However, Dr Davenport was careful to accept that, in the future, it might be that ATS would become a recognisable and accepted diagnosis.

[146] Dr Davenport did not recognise the use of the term "diffuse encephalopathy" as Professor Howard had used that term to describe the condition of both of the pursuers. Dr Davenport considered that this descriptive term would be used in situations where there was an alteration in mental state – disorientation, confusion evolving into coma if the cause was not corrected. It could be caused by a broad range of conditions: infectious disorders, metabolic disorders, toxic causes, and sometimes specific neurological conditions.

[147] In respect of both pursuers, Dr Davenport had in his first reports considered that they would be able to work in a flexible, part-time role. Dr Davenport clarified that, based on his experience, he recognised the difficulties in working regular, routine hours experienced by those who suffered from chronic fatigue because of the tendency of such people to suffer from unexpected periods of fatigue. He did not seek to cast doubt on the accuracy of the pursuers' account of their symptoms. He also was careful to make clear that

he did not consider that he was really in a position to comment in detail on either of the pursuers' residual earning capacity.

Toxicology: Professor Vyvyan Howard and Professor Jim Bridges

[148] Each party put forward an expert witness speaking to the issues of toxicology: Professor Vyvyan Howard for the pursuers and Professor Jim Bridges for the defender. Each of these witnesses had prepared a number of reports which they adopted and the two witnesses gave their evidence concurrently.

Professor Howard

[149] Professor Howard is emeritus professor of bioimaging at the University of Ulster. He has been a fellow of the Royal College of Pathologists since 1999. In respect of toxicology, Professor Howard is a member of the British Society of Toxicological Pathologists. He had published widely in the field, including in relation to ATS in the World Health Organisation Journal "Public Health Panorama". He had carried out research work for pharmaceutical companies designing and conducting toxicological studies. He served for 6 years as a member of the Advisory Committee on Pesticides which was a DEFRA body. He had also served on a European body, Technical Committee 436, as the Irish representative working as a toxicologist. Professor Howard had been retained as an expert witness in relation to a number of litigations which involved giving his expert opinion on toxicological issues. These included litigation in the US against Boeing in relation to toxic cabin air.

[150] In respect of ATS, Professor Howard had first come across the issue when asked to give a presentation at a BALPA conference in 2005. Subsequently, in 2017, he had been

asked to examine a number of pilots who were complaining of ill health. As a result of his examination of these pilots, his view was that the symptomology was very diffuse. There were no localising signs typically used by neurologists to indicate lesions or structural damage within the nervous system.

[151] Professor Howard had prepared three reports.

[152] The first, dated 22 June 2018, was described as his generic report. In this report, Professor Howard set out his understanding of a number of matters, including: the way in which cabin air is heated and pressurised; the ways in which there is a pathway for oil droplets or fumes to enter the cabin air supply as a result of the design of the seals and the operation of the engines; the ways in which "fume events" occur and how they might be avoided; the recognition within the aviation industry that low-level leakage of oil and other fluids does occur as a normal function of using the bleed air system; the composition of synthetic jet engine oils; the effect on the oil of exposure to high temperatures within the engine resulting in it being subject to thermal degradation (pyrolysis). Professor Howard was cross-examined as to the basis upon which he had the relevant expertise to include this material within his report. In response, Professor Howard did not dispute these areas fell outwith his field of expertise. His position was that he was seeking to set out the basis of his understanding by extracting material from publicly available sources.

[153] Professor Howard also set out the results of the cabin air studies carried out to date which showed that included among the substances identified as being present, was tricreysl phosphate or TCP, and that the amounts of these substances was well below any applicable "Occupational Exposure Levels" or OELs.

[154] Professor Howard noted that classical toxicology has been developed to test individual chemicals one at a time. Accordingly, classical toxicology is not good at

addressing mixtures of chemicals and non-straight line dose responses. As such, classical toxicology tends to assume that the effect of chemicals in a mixture is simply additive. That assumption requires the toxicity of each individual component in the mixture to be known. Professor Howard considered that an assumption of additivity was unfounded when considering cabin air. He pointed to studies which highlighted unexpected synergistic interactions arising from mixtures. For these reasons, Professor Howard considered that there was no merit in trying to apply OELs or other equivalent regulatory limits to the cabin air situation. In particular, Professor Howard considered that this was the case in relation to TCP and tri-ortho-cresyl phosphate (TOCP). The isomers of TCP were acknowledged to be neurotoxic.

[155] Professor Howard did not consider that it was possible, safely, to divide exposure into fume events and non-fume events. He considered that the available data showed that there were a number of different factors that required to be taken into account including: individual susceptibility both in terms of genetics and length of prior exposure and the number and mixture of different chemicals involved.

[156] In terms of considering the method of exposure of pilots and cabin crew to toxins, Professor Howard considered that inhalation both of fumes and ultra-fine particles represented the principal route. He noted that there was a lack of inhalation studies in respect of jet oils and TCP. In relation to the ultra-fine or nano particles, research indicated that these could be composed of pure engine oil. This suggested that exposure levels may be higher than previously thought.

[157] As to the mechanism whereby exposure causes injury, Professor Howard accepted that the precise mechanism was not defined. The main impediment to this was the complexity of the mixture of chemicals involved. He emphasised the length of exposure

which pilots and cabin crew would experience over many thousands of hours. Professor Howard noted that in its report into cabin air, the UK Committee on Toxicity had focussed only on TOCP in the context of organophosphate-induced delayed neuropathy (OPIDN). It was acknowledged that OPIDN required a high level of exposure to organophosphates. Other research had identified the toxicological effects of repeated dose exposures to low levels of organophosphates. Professor Howard referred in particular to papers published by Professor Alvin Terry of the Department of Pharmacology and Toxicology, Medical College of Georgia, Augusta University, Georgia, USA. Some of the effects described in that research were irreversible and, therefore, cumulative in their pathogenic action. On the basis of this research, Professor Howard considered that there was evidence that exposure to organophosphates interfered with axonal transport, the process by which information was communicated between nerve cells.

[158] This led Professor Howard to the conclusion that cabin crew and pilots would be more susceptible to neurological harm than passengers following an acute high-dose fume event. Professor Howard considered that this conclusion was borne out by a comparison of hospital attendance rates by passengers and aircrew following fume events.

[159] In Professor Howard's opinion,

> "on the balance of scientific and medical probability, exposure to the low level fumes in engine bleed air is causally related to the signs and symptoms known collectively as 'Aerotoxic Syndrome'."

[160] Professor Howard also prepared a further report in respect of each of the pursuers. These reports were prepared following a desktop review and did not involve a physical examination.

[161] In respect of Mr Gough, Professor Howard noted that during his career, he had accumulated over 6,000 hours flying time. Professor Howard also noted the results of

Professor Mackenzie Ross's assessment of Mr Gough. Professor Howard did not agree with the conclusion of Dr Davenport that there was no organic basis for Mr Gough's observed symptoms. Professor Howard considered that research had demonstrated the mechanisms by which harm could be caused by repeated low-dose exposure to organophosphates. These mechanisms included the inhibition of axonal transport, neuroinflammation and organophosphates binding to amino acids. Professor Howard's view was that these mechanisms could cause what he described as a "diffuse encephalopathy" giving rise to the spectrum of signs and symptoms associated with ATS. He accepted that the diffuse nature of the symptom spectrum presented difficulties for diagnosis.

[162] Accordingly, Professor Howard was of the view that Mr Gough had suffered organic damage to his nervous system as a result of chronic and acute exposure to aircraft engine bleed air over his flying career and that Mr Gough's symptoms are consistent with a diagnosis of ATS.

[163] In respect of Mr Montague-Trenchard, Professor Howard reached a similar conclusion. He again noted that during Mr Montague-Trenchard's career, he had accumulated over 9,500 hours flying time. He again noted the results of Professor Mackenzie Ross's assessment of Mr Montague-Trenchard and disagreed with the conclusion of Dr Davenport that there was no organic basis for Mr Montague-Trenchard's observed symptoms. Professor Howard noted that, on the basis of Mr Montague-Trenchard's recollection of his symptoms, there was an association between those symptoms and his flying. Professor Howard considered that this was a strong indicator that Mr Montague-Trenchard's illness was associated with exposure to a factor in his place of work – the cockpit. Accordingly, Professor Howard was of the view that Mr Montague-Trenchard had also suffered organic damage to his nervous system as a

result of chronic and acute exposure to aircraft engine bleed air over his flying career and that his symptoms are consistent with a diagnosis of ATS.

Professor Bridges

[164] Professor Bridges is emeritus professor of Toxicology and Environmental Health at the University of Surrey. He holds a Batchelor of Science degree in chemistry and physiology and a PhD in biochemistry and analytical chemistry, all from the University of London. Professor Bridges explained that the University of Surrey had been the first UK institution to establish a chair of toxicology. Professor Bridges had been involved in setting up the first MSc courses in toxicology in Europe. He had established the British Toxicology Club which subsequently became the British Toxicology Society. From 1970 to 2004, Professor Bridges had served on many UK Government and EU scientific committees. This included serving on the Advisory Committee on Toxic Substances known as the WATCH committee, the principal role of which was to fix occupational exposure standards. Professor Bridges had not published at all in respect of ATS. As he explained in evidence, this was a conscious choice of his to avoid areas of public controversy.

[165] Professor Bridges had prepared two reports in respect of each of the pursuers.

[166] Professor Bridges' starting point was to highlight the fact that pilots, as all individuals in normal life, will be exposed every day to many thousands of different chemicals. In the case of the great majority of those chemicals, the level of exposure will be very low. Professor Bridges pointed to the results of research in 2017 which attempted to model the interaction of the mixture of chemicals thought to be relevant to ATS. This research found only minimal changes in the effect of the mixture. Professor Bridges recognised that the science in this area was not complete, but, in his view, low-level

exposure to a wide range of chemicals did not lead to obvious toxicity. Human beings were exposed every day to many thousands of chemicals without noticeable significant adverse effects on their health.

[167] Professor Bridges noted that the assumption in the majority of studies of ATS appears to have been that TOCP is the sole or the most important toxic component of cabin air. TOCP, an isomer of TCP, is an organophosphoric chemical. Professor Bridges questioned this focus. Since 2017, ultrafine particles had also been considered.

[168] In terms of the level of exposure, Professor Bridges highlighted that there were many different factors to be considered and it was difficult to assess the effect of exposure. However, Professor Bridges emphasised that it is an established principle of toxicology that for each chemical there is a level of exposure below which no adverse effect will arise. This principle has been used for many decades as the basis upon which safe exposure levels have been set. The setting of these levels is based upon data derived from, among other things, toxicity studies and human epidemiology. The precautionary principle is then applied and levels are set substantially below the estimated "no adverse effect" threshold. This process results in the setting of OELs.

[169] Professor Bridges also considered that, of the chemicals identified as "aerotoxic", none were likely to be sufficiently persistent to build up in the body during normal flights. He considered that a significant contribution from other psychological, physical or biological stressors would be required. Organophosphates were generally not regarded as bioaccumulative, so exposure to very low doses does not generally result in significant quantities accumulating within the body.

[170] Using the precautionary approach, Professor Bridges noted that TOCP, the most toxic isomer of TCP, had been used to establish an OEL. Although Professor Bridges

recognised that other predominant TCP isomers – di-ortho-cresylphosphate (DOCP) and mono-ortho-cresyl phosphate (MOCP) – were more toxic than TOCP, they were likely to be only very minor contaminants. As workplace exposure to these chemicals was very low, there was no workplace standard for them.

[171] Professor Bridges recognised that the appropriateness of applying OELs in the context of ATS was disputed. However, he could find no studies which provided scientific evidence to justify why pilots and cabin crew should be regarded as uniquely susceptible. Professor Bridges pointed out that TCPs are widely used for many purposes including as solvents, anti-foam agents, refrigeration chemicals, lubricants and in resins and plastics. They were almost ubiquitous in our environment. Nano particles were also commonly found. Against this background, Professor Bridges considered that for a member of air crew to be diagnosed as suffering from ATS, exposure levels should be comparable at least to the OELs of the chemicals of interest. However, the available studies of cabin air showed TCP levels which were very low, if present at all. The measurements were well below the relevant OELs. This was true even if the OELs were reduced ten-fold. Professor Bridges considered that the measured levels were far too low to have caused any adverse health effects. So far as Professor Bridges was concerned this was also true of the short-lived "fume events" which had been measured.

[172] Professor Bridges considered that the available published studies suffered from one or more of the following problems: a lack of reliably objective criteria to characterise the symptoms; unreliable data; non-random selection; poor information on exposure to the "aerotoxic chemicals"; wide variability in the symptoms; and a failure to take into account other stressors. Inevitably, the main source of information was self-reported symptoms.

[173] In respect of both pursuers, Professor Bridges considered that there were three principal challenges in concluding that their ill health was attributable to ATS: first, there were no measurements of the exposure to chemicals of either; second, the pattern of symptoms of both pursuers was not characteristic of organophosphates; and third, no specific events had been correlated with the development of their symptoms. In Professor Bridges' opinion, the pursuers' estimated exposure to cabin air chemicals did not support the conclusion that either Mr Gough or Mr Montague-Trenchard suffered from ATS. Although as yet unidentified chemicals could not be ruled out, Professor Bridges thought that the likelihood was that their levels would be extremely low.

Areas of disagreement

[174] It is fair to observe that there was little by way of a meeting of minds between the two professors. In particular, it was notable that Professor Bridges refused even to accept that Professor Howard was qualified to express an opinion on toxicology. Apparently for similar reasons, Professor Bridges had considered there would be no value in his meeting with Professor Howard in advance of the proof to prepare a joint statement.

[175] One of the principal areas of disagreement between the two professors concerned the use of OELs. Professor Bridges gave evidence about the way in which OELs were fixed. He explained that information from various workplaces was considered in order to fix a safe "no effect" level. This level would be fixed on a precautionary basis. Professor Bridges explained that it was important to fix a level which could be both practically achieved and measured. OELs could be set both for short-term exposure and for chronic exposure (8 hours per day, 5 days per week for a working lifetime). TCP had been tested as a mixture by considering TOCP, the most toxic isomer.

[176] Professor Howard had a number of concerns with the use and application of OELs in the context of cabin air. As a starting point, Professor Howard noted that OELs were not intended to apply to an environment in which the general public would be present. Furthermore, of the substances which had been detected in cabin air, the great majority of the chemicals had not even been identified, so the toxicology of these substances was unknown. The complexity of this mixture also meant that it was difficult to isolate and assess the numerous chemicals contained within it. Second, Professor Howard questioned whether OELs were applicable to the high altitude, high pressure and hypoxic (low oxygen) environment of the cabin. Nerve cells were highly metabolic. It was also known that if hypoxia were induced, the toxicity of a number of toxicants was increased.

[177] Professor Bridges accepted that a different standard should be used where the general public were concerned. But in considering the pursuers in their workplace, he considered that this required to be seen in context. Humans are exposed to thousands of airborne chemicals every day. It was necessary to determine the particular chemicals to be concerned about. You could never be absolutely sure that you had not missed something but experience indicated that this did not happen commonly. This approach was the common approach that was adopted in relation to the fixing of OELs. The fact that a mixture of chemicals was found in the cabin was not unique to aircraft. Professor Bridges was also of the view that synergistic effects were relatively rare. He pointed out that two chemicals could also interact in an antagonistic way where the effect of one blocked another. As to the lower level of oxygen experienced in the aircraft, Professor Bridges did not consider that the lower level would be likely to affect the toxicity of the chemicals being considered.

[178] The two professors also disagreed about the extent to which there was evidence that low-dose exposure to organophosphates would have an adverse effect. Professor Bridges had considered the papers published by Professor Terry referred to by Professor Howard. However, he considered that it was important to distinguish between a change caused by exposure and whether this was, in fact, adverse.

[179] For Professor Bridges, the key issue was to quantify the dose of any toxin which was being considered. For him, the cabin air surveys showed that the likely dosage was far below the relevant OELs for, in particular, organophosphates. Whereas for Professor Howard, it was important to recognise the patterns of symptoms which were being reported by the pilots and cabin crew affected. That is what he, amongst others, had done in the paper he had published in the WHO publication Panorama in 2017. Identifying the dose would require more research and access to testing in aircraft. Professor Bridges responded that the symptoms referred to were very varied. He questioned whether enough consideration had been given to other possible causes such as the other stresses – biological, physical and psychological – to which pilots were exposed.

The pursuers' careers

[180] I heard evidence from two expert witnesses in respect of the likely progression of each of the pursuers' careers had they not been forced to retire as a result of ill health.

[181] The pursuers led evidence from Captain David Warner. Captain Warner had been a pilot, serving with the RAF. He had retired in 1988 with the rank of Squadron Leader. He had then joined British Airways where he was a captain as well as qualifying as a type rating instructor and examiner. At British Airways, he had progressed up to chief pilot level. In 2010, he had taken up a position as the vice president of operations of a VVIP

operator in the UAE. In that role he had had regular interaction with the major local carriers including Etihad. In particular, he had been responsible for recruiting pilots from the other operators and so required to have a good understanding of rates of pay and conditions. He continued in this role until 2016.

[182] The defender led evidence from Keith Carter. Mr Carter is an employment expert, the principal of a consultancy, who has given expert evidence in litigation for 40 years. This included preparing reports in respect of pilots, ground staff and others working in the aviation sector.

Areas of agreement

[183] The experts were in agreement as to Mr Gough's basic salary as at September 2005. They also agreed on the value of Mr Gough's benefits. The experts also agreed that it was unlikely that Mr Gough would, after retirement, have worked as a synthetic flight instructor or examiner, using simulators. Both experts noted that only a small proportion of commercial pilots choose to continue working as an instructor or examiner after retirement. Captain Warner also noted that, on the basis of the information with which he had been provided, Mr Gough had not shown any desire or aspiration to qualify as an instructor or examiner prior to 2005.

[184] In the same way, the experts agreed Mr Montague-Trenchard's basic salary as at April 2012. They also agreed on the value of the flying and training allowances to which Mr Montague-Trenchard would have been entitled. Captain Warner accepted that a number of benefits, most significantly housing and education, were payable to employees in order to enable them to defray the associated costs while living in the Emirates.

[185] In relation to post-retirement work for Mr Montague-Trenchard, the experts were agreed that, if Mr Montague-Trenchard had continued to work as a synthetic instructor or examiner, this would have been in the United Kingdom and on a part-time or consultancy basis. The experts were also in broad agreement as to the likely gross income that such work would generate. Captain Warner considered it likely that Mr Montague-Trenchard would have continued with this work until he was 72. His reasoning was that, in his experience, former pilots carrying out this work tended to work until around 70 and, in Mr Montague-Trenchard's case, Captain Warner took particular account of the age of his children.

Areas of disagreement

[186] The experts did not agree on Mr Gough's likely career path. Mr Carter considered that Mr Gough would have remained with Thomas Cook until that company entered liquidation in 2019. Mr Carter pointed to the fact that Mr Gough had not, up to the point of his retirement, either worked or applied for jobs outside the United Kingdom. Mr Gough's conditions at Thomas Cook, including, in particular, his pension, were relatively good. Captain Warner was of the view that after a few more years at Thomas Cook, Mr Gough would have sought to transfer to a large carrier, possibly Etihad. Captain Warner was not able to speak directly to the recruitment process used by Etihad.

[187] The experts did not agree as to the likely retirement age for the pursuers. Mr Carter considered that it was likely that each of the pursuers would have retired between 55 and 60. Whereas Captain Warner was of the view that each of the pursuers would have worked until they were 65. Mr Carter had based his view on statistics which showed a general trend of commercial pilots retiring before the age of 60. Captain Warner considered that the data

Mr Carter relied upon did not properly take account of the different licenses available to pilots and also the fact that senior pilots might go abroad to fly at the end of their careers. Captain Warner based his view on his interpretation of the available data and his own experience in flight operation. He recognised that after 60, the risk of health issues increased. However, he also considered that one had to take account of other factors such as when the particular pilot had started flying commercially: a later entry date would point to a later retirement date in his experience.

[188] In this regard, the experts did not agree on what would have happened to Mr Gough if he had remained working for Thomas Cook at the point that company went into liquidation in 2019. Mr Carter was of the view that, at this point, aged 59, it was likely that Mr Gough would have retired. This was especially so when the impact of Covid was taken into account. Captain Warner accepted that, given his age, it was likely that Mr Gough would have been at a disadvantage in obtaining a new position at this point in his career.

[189] The experts also did not agree about the impact of the Covid pandemic on the pursuers' likely careers. Captain Warner was of the view that Mr Gough would have been likely to suffer a period of little or no work from summer 2020 to early 2022 but thereafter would have been able to resume work in the rapidly recovering sector. His opinion was based upon his own experience as to the way in which airlines had rapidly sought to re-employ staff in 2022. As regards Mr Montague-Trenchard, Captain Warner was of the view that, although he was an ex-patriate, he would have been retained by Etihad during the pandemic. This was because by the date of the pandemic, Mr Montague-Trenchard would have been a very senior pilot who was also a type rating instructor and examiner. Etihad would have required to retain individuals with these qualifications in order to keep the licences of their pilots valid. This was notwithstanding the fact that Captain Warner

recognised that Etihad had faced financial difficulties in 2016 and had undergone re-structuring in 2018 which involved laying off many non-Emirati pilots. Mr Carter accepted that he could not comment on whether Mr Montague-Trenchard would have been retained based on his particular experience and qualifications.

Residual earning capacity

[190] Mr Carter had considered the residual earning capacity of each of the pursuers. This involved looking at the individual's skills, experience and qualifications and then working out what that might lead them to in the job market. Mr Carter deferred to those with medical expertise as to the pursuers' actual physical capabilities.

[191] Captain Warner did not consider that this was an area which fell within his expertise.

Pension loss

[192] I heard evidence from Dr John Pollock, fellow of the Institute and Faculty of Actuaries, in respect of the quantification of pension loss. This evidence was, essentially, only relevant to Mr Gough's claims because it was agreed that Mr Montague-Trenchard had had no entitlement to a pension while employed by Etihad.

[193] In relation to Mr Gough, Dr Pollock's primary calculation was based on the assumption that he had remained employed by Thomas Cook and had not been promoted and become an instructor or examiner. In that case any pension loss depended on two things: first, that the income protection payments he had received were not deductible; and second, that he had been able to obtain further employment after the Covid pandemic. Dr Pollock had also carried out calculations based on the other scenarios considered by the employment experts.

Pursuers' submissions

Introduction

[194] To a very great extent the pursuers advanced a combined submission. The main area where separate submissions were made concerned the quantification of the sums sought by way of damages.

[195] By way of introduction, senior counsel highlighted two points.

[196] First, the starting point for the pursuers was that at no time had it been suggested that they were not suffering from genuine symptoms. If those symptoms were causally related to the pursuers' working conditions, then, whether these symptoms were caused by organophosphates or not, the pursuers were entitled to compensation from their employers. Each of the pursuers had been eloquent as to the devastating impact that their poor health had had on their careers and lives.

[197] Second, by reference to Lord Hodge's judgment in *Griffiths* v *TUI (UK) Ltd* [2023] 3 WLR 1204, senior counsel emphasised that, if the defender sought to dispute the evidence of the pursuers' witnesses, it was incumbent on the defender to have challenged those witnesses in cross-examination. The duty on the defender arose as a matter of fairness of the legal proceedings as a whole (at paragraphs 43 and 44). There were exceptions to this rule. For example, it did not apply where the challenge was directed to a matter which was collateral or insignificant. It also had no application where evidence of fact was manifestly incredible. Furthermore, it was clear that there was no such duty where what was being challenged was an expert's opinion unsupported by any reasoning or where there were obvious mistakes of fact on the face of the expert's report (at paragraphs 61 to 64).

[198] The pursuers relied on this point in relation, in particular, to the evidence of Professors Howard and Mackenzie Ross. The pursuers noted that the counsel for the defender had, during cross-examination, without notice, attempted to attack the professional reputations of both these witnesses. Such an approach was to be strongly deprecated. However, beyond these attacks and the generalised suggestion that neither witness was a toxicologist, the defender had not in fact mounted a challenge to the evidence of either witness. In these circumstances, the uncontroverted evidence of the pursuers' witnesses fell to be accepted.

Proper approach to loss of a chance cases

[199] The pursuers submitted that the correct approach to be adopted in cases which depended on a loss of chance had been set out by the UK Supreme Court by Lord Briggs JSC in *Perry* v *Raleys Solicitors* [2019] UKSC 5. The courts had developed a clear dividing line between those matters which the pursuer must prove on the balance of probabilities and those matters which were better assessed on the basis of a lost chance. Where, on the one hand, the loss to the pursuer depended upon the pursuer's own actions, then it was incumbent on the pursuer to prove, on the balance of probabilities, what he or she would have done. Where, on the other, the pursuer's loss depended upon the actions of a third party, that should be evaluated as a lost chance (*Perry* at paragraph 20 and those following).

[200] In the present case, the lost chance was the opportunity to pursue a claim against their former employers. This depended both on each of the pursuers' own actions as to what they would have done had they been properly advised and the actions of a number of third parties: being the solicitors, funders, defendants and courts who would have been involved in the resolution of the pursuers' claim.

[201] The pursuers submitted further that it was not appropriate in cases such as the present one for the court to engage in a "trial within a trial". In other words, it would be unfair for the court to seek to determine in the normal way the issues which would have been in dispute in the pursuers' claim had it proceeded (*Hanif* v *Middleweeks* [2000] Lloyd's Rep PN 920 at paragraph 17 and those following). Rather, the pursuers had to demonstrate that they had a real and substantial chance of success which the court then had to evaluate. It was critical to understand that what the court was seeking to do was value what the pursuers had lost, not determine the outcome of that claim (*Edwards* v *Hugh James Ford Simey* [2018] PNLR 30, paragraph 67 (Irwin LJ)). The court should tend to a generous assessment of the uncertainties insofar as the pursuers' difficulties arose as a result of the defender's negligence (*Mount* v *Barker Austin* [1998] PNLR 493, 510-511 (Simon Brown LJ)).

[202] The pursuers submitted that it would be unfair and unrealistic to impose on them, in the context of a professional negligence claim, the same burden of proof as would apply to the underlying claim. Neither the pursuers nor the court were in the position they would have been in had the underlying claim proceeded. The position of the pursuers' employer, Thomas Cook, was not known. It was not known what evidence might have been obtained from it. Equally, it was not known what defence would have been advanced by it (see *Perry* at paragraph 18). The pursuers also stressed that it had to be borne in mind that the pursuers' cases might have been settled before trial (*Dixon* v *Clement Jones Solicitors* [2005] PNLR 6, paragraph 27 (Lord Justice Rix)).

[203] In this regard, the pursuers drew my attention to the obvious tension which arises in cases in which a solicitor has apparently acted for a client without advising them that their position is hopeless and who then, when faced with a claim for negligence, seeks to argue

exactly that. As Lord Ericht had noted in *Centenary 6* v *TLT* 2023 SLT 555 (Outer House) this gave rise to obvious difficulties for the solicitor (at paragraph 121).

[204] The pursuers submitted that the court should take a broad approach to the assessment of the pursuers' chances of success taking into account all of the various factors. On this basis, the pursuers submitted that their chances of success were of the order of 80%. In this regard, senior counsel referred to the decision of Lord Ericht in *Centenary 6* as well as to the hearing of the reclaiming motion by the Inner House in that case (this was subsequently reported: 2024 SLT 681). These cases supported the proposition that the correct approach when dealing with a number of different non-independent contingencies was to take an overall view as opposed to trying to ascribe a separate percentage to each.

The significance of the defender's admitted negligence

[205] The pursuers stressed the admissions which had been made by the defender in both cases. The defender had admitted that he ought to have taken a detailed precognition from each of the pursuers within 3 months of being instructed. That precognition would have disclosed a number of things: the identity of potential defenders, being Thomas Cook in the case of Mr Gough and Etihad and Thomas Cook in the case of Mr Montague-Trenchard; that the likely forum for litigation was England; that an English solicitor ought to be instructed as soon as possible; and that there were likely to be limitation issues arising if steps were not taken.

Causation

What would the pursuers have done?

[206] The pursuers each submitted that there had been no challenge to their evidence that, had they been properly advised by the defender, they would have followed that advice and would have sought assistance from an English solicitor. Accordingly, the pursuers invited me to hold, on the balance of probabilities, that the pursuers would have done so.

[207] The pursuers noted that there had been some dispute as to when the defender had concluded a contract with each of the pursuers. However, the pursuers submitted that this dispute made no practical difference. Even taking the latest date for this – being the meeting in April 2013 between the pursuers and the defender – the pursuers would have landed with English solicitors by mid-July 2013 which was not close to the end of the limitation period.

What would have an English solicitor have done?

[208] The pursuers submitted that the English solicitors the pursuers would have instructed, had they been properly advised, would have most probably been Thompsons, England. As such, the pursuers submitted that they would have ended up as part of the collective proceedings seeking damages for ATS presently being pursued in the English courts. The pursuers made this submission on the basis that Thompsons were the only firm with funding in place, with that funding coming from the union Unite. Accordingly, when one took account of the strong network of affected pilots, of which the pursuers were part, it was inconceivable that the pursuers would not have found their way to Thompsons and to the collective proceedings.

[209] On a related point, the pursuers submitted that it was certain that they would have received funding from Unite. They had each been accepted into the cohort of claimants

prior to receiving the advice that their claims were hopelessly time-barred. The evidence from both Mr Lemon and Mr Hayward that the pursuers would have received funding from Unite had not been challenged. Senior counsel submitted that the court should prefer this evidence to the opinion evidence of Mr Barrett which had been led for the defender.

[210] Senior counsel made the general point that when dealing with counterfactual questions, one had to bear in mind that the correct approach was not to try and graft the counterfactual directly onto what actually happened without taking account of the counterfactual itself. One had to bear in mind that, in considering a counterfactual, key aspects of what had in fact occurred would be different. He submitted that the defender's argument that, even if they had been properly advised, the pursuers would not have ended up part of the current collective proceedings in England was an example of this. The defender based this argument on Mr Lemon's evidence that Unite did not become aware of ATS until after the coroner's inquiry into the death of Richard Westgate in 2015, which was too late for the pursuers. The flaw in the defender's approach was that it ignored that, in the counterfactual, the pursuers, properly advised, would have been seeking legal representation at a much earlier point. The pursuers were part of a vocal group. In these circumstances, there was a basis for concluding that Unite and Thompsons, England would have become aware of ATS at an earlier point.

[211] In relation to the issue raised by the defender as to whether the harm caused by ATS was divisible or indivisible, the pursuers' first response was to highlight that the defender had no pleadings in that regard. This was important in that, provided the pursuers established that the exposure by their employers materially contributed to their illness, then the onus would be on the defender to demonstrate that the harm caused was divisible (see *Asbestos Law and Litigation* (2nd edition, 2022) at 11.005 and 006). Further, and in any

event, the evidence of Mr Rawlinson and Mr Hayward had been that the advice they would have given was that the harm caused by ATS was indivisible. Senior counsel stressed what he submitted was an important distinction between these witnesses giving evidence about the advice they would have given, which was entirely admissible, and these witnesses giving opinion evidence as to the underlying legal position, to which the defender took objection. Finally, senior counsel submitted that, based on the evidence of Professor Howard, it was not apparent on what basis the harm caused by ATS could be said to be divisible. Nothing had been put to Professor Howard in this regard.

[212] On the related issue, also raised by the defender, as to whether Etihad would have been sued, the submission on behalf of Mr Montague-Trenchard was straightforward. Mr Rawlinson had been clear that, having considered the matter, he would not have advised pursuing Etihad. On this basis, senior counsel submitted that the defender's arguments based on the law of Abu Dhabi simply did not arise.

Limitation and section 33 application

[213] The pursuers rejected the defender's arguments in respect of limitation for a number of reasons. The defender argued that, at the time Mr Gough had instructed Thompsons in 2015, his claim was not yet subject to limitation and that this broke the chain of causation.

[214] The starting point was that the onus was on the defender to aver and prove that either the chain of causation had been broken or that the pursuers had failed to mitigate their losses (*Armstead* v *Royal & Sun Alliance Insurance Company* 2024 UKSC 6 at paragraphs 23, 59-64). Thereafter, the pursuers contended that the defender had never put the starting point of this argument, namely the point of his awareness, to Mr Gough. Secondly, the defender had also failed to put to Mr Hayward or any other witness what it

was contended ought to have been done upon being instructed or that what was done was in any way unreasonable. The defender had failed properly either to plead or prove any criticism of the actions of Thompsons. Finally, and in any event, senior counsel submitted that the defender's argument was wrong as a matter of causation. At best for the defender on this argument, as a result of its admitted negligence, when Thompsons had been instructed they had had at most a couple of months to try to deal with Mr Gough's claim. In these circumstances, it was simply not credible to contend that the defender's negligence had no causal relationship with the loss suffered by Mr Gough. On the basis of the evidence, the court could not be satisfied that the actions of Thompsons were such as to eclipse the original wrongdoing. It was submitted that the advice given to the pursuers by Mr Rawlinson KC was both logical and sensible in the circumstances.

[215] In any event, the pursuers submitted that when one considered the evidence of the English law experts, Ms Deal and Ms Crowther, the defender's argument lacked an evidential foundation. It was clear that both experts agreed that, in the context of date of knowledge, a strict medical diagnosis was not required.

The pursuers' potential claim

[216] The pursuers submitted that their claims had real and substantial prospects of success.

[217] The pursuers recognised that the present case was unusual: but for the defender's negligence, the pursuers submitted that they would have been part of the ongoing collective proceedings in England. As a result, the court was put in the somewhat novel position of having to carry out the exercise of predicting the outcome of those proceedings. However, the pursuers submitted that they could not be expected to carry out the same exercise as

would, no doubt, take place in the English proceedings. The claimants in those proceedings would have access to significantly greater resources than the pursuers. The court had to determine the present claims on the basis of the evidence before it. It could not, for example, speculate as to what the position of Thomas Cook would have been in respect of the pursuers' claims.

[218] The pursuers emphasised that the essential point of assessing matters on a loss of a chance basis was to make it easier and not harder for a pursuer to recover damages in a situation in which, as a result of negligent advice, he or she has lost the opportunity to present a claim to its fullest extent. The fact that it was easier for the pursuer to advance its claim in these circumstances justified the fact that any award of damages would be discounted. On this basis, the pursuers submitted that they should be afforded the benefit of every doubt in the consideration of their claims.

Soft pointers

[219] Senior counsel identified what were a series of "soft" pointers which pointed towards the conclusion that the pursuers had real and substantial prospects of success. These were:

- Mr Cannon's own view, certainly at the time, that the pursuers' claims were sound.
- The fact that Mr Rawlinson KC was prepared to act in the collective proceedings on a "no win, no fee" basis.
- The fact that Mr Hayward and Mr Lemon took a similar view to Mr Rawlinson.
- The fact that it appeared from the evidence that another senior counsel, Rob Weir QC (as he then was), evaluated prospects of success at 30%.

- The evidence of Ms Littlepage to the effect that claims based on chronic exposure were being settled in the United States.
- Mr Cannon's evidence that claims in Germany and other jurisdictions had been settled.
- The fact that courts in France had apparently recognised a link between ATS and exposure to contaminated cabin air.

The pursuers recognised that each of these factors had limited individual importance but cumulatively supported the contention that the pursuers' claims were certainly not fanciful. The pursuers submitted that these factors should be given greater weight than the equivalent general considerations relied upon by the defender which appeared essentially to boil down to the fact that ATS was controversial; was not recognised in the International Classification of Diseases; and that no litigation had thus far established the existence of ATS. The factors relied upon by the defender did not meaningfully engage with the assessment of the pursuers' prospects of success.

Mr Cannon's evidence

[220] The position of Mr Cannon himself, while he was acting for the pursuers, had been clear – he had been confident in the strength of the claims. This was apparent from the evidence of the pursuers themselves along with Mr Atherton. The pursuers pointed, in particular, to the article that Mr Cannon had written entitled "Aircraft cabin air contamination and aerotoxic syndrome – a review of the evidence" which was published in *Nanotechnology Perceptions* (12 (2016) 1-27). The pursuers acknowledged that Mr Cannon's opinion did not represent the final word on the matter but the article bore to be

well-researched. Mr Cannon had clearly had access to considerable expertise and information in reaching his opinion.

[221] As to Mr Cannon's evidence in the witness box, the pursuer submitted that his credibility was very seriously at issue – see [65]. Accordingly, little if any weight should be attached to any perceived change in position by Mr Cannon when giving evidence as to his views of the pursuers' claims. Apart from anything else, the pursuers submitted that any alleged reservations which Mr Cannon now claimed he had had were unsupported by his contemporaneous email correspondence.

The opinions of other lawyers

[222] In this regard, the pursuers pointed to the fact that Mr Rawlinson KC, the lead counsel acting in the ongoing collective proceedings in England, was prepared to act on a "no win, no fee" basis. Mr Rawlinson had considerable experience. His evidence was that he considered that, as cohort, the claimants enjoyed a chance of success substantially above 50%. As he put it, he would not take on cases which he did consider he could fight properly and win. Mr Rawlinson's position was broadly shared by both Mr Hayward and Mr Lemon.

[223] In relation to Ms Littlepage's evidence, the pursuers submitted that it was of importance despite recognising that there were limitations in what she could say which went to the weight to be attached to her evidence. However, the pursuers submitted that two matters arose undeniably from her evidence: first, that the ingress of toxic fumes was known both to manufacturers and airlines; and, second, that chronic illness claims based on ATS had been settled.

[224] Finally, the pursuers pointed to the evidence from Mr Cannon that when he was consulted in 2015, Mr Rob Weir KC had assessed the pursuers' prospects of success as no better than 30%. The pursuers considered that this adminicle of evidence required to be treated with some caution as the only source for it was Mr Cannon himself and all he was in fact speaking to was what had apparently been reported to him by Harminder Bains of Leigh Day. Furthermore, the pursuers considered that it was important to note that Mr Weir had not had access to the opinions of either Professor Howard or Professor Mackenzie Ross. However, despite those caveats, the pursuers submitted that evidence of this opinion was still supportive of the merits of the pursuers' claims.

Basis of claims

[225] The pursuers submitted that, notwithstanding the obstacles, they had presented a compelling case.

[226] As a starting point, the pursuers stressed that much guidance could be taken from the observations made by Lord Prosser in *Dingley* v *Chief Constable of Strathclyde Police* 1998 SC 548 (IH) (at 602 and following). The pursuers took two propositions from Lord Prosser's observations. First, that when the court is determining a question of medical causation, the court requires to approach this question on the basis of the evidence before it and determine the question on the balance of probabilities. Second, self-evidently, that approach would clearly be quite different from the approach which would be adopted by clinicians.

Mechanism of injury – ingress of contaminated air

[227] Under this heading, the first question was whether toxic fumes are entering the cabin as a matter of aircraft mechanics. The pursuers contended that this could not, seriously, be a

matter of dispute. There was overwhelming evidence that "bleed" air from aircraft engines entered the cabin. That evidence came from Ms Littlepage and from Professor Howard. In respect of the latter, the pursuers invited the court to reject the suggestion by the defender that, in some way, Professor Howard's evidence in this regard was inadmissible as not falling within his area of expertise. This was not an issue of opinion, it was a simple question of fact. As such, it was entirely appropriate for Professor Howard to have set out the numerous articles he had read which vouched this fact. Professor MacKenzie Ross had also set out her understanding of this fact.

[228] In summary, the pursuers submitted, on the basis of this evidence, that the following propositions could be substantiated:

- Since the 1950s, the process by which air enters a jet aircraft in order to power the air conditioning system is that it is "bled" from the compression system prior to combustion. The only exception to this is the Boeing 787 Dreamliner.
- Jet oil is present within the engine bearing chambers. Jet oil is known to contain a complex mixture of compounds including a form of organophosphate known as TCP. When that jet oil comes into contact with a hot engine surface, it thermally degrades in a process known as pyrolysis. That process causes a chemical change in the constituents of the oil. The resulting mixture of chemicals contains hundreds of compounds, many of which are not known.
- Although seals are employed within the engines, their design precludes a complete seal and so, even in normal operation, bleed air will be contaminated with jet oil.
- There was also recognition that pilots could be exposed to acute incidents – "fume events" – for various reasons including over-filling of oil or a defect.

[229] The pursuers highlighted that Mr Cannon's article also vouched the mechanism whereby the cabin air was contaminated.

The link between chronic and acute exposure and ATS

[230] In this regard, the pursuers relied upon the evidence of Professor Howard. The professor had given evidence as to the mechanism, the studies available and the reasons for his opinion. The pursuers submitted that, apart from generalised challenges based upon, for example, the fact that Professor Howard was not a member of the British Toxicology Society or that in some other way he lacked the appropriate qualifications, the defender had failed properly to challenge his evidence. In particular, the pursuers contended that Professor Bridges' evidence criticising Professor Howard ought to be summarily rejected on the grounds that the defender had not articulated these criticisms in advance of the proof (see *Griffiths* v *Tui*).

[231] In the alternative, the pursuers submitted that the court ought to approach Professor Howard's evidence by asking whether, in fact, the defender had presented any evidence which contradicted it. Professor Howard's evidence identified the mechanism by which toxins contained in the fumes could cause damage to the nervous system. The pursuers submitted that there was little in the way of direct contradiction of Professor Howard's evidence. Professor Bridges had approached the problems presented by the pursuers' cases from the opposite end of the spectrum. Whereas Professor Howard had started with the symptoms and worked backwards, Professor Bridges had started with the chemicals and worked towards the risk of injury arising from those chemicals. Professor Bridges was not medically qualified and did not engage in the medical debate. Professor Bridges had, notably, deliberately not published on issues arising from ATS. His

explanation for this appeared to be that he wished to avoid controversy. His views on occupational exposure limits or OELs were of no relevance to the cabin situation where there were no such limits and, in any event, the particular chemicals were not known.

[232] The pursuers also stressed the fact that there appeared to be no dispute about the fact that fume events can cause acute harm. In this regard, the pursuers referred to the Position Paper issued by the Committee on Toxicity. Professor Bridges had accepted in cross-examination that acute fume events might cause injury. There was then no challenge to the fact that each of the pursuers had been exposed to acute fume events. This exposure to acute fume events also had to be seen alongside Professor Mackenzie Ross' evidence that after the fumes cease, the harm can still develop.

[233] Moving from acute fume events, the court then required to consider the evidence in relation to the effect of chronic exposure. Again, the pursuer relied upon the evidence of Professors Howard and Mackenzie Ross. In respect of the latter, the pursuers submitted that the position was akin to that of Professor Howard: Professor Mackenzie Ross had been criticised in only the most general way on the basis that she was not qualified to give an opinion as she was not a toxicologist. In light of the evidence of her research and qualifications, the pursuers submitted that this criticism was groundless and should be rejected.

[234] The pursuers submitted that Professor Bridges' evidence about OELs did not in fact engage with the evidence of Professors Mackenzie Ross and Howard. Professor Bridges had accepted in cross-examination that he could not exclude the possibility of harm from chronic exposure. Professor Howard had explained that the studies on which OELs were based were not of assistance in considering the question of chronic exposure.

- First, the studies were carried out at ground level in an unpressurised environment. Further, the studies had not captured a fume event.
- Second, there were no OELs specific to a pilot's operating environment. There were also no OELs for burning organophosphates.
- Third, the cabin air studies were concerned only with testing a single chemical at a time. They did not take account of the synergistic effect of simultaneous exposure to multiple chemicals.
- Fourth, Professor Mackenzie Ross had also pointed out that OELs were misleading in seeking to identify a single limit in respect of multiple outcomes.

[235] The pursuers also drew attention to the studies which showed that low-level exposure to organophosphates was associated with rendering nerve cells more vulnerable to subsequent injury in a high-dose event. The pursuers referred in particular to the studies published by Professor Howard (among others) and by Professor Alvin Terry of Augusta University, Georgia. The pursuers also pointed to the WHO study published in 1990 which found organophosphate chemicals in contaminated cabin air are neurotoxic. This had been referred to by Ms Littlepage.

Do the pursuers suffer from symptoms caused by exposure to fumes?

[236] In respect of this issue, the pursuers relied upon the evidence of Professor Mackenzie Ross. Her evidence was, in respect of each of the pursuers, that their symptoms were indicative of a compromise caused by organophosphates. The pursuers submitted that the evidence of Dr Davenport was not contradictory of this evidence. Dr Davenport's diagnoses of chronic fatigue syndrome in respect of both of the pursuers related to the symptoms and not the cause. Dr Davenport had not engaged on the question of causation.

Legal basis

[237] As to the pursuers' claim against their employers, senior counsel submitted that it would have been advanced on a common law basis. In other words, that injury to the pursuers had been reasonably foreseeable and their employers had been negligent so to expose them. He noted that the current pleadings in the ongoing English litigation had been referred to during the course of the evidence. However, he emphasised that those pleadings had to be treated with a degree of caution as those proceedings were still at a relatively early stage, disclosure had not been completed, and the pleadings were not in final form. Nonetheless, the court had the benefit of Mr Rawlinson's evidence, in general terms, as to the merits of the ongoing collective proceedings in England and on this basis ought to conclude that a substantial common law case could have been presented on behalf of each of the pursuers.

[238] The pursuers' starting point was the evidence from Professor Howard and Ms Littlepage that risks of injury arising from contamination of the cabin air supply by oil fumes had been known about within the industry for years. In this regard, senior counsel referred to the Air Accidents Investigation Branch (AAIB) "Report on the incident to BAe 146, G-JEAK during the descent into Birmingham Airport on 5 November 2000" (1/2004). On this basis, the pursuers would have had a basis for arguing that the pursuers' employers were aware of the risk of injury to them. Senior counsel emphasised that the injury in question was not the particular long-term neurological damage which the pursuers suffered from. It was simply the risk of neurological damage caused by the ingress of fumes. The pursuers submitted that the type of harm which arose from fume events was of

the same kind as that which arose from long-term exposure (see *Hughes* v *Lord Advocate* 1963 SC(HL) 31).

[239] This then gave rise to the question: what was the exercise of reasonable care by the employer in light of that knowledge? Senior counsel did not know what the pursuers' employers would say in answer to the claim but, given the very significant consequences which could potentially arise from injury to flight crew, it would seem very surprising if the answer was nothing could be done. In this regard, senior counsel pointed to the Boeing 787 Dreamliner which did not use "bleed" air from the aircraft engines. This was the system which Mr Cannon had himself referred to in the article in 2016.

Conclusion

[240] Overall, the pursuers submitted that the pursuers' chances of success were in the order of at least 80%.

Quantum

Notional trial date

[241] The pursuers recognised that the court required to fix a notional date for the resolution of the pursuers' claims in order to deal with issues of interest and other ancillary matters. The pursuers submitted that the court's exercise in picking a date was little more than an educated guess (*Harrison & Another* v *Bloom Camillin* [2001] PNLR 7 (Neuberger J). The pursuer had pled that the case would not come to trial before September 2024. It appeared, from the evidence of Mr Hayward and Mr Rawlinson that the collective proceedings in England would, in fact, be unlikely to come to trial before 2026. On this basis,

the pursuers submitted that the court should work on the basis that the notional trial diet would be April 2026.

General damages

[242] Both pursuers had brought claims for general damages. The English law experts were agreed that the 16th Edition of the Judicial College Guidelines, Chapter 9 – Chronic Pain, Section (B) – Other Pain Disorders, fit best for the type of symptoms alleged by both pursuers, and that it was for the court to determine where within the range the pursuers' claims fell. By the date of submissions, the 17th edition had been published. The pursuers submitted that each of their symptoms fell within the "Severe" category which was described as follows:

> "Severe: In these cases significant symptoms will be ongoing despite treatment and will be expected to persist, resulting in adverse impact on ability to work and the need for some care/assistance. Most cases of Fibromyalgia with serious persisting symptoms will fall within this range.
> £51,410 to £76,870"

[243] The pursuers submitted that their symptoms were ongoing and there was no suggestion from any of the medical practitioners that either of their conditions were likely to improve. However, they also acknowledged that their conditions were not ones which involved a significant need for care or assistance. On this basis, a mid-range award of £65,000 was appropriate. In this regard, senior counsel submitted that I should reject any suggestion by the defender that the evidence of each of the pursuers as to their symptoms was not genuine. The idea that the pursuers would give up jobs that they plainly enjoyed when they had ongoing financial commitments unless they were unable to carry on with them was a very surprising one.

[244] In terms of interest, the pursuers submitted that the general rule is that interest accrues from date of service of the claim until the date of trial. The experts were agreed that interest is awarded at the rate of 2% per annum. It was submitted that the precise timing of the pursuers' claims, had they been brought in England, was speculative. However, on the basis that a solicitor acting reasonably would have brought their claims within the triennium, and for ease of calculation, the pursuers' suggested that interest would run at 2% from January 2016 to April 2026 totalling £13,324.11.

Loss of earnings

[245] Both pursuers contend that they would have presented claims for both past and future loss of income in their claims against their former employers.

[246] In this regard, the pursuers relied on the evidence of Captain David Warner. The pursuers submitted that his evidence ought to be preferred to that of Keith Carter, the employment expert who gave evidence on behalf of the defender. Captain Warner was an impressive witness who clearly had extensive experience of the aviation industry both in the UK and in the UAE. Mr Carter on the other hand was essentially reliant on UK-based statistics. Captain Warner was clearly independent and did not slavishly endorse the claims advanced on behalf of each pursuer.

<u>Mr Montague-Trenchard</u>

[247] Mr Montague-Trenchard's own evidence was that, but for his illness, he would have continued to work for Etihad until his retirement at the age of 65. Thereafter, he would have continued working as a simulator instructor or examiner. His position was supported by Captain Warner who took the view that Mr Montague-Trenchard's retirement age would

have been between the ages of 60 to 65. The evidence of Mr Montague-Trenchard and Captain Warner was to be preferred on this point to that of Mr Carter. Mr Carter relied upon UK CAA statistics. However, there were two problems with this approach. First, the statistics did not take account of pilots, such as Mr Montague-Trenchard, who had taken up employment outside the UK. Secondly, and more fundamentally, Mr Carter's approach failed to give proper weight to Mr Montague-Trenchard's particular circumstances: he had become a pilot later in his life (at 35); he had children who would be in full-time education until he was 72. Furthermore, Mr Carter's hypothesis had not been put to Mr-Montague-Trenchard.

[248] As to the pandemic, Captain Warner gave compelling reasons why Mr Montague-Trenchard would have been retained as instructors and examiners were required to maintain the licences of grounded pilots.

[249] In relation to Mr Montague-Trenchard's earnings post age 65, his position was that he would have continued to work for Etihad as an instructor and examiner until his 75th birthday. Captain Warner was of the view that 72 was a more realistic end point. It was submitted on Mr Montague-Trenchard's behalf that Captain Warner's evidence should be accepted in its entirety in this regard.

[250] In respect of residual earning capacity, Mr Montague-Trenchard's evidence was to the effect that he was incapable of maintaining gainful employment as a result of his ongoing symptoms. The limited work he had carried out in respect of his properties appeared to have been done for reasons of tax efficiency. It was submitted that the court should find that he had no capacity for work and, on this basis, Mr Carter's calculation of potential residual earnings should be disregarded.

[251] It was submitted that, in accordance with the general approach, interest should be awarded on wage loss to 65 at the rate of 3% from January 2012 to April 2026.

Mr Gough

[252] Mr Gough's own evidence was that, after a period with Thomas Cook, he would have transitioned to the Middle East to take advantage of the opportunities available to him there. He had not been challenged on this. He would then have continued to work as a commercial pilot until the age of 65. This was also unchallenged and had been supported by Captain Warner's evidence. It was accepted that the Covid-19 pandemic would have had a greater impact on Mr Gough's career given that he was neither an instructor nor examiner. It was submitted that Captain Warner's opinion that the pandemic would have resulted in a 2 year gap in Mr Gough's career should be accepted.

[253] Based on his own evidence as to his symptoms, it was submitted that the court should conclude that Mr Gough also had no residual earning capacity.

[254] Interest was sought on Mr Gough's loss of earnings on the same basis as for Mr Montague-Trenchard.

[255] In relation to Mr Gough, a further question arose as to the correct treatment of the payments from disability insurance received by him. That insurance had been arranged by his former employer, Thomas Cook. It was submitted that these sums ought not to be deducted from the sums recoverable by Mr Gough for two alternative reasons. The pursuer's position was founded in the evidence of Sarah Crowther KC. First, it was submitted that, properly construed, he had paid the premiums for the insurance as part of his pension scheme contributions. Even if this was not a direct payment of the insurance

premiums, the benefit of the plan was the counterpart of the services which he was required to perform.

[256] In the alternative, it was submitted that the sums paid fell to be regarded as a contractual entitlement in accordance with the House of Lords decision in *Smoker* v *London Fire Authority*. If he had not been provided with this benefit, his employer would, in theory, have paid him a higher salary.

Pension loss

Mr Montague-Trenchard

[257] No traditional pension loss claim was advanced on behalf of Mr Montague-Trenchard.

Mr Gough

[258] Mr Gough's primary position was that there was also no pension loss to be advanced. That was because Mr Gough's primary case was that he would have pursued a career in the Middle East in a similar way to Mr Montague-Trenchard. However, in the event that the court was not persuaded that he would have made this move, the pursuer founded upon the evidence of Dr Pollock and his calculation of pension loss.

Loss of property investment income and appreciation

[259] Both of the pursuers submitted that they would have brought claims against their former employers for losses based on the fact that they were unable to make investments in property. It was submitted that these claims were in lieu of a pension loss claim because, instead of investing in a pension, each pursuer would have invested their earnings in property. That property would have generated rental income and would have appreciated

in value. The pursuers submitted that the question which these claims raised was whether this was a foreseeable type of loss which flowed from their injuries. If the court was satisfied that the pursuers had suffered a loss, it then became a question for the defender to establish that that loss was irrecoverable as a result of being too remote (see *Armstead).*

[260] In this regard, the pursuers drew attention to the fact that one element of the defender's admission of liability was that a detailed precognition ought to have been taken from each of the pursuers. Had such a precognition been taken, the defender would have become aware of the nature and extent of the pursuers' losses.

[261] The pursuers submitted that on this point there was only a narrow difference in opinion between the two English law experts Ms Deal KC and Ms Crowther KC. In the particular circumstances of the case, it was submitted that the court should find that there was no bar in principle to this part of the pursuers' claims.

[262] In this regard, both pursuers had prepared and spoken to schedules which set out their respective losses.

Defender's submissions

Introduction

[263] Senior counsel moved me to assoilzie the defender in both actions.

Loss of chance

[264] The starting point for the defender was to remind me that the onus of proof lay upon each of the pursuers to satisfy the court as to the amount of damage and loss that each had suffered. The assessment of loss and damage, in turn, depends upon determining what would have happened had there been no negligence.

[265] Following the decision of the UK Supreme Court in *Perry*, it was clear that in cases such as the pursuers' a two-stage test required to be applied. First, each pursuer had to prove on the balance of probabilities that he would have brought his claim in time. For this stage, the parties had the benefit of a full adversarial trial. *Perry* also made clear that the claim required to be an honest one.

[266] The second stage involved assessing the value of each pursuer's underlying claim. This stage was to be assessed on the basis of a loss of chance and would not generally involve the court carrying out a "trial within a trial". Each pursuer required to prove that he had lost something of value. Accordingly, it was necessary for him to prove that he had a "real and substantial" chance of recovering damages as opposed to something that was negligible or merely speculative (*Mount* v *Barker Austin*). The threshold for a substantial prospect of success was 10% (see *Thomas* v *Albutt* [2015] EWHC 2187 (Ch) at paragraph 474).

[267] The reason why a "trial within a trial" was not conducted was founded in fairness – it would not be fair to require the claimant to prove the facts of his underlying claim as part of his claim against the negligent professional. This unfairness arose from the passage of time, impracticability and the difficulties or even impossibility of obtaining evidence. The defender submitted that, although in some cases the courts have adopted a broad-brush approach to the assessment of prospects, this was far from being the only approach to such cases. The defender noted that in other cases a more detailed approach had been adopted (see *Harrison* v *Bloom Camillin*).

[268] The defender submitted that the present cases were amenable to a more detailed assessment. The "historical" evidence as to the pursuers' condition was available as was evidence as to the extent their employers were on notice. It was submitted that the court should, comparatively speaking, be prepared to come to a clear conclusion on the likely

outcome of at least some of these matters given the extensive documentary evidence available and the submissions made. The court should also have regard to issues in relation to the funding of the litigation.

[269] The defender also sought to distinguish the present cases from those where a solicitor, who had previously championed a cause, seeks to change his position (see *Mount* v *Barker Austin*). In the present cases, the defender was never going to have been the solicitor acting for the pursuers in their claims: he was not qualified in England and could not have acted for them in the ATS litigation. As such, he had not risk assessed the pursuers' cases. The defender was not going to be funding the pursuers' cases and he would not stand to gain financially.

[270] The defender submitted that in these cases the court ought to address the probability of each of the contingencies upon which the pursuers' cases depended and then take an arithmetical approach of multiplying together those percentage chances (*Chweidan* v *Mischcon de Reya Solicitors* [2014] EWHC 2685 (QB); *Ball* v *Druces & Attlee* [2004] EWHC 1402 (QB) per Nelson J at paragraph 275). Such an approach was appropriate where the contingencies were truly independent (*Tom Hoskins plc* v *EMW* [2010] ECC 20 at paragraph 133). That was the position in the present cases in which a number of independent variables – such as foreseeability, breach of duty on the part of the airlines and medical causation – required to be considered.

[271] The court requires to determine the value of the case at the notional trial date or settlement. Insofar as a future trial date is posited, as in the present case, all the evidence available to date can be considered and, equally, regard should be had to the absence of evidence on a fundamental point.

[272] The defender submitted that although, in certain circumstances, it was appropriate for the court to consider the chances of settlement of the underlying claim, that was not so in the present cases. This was because of the novelty of the current claims, their importance to the airlines and the nature of the collective proceedings all pointed away from a negotiated settlement.

Would the pursuers have issued proceedings timeously?

[273] The defender submitted that there were two issues to be considered: first, were the pursuers' claims time-barred when they instructed English solicitors? This issue raised a question of limitation. Second, if the pursuers' claims were time-barred when English solicitors were, in fact, instructed, would the claims have been issued timeously if the English solicitors had been instructed sooner?

Limitation

Mr Gough

[274] The experts had agreed that in English law, the primary limitation period is 3 years from the later of the accrual of the cause of action or date of knowledge. They also both agreed that in Mr Gough's case, the evidence pointed to date of knowledge being the relevant consideration. They agreed further that, on the basis of their understanding of the evidence, the parameters for date of knowledge were August 2012 (when tests were carried out in the Netherlands) to July 2013 (on receipt of the results of the tests that were carried out by Professor Abou Donia).

[275] From this starting point, the defender submitted that Mr Gough's date of knowledge should be fixed at the latest date – that is following his knowledge of the results of the

Abou Donia testing. The neurofeedback test results in August 2012 were insufficient to fix knowledge. Aerotoxic influence was only one possibility among thirteen conclusions. Without the test carried out by Professor Abou Donia, the earlier tests were insufficient to displace Mr Gough's pre-existing diagnosis of multiple sclerosis. On this basis, the defender submitted that Mr Gough's claim had not time-barred until July 2016 at which point he was a client of Thompsons, England.

Mr Montague-Trenchard

[276] The defender submitted that the issue of limitation required to be considered separately for Mr Montague-Trenchard's claim against Etihad and his claim against Thomas Cook.

[277] In relation to Thomas Cook, the English law experts had agreed that it would be subject to English law. As a matter of English law, the experts agreed that Mr Montague-Trenchard's date of knowledge in relation to a claim against Etihad could not be any later than July 2013 – that is the date of receipt of Professor Abou Donia's report.

[278] The defender submitted that, in relation to Mr Montague-Trenchard's claim against Thomas Cook, the date of knowledge was likely to be later. This was because, initially, Mr Montague-Trenchard's focus was entirely on his claim against Etihad and the fume events he had experienced while working for them. It did not appear until much later – after the involvement of Thompsons, England – that the possibility of convening Thomas Cook as a defendant even occurred to him. Mr Montague-Trenchard appeared to understand that fume events were an essential component of causation and he could not recollect such events having occurred while he was working for Thomas Cook.

[279] In the alternative, the defender submitted that the tests carried out by Dr Jenny Goodman were not sufficient to establish knowledge. The defender noted that Dr Goodman's tests did not identify any organophosphates. As with Mr Gough, the report from Professor Abou Donia was the critical final piece of the jigsaw.

[280] In relation to Etihad, the English law experts agreed that the law applicable to Mr Montague-Trenchard's claim would be the law of Abu Dhabi. Mr Obeid's evidence had indicated that claims required to be raised within 3 years and two conditions had to be met for the time to start running: first, one required knowledge of the occurrence of harm; and, second, one required to know who was responsible for the harm. Mr Obeid had explained that knowledge was actual knowledge and there had to be certainty as to the occurrence of harm and certainty with regard to the person responsible. On this view, the defender submitted that it was arguable that even now time had not started running in respect of the pursuer's claim against Etihad. In any event, it could not be said that there was any "certainty" until the receipt of Professor Howard's report in June 2018.

Conclusion

[281] The conclusion of this part of the defender's argument was that, if neither pursuer's claim was time-barred by the time that Thompsons, England were instructed, then it could not be said that the pursuers lost the chance of bringing their claims as a result of the defender's negligence. The defender did not require to establish any fault or negligence on the part of Thompsons, England: all the defender required to do was prove that the pursuers were not deprived of bringing proceedings timeously as a result of the defender's negligence.

Would the pursuers' claims have been brought timeously?

[282] This part of the defender's argument proceeded in the alternative.

[283] The defender submitted that the court required to consider the prospects of the pursuers finding and being able to instruct English solicitors at the material time – namely, in or around July 2012. On the basis of the evidence of Keith Barrett, the defender submitted that the pursuers' enquiries would have failed the "risk assessment" stage at the vast majority of claimant personal injury firms. This was because of the novel nature of ATS and the financial risk that the claims would have represented to these firms at that time. The defender also pointed to the evidence from Mr Cannon himself. In 2012 he had been the only solicitor interested in pursuing these matters. His evidence had been that he had tried, unsuccessfully, to get two firms of English solicitors interested in ATS cases – Barkers Gillette and Leigh Day. Ultimately, neither had been prepared to take on the pursuers' claims.

[284] As to Thompsons, England, the defender pointed out that the only reason that the pursuers approached them – in late 2015/early 2016 – was that the father of Matt Bass, who had died in 2014, was instructing them in relation to the inquest. There was nothing to suggest that either of the pursuers would have approached Thompsons in 2012. Furthermore, even if they had, then on the balance of probabilities, they would not have been taken on as clients as neither were members of Unite. The pursuers had only become members of Unite in March 2017 albeit Mr Gough had been a member of BALPA. However, the defender submitted that the evidence suggested that it had been Mr Montague-Trenchard who was "doing the running" in respect of pursuing their claims. It was he who had taken the initiative of contacting Thompsons.

[285] Accordingly, the defender submitted that the pursuers have not provided sufficient evidence to demonstrate that they would have been able to issue and pursue proceedings in England.

[286] A further difficulty for the pursuers was that they required to demonstrate on the balance of probabilities that their claims would have been issued timeously. The defender noted that the correspondence in the Thompsons files, from 2016 onwards, repeatedly referenced the uncertain nature of the science. The defender submitted that these files made clear that the progressing of any ATS claims was dependent on the outcome of the inquests into the deaths of Mr Westgate and then Mr Bass. It was then delayed until Professor Howard's report was prepared in June 2018. It was only in March 2019 that Unite publicised that it had launched court cases against five UK airlines. The defender submitted that the evidence did not support the pursuers' contention that their cases would have been pushed ahead of the other cases.

Etihad

[287] The defender raised a further issue specifically in relation to Mr Montague-Trenchard's claim. This was whether, on the assumption that he had been properly advised, he would have raised proceedings against Etihad.

[288] The defender submitted that Mr Rawlinson's position that his advice would have been to not raise such proceedings flew in the face of a number of factors. First, it was apparent from the Thompsons' file that Etihad had been actively considered as a potential defendant.

[289] Second, until Professor Howard's so-called "generic" report had been completed in June 2018, neither of the pursuers had a basis for reaching a conclusion on the question of whether ATS was a divisible or indivisible condition.

[290] In any event, the defender submitted that the evidence led by the pursuers in fact led to the conclusion that ATS was a divisible condition. In other words, the damage caused was affected by the amount of the causative agent to which the person was exposed. Professor Mackenzie Ross did not engage, to any meaningful extent, with the question of causation. Insofar as Professor Howard properly addressed the issue of causation, he had referred to the length of exposure as being important. During his oral evidence, he had also referred to the accumulative damage to the nervous system with repeated low-dose exposure.

[291] The pursuers appeared to found on Mr Rawlinson's evidence on this issue. Objection had been taken to Mr Rawlinson's evidence on the question of divisibility. He was not an impartial expert witness. He also had no medical qualification. Furthermore, his evidence appeared to be based on the notion that ATS was a neurological condition notwithstanding the fact that many of the symptoms of which the pursuers complained were not neurological.

[292] A wrongdoer was only liable to the extent of their contribution and no more. On this basis, had Mr Montague-Trenchard only sued Thomas Cook, it could only have been found liable to a very limited extent. It appeared from the evidence that at the time Mr Montague-Trenchard left Thomas Cook he had only minor symptoms which subsided during his break from flying. Accordingly, there was a significant risk that, even if successful, Mr Montague-Trenchard's claim against Thomas Cook would only entitle him to a small amount of damages.

The underlying claim

[293] The defender accepted that the starting point was that the court would not conduct a "trial within a trial" in order to determine the merits of the pursuers' underlying claim. However, the defender submitted that, in the present case, there was no reason why the court should adopt the broad-brush, impressionistic approach urged on it by the pursuers. In the present case, the pursuers were in a unique position. The notional trial had yet to take place. The pursuers' claims were not "old" in the sense that, but for the defender's negligence, they would have already been resolved. As such, there was no question of evidence having been lost or memories having faded. Nor could there be any question of the pursuers being unable to recover and produce documentation. Furthermore, the court ought to have regard to the fact that the pursuers' claims were novel and unprecedented with potentially far-reaching implications for the airline industry. These factors pointed towards the court undertaking a thorough analysis of the strengths and weaknesses of the underlying claims.

[294] The defender focussed on four fundamental issues which it contended the pursuers would require to address in order to be successful in their claims : (1) foreseeability of injury; (2) the harmful substance to which the pursuers have been exposed; (3) breach of duty; and (4) causation.

Foreseeability

[295] In the pursuers' putative litigation, they would require to demonstrate that their former employers knew or ought to have known about the risk of injury at the time they were employed.

[296] The defender's short point was that the pursuers had led no evidence at all regarding the awareness on the part of the pursuers' employers during the relevant period. The defender noted that the issue of foreseeability had been highlighted by the defendants to the ATS collective proceedings in England. In this regard, the defender drew attention to the evidence of Professor Mackenzie Ross. Her evidence had been that research into cabin air quality was in its infancy and that the connection between toxic cabin air and ill health had not yet been established. Professor Mackenzie Ross had also referred to the limitations in the research carried out into cabin air quality by the European Aviation Safety Agency. But, the defender pointed out, that research had shown that cabin air was less polluted when compared to normal indoor environments. Given that this was the position now, how reasonably could it be said to be foreseeable to the pursuers' employers at the relevant time?

[297] The defender submitted further that it did not follow that, because some sort of injury might be foreseeable from an acute fume event, injury from non-acute events must also be foreseeable. It was not the law that a person was obliged to take all possible steps to prevent the occurrence of a risk that was not reasonably foreseeable (see *White* v *Secretary of State for Health and Social Care* [2024] EWCA Civ 244 at paragraph 135).

[298] In any event, the focus of the pursuers' cases had been on long-term, low-dose exposure rather than fume events. The defender submitted that there was no evidential basis for the proposition that the kind of harm arising from fume events was of the same kind as that from long-term exposure. Neither Professor Mackenzie Ross nor Professor Howard had been asked about this and there was no basis for this conclusion.

Exposure to harmful substances

[299] Again, the defender's submission was a short one – the pursuers had failed to identify the harmful substance or substances which they alleged they had been exposed to. This would be a crucial element in an employer's liability claim. Without identifying this, the pursuers' claim could never have succeeded.

Breach of duty

[300] It was not disputed by the defender that the pursuers' former employers would have owed them a duty of care. However, the pursuers would require to show that there had been a breach of this duty. As such, the pursuers would require to show that there were steps that could have been taken to avoid harmful exposure and that those steps were reasonably practicable and available at the time of employment.

[301] Although the pursuers had made averments about a number of different measures, they had not in fact led any evidence that these measures were ones which their former employers could have adopted at the time the pursuers were employed by them. During the proof there had been reference to the Boeing 787 Dreamliner. This was mentioned by Professor Howard during his evidence. However, the defender pointed out that the Dreamliner was not in commercial use until 2014. This was after the employment of both pursuers ceased. Furthermore, the European Aviation Safety Agency research into cabin air quality had considered the Dreamliner and found only small differences. On this basis, the Dreamliner could not be said to be "safer" than other aircraft.

Causation

[302] A claimant in English law was entitled to recover damages for personal injury caused or materially contributed to by the defendant's negligence. The defender recognised that the court would not need a full scientific account of exactly how exposure caused a particular injury (*McGhee* v *National Coal Board* [1973] 1 WLR 1). However where there was a lack of medical literature creating an association between chemical exposure and the injury sustained, causation may not be established if there are other factors which could have caused the injury (*Wood* v *Ministry of Defence* [2011] All ER (D) 66).

[303] The defender submitted that neither of the experts relied upon by the pursuers for evidence of causation, Professor Mackenzie Ross and Professor Howard, in fact provided this.

[304] Professor Mackenzie Ross' report in respect of Mr Gough concluded by stating that "…it is premature to conclude aircraft cabin air does not pose any risk to aircrew" (at paragraph 18.22). The defender did not accept this conclusion but merely observed that even on this basis the opposite would also follow – it is equally premature to conclude that aircraft cabin air does pose a risk to cabin crew. Although Professor Mackenzie Ross had referred to the Bradford Hill criteria, she had acknowledged the flaws of this method. At best for the pursuers, Professor Mackenzie Ross' evidence concerned the results of neuropsychological testing. Those results could also be found in people who suffered from chronic fatigue syndrome. It did not allow any conclusions to be drawn about either organic damage or causation. The defender made the same observations about Professor Mackenzie Ross' report in respect of Mr Montague-Trenchard.

[305] This evidence was to be contrasted with the evidence of Dr Davenport. Dr Davenport concluded that both pursuers were best diagnosed with chronic fatigue

syndrome – notwithstanding that their actual symptoms were quite different.

Dr Davenport's evidence was that chronic fatigue syndrome fell into that category of condition where no structural deficit or organic damage could be identified. On the issue of ATS, Dr Davenport had noted the controversy surrounding it and the absence of any accepted or validated diagnostic criteria. His ultimate conclusion was that there was not sufficient evidence to conclude that ATS was the cause of the pursuers' symptoms.

Dr Davenport disagreed with Professor Howard's opinion that the pursuers had a "diffuse encephalopathy". His evidence was that someone with a condition of that description would be incapable of carrying out day-to-day functions.

[306] In relation to the evidence of Professor Howard, the defender launched a root and branch challenge. The defender challenged the admissibility of Professor Howard's evidence on three grounds. First, as noted above (at [152]), the defender argued that parts of Professor Howard's generic report fell outwith the scope of even his self-professed expertise. Second, the defender argued essentially that as Professor Howard was neither a toxicologist, toxico-pathologist nor a clinician, his opinion on these matters was not admissible. Finally, the defender argued that Professor Howard was not independent as he was, essentially, advocating for his theories in respect of aerotoxicity. He was, so contended the defender, part of a small group of "believers" in ATS.

[307] In any event, Professor Howard had recognised that the science in respect of ATS was in its infancy. However, the defender submitted that Professor Howard had presupposed that ATS was the well-established cause of pilot ill health. He had relied upon studies which supported this view and, to a large extent, he had relied upon his own published work and that of other ATS "believers". He discounted as inappropriate the risk assessment procedure which was used to determine chemical safety. Other sources of

exposure to chemicals were not considered. Other reasons for adverse ill health effects were ignored.

[308] By contrast, Professor Bridges had sought to address the question of whether there was scientific evidence to support the hypothesis that exposure to certain chemicals in cabin air was an important cause of pilot ill health. Professor Bridges had considered whether there was a consistent pattern of adverse ill health effects; the principal chemicals involved; whether these chemicals had been measured or estimated along with the duration of exposure; and whether these chemicals were unique to cabin air or were found in other working environments. His conclusions were that the chemicals identified as causing ATS were not unique to cabin air and were present in many locations both domestic and in the workplace. The measured and estimated levels of chronic exposure to any of the identified chemicals were far too low to be a cause of adverse effect. For fume events, some uncertainty was inevitable because such events were not common and were difficult to anticipate in advance and measure. The assessment of risk from identified exposure levels to specific chemicals is very widely established and relied on. The methodology for assessing the impact of a combination of chemicals is widely discussed, but with no conclusions that the introduction of a modified methodology is a priority. The fact that humans are exposed to many chemicals at low levels each day indicates that additive and synergistic effects must be uncommon in practice. Finally, the adverse health effects experienced by the pursuers were not characteristic of exposure to a specific chemical.

[309] On this basis, the defender submitted that Professor Howard's approach was unsupportable. As his approach was fundamentally flawed, the pursuers would have been unable to succeed in the putative actions.

Conclusion

[310] The defender submitted that the problems identified under each of the four headings were so significant that the court should conclude that the pursuers' claim would have been bound to fail and there was no need to evaluate the lost chance. In the alternative, the defender submitted that, at best for the pursuers, their underlying claims had no more than a 20% chance of success.

[311] The defender submitted that this approach did not impose an unreasonable burden on the pursuers. First, the issues raised were fundamental and the pursuers required to address them in order to enable the court properly to assess the lost chance. Second, no assumptions should be made about the means of the pursuers. It was not clear to the defender what those means were. Finally, it required to be borne in mind that the pursuers had had the option to sist the current proceedings to await the outcome of the collective proceedings in England. They had chosen not to do so.

Quantum

Mr Gough

Deductibility of health insurance payments

[312] As a preliminary point, the defender submitted that the payments received by Mr Gough under the income protection policy with Scottish Equitable were deductible. Thomas Cook, Mr Gough's former employer, was the policyholder. Mr Gough had received 75% of his full salary, index-linked, from February 2006 until March 2021 when the payments due until a retirement age of 65 were commuted into a lump sum. He also received pension contributions as well as private health cover.

[313] As a matter of English law, the defender submitted that the payments which Mr Gough had received were permanent health insurance (PHI) under an income protection scheme. Mr Gough's wage slips made clear that he continued to be employed by Thomas Cook up until retirement. The payments were a continuation of salary up until retirement (cf *Hussain* v *New Taplow Paper Mills Limited*). There was no basis for suggesting that Mr Gough, in fact, contributed to the scheme. Accordingly, the sums paid out fell to be deducted to avoid over-compensation (*Pirelli General plc* v *Gaca* [2004] EWCA Civ 373).

[314] The defender submitted that the court should reject Ms Crowther KC's attempt to characterise the payments to Mr Gough as being some form of ill-health pension. It was apparent from the evidence that these payments were the reverse of a pension. Mr Gough continued to be employed by Thomas Cook. The payments were described as a salary and stopped at retirement age. Separate contributions were made to Mr Gough's pension.

<u>Loss of property investment</u>

[315] The defender submitted that claims advanced by both pursuers for a loss of investment opportunity were entirely misconceived. Were Mr Gough to be compensated both for the loss of income and for losses arising from how he claims that income would have been invested, that would represent double recovery and would, in any event, be too remote. The defender submitted that it would be too remote whether one characterised the claim in tort or in breach of contract.

[316] It was extremely significant that neither of the English law experts had ever come across such a claim being advanced. The defender submitted that little weight should be given to Ms Crowther's evidence that this part of the claim was "not unstateable" (see [121] above).

General damages

[317] The defender submitted that the starting point for any damages to which the pursuers would have been entitled was the 17th edition of the Judicial College Guidelines. On the basis of Ms Deal KC's evidence, the defender submitted that there was no obvious fit for the pursuers' claims but that Chapter 9, which is entitled Chronic Pain and deals with a number of disorders including fibromyalgia and chronic fatigue syndrome, seemed the best starting point. The preamble to the chapter states that many of the disorders with which it deals are characterised by subjective pain without any commensurate organic basis. This approach was consistent with Dr Davenport's evidence. The defender emphasised that the figures assumed that causation had been established. The factors to be taken account of included: i) the degree of pain experienced; ii) the overall impact of the symptoms; iii) the effect of the condition on the person's ability to work; iv) the need to take medication to control pain; v) the extent to which treatment has been undertaken and its effect; vi) whether the condition is limited to one anatomical site or is widespread; vii) the presence of any separately identifiable psychiatric disorder; viii) the age of the claimant; and ix) prognosis.

[318] Albeit Mr Gough had a diagnosis of chronic fatigue syndrome, the defender submitted that Dr Davenport considered that Mr Gough is and had been capable of work. The physicians from the Department of Work and Pensions agreed with that view in 2017. The reality was that Mr Gough was disincentivised from working as a result of the PHI payments he had received. It was apparent from the evidence that Mr Gough had been able to manage the activities of daily living. He had a social life. He went on foreign

holidays and engaged in active hobbies. The defender also drew attention to the fact that he had attended most days of the proof which would involve staying away from home.

[319] On this basis, the defender submitted that any award to which Mr Gough would have been entitled fell at the lowest end of the "moderate" range (£25,710 to £46,970). Interest fell to be added at 2% from the date of service of the claim. The defender submitted that, in the absence of averment from the pursuer, that date should be taken to be the date by which Mr Gough's claim would have time-barred – namely 1 November 2015.

Past wage loss

[320] The defender submitted that the court should prefer the evidence of Mr Carter on the basis of his extensive experience as an employment consultant. Captain Warner had been too ready to accept Mr Gough's somewhat unrealistic views as to the career which he would have had. Captain Warner had also failed to have proper regard to the statistical evidence which indicated that few pilots work beyond 60. It was significant that twice-yearly medicals were required. In this regard, the notion of Mr Gough working past the age of 60 was not consistent with the evidence of the array of ailments from which he had suffered. It was not clear which of Mr Gough's ailments, including mental health difficulties, were said to be attributable to ATS.

[321] The defender also submitted that the evidence did not support the suggestion that Mr Gough would have moved to work for Etihad. Unlike Mr Montague-Trenchard, Mr Gough's career did not indicate that he was geographically adventurous.

[322] Accordingly, the defender submitted that, in the evidence, the likelihood was that Mr Gough would have remained with Thomas Cook until September 2019 when that

company went into liquidation. At that point, Mr Gough would have been 59 and, based on Mr Carter's evidence, the defender submitted that he would have retired.

[323] Both Mr Carter and Captain Warner were agreed that Mr Gough would not have worked post retirement.

[324] Calculated on this basis, the defender submitted that Mr Gough had not in fact suffered any past wage loss when credit was given for the PHI payments which he had received.

[325] In the event that the court accepted Captain Warner's evidence that Mr Gough would have successfully returned to work following the liquidation of Thomas Cook and the subsequent Covid pandemic, the defender accepted that there would be a small net loss recoverable. Albeit that the defender submitted that a sum in lieu of deductible benefits would fall to be deducted therefrom.

Pension loss

[326] The defender submitted that Mr Gough had not suffered a pension loss. Any theoretical loss which might have accrued on the basis that he would have continued to have worked with Thomas Cook was covered by the PHI payments which he had received. In the event that Mr Gough had worked after 2019, there would, potentially, have been a small pension loss arising. However, the defender submitted that the pursuer had not provided the evidential basis upon which such a loss could be quantified.

Private health insurance

[327] The defender submitted that any claim for health insurance was misconceived insofar as it failed to take into account the fact that Mr Gough had been provided with health insurance courtesy of the PHI payments.

Mr Montague-Trenchard

[328] The defender's principal position in respect of the quantification of Mr Montague-Trenchard's losses was premised on the basis that he would have pursued a claim against Etihad. The English law experts were agreed that the English courts would have considered that the law applicable to this claim would have been the law of Abu Dhabi as part of the law of the UAE. The defender submitted that this would be the case whether Mr Montague-Trenchard brought his claim in tort or in contract. The defender's position was that, in terms of the Rome II Regulation (Regulation (EC) 864/2007) the law of the UAE governed both heads of damage claimable and the assessment of damages.

[329] Accordingly, on the basis of Mr Obeid's evidence, the defender submitted that Mr Montague-Trenchard would have been able only to advance claims for physical and psychological damage and loss of earnings. Claims for pension losses and loss of services were not recognised in UAE law. As to the assessment of damages under UAE law, it was very difficult to predict. In general terms, the defender submitted that the awards listed by Mr Obeid were significantly lower than would have been awarded by either English or Scottish courts.

[330] The defender also advanced an alternative position that, in terms of the Private International Law (Miscellaneous Provisions) Act 1995, the assessment of damages would fall to be determined by English law.

[331] As to Mr Montague-Trenchard's potential claim against Thomas Cook, the defender proceeded on the basis that ATS was a divisible condition. Accordingly, Thomas Cook would only be liable to the extent that they had contributed to Mr Montague-Trenchard's condition. This resulted in only a minimal award.

Decision

The defender's admissions

[332] As a starting point, it is important to bear in mind the admissions which the defender has made in each of the pursuer's cases.

[333] The defender has admitted breach of duty. As I have noted above (at [5]), the defender admits that a detailed precognition ought to have been taken from each of the pursuers, if possible, within 3 months of being instructed. The defender also admits that it ought to have appreciated that the likely jurisdiction for any claim by each of the pursuers against their former employers would be England; that there was a material risk that limitation arguments might be raised by prospective defendants; and that it was important to take urgent steps to reduce that risk. The defender admits that it ought to have advised each of the pursuers of these matters and that an English solicitor should have been instructed as soon as possible.

[334] These admissions are significant in two respects. First, and most obviously, in light of these admissions, the remaining issues to be resolved by the court concern the assessment of what chance, if any, has been lost by the pursuers as a result of the defender's breach. In particular, the court requires to consider:

- On the balance of probabilities, what steps would the pursuers have taken upon receipt of the advice they ought to have received?

- On the assumption that each of the pursuers would have taken those steps, did each of the pursuers have a real and substantial chance of success in their claims and, if so, what is the value of that chance?

[335] Secondly, the details of the defender's admissions are important because they provide the basis on which the court requires to approach its consideration of the counterfactual – in other words, what each of the pursuers would have done had they been properly advised.

The approach to the assessment of loss of a chance

[336] The general approach to be taken by the courts to the assessment of the loss of a chance in litigation is now well established and was not in dispute between parties. That approach involves drawing a distinction between, on the one hand, issues the resolution of which depend upon establishing what the pursuer would have done and, on the other, those issues which depend upon what others would have done. In the case of *Perry* v *Raleys Solicitors*, the approach was summarised by Lord Briggs in the UK Supreme Court as follows:

> "For present purposes the courts have developed a clear and common-sense dividing line between those matters which the client must prove, and those which may better be assessed upon the basis of the evaluation of a lost chance. To the extent (if at all) that the question whether the client would have been better off depends upon what the client would have done upon receipt of competent advice, this must be proved by the claimant upon the balance of probabilities. To the extent that the supposed beneficial outcome depends upon what others would have done, this depends upon a loss of chance evaluation." (at paragraph 20)

This approach was recently endorsed by the Inner House in *Centenary 6* (at paragraph 68).

[337] For present purposes, there are two other aspects of the general approach which require to be addressed.

[338] First, in *Centenary 6,* the court also required to address how, in the context of a lost chance to litigate, multiple hurdles facing the pursuer should be assessed. The court recognised that there were English authorities in which an essentially arithmetical approach had been adopted to this type of situation (see paragraph 69 and the authorities cited there). In other words, percentage prospects had been applied to each of a number of uncertainties, and these percentages had then been multiplied together to produce an overall loss of a chance percentage. In the present case, the defender submitted that such an approach should be taken by the court in relation to what the defender considered were the independent variables of foreseeability, breach of duty on the part of the airlines and medical causation (see [270] above). In the particular context of assessing litigation risks, the Inner House was not persuaded that such an arithmetical or mathematical approach was the correct one:

> "The commercial judge rejected the application of a mathematical approach on the ground that these were not independent contingencies but rather facets of the same contingency, ie whether C6 would have succeeded on the substance of the section 212 note. The court is not persuaded that he erred in doing so. Although there may be circumstances in which it would be appropriate to adopt a mathematical approach to the loss of a chance, it is less obviously attractive in the context of litigation risks. It is not, for example, the approach that would be adopted by experienced counsel when advising a client on prospects of success or on the level at which a settlement offer ought to be made or accepted. As the commercial judge observed, the uncertainties in the present case would in practical terms have been regarded by the parties to the section 212 note as facets of one question, namely whether C6 were likely to succeed. The commercial judge has given reasons for selecting a broad brush figure of 65% and there is no reason to disturb that assessment." (at paragraph 70)

[339] Second, in *Perry,* Lord Briggs stated that, where the question for the court is one which turns upon the assessment of a lost chance, rather than on the balance of probabilities, it is generally inappropriate to conduct a "trial within a trial" (at paragraph 31). At paragraph 18, his Lordship set out the underlying reasons for this general approach:

> "Sometimes it is simply unfair to visit upon the client the same burden of proving the facts in the underlying (lost) claim as part of his claim against the negligent professional. This may be because of the passage of time following the occasion when, with competent advice, the underlying claim would have been pursued. Sometimes it is because it is simply impracticable to prove, in proceedings against the professional, facts which would ordinarily be provable in proceedings against the third party who would be the defendant to the underlying claim. Disclosure and production of relevant documents might be impossible, and the obtaining of relevant evidence from witnesses might be impracticable. The same departure from the practicable likelihood that the underlying claim would have been settled rather than tried is inherent in any such process of trial within a trial."

[340] This approach is consistent with the fact that in assessing the pursuers' lost chances, the court is carrying out a process of valuation rather than determination of the outcome. In my opinion, this important distinction was very well put by Lord Justice Irwin in *Edwards* v *Hugh James Ford Simey*:

> "But what the claimant should recover in the professional negligence claim [for the lost chance] is not established by answering the question: how much of the original claim can he prove now? Rather it is established by answering the question: what was the value of what he lost then?" (at paragraph 67)

Contrary to what was submitted on behalf of the pursuers (at [217]), the role of the court in this case is not to predict the outcome of the ongoing collective proceedings in England but, rather, to value what was lost by the pursuers as a result of the defender's negligence.

[341] A further aspect informing the approach to be adopted by the court is mentioned in the judgment of Lord Justice Simon Brown in *Mount* v *Barker Austin.* In that case, Simon Brown LJ sets out the underlying principles in four propositions. The fourth was:

> "4. If and when the court decides that the plaintiff's chances in the original action were more than merely negligible, it will then have to evaluate them. That requires the court to make a realistic assessment of what would have been the plaintiff's prospects of success had the original litigation been fought out. Generally speaking one would expect the court to tend towards a generous assessment given that it was the defendants' negligence which lost the plaintiff the opportunity of succeeding in full or fuller measure. …" (at 511)

[342] In this regard, it is important to note, as the defender stressed in submissions, that the decision by the court as to the appropriate level of scrutiny to be applied to the pursuer's case depends on the particular circumstances. For example, the defender drew attention to the observations of Lord Justice Neuberger (as he then was) in *Harrison & Another* v *Bloom Camillin* as to the appropriate approach to be adopted where a pure question of law arises in this context:

> "In my judgment, the proper approach to the court to an issue of law which would have arisen in the action, which the claimant has been deprived of the opportunity to bring, is the same as in relation to an issue of fact or opinion which the claimant would have established in the action. However, at least in general, the court should in my judgment be far more ready to determine that the claimant would have failed or succeeded on a point of law than to determine that the claimant would have failed or succeeded on a point of fact or, even, opinion." (at paragraph 101)

[343] In the present case, the defender urged me not to adopt what was described as "a broad brush or impressionistic approach" to the assessment of any chance lost by the pursuers. Instead, the defender submitted that I ought to undertake a more detailed assessment of the pursuers' underlying claims than was envisaged by Simon Brown LJ in *Mount* v *Barker Austin*. As I understood it, this was for three reasons.

[344] First, the defender pointed to the fact that, in the present case, the notional trial date had not yet taken place. This was because it was the pursuers' case that, but for the negligence of the defender, the pursuers would have become part of the collective proceedings which were currently ongoing in England. The trial in those proceedings had not yet taken place (see [93] above). As a result, it could not be argued that the pursuers' claims were "old" in the sense that, but for the defender's negligence, they would have been resolved. Therefore, so argued the defender, there could be no question of evidence having been lost or memories having faded as a result of the defender's negligence. In this regard, the defender also drew attention to the fact that, at an earlier stage in proceedings, the

pursuers had successfully opposed a motion by the defender to sist these cases pending the outcome of the English proceedings.

[345] Second, the defender emphasised that the cases which the pursuers claimed they had lost the chance to pursue were not straightforward. They were novel with potentially far-reaching consequences for the airline industry. The unprecedented nature of the pursuers' underlying claims militated in favour of the court analysing matters more rigorously.

[346] Finally, the defender sought to distinguish the present case from those in which a defending solicitor, when accused of professional negligence, seeks to cast doubt on the merits of claims that he or she had previously championed. As Lord Ericht had observed in *Centenary 6,* at first instance, there are obvious difficulties for a solicitor in such circumstances (at paragraph 121). Such reasoning did not apply in the present case as the defender, as a firm of Scottish solicitors, was never going to be the solicitors acting for the pursuers.

[347] I am not persuaded that the approach to be adopted to the assessment of the pursuers' underlying claims should be other than the general approach summarised by both Lord Briggs in *Perry* and Lord Justice Simon Brown in *Mount.* As I understand the rationale underlying the proposition that, generally, a pursuer claiming for the loss of a chance to pursue litigation ought not to be required to establish his or her underlying claim in a trial within a trial, it is, in short, because it would be unfair to do so. As Lord Briggs identifies, that unfairness to the pursuer may manifest itself in a number of different ways including: difficulties caused by the passage of time, difficulties caused by the absence of the third party defender; and difficulties in relation to the recovery of documents or the tracing and/or memories of witnesses (see *Perry* at paragraph 18). In this type of case,

unfairness arises precisely because the position of the pursuer has been made more difficult as a result of the negligence of the defender (see Simon Brown LJ's third proposition in *Mount* at 510-511).

[348] Analysed in this way, I do not consider the fact that the notional trial date is in the future, whilst admittedly unusual, removes all the other obstacles in the way of the pursuers proving the underlying claims against their former employers which they say they have lost the chance of doing. The fact remains that the pursuers' former employers are not parties to this litigation which is being conducted in a different jurisdiction. That fact in itself gives rise to obvious practical difficulties for the pursuers, for example in relation to the recovery of evidence from their former employers.

[349] In my opinion, the pursuers' opposition to sist is also not relevant to this point. Even in the event that the lead cases in the collective proceedings proceed to trial and do not settle, difficulties for the pursuers in establishing their underlying claims against their former employers (who are not parties to the lead cases) would remain. For completeness, I should add that I also do not consider it remotely equitable that the pursuers should be penalised for not wishing the protracted duration of the present proceedings to be yet further prolonged. Apart from anything else, given the arguments advanced on behalf of the defender in this case, I do not consider it is safe to assume that, even were the claimants in the lead cases to be successful after trial, it would necessarily resolve the present cases.

[350] Furthermore, I do not consider that the novelty of the pursuers' underlying claims assists this aspect of the defender's argument. To the contrary. It was apparent from the unchallenged evidence of the defender's expert, Keith Barrett that the only reasonable prospect for the pursuers to obtain representation and funding for their claims was through a larger litigation firm with union affiliation. Such a firm would be likely to be acting for

a pool of claimants and have the resources to pursue what Mr Barrett considered to be an expensive and risky litigation. Consistent with this evidence, the pursuers' case, as it was advanced during submissions, was that they would have ended up as part of the currently ongoing collective proceedings being pursued by Thompsons, England with the backing of Unite. I appreciate that this is contentious and will return to it below under the heading of causation (see [355] and following). However, for present purposes, on the pursuers' case, as a result of the defender's negligence, the pursuers have been prevented from pursuing their underlying claims as part of the ongoing collective proceedings. As a result, on this hypothesis, they have been denied the undoubted advantages in investigating and prosecuting their claims that being part of the collective proceedings would have provided. In my opinion, in the particular circumstances of the present cases, this factor, if established, weighs in favour of the pursuers not being subjected to a trial within a trial in respect of their underlying claims.

[351] Finally, I struggle to understand on what basis the defender seeks meaningfully to distinguish the present case from the situation envisaged by Lord Justice Simon Brown in *Mount:*

> "The evidential burden lies on the defendants to show that despite their having acted for the plaintiff in the litigation and charged for their services, that litigation was of no value to their client, so that he lost nothing by their negligence in causing it to be struck out. Plainly the burden is heavier in a case where the solicitors have failed to advise their client of the hopelessness of his position…" (at 510)

I note that, on the evidence, Mr Cannon did not charge the pursuers for his services. However, it is also readily apparent to me on the basis of the evidence that I have accepted, that at the time he was acting for the pursuers, Mr Cannon actively promoted himself as a leading legal voice in the field of ATS claims. This is evident not least from the article in the Glasgow Herald published in January 2016 and also the article Mr Cannon himself authored

later that year. It appears to me that Mr Cannon's subsequent attempts in evidence to emphasis his scepticism as to the pursuers' claims, notably at the Cartford Arms meeting, fall squarely into the type of situation being considered by Simon Brown LJ.

[352] Accordingly, for these reasons, I consider that it is appropriate in the present case to adopt what Lord Briggs describes as the "general approach" and not the more detailed assessment contended for by the defender.

Causation

What would the pursuers have done had they been properly advised?

[353] Based on the evidence that I heard from both pursuers, there was no challenge to the suggestion that, had they been advised in accordance with the defender's admissions, they would each have followed that advice.

[354] Accordingly, in considering the issue of causation, I proceed on the basis that by the end of July 2013, the pursuers ought to have been advised to seek out an English solicitor as a matter of urgency in order raise proceedings. This date is based on the pursuers having instructed the defender on 23 April 2013. Although during the course of the proof, there appeared to be some dispute as to the date on which Mr Montague-Trenchard had instructed the defender, in submissions the pursuers were prepared to accept that the date of instruction was 23 April 2013, the date on which both pursuers had first met Mr Cannon.

[355] Under the heading of causation, the defender submits that the pursuers would not have been able to locate and instruct solicitors to issue proceedings timeously. In this regard, the defender relies on the evidence of Keith Barrett to the effect that the pursuers would have failed at the risk assessment stage for the vast majority of claimant personal

injury firms. The defender also points to the fact that Mr Cannon was unsuccessful in engaging either Barkers Gillette or Leigh Day to take on the pursuers' cases.

[356] As a starting point to considering the defender's argument, it is very significant to bear in mind that, as subsequent events demonstrate, Thompsons, England were, in fact, prepared to act both for the pursuers and for other pilots and flight crew who wished to pursue their former employers for injuries caused by ATS. Thompsons were and are prepared to act on the basis of the support and funding of Unite.

[357] From this starting point, the issue is whether, had the pursuers been properly advised, they would have been able to locate and instruct solicitors to commence proceedings before the expiry of the statutory limitation period. The date of commencement of the limitation period for each of the pursuers is in dispute. This dispute is at the root of a separate argument relating to causation advanced by the defender which I deal with below (see [368] and following). However, for present purposes, I will use the date which the parties appeared to be agreed was the earliest point at which the limitation period would have expired – namely, August 2015.

[358] I am satisfied that, on the balance of probabilities, the pursuers would have been able to locate and instruct solicitors to issue proceedings timeously.

[359] I reach this conclusion for the following reasons.

[360] First, I consider that it is important to appreciate that in this counterfactual situation, having been properly advised, the pursuers would, in July 2013, have commenced their search for English legal representation both having prepared a detailed precognition and being aware that in light of the looming threat of limitation, they required to progress matters urgently.

[361] This counterfactual position is in no way comparable to that which confronted the pursuers in 2015 where the pursuers were essentially having to start from scratch and had not had the need for urgency stressed to them. The counterfactual is also not comparable to Mr Cannon's attempts to find English solicitors. In relation to Barker Gillette, while it is clear that they were in discussion with Mr Cannon in respect of the Westgate inquest in 2013/14, it is not clear to me from the evidence that Mr Cannon ever sought directly to engage them on behalf of the pursuers' ATS claims. The correspondence relating to Mr Montague-Trenchard seemed to be more concerned with Mr Cannon seeking assistance with Mr Montague-Trenchard's then continuing contractual dispute with Etihad. As to Mr Cannon's discussions with Harminder Bains of Leigh Day in 2015, as I have noted above (at [60]), it is apparent from the correspondence that the question of Mr Cannon's continuing involvement in and control over the litigation clearly caused friction between them.

[362] Second, I attach significance to the fact that it was apparent from the evidence that both of the pursuers were, at the time, part of a relatively close-knit and organised group of pilots and air crew who considered that they suffered from ATS. This was apparent from the obvious friendship between the pursuers as well as the way in which the pursuers, together with Mr Atherton and others, engaged with Mr Cannon on a collective basis. In this regard, it is notable that Mr Montague-Trenchard had first been put in touch with Mr Cannon following Mr Montague-Trenchard's communications with former pilot John Hoyte, of the Aerotoxic Association. Further, when late in 2015 Mr Montague-Trenchard had started to look for alternative representation, he had made contact with Thompsons following discussions with Charlie Bass, the father of the late Matt Bass. In these circumstances, it is reasonable to infer from the evidence that, had the pursuers been properly advised, one or both of them would have reached out to this wider group in order to locate alternative English representation.

[363] Third, I also consider that it is significant that during the final quarter of 2014, claims were being raised which would go on to form part of the collective proceedings. Although not raised by Thompsons, these claims were subsequently taken over by them. It was also apparent from Mr Lemon's evidence that around the same time Unite's legal department became aware of claims by pilots and air crew in respect of ATS. This led to Mr Rawlinson being contacted, initially on an informal basis.

[364] Taking these three points together, I am satisfied on the balance of probabilities that, had the pursuers begun to search for alternative representation in July 2013, they would have, via the informal network of those who claim to have been affected by ATS, found their way into the initial group of claimants who, in reality, raised proceedings towards the end of 2014. I consider it more likely than not that the pursuers would have been able to instruct either O H Parsons or Thompsons and would, as they did in reality, have obtained retrospective support from Unite. Having been properly precognosced, it would have been apparent to their potential solicitors that both pursuers complained of fume events as well as chronic exposure. As pilots, with access to log books and other documentation, the pursuers would have been an attractive addition to the cohort.

[365] As to the timing of this, I recognise that this counterfactual involves Thompsons and possibly Unite becoming engaged at a slightly earlier point than occurred in reality – in mid-2014 rather than early 2015. However, on the balance of probabilities, I consider that this slight acceleration would reflect the impact on events of a cohort of pilots, armed with their detailed precognitions, seeking out legal representation at a significantly earlier point than occurred in reality.

[366] Having instructed solicitors, there is no basis to conclude that those solicitors would have acted other than with reasonable care and that proceedings would not have been raised

timeously. I do not consider that there is any proper basis in the evidence for inferring that any solicitor would have allowed the pursuers' claims to become subject to limitation while the inquests of Mr Westgate and Mr Bass were proceeding or while further scientific research was being carried out. The simple fact remains that, notwithstanding these factors, some ATS claims were raised at the end of 2014.

[367] For completeness, I note that in submissions the defender approached this question as one which the pursuers required to prove on the balance of probabilities (see [286]). From this, it would follow that the defender's argument is that the timeous raising of proceedings, as opposed to the locating and instructing of English solicitors, was a matter which depended on the actions of the pursuers themselves as opposed to the actions of third parties (see *Perry* at paragraph 20). It may not be significant but, as a matter of analysis, I do not consider that this is correct and, notably, the factors relied on by the defender in this regard are issues which it is said affected Thompsons' progression of claims rather than points relating directly to the pursuers' actions.

The defender's limitation argument

[368] Under the heading of causation, the defender argues that, on a proper application of the law of England, and, in particular, of the Limitation Act 1980, the pursuers' claims were not, in fact, subject to limitation by March 2016 when the pursuers had engaged Thompsons. As a result, the defender argues that:

> "…can it be said that the pursuers lost the chance of bringing proceedings timeously due to the defenders' negligence? As a matter of causation, the answer must be 'No'. The defenders do not need to prove that there was fault or negligence on the part of Thompsons England; all they need to do is prove that the pursuers were not deprived of bringing proceedings timeously due to the defenders' negligence." (defender's written submissions at paragraph 169)

[369] The defender's argument proceeds on the basis, which was agreed by the English law experts, that in the case of each pursuer, the 3 year period of limitation provided by section 11(4) of the 1980 Act would commence from the date of the pursuer's knowledge. This was because the experts were agreed that, in the case of each pursuer, the accrual of the cause of action occurred as soon as either suffered injury. Accordingly, the experts agreed that, for these purposes, what was required was set out in section 14 of the Limitation Act 1980, namely knowledge (a) that the injury was significant (ie the person in question would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment); (b) that the injury was attributable in whole or in part to the act or omission alleged to constitute negligence, nuisance or breach of duty; (c) of the identity of the defendant; and (d) if it is alleged that the act or omission was that of a person other than the defendant, of the identity of that person and the additional facts supporting the bringing of an action. Both experts also agreed that, in the present case, the critical question was whether each pursuer knew that the injury he had suffered was attributable to his former employer's alleged negligence (point (b) above).

[370] The defender then argued that, in the case of Mr Gough, the date by which he had knowledge of attribution arose only in July 2013 when he received the results of Professor Abou Donia's tests.

[371] In the case of Mr Montague-Trenchard, the defender argued in respect of his claim against Thomas Cook that the date of his knowledge of attribution was significantly later because it was only at a much later point, after his engagement of Thompsons, England, that the possibility of pursuing Thomas Cook occurred to him. As to any time bar in respect of

Mr Montague-Trenchard's claim against Etihad, the defender submitted, on the basis of the joint evidence of the experts, that this fell to be determined by the law of Abu Dhabi.

[372] In my opinion, there are a number of fundamental problems with the defender's arguments in relation to limitation.

[373] First, in relation to both pursuers' claims against Thomas Cook, I consider that each pursuer's own unchallenged evidence represents an insuperable obstacle to this part of the defender's argument.

[374] In the case of Mr Gough, his position was clear that he dated his own certainty that his symptoms had been caused by exposure to fumes containing organophosphates during the course of his employment to September 2012. This was the date he had received the results of the tests carried out in the Netherlands. Standing this unchallenged evidence from Mr Gough as to the date of his knowledge, I do not consider that the defender's argument is tenable. Mr Gough's evidence satisfies the test of attribution as it was explained by the experts (see [114] and [115] above) – so far as he was concerned, following his receipt of the test results, the symptoms from which he was suffering were capable of being attributed to a possible cause namely his exposure to fumes during the course of his employment.

[375] In the case of Mr Montague-Trenchard, his evidence as to the date he considered he had known that his symptoms were caused by ATS was similar to that given by Mr Gough. Notably he described the results he had received following the Dutch test as a "diagnosis". His evidence mirrored the evidence given by Ms Deal KC, by reference to the case of *Balls* v *Reeve*, that a "diagnosis" in a non-technical sense was what was required for attribution. Again, Mr Montague-Trenchard was not challenged on this point.

[376] In relation to the point made by the defender in respect of Thomas Cook, Mr Montague-Trenchard's evidence was that he was aware of the possibility of pursuing

Thomas Cook as a former employer from an early point in his communication with Mr Cannon (see [49]). Mr Montague-Trenchard was not challenged about this during cross-examination. There was evidence to the contrary contained in one of Mr Cannon's witness statements. This was unsupported by reference to any contemporary documentation. In the circumstances, for the reasons explained above (at [57] to [65]), I prefer the evidence of Mr Montague-Trenchard on this point.

[377] I do accept that it is apparent from Mr Montague-Trenchard's early exchanges with Mr Cannon that he was concerned at the outset with the then current dispute he was having with Etihad. It is also apparent that, later, when he first engaged Thompsons, the initial focus was again Etihad. However, in light of Mr Montague-Trenchard' evidence, which I accept, I am not persuaded that, applying the test of attribution separately in relation to Thomas Cook, one comes to a date later than September 2012. The fact that Mr Montague-Trenchard's immediate concerns related to the issue arising out of his employment with Etihad does not provide a basis for concluding that he was unaware that his symptoms could be attributed to the exposure he had experienced while employed by both of his employers. In this regard, I think that there is force in Ms Crowther's observations in relation to the fact that the pursuers were part of a group of pilots with varying types of exposure.

[378] Secondly, and in any event, in relation to the pursuers' claims against Thomas Cook, even if I am wrong in relation to the commencement of the limitation period, it is not clear to me that the defender's argument, properly analysed, assists them. As noted above, the defender seeks to characterise its argument as being a basis to challenge whether the pursuers have, in fact, established a causal connection between the defender's admitted negligence and their loss – being the loss of the chance to pursue their claims against their

former employers. However, in truth, I consider that the defender's argument is actually an attempt to contend that an intervening event, namely some unspecified failure by the pursuers' subsequent advisers to bring proceedings, has broken the chain of causation. Notably, this is the pled position of the defender in both cases (see Answer 6 in both actions).

[379] That this must be the correct characterisation of the defender's position can be seen if one tests the defender's argument as follows. If, as a result of the defender's negligence, the pursuers were to have arrived at Thompsons' door with 1 day left of the limitation period, it would follow, on the logic of the defender's argument, that the pursuers would not have established a causal connection between the defender's admitted negligence and the loss of their claims. The notion that, in these circumstances, the pursuers' loss had not been factually caused by the defender's negligence is absurd and offends against common sense.

[380] I suspect that the reason why the defender seeks to avoid the more straightforward characterisation of its argument, namely, that alleged failures by Thompsons broke the chain of causation, is that, notwithstanding its pleadings, the defender has led no evidence to support any such allegation. In this regard, it is notable that, in submissions, the defender did not seek to advance such a position either in relation to limitation or the related argument, which features in evidence, as to the possibility that an application could have been made on behalf of either of the pursuers for the exercise of the court's discretion in terms of section 33 of the Limitation Act 1980.

[381] In any event, whatever the underlying reasoning for the way in which the argument was presented, the fact remains that the defender has led no evidence upon which the actions of the pursuers' subsequent legal advisers can be characterised as breaking the chain

of causation between the defender's admitted negligence and the pursuers' loss of a chance. As such, the defender failed to discharge the onus incumbent on them in this regard (see *Armstead* at paragraph 61).

Properly advised, would Mr Montague-Trenchard have sued Etihad?

[382] Under the heading of causation, the defender also raised the question of whether, properly advised, Mr Montague-Trenchard would have raised proceedings against Etihad. I found this part of the defender's argument difficult to follow.

[383] On the one hand, the defender's pled position was that there were obvious difficulties for Mr Montague-Trenchard in suing Etihad including those arising from the jurisdiction and applicable law being that of Abu Dhabi; and the possibility that Etihad would counterclaim in respect of its employment dispute with Mr Montague-Trenchard. As a result, the defender pled that Mr Montague-Trenchard would not have embarked on litigation (see Answer 6).

[384] On the other hand, in submissions, the position of the defender in this respect had developed. The defender submitted that, contrary to the evidence of Mr Rawlinson KC that his advice would have been not to raise any proceedings against Etihad, the Thompsons' file indicated that such proceedings had been under active consideration. Furthermore, the defender also submitted that, prior to the completion of Professor Howard's generic report in July 2018, as the scientific basis for the claims would have been uncertain, Etihad would have to have remained under consideration as a potential defendant.

[385] On this basis, as I understand the defender's position as it was developed in submissions, it came to be that the defender was no longer advancing a definitive position as to whether, assuming he had been properly advised, Mr Montague-Trenchard would have

raised proceedings against Etihad. Instead, the Etihad issue essentially formed the backdrop to two further arguments that the defender advanced.

[386] The first was an argument about what could be taken from the evidence as to the aetiology of ATS and, in particular, whether, as a matter of law, it would be treated as a divisible or indivisible condition. The defender contended that the evidence indicated that ATS was divisible and, therefore, if Etihad had not been sued, Mr Montague-Trenchard would only be able to recover a small part of the value of his claim from Thomas Cook. I deal with this argument below while dealing with my assessment of Mr Montague-Trenchard's underlying claims.

[387] The second argument was that, if the court concluded that Etihad would have been sued, any recovery by Mr Montague-Trenchard required to be considered as a matter of the law of Abu Dhabi and in light of Mr Obeid's evidence.

[388] Ultimately, this issue comes to be resolved as a counterfactual question: what Mr Montague-Trenchard would have had done, had he been properly advised. My starting point for addressing this question is my finding (set out above at [364]) that the pursuers would have joined that group of claimants who raised proceedings towards the end of 2014. It follows from that finding that, in this counterfactual scenario, Mr Montague-Trenchard would have had the benefit of advice from Thompsons and, more pertinently, Mr Rawlinson KC.

[389] For his part, Mr Rawlinson was quite clear in his evidence that he would have advised Mr Montague-Trenchard against the bringing of proceedings against Etihad. He noted, in particular, the jurisdictional difficulties with finding a basis to bring such proceedings in England together with issues which would arise in the event the applicable law was that of Abu Dhabi (see [71]). Above all, Mr Rawlinson's position was that he would

not have litigated against Etihad on Mr Montague-Trenchard's behalf on a "no win, no fee" basis when he had the possibility of pursing Thomas Cook in England.

[390] In giving this evidence, Mr Rawlinson was also plain that these were his concerns, which would have informed his advice, but he deferred to the English law experts, Ms Crowther and Ms Deal, who gave evidence on these points. On the basis of the position of those experts, it appeared that Mr Rawlinson was quite correct to have concerns. The experts agreed that the law applicable to Mr Montague-Trenchard's claim against Etihad would be the law of Abu Dhabi (at [111]). On the issue of jurisdiction, it seemed that Ms Deal was more strongly of the view that an argument of forum non conveniens by Etihad would be successful, but even Ms Crowther considered that obtaining jurisdiction in England would be "risky" (at [109]).

[391] I see no reason to doubt Mr Rawlinson's evidence as to what his views and advice would have been in relation to raising proceedings against Etihad. Despite reasonably extensive cross-examination, he was not shifted from his position. Given the undoubted difficulties there were with such proceedings, it seems an entirely reasonable position. It is, after all, the defender's pled position.

[392] I am not persuaded by the defender's argument that there is any tension between Mr Rawlinson's evidence and the documentation contained in the Thompsons file. I accept entirely that, in initially investigating Mr Montague-Trenchard's claim, steps were taken in relation to a potential claim against Etihad including intimating a letter of claim and, possibly, drafting Particulars of Claim. However, I do not consider that the taking of these preparatory steps meant that Mr Rawlinson would, in fact, ever have advised that proceedings should be raised against Etihad. It is apparent from the file that Mr Rawlinson's concerns about the private international law features of

Mr Montague-Trenchard's case were also actively being considered not least because they had been raised by Etihad in correspondence. In the event, no proceedings were raised on Mr Montague-Trenchard's behalf because, in October 2017, the pursuers were advised to bring proceedings against the defender.

[393] As to the possibility of pursuing Thomas Cook on Mr Montague-Trenchard's behalf for the entirety of his claim, Mr Rawlinson explained in his evidence why, in his view, ATS ought to be regarded as an indivisible condition. In other words, Mr Rawlinson's view was that, provided it could be shown that the period of employment with Thomas Cook materially contributed to Mr Montague-Trenchard's exposure, he would be entitled to claim all his losses from Thomas Cook. Further, according to Mr Rawlinson, he had expert evidence supporting this position at the time he was advising Mr Montague-Trenchard, albeit this was evidence from what Mr Rawlinson described as "campaigning experts" rather than an expert he might choose to use in litigation, like Professor Howard.

[394] The defender objected to this evidence of Mr Rawlinson's opinion on the grounds that he was a factual witness and could not be described as an impartial expert. I consider that the defender's objection misses the point. Mr Rawlinson's evidence as to his opinion of the indivisibility or otherwise of ATS is of importance not as independent expert evidence (which it is not) but, rather, because it provides the basis for the evidence of both the advice he actually provided to Mr Montague-Trenchard and the advice he would have provided in the counterfactual scenario. On this basis, I repel the defender's objection.

[395] Accordingly, for these reasons, I conclude that had Mr Montague-Trenchard been properly advised by the defender, he would not have raised proceedings against Etihad. As I have noted above, I consider the defender's argument concerning the divisibility or otherwise of ATS below.

The pursuers' underlying claims against Thomas Cook

Approach

[396] In light of the views I have reached on causation, I require next to consider the value of the chance which the pursuers have lost as a result of the defender's negligence. As I have set out above, that exercise involves assessing the pursuers' chances of success in their underlying claims against Thomas Cook while recognising that I have not presided over a "trial within a trial".

[397] That assessment involves considering the various contingencies which the defender contends impact significantly on any chance that the pursuers had. In submissions on the pursuers' underlying claims, the defender focussed on four aspects of the pursuers' claims: (1) foreseeability of injury; (2) breach of duty; (3) the harmful substance to which the pursuers have been exposed; and (4) causation. The defender also raised two further discrete points in respect of: (5) the pursuers' claims for losses relating to property investment; and (6) the deductibility of the insurance payments made to Mr Gough.

[398] Contrary to the defender's submissions, I do not consider that the first four issues are truly independent contingencies. Rather, as was the case for the Inner House in *Centenary 6,* these issues appear to me to be all facets of the same contingency – whether the pursuers would have succeeded in the substance of their actions. Accordingly, and consistent with the Inner House's approach in *Centenary 6*, I will assess these four issues in combination rather than seeking to apply a percentage to each and multiplying them together.

[399] The final two points appear to me to fall into the category of an issue which the court should be more ready to determine (see *Harrison* at paragraph 101; *cf Centenary 6* (Outer House) at paragraph 34) and I have dealt with them on that basis. Although neither is a

pure issue of law, not least because the law applicable to the pursuers' underlying claims is English, I consider that they are capable of a definitive resolution at this stage.

Foreseeability

[400] Although the pursuers' pled position was, perhaps, not entirely clear, by the point of submissions, senior counsel's position was that the claim which each of the pursuers would have brought against Thomas Cook would have been advanced on a common law basis (at [237] above). In short, injury to each of the pursuers had been reasonably foreseeable and their employer, Thomas Cook, had been negligent to expose them. It follows that, in order to be successful, the pursuers would have required to plead and prove that Thomas Cook knew or ought to have known of the risk of injury to which the pursuers were exposed at the time of their employment: in Mr Gough's case from 1998 to 2005 and Mr Montague-Trenchard's case from 1998 to 2003.

[401] The defender's position on this issue is straightforward: the pursuers had simply led no evidence in relation to the awareness on the part of their employers during the relevant period. The defender essentially submitted that the evidence led by the pursuers undermined the suggestion that there was a general awareness of the risk of toxic cabin air. In this regard, the defender relied on the evidence of Professor Mackenzie Ross as to the limitations of the research carried out into cabin air quality (see [296] above).

[402] On the particular issue of awareness on the part of Thomas Cook, I consider that the defender is correct. No evidence was led as to the awareness of the pursuers' common employer. Instead, the pursuers approached this issue at quite a high level of generality. They pointed to the fact that Mr Rawlinson considered that the collective proceedings, in which the issue of foreseeability had been raised by the defendants, enjoyed a chance of

success substantially above 50%. In terms of actual evidence of awareness, the pursuers relied on the evidence of Professor Howard and, in particular, Ms Littlepage that "there would appear to be no doubt that most if not all airlines (as well as manufacturers) have been aware… for decades of the risks of OP poisoning from bleed air." (paragraph 6.42 of the pursuers' written submissions).

[403] If this was intended to be a summary of the evidence led before me, it would appear to be a significant overstatement. As I have noted above (at [104]), Ms Littlepage's evidence was extremely circumscribed in scope as a result, no doubt, of the confidentiality orders to which she was subject. For the same reasons, she was unable to provide much in the way of detail. For these reasons alone, I do not consider that I can attach much weight to her evidence. In any event, taking her evidence at its highest, in relation to the material period of the pursuers' employment, Ms Littlepage spoke only of the knowledge of Boeing.

[404] As to Professor Howard, he accepted that the issue of awareness within the industry of fume events and contamination of cabin air fell outwith his area of expertise. In preparing his generic report, he had sought to set out the basis of his understanding by extracting and collating information from publicly available sources. However, that notwithstanding, I do accept that Professor Howard's generic report provides an evidential basis for the proposition that in 2004 in the UK, it could be said that: "The problem of oil contamination of aircraft cockpit and cabin air supplies has been known about for some years." (AAIB Report 1/2004, Conclusions, paragraph 15). This is a quotation from the AAIB Report, to which Professor Howard refers, into the incident on BAe 146, G-JEAK during the descent into Birmingham Airport on 5 November 2000. Professor Howard also refers to and quotes from a CAA paper dated February 2004 (2004/04) which related to Cabin Air Quality and in which the following statement was made in the foreword:

> "The Civil Aviation Authority initiated its research programme into cabin air quality in 2001 after a small number of events, including two on UK registered aircraft, where flight crew were partially incapacitated. Evidence from these incidents indicated that contamination of the ventilation systems by engine oil fumes was the most likely cause."

[405] I do not consider that this, admittedly slender, basis is undermined by the evidence of Professor Mackenzie Ross to which the defender refers. The defender is quite correct to point out Professor Mackenzie Ross' view that the research into cabin air contamination was in its "infancy" and to highlight her views on the limitations in the research that has been carried out to date. However, it is important to note that in making these observations, Professor Mackenzie Ross was referring to research which was carried out in the years subsequent to 2004. In particular, she was referring to the cabin air quality studies carried out by Cranfield University in 2008 and by EASA in 2017.

[406] Accordingly, on the issue of foreseeability, in light of the evidence I have heard, I am not prepared to dismiss the pursuers' chances of success as being negligible or merely speculative. I consider that the conclusion is consistent with Mr Rawlinson's evidence as to the prospects of the collective proceedings. However, I emphasise that, in the absence of any detail as to the basis on which that opinion was reached, which Mr Rawlinson quite understandably could not give, his evidence does not take the pursuers beyond that point.

[407] The fact remains that I also consider that given the slender evidential basis upon which the pursuers rely in these proceedings on this issue, considerable uncertainties remain which I require to carry forward into my overall assessment of the pursuers' chances of success. These uncertainties include the awareness both actual and constructive of Thomas Cook. They also include resolution of the question as to whether foreseeability of the risk of the injuries arising fume events at the material time would be deemed to be foreseeability of

the “type” of injuries sustained by the pursuers (*cf Hughes* v *Lord Advocate* at 46 to 47 with *White* v *Secretary of State for Health and Social Care* at paragraph 135).

Breach of duty

[408] In order to have been successful, the pursuers would also have required to establish that Thomas Cook had acted in breach of its duty of care to them.

[409] In respect of this issue, the defender submitted that in order to prove such a breach, the pursuers would have required to prove that there were steps which Thomas Cook could have taken which would have prevented their exposure to the allegedly harmful substance. Despite having made averments about a number of such steps, in the event the pursuers had, again, simply led no evidence in respect of any of them. Although there had been some evidence about the Boeing 787 Dreamliner, this was of no assistance to the pursuers as that aircraft had only entered service in 2014 long after the pursuers had stopped working.

[410] In submissions, as I understood their position, the pursuers did not dispute that no evidence had been led on the breach issue. Rather, their position was that, in the absence of Thomas Cook, they did not know what response would have been made on the part of the employer to the claims they were making. But, given the potentially extremely serious consequences were the risks of injury to flight crew to eventuate, the pursuers had, at the very least, a very good starting point because it would be very surprising if nothing could be done.

[411] In the event that the pursuers are correct about the potential risks of injury to flight crew, then there is plainly force in their position. As it is put in *Munkman: Employer’s Liability* (17th Edition) at paragraph 2.79:

> "2.79 A further significant consideration is how great is the probability of the risk materialising and what would be the gravity of the harm if it does occur: see *Paris* v *Stepney Borough Council* [1951] AC 367. The duty is to take reasonable precautions: the greater the magnitude of the risk and the greater the gravity of harm should the event occur, the higher is the duty to take precautions, even if these are expensive or difficult to adopt."

[412] In these circumstances, it is apparent that the strength of the pursuers' position on the breach issue is, in turn, dependent upon the pursuers being successful in relation to its case on causation. This has two consequences. First, I do not consider that the pursuers' chances of success in respect of the breach issue can be dismissed as being merely negligible or speculative. However, once again, standing the pursuers' position, significant uncertainty in relation to this issue requires to be carried forward into my overall assessment of the pursuers' chances of success.

Identification of the harmful substance

[413] The short point advanced by the defender under this heading was to highlight that the pursuers were not in a position to identify the harmful substance or substances to which they allege they had been negligently exposed. In the absence of such an identification, the defender contended that the pursuers' underlying employer's liability claim could never have succeeded.

[414] I do not consider, as a matter of law, that this submission by the defender is correct. The identification of the particular substance or substances the exposure to which the pursuers contend caused their condition is not an essential element of their claim against their employers. In my opinion, it would have been possible for the pursuers to succeed in their claims if, for example, they had proved, on the balance of probabilities, that their negligent exposure to a mixture of fumes in the cockpit during the course of their

employment had caused or at least materially contributed to their symptoms without pinning down precisely which chemical or chemicals was responsible. Such a possibility would be consistent with the evidence I heard as to the composition of cabin air containing many different chemical compounds. Were the pursuers to have succeeded in this way, their position would have been similar to that of the pursuer in *McGhee* who succeeded in his claim for dermatitis against his employer notwithstanding that the precise mechanism whereby that condition was caused was not known.

[415] As such, I consider that this aspect of the defender's argument fails to appreciate the important distinction drawn out by Lord Prosser in *Dingley* (at 602 to 604) between the requirement of legal proof in a civil action – namely, the balance of probabilities – on the one hand and the ordinary use of "establishing" or "proving" that something is the case in any other context, particularly a medical or scientific one. As Lord Prosser put it:

> "But speaking very generally, I think that the civil requirement of a pursuer – that he satisfy the court that upon the evidence his case is probably sound – would in ordinary language be regarded as very different from, and less stringent than, a requirement that his case be established or proved. More importantly in the context of a case such as the present, the fact that the two concepts are distinct in ordinary language, but the same in this legal context, seems to me to give rise to a risk of ambiguity or misunderstanding in the expressed opinions of expert witnesses." (603 C-E)

Reformulating the defender's argument to take into account Lord Prosser's distinction, one can see that there might be significant force in the proposition that without identifying the particular substances involved, it would be impossible for the pursuers to demonstrate that their condition had been caused by exposure to toxic cabin air as a matter of scientific proof. However, as Lord Prosser makes clear, that is not the appropriate approach in the context of civil litigation.

[416] Of course, even though I reject this part of the defender's argument, I still require to consider the defender's arguments in relation to causation which I do in the next section.

Causation

[417] Under the heading of causation, it is necessary to consider two discrete arguments raised by the defender. The first concerns the issue of causation in general and is, essentially, whether the problems in respect of causation were so significant as to mean that the pursuers' chances of success were negligible. The second concerns the specific question of the divisibility or otherwise of ATS as a condition. For the reasons noted above, this argument relates, in particular, to Mr Montague-Trenchard (see [386]).

Causation – general

[418] As a starting point, it is fair to observe that in relation to the pursuers' underlying claims against Thomas Cook, the majority of the evidence that I heard was focussed on the issue of causation. In particular, this included evidence from four expert witnesses: the neuropsychologist, Professor Mackenzie Ross; the consultant neurologist, Dr Davenport; the toxicological pathologist, Professor Howard; and the toxicologist, Professor Bridges.

[419] Distilling the pursuers' case on causation to its essentials, it can be summarised as follows:

1. Aeroplane cabin air is contaminated by air "bled" from the aircraft engines.
2. As well as occurring at a low level, this contamination is evident in one-off "fume events".
3. The contamination includes both fumes and particles from jet oil which is known to comprise, among other things, organophosphates.

4. The contamination is capable of causing harm. This can be seen from:
    - The documented effects of fume events; and
    - The research which identified the toxicological effects of repeated exposure to low levels of organophosphates.
5. The pursuers had each been exposed to contaminated cabin air including fume events.
6. The development of neuropsychological symptoms by both of the pursuers was consistent with those reported by other aircrew and was consistent with the pursuers' history of exposure.

[420] The pursuers basically relied upon the evidence of Ms Littlepage and Professor Howard for the first proposition albeit I did not understand this to be in dispute. As to the remainder, the pursuers relied principally on Professor Howard for the second, third and fourth propositions; the pursuers themselves for the fifth proposition; and Professor Mackenzie Ross for the last.

[421] The defender submits that the problems with the pursuers' cases are so significant as to render negligible any chances of success which they have lost.

[422] The starting point for the defender's position is to highlight that the pursuers are seeking to establish causation in the absence of a medical consensus as to any causal relationship between the contaminated cabin air and the symptoms suffered by the pursuers. I do not understand the defender to be arguing that this absence of consensus is, in and of itself, fatal to the pursuers. Certainly, the case cited by the defender in support of this part of its argument, *Wood* v *Ministry of Defence*, does not support so broadly-stated a proposition (see, for example, paragraphs 60, 65, 76 and 78 per Dame Janet Smith). Furthermore, such an approach would involve failing to recognise the distinction drawn

by Lord Prosser in *Dingley* between the legal and scientific concepts of proof (see [415] above). Equally, there can be no doubt that the absence of such a consensus does make the pursuers' task significantly more difficult.

[423] The defender challenged the evidence of each of the two principal witnesses founded upon by the pursuers.

Professor Howard

[424] As noted above (see [306]), the defender challenged the admissibility of Professor Howard's evidence on three grounds. I am not persuaded that I should sustain any of the defender's objections.

[425] First, the defender argued that parts of Professor Howard's generic report strayed beyond even his self-professed expertise as a toxicological pathologist and, therefore, Professor Howard's opinion on these matters was not admissible. As I have noted above (at [152]), I did not understand Professor Howard to be holding himself out as an expert in these matters. Rather, Professor Howard was clear that in these parts of his report, he was simply setting out his understanding of the relatively complex factual background to his opinion based on publicly available and referenced documents.

[426] Second, and more fundamentally, the defender objects to Professor Howard's evidence on matters of toxicological pathology on the grounds that he is not appropriately qualified and, therefore, his evidence was inadmissible. To sustain the defender's objection would require me to be satisfied that Professor Howard's knowledge and expertise fell below the threshold of admissibility. The defender's objection appeared to proceed on a very narrow definition of the field of toxicology and to stem from Professor Bridges' views on this matter. However, it appeared to me, on the basis of the evidence which I heard

from, in particular, Professors Howard and Bridges, that the field of toxicology involves a number of different professional disciplines and subjects including those of medicine, pathology, analytical chemistry, neuropsychology, public and occupational health. Having considered Professor Howard's qualifications, his publications, his professional memberships and his experience, not least, in serving on public committees (see [149] and [150]), I have no hesitation in repelling this objection.

[427] Finally, the defender objected to Professor Howard's evidence on the grounds that he was not truly independent. This objection was based on the assertions that, first, Professor Howard had "…spent his recent professional life trying to convince others of his theories on aerotoxicity…" (defender's written submissions at paragraph 113) and, second, that Professor Howard did not present competing or alternative positions in any of his reports. The defender asserted further that it was not open to the court to admit evidence and address the issue of independence or impartiality in terms of the weight ascribed to that evidence.

[428] Dealing with the last point first, I consider that the defender's argument is not consistent with the opinion of the UK Supreme Court in *Kennedy* v *Cordia (Services) LLP* [2016] WLR 597. Their Lordships are clear that independence and impartiality is an issue of admissibility as opposed to being "merely" one of weight (at paragraph 51). However, I do not read their Lordships as restricting the court, once it is satisfied that the threshold of admissibility has been crossed, from taking account of any remaining issues in relation to a witness' independence and impartiality in the weight ascribed to that witness' evidence.

[429] In any event, having considered Professor Howard's reports and having listened to his evidence, I consider that the defender's objection is unfounded. It is fair to observe

that Professor Howard has, in recent years, involved himself in research and publishing in the undoubtedly controversial area of aerotoxicity. However, I consider that Professor Howard's response when his independence was challenged in cross-examination was equally fair: "… I am not an activist. I am just putting my scientific thoughts into the literature with co-writers, co-authors and that's where it stands." (day 8, page 177: lines 19 to 21). In the reports he prepared in respect of each of the pursuers, he addressed the opinion of Professor Bridges and explained his reasons for not agreeing with it.

[430] Accordingly, for these reasons, I repel the defender's objections to the admissibility of Professor Howard's evidence.

[431] It is convenient at this point to address the pursuers' submission (at [230]), that I ought summarily to reject Professor Bridges' evidence on the grounds that the criticisms he made of, in particular, Professor Howard's evidence had not been articulated in advance of the proof and/or the points were not put to Professor Howard in cross-examination. In short, I reject this submission. Standing the fact that Professor Bridges' supplementary reports in respect of each of the pursuers both contain an appendix which specifically responds to Professor Howard's reports, I do not understand the basis of the pursuers' submission. Furthermore, taking account of the constraints in questioning which arose from the fact that the parties had agreed that the evidence of Professor Bridges and Professor Howard be taken concurrently, I was unable to detect any significant line of criticism of Professor Howard which was not put to him. In this regard, I consider it notable that the pursuers also omitted to identify any particular criticism which was not put to him.

[432] As I have set out above (at [307] to [309]), the defender submitted that I should prefer the evidence of Professor Bridges to that of Professor Howard. The pursuers, on the other

hand, submit that I should do the opposite and prefer the evidence of Professor Howard (at [231] to [234]).

[433] I consider that it is important to remember that, for the reasons I explained at the outset of my decision, I am not conducting a "trial within a trial" (see [347] to [352] above). What I require to do is not decide whether the pursuers have proved causation on the balance of probabilities. Rather, I require to value the chances of success in their underlying claims that the pursuers lost as a result of the defender's negligence. As such, I do not consider that I require ultimately to determine whether I prefer the evidence of Professor Howard or Professor Bridges.

[434] Instead, to carry out that exercise of valuation, I require, first, to consider whether the pursuers' chances of success can be rejected as negligible or speculative. On the basis of Professor Howard's evidence, I do not consider that the pursuers' chances can be so described. Taken as a whole, I consider that Professor Howard's evidence establishes a basis for inferring that the pursuers' symptoms could have been caused by contaminated air to which they were exposed.

[435] I do not consider that, properly understood, the evidence of Professor Bridges negates that basis. Rather, Professor Bridges' evidence raises a series of factors which cast doubt on the drawing of the inference of causation. These factors include the following:

- There was little or no evidence of the chemicals to which the pursuers were actually exposed in the cabin.
- Insofar as chemicals have been identified in cabin air, these do not appear to be unique to that environment.
- Furthermore, the estimated exposure of the pursuers to the chemicals identified appeared significantly lower than the levels currently thought

to be capable of causing an adverse effect using current well-established methodologies.

- The fact that humans are exposed to many chemicals at low levels each day indicates that additive and synergistic effects must be uncommon in practice.
- The fact that low-dose exposure to organophosphates has been shown to produce a change does not, in itself, show that any such change was adverse.
- There does not appear to be a recognised or accepted pattern of symptoms reported by those who claim to suffer from ATS.

I consider that these factors do give rise to significant doubts in respect of causation. These doubts require to be carried forward into my overall assessment of the pursuers' chances of success.

Professor Mackenzie Ross

[436] The defender's submission in respect of Professor Mackenzie Ross was that, in short, her evidence as a neuropsychologist did not, in fact, support the pursuers' case on causation. She had been careful to make clear that the tests she performed on the pursuers do not, in themselves and in the absence of other evidence, allow conclusions to be drawn in relation to the cause of the pursuers' symptoms. She had concluded that it was premature to conclude that cabin air does not cause any risk to aircrew, but her evidence left open the opposite conclusion: namely, that it was premature to conclude that cabin air does pose such a risk. The defender contrasted the evidence of Professor Mackenzie Ross with that of Dr Davenport who had concluded that there was insufficient evidence to conclude that ATS was the cause of the pursuers' symptoms.

[437] I accept the thrust of the defender's argument. I agree that Professor Mackenzie Ross' evidence, on its own, would not provide a sufficient basis to infer that the pursuers' symptoms had been caused by toxic cabin air. However, that is not the pursuers' case. As I understand their position, they principally rely on Professor Mackenzie Ross' evidence in two respects: first, to show that each of the pursuers presented the neuropsychological symptoms which her psychometric testing had revealed; and second, that those symptoms were consistent with previous studies of aircrew and appeared to show a temporal relationship with the pursuers' exposure. The pursuers rely upon this evidence to connect the symptoms suffered by the pursuers with their exposure to toxic cabin air as explained by Professor Howard.

[438] As to Dr Davenport, I did not understand there to be any real conflict between his evidence and that of Professor Mackenzie Ross. He had diagnosed each of the pursuers with chronic fatigue syndrome. He did not consider that there was sufficient evidence in the medical literature to support the notion of a specific aerotoxic syndrome. Further, he highlighted that based on what had been published to date, it was not clear to him that the pursuers would satisfy the criteria. However, it was clear that he remained open-minded. He did not seek to deny the possibility that at some point in the future ATS might become a recognised and accepted diagnosis.

[439] Accordingly, I do not consider that the defender's submissions in respect of the pursuers' reliance on the evidence of Professor Mackenzie Ross undermine the pursuers' case on causation. The pursuers' chances of success cannot be described as negligible or speculative on this basis. I carry forward Dr Davenport's doubts to my overall consideration of the pursuers' chances of success.

Causation – divisibility

[440] The defender's argument in respect of divisibility was that, on the basis of the pursuers' own evidence, it was apparent that ATS was a divisible condition, meaning that its severity would be influenced by the amount of the agent which had caused it – toxic cabin air – to which the pursuers were exposed (see *Holmes* v *Poeton Holdings Limited* [2024] 2 WLR 1029 at paragraphs 31 to 32). The defender founded upon the evidence of Professor Howard which attached significance to the duration of exposure and also to the "accumulative damage" to the nervous system with repeated low-dose exposure (see [290]). This evidence was consistent with ATS being a cumulative, divisible condition. As such, the defender argued that a wrongdoer could only be liable to the extent of its contribution and no more. The significance of this for the present case is that, had Mr Montague-Trenchard sued only Thomas Cook, he would, even if he had been successful, only have been able to recover that part of his losses attributable to his employment with them between 1998 and 2003.

[441] In submission, the pursuers objected to this part of the defender's argument on the basis that the defender had made no averments in relation to this issue. The pursuers argued that provided they showed that exposure by their employers materially contributed to their illness, it was incumbent on the defender to demonstrate that the illness was divisible. As a matter of analysis, I consider that the pursuers are not correct on this point. In the context of the present claim, the defender's argument is that on the pursuers' own evidence, Mr Montague-Trenchard essentially had no chance of recovering all of his claimed losses from Thomas Cook because ATS was necessarily a divisible condition. Accordingly, I do not consider that the defender is prevented from advancing this argument in the absence of pleading.

[442] In any event, properly analysed, I do not consider that Professor Howard's evidence supports the defender's contention that ATS is necessarily a divisible condition. In this regard, the defender's position is not assisted by the fact that the issue of divisibility was not put to Professor Howard in the course of cross-examination or indeed at all. As a result, the defender relies upon a number of points in Professor Howard's evidence where, in giving his opinion as to the mechanism whereby exposure to contaminated cabin air caused harm, he referred to the length of exposure. In his generic report, Professor Howard referred to "…the length of exposure as part of the 'dosing regime'." (generic report at paragraph 106). Professor Howard goes on to say, in considering the potential impact of repeated low-dose exposure:

> "Thus chronic continual exposure to a complex mixture of neurotoxic chemicals while in the 'workplace' is the most likely mechanism for the clinical picture presenting in some aircrew." (at paragraph 112)

Professor Howard gave oral evidence to similar effect.

[443] However, I do not understand the passages relied upon by the defender demonstrate that Professor Howard's opinion is that the severity of the ATS symptoms experienced is related to the extent of exposure to cabin air. In paragraph 112 of his generic report, he refers to an article he had co-authored in the Open Access Journal of Toxicology: C V Howard, S Michaelis, A Watterson, "The Aetiology of 'Aerotoxic Syndrome' – A Toxico-Pathological Viewpoint" (2017) Volume 1 Issue 5, OAJT. In that article, Professor Howard addresses what he describes as a "conundrum" arising from, on the one hand, the fact that flight crew have become unwell, some chronically, following fume events and, on the other, the argument that the levels of measurable contamination in the cabin are too low to cause illness. It is in addressing this "conundrum" that Professor Howard refers to "low-dose exposure" and, as he did in evidence, to the work of Professor Alvin Terry of

Augusta University, Georgia (see [157]). As I understand Professor Howard's evidence, his opinion is that ATS is caused by continual low-dose exposure rather than that the severity of symptoms is affected by the amount of toxic cabin air to which an individual has been exposed. My understanding is confirmed by the fact that, in the article, Professor Howard and his co-authors go on to identify three complications in understanding the issue of causation: (i) the complexity of the mixture to which the aircrew are exposed; (ii) the wide variability between individuals' ability to metabolise and detoxify OP compounds; and (iii) the fact that low-dose repeated exposure can increase the vulnerability of neurons to a subsequent high-dose event.

[444] On this basis, I do not consider that it follows from the evidence that I have heard that ATS is necessarily a divisible condition. Accordingly, I do not consider that it can be said on this basis that Mr Montague-Trenchard had no or only a negligible chance of recovering all of his claimed losses from Thomas Cook. Instead, the issue of the divisibility or otherwise of ATS, arising as it does from resolution of the causation question, requires to be considered as part of the overall appraisal of the pursuers' chances of success.

The pursuers' claims for losses relating to property investment

[445] The defender challenges the claims advanced on behalf of both pursuers which are said to arise from the fact that, as a result of their illness, they were unable to invest in property. These claims were said to be in lieu of a claim for loss of pension. In the pleadings for both pursuers, the following averments are made:

> "The pursuer, in a similar position to other pilots, did not consider that there was any suitable traditional pension arrangements which could be made for his retirement. He, like many other pilots, anticipated working for many airlines over his career, including in the Middle East (for example with Etihad) who do not provide any pension arrangements. Tax efficiency in pension arrangements in

> the UK are not generally available when investors are not tax resident in the UK. For those reasons, many pilots (and the pursuer) adopted a system of making investment in property in the UK whilst absent. They were able to take advantage of the fact that they had accommodation allowances paid abroad, and other similar benefits, which permitted them to use substantial portions of their income to invest in property." (Article 6)

[446] In light of the evidence I have heard, I do not consider that either of the pursuers had any substantial chance of recovering this part of their claim from their former employer. I reach this conclusion for two principal reasons.

[447] First, as I have noted, the premise of this part of each of the pursuers' claims was that the claim for losses relating to property investment was in lieu of a loss of pension claim. As the pursuers' averments (quoted above) make clear, it was contended that this was an industry practice among pilots. No doubt the reason why the claims were advanced in this way was to avoid the obvious response that, otherwise, they were seeking to obtain double recovery: recovering both the entirety of their lost earnings and losses which would arise from what they would have used those earnings for.

[448] However, there was simply no independent evidence to support the premise upon which these parts of the pursuers' claims are based. To begin with, it was notable that both of the pursuers had occupational pensions while they were employed by Thomas Cook. Of the former pilots who gave expert evidence, Lloyd Watson's evidence was that it was not common for pilots to invest in property in lieu of a pension. Captain Warner did not address this point in his evidence at all.

[449] Secondly, and relatedly, it was clear from the English law experts that a claim of the sort advanced by the pursuers was essentially unheard of. I attach some significance to the fact that, notwithstanding their extensive combined experience, neither Ms Deal nor Ms Crowther had ever come across such a claim. Furthermore, Ms Deal was clear and

unequivocal in her view that this type of claim was unsustainable. Insofar as Ms Crowther was prepared to keep an open mind as to the stateability of such claims, this was on the basis that the claims were being advanced in lieu of a loss of pension. However, as I have noted, in the event, there was no evidence to support this premise.

[450] Accordingly, as I conclude that the pursuers had no substantial chance in respect of this element of their claims, I will deduct this element from the sums claimed.

The deductibility of the insurance payments made to Mr Gough

[451] The final issue which is raised by the defender concerns whether the payments received by Mr Gough under the Scottish Equitable income protection scheme following his retirement fall to be deducted from his claim for lost earnings.

[452] The English law experts, Ms Deal and Ms Crowther, were agreed that the general principle is that assessment is made on a net basis and financial gains accruing which the claimant would not have received but for the event which constitutes the cause of action are *prima facie* to be taken into account in mitigation of the loss which that event occasions.

[453] Against this background, the pursuers advanced two arguments in support of the contention that the payments were not deductible. The first was that Mr Gough himself contributed to the policy and, therefore, the payments under the policy should not be deducted essentially because the defendant ought not to get the benefit of the claimant's prudence. The pursuers' fall-back position was that, in any event, the court required to consider whether the payments ought to be considered as a contractual entitlement of the kind considered by the courts in *Parry* v *Cleaver* [1970] AC 1 and *Smoker* v *London Fire Authority.*

[454] Having considered the evidence, I am satisfied that Mr Gough had no substantial chance of avoiding the deduction of the payments from his claim against Thomas Cook.

[455] In respect of the first argument, it is apparent from the available documentation that Thomas Cook contracted to arrange a prolonged disability insurance scheme for all of its pilots by entering into a Group Income Protection Policy. The policyholder was Thomas Cook's predecessor, MyTravel Group. It is also reasonably clear that the scheme was made available to all pilots whether or not, like Mr Gough, they made contributions to the Thomas Cook pension scheme. Finally, it was plain from the available documentation that the payments which Mr Gough received included an element both for earnings and, separately, a contribution to his pension. Importantly, there was also no evidence that Mr Gough's pension contributions would have been lower if the insurance policy did not exist or, conversely, that his income would have been higher if the income protection policy had not been provided.

[456] On the basis of the agreed position of the English law experts, I understand that in order for Mr Gough to fall within the well-established exception to the general principle set out above, it would be necessary for him to demonstrate that he had contributed either directly or indirectly to the insurance premiums. However, in light of the foregoing evidence, there is simply no evidence that Mr Gough, in fact, did so. Accordingly, I consider that the pursuers' first argument has no substantial chance of success.

[457] As to the second argument, this depended on the payments Mr Gough received under the income protection policy being characterised as akin to ill-health pension payments which were the subject of the decision in *Smoker.* It is apparent to me, based on the documentation which I have seen during the course of the evidence, that the payments received by Mr Gough were not pension payments but, rather, were in lieu of

salary and included a contribution to Mr Gough's pension. I agree with Ms Deal KC that Mr Gough's case appears indistinguishable from the House of Lords' decision in *Hussain* v *New Taplow* in which ill-health insurance payments made under a scheme to which the employee did not contribute were held to be deductible.

[458] Accordingly, as I conclude that Mr Gough had no substantial chance in respect of this element of his claim, I will deduct it from the sums claimed.

Overall assessment

[459] For the reasons I have set out above, I consider that the pursuers had a real and substantial chance of success in their claims against Thomas Cook (excluding their claims for the losses relating to property investment and, in Mr Gough's case, for not deducting the income protection payments). Equally, I have identified that, in respect of each of the four aspects of the pursuers' claims focussed on by the defender, significant uncertainties remain. In this regard, I consider "success" for the pursuers to be the achievement of a substantial payment in respect of their claims whether following a fully contested litigation or following an extra-judicial settlement. On the basis of the evidence I heard, I do not consider that it is possible to distinguish between these outcomes.

[460] In submission, the pursuers also relied on what were described as "soft pointers" (see [219]). In fairness, the pursuers relied on these factors in support of their position that their claims had a real and substantial chance of success rather than in support of their assessment of that chance as being 80%. In the event, I do not find any of these factors to be of much assistance in assessing the pursuers' overall chance of success. In light of my views of Mr Cannon's credibility (see [65]), I am not prepared to attach any weight to views that he may have expressed. In this regard, Mr Cannon was, so far as I am aware, also the only

source of evidence in relation to the settlement of ATS-related disputes against employers in other jurisdictions. (Albeit, I was unable to find any reference at all in the evidence to the French court cases).

[461] Mr Cannon is also the only source of evidence about the appraisal made of the ATS case by Robert Weir KC together with junior counsel and Professor Bridges. According to Mr Cannon, it was reported to him, via Harminder Bains of Leigh Day, that the claims had less than a 30% chance of success. This apparently followed a meeting towards the end of 2015 and prior to the Cartford Arms meeting. So far as I am aware, there is no contemporaneous documentary support for this. Professor Bridges also had no recollection of this. However, I find this an interesting piece of evidence because it would appear to run contrary to Mr Cannon's interest to suggest that, at a point when he was apparently of the view that the pursuers had no case, other, independent, advisers had assessed the prospects of ATS claims as possibly being as high as 30%.

[462] I also do not consider that much weight can be attached to the evidence of Ms Littlepage in respect of the settlement of the claims with which she was involved in the US essentially for the reasons identified by the defender: the settlements were in another jurisdiction, relating to a different type of action, on a different basis and relating to a different type of aircraft. Moreover, the terms of those settlements are completely unknown.

[463] As to the views of those involved in the ongoing English collective proceedings – Mr Rawlinson and Mr Hayward – their views on the prospects of success that the claimants in those proceedings enjoy is of limited value (see [96]). First, these views do not directly concern the pursuers' claims which are not part of those proceedings. Albeit, it should be recognised that Mr Rawlinson considered that neither of the pursuer's claims could be regarded as weak and he rejected the notion that they had been excluded from the

cohort because of inherent problems. Second, the views of Mr Rawlinson and Mr Hayward were expressed at a very high level of generality and, as a result of understandable concerns in respect of privilege, neither was in a position to explain the underlying reasons for their assessment. Despite these limitations, I do consider that some weight can be attached to the fact that an extremely experienced litigator in the field of disease litigation, Mr Rawlinson, is prepared to act in the collective proceedings, which are clearly a significant piece of litigation, on a "no win, no fee" basis.

[464] As I have noted, the pursuers submit that their overall prospects of success in the claims against Thomas Cook ought to be assessed in the order of 80%. Taking account of the very significant uncertainties I have identified in relation to foreseeability, breach of duty, and causation, I consider that such a figure greatly overstates the chances of success which the pursuers lost. In particular, in light of the remaining uncertainties, I do not consider that those prospects can be assessed as being greater than 50%. Equally, I consider that the defender's assessment of 20% significantly underestimates the chances that the pursuers have lost. Overall, I assess the pursuers' chances of success in their claims against Thomas Cook as being 40%.

[465] As a cross-check, if one assumes, adopting a generous approach to the evidence, that the prospects of ATS claims were assessed being possibly as high as 30% in the absence of the work carried out by Professors Mackenzie Ross and Howard, then it is reasonable to consider that the pursuers' chances were materially improved by that work and this analysis is broadly consistent with my overall assessment of 40%.

Quantum

Notional trial date

[466] The parties are agreed that, as a starting point, it is necessary to determine a notional date at which point the pursuers' claims would have been resolved. Given my conclusions in respect of causation – that the pursuers would have become part of the ongoing collective proceedings in England, I conclude, on the basis of the evidence of Mr Rawlinson, that the notional date of resolution would be 1 April 2026.

[467] The defender submitted that, as the notional trial date was in the future, interest should be calculated to the date of the last day of the proof. I agree and have used the date of 9 May 2024, that being the conclusion of the hearing in these proceedings.

General damages

[468] The English law experts, Ms Crowther KC and Ms Deal KC, were agreed that the court should approach this head of damages by reference to "Chronic Pain (B) Other Pain Disorders" section of Chapter 9 of the Judicial College Guidelines (16th edition). As I have noted, by the date of submissions this had been superseded by the 17th edition and both parties submitted that I should use this edition. Having considered Chapter 9, it appears to me to be entirely appropriate. I note that the chapter is intended to deal with, among other conditions, Chronic Fatigue Syndrome, which was Dr Davenport's diagnosis of both of the pursuers.

[469] The Guidelines indicate that the factors to be taken into account in valuing pain disorders should include i) the degree of pain experienced; ii) the overall impact of the symptoms; iii) the effect of the condition on the person's ability to work; iv) the need to take medication to control pain; v) the extent to which treatment has been undertaken and

its effect; vi) whether the condition is limited to one anatomical site or is widespread; vii) the presence of any separately identifiable psychiatric disorder; viii) the age of the claimant; and ix) prognosis.

[470] The pursuers submitted that their symptoms fell within the description of "Severe" and that a mid-range award was appropriate:

> "Severe: In these cases, significant symptoms will be ongoing despite treatment and will be expected to persist, resulting in adverse impact on ability to work and the need for some care/assistance. Most cases of Fibromyalgia with serious persisting symptoms will fall within this range.
> £51,410 to £76,870"

[471] The defender submitted that an award at the bottom end of the "Moderate" category should be made:

> "Moderate: At the top end of this bracket are cases where symptoms are ongoing, albeit of lesser degree than in (i) above and the impact on ability to work/function in daily life is less marked. At the bottom end are cases where full, or near complete recovery has been made (or is anticipated) after symptoms have persisted for a number of years. Cases involving significant symptoms but where the claimant was vulnerable to the development of a pain disorder within a few years (or 'acceleration' cases) will also fall within this bracket.
> £25,710 to £46,970"

[472] On the basis of the evidence I have heard, I consider that the pursuers' symptoms fall within the "Severe" category. As I understand the Guidelines, one of the principal distinctions between the "Severe" category and the "Moderate" category is the impact that the condition has on an individual's ability to work. Each of the pursuers spoke to being unable to hold down paid employment as a result, in particular, of the fact that they were afflicted with physical and mental fatigue. It was clear in his evidence that Dr Davenport did not seek to cast doubt on the veracity of each pursuer's account of their symptoms. Furthermore, he also recognised that those suffering with chronic fatigue-like symptoms would have difficulties in holding down regular employment. Accordingly, I conclude in

respect of each of the pursuers that the symptoms that they are suffering from do have an adverse impact on their abilities to work.

[473] Although falling within the severe category, it appears to me that the pursuers both fall towards the bottom end of that scale. I note that neither of the pursuers appeared to require any significant degree of care or assistance in their daily lives.

[474] In all the circumstances, I consider that an award of £52,000 would have been appropriate in respect of general damages.

[475] The parties were agreed that, in accordance with English law, interest would run on this amount from the date of service until the date of trial. In line with my findings in respect of causation (see [364]), it follows that interest would run from 1 November 2014 to 9 May 2024 which brings out the sum of £9,907.

Loss of earnings

<u>Mr Gough</u>

[476] In respect of Mr Gough's claim for lost earnings, the first issue is whether, as the pursuers contend, but for his forced retirement, Mr Gough would have transitioned to the Middle East to pursue his career there. The pursuers' position was based on the evidence both of Mr Gough and Captain Warner.

[477] Mr Gough indicated in his witness statement that he had aspirations of moving to the Middle East as Mr Montague-Trenchard had done. As I understand the evidence of Captain Warner, Mr Gough would have required to remain with Thomas Cook until the end of 2007 in order to accrue the minimum flying experience to apply to an airline such as Etihad. Captain Warner's evidence was also that at that time, following the global financial crisis (2007 to 2008), Etihad was rather unusual in actively seeking to recruit new pilots. At

the time, Etihad was preparing for a projected fleet expansion in 2010. Captain Warner's evidence was that the success rate for applications to Etihad was less than 50%. Nonetheless, he considered, based on Mr Gough's background and experience, that Mr Gough would have been successful.

[478] On balance, I am not persuaded that Mr Gough would have sought to move to the Middle East in 2007. I note that there is no evidence that, at any point during his career, Mr Gough ever sought to work outside the United Kingdom. For example, when he first obtained his commercial pilot's licence and was looking for a job, I note that Mr Gough did not seek to pursue opportunities abroad. Thereafter, for his entire career as a pilot, Mr Gough was based in the Midlands. Mr Gough also showed no particular ambition to qualify as an instructor or examiner. In these respects, Mr Gough's career can be contrasted with that of Mr Montague-Trenchard.

[479] The next issue which arises in respect of Mr Gough is what he would have done in September 2019 following the demise of his then employer, Thomas Cook. Mr Gough was 58 years old at that point. In considering this issue, it is necessary to remind oneself that the severe travel restrictions introduced as a result of the Covid-19 pandemic took effect less than 6 months later and lasted until mid to late-2021 when Mr Gough was turning 60.

[480] Captain Warner's evidence was that, if Mr Gough had been working for Thomas Cook in September 2019, it was likely that he would have suffered a period of enforced unemployment until early 2022. However, thereafter, Captain Warner considered that Mr Gough could have obtained employment until his 65th birthday in 2026 albeit he recognised that Mr Gough would have been at a disadvantage in trying to obtain employment at this point in his career.

[481] The defender submitted, on the basis of Mr Carter's evidence, that, following the demise of Thomas Cook and the Covid-19 pandemic, Mr Gough would have chosen to retire. Mr Carter based his opinion, in part, on the general trend of statistics which showed commercial pilots retiring before the age of 60.

[482] Again, on the basis of the evidence I have heard, I am not persuaded that Mr Gough would have sought to return to employment following the pandemic. In 2022, Mr Gough would have been 60. He would not have worked for more than 2 years. Given his age, it is likely that he would have suffered difficulties in obtaining a new position. Thereafter, even were he to have obtained a new position, it is likely that he would have dropped to the bottom of the seniority scale. Moreover, based on the evidence of his personal circumstances, it does not appear to me that there would have been any particular drivers pushing Mr Gough to seek employment. Unlike Mr Montague-Trenchard, for example, he does not have any dependants. This conclusion would seem to be broadly in line with the statistical evidence of retirement ages in the industry. While I recognise the force in Captain Warner's criticisms of the data upon which Mr Carter relied (at [187]), the fact remained that, in general, the retirement age for pilots was between 60 and 65.

[483] The final issue to consider in relation to Mr Gough, is whether he would have worked post retirement. In this regard, I see no reason to differ from the agreed position of Captain Warner and Mr Carter, that this would not have happened.

[484] Accordingly based on these three findings taken together with my decision as to the deductibility of the payments made to Mr Gough under the Scottish Equitable income protection policy (see [458] above), I conclude that Mr Gough has suffered no loss of earnings.

Mr Montague-Trenchard

[485] Mr Montague-Trenchard's claim for loss of earnings was based on the premise that he would have continued to work at Etihad until he reached the age of 65 and, thereafter, he would have worked as an instructor and examiner.

[486] The defender submitted, on the basis of Mr Carter's evidence, that Mr Montague-Trenchard was unlikely to have worked beyond April 2020, when aircraft were grounded as a result of the Covid-19 pandemic. At this point, Mr Montague-Trenchard was 59 years old. The defender advanced this submission on three bases. First, the defender relied on Mr Carter's evidence as to the general trend of commercial pilots retiring before reaching the age of 60. Second, the defender pointed to the financial difficulties which Etihad had experienced from 2016 onwards. These had resulted in the airline downsizing and laying off, in particular, non-Emirati pilots. Finally, the defender noted that during the course of the pandemic, Etihad had again laid off pilots, again favouring those who were Emirati.

[487] I am satisfied that, on balance, Mr Montague-Trenchard would have continued to work for Etihad until he had reached the age of 65. I am not persuaded by any of the points raised by the defender.

[488] In relation to the first, as I have already said as regards Mr Gough, I consider that there is force in the criticisms of the data relied upon by Mr Carter made by Captain Warner. However, more fundamentally, I consider that Mr Carter's position fails properly to take into account Mr Montague-Trenchard's particular circumstances. He had embarked on his career as a pilot relatively late in life and had, thereafter, started a family in his late 40s. Having become a pilot, he had actively pursued advancement, first, to become a captain and then to pilot ultra-long-haul flights. Thereafter, he had qualified as an instructor and

examiner. In these circumstances, I am persuaded that Mr Montague-Trenchard would, given the opportunity, have continued to work with Etihad for as long as possible.

[489] In relation to the second and third points, I prefer the evidence of Captain Warner to that of Mr Carter. Given Captain Warner's particular experience working in the field of pilot recruitment in the Gulf, he was better able to comment on the likelihood that Mr Montague-Trenchard would have been retained by Etihad during both its financial difficulties in 2016 and during the pandemic. In this regard, I do not consider that Mr Carter attached sufficient weight to Mr Montague-Trenchard's seniority and his qualification as a type rating instructor and examiner. Captain Warner cogently explained why it was likely that Etihad would have sought to retain someone of Mr Montague-Trenchard's seniority and qualifications. This was particularly true during the pandemic when instructors and examiners were required by airlines in order to maintain the licences of their grounded pilots.

[490] Accordingly, I have calculated Mr Montague-Trenchard's past lost earnings on this basis. To do this, I have used, as a starting point, the figures contained in Appendix II of Captain Warner's report dated 4 December 2023. However, I have not included the figures he had included for various allowances: housing allowance, ADSL allowance and educational allowance. I have excluded those figures because Captain Warner accepted in his evidence that these allowances were paid by Etihad to an employee in order to enable that employee to defray costs for accommodation, internet and for the education of his or her children which Mr Montague-Trenchard has, in fact, not incurred. I have however included the two bonus payments included by Captain Warner as I am satisfied by his evidence on this point. This brings out a total figure for lost past earnings of £1,717,471. The parties were in agreement that, in accordance with English law, interest fell to be

calculated on past earnings at half the Special Investment Account Rate. On this basis, interest amounts to £105,292.55.

[491] The next issue is whether Mr Montague-Trenchard would have worked post retirement as a synthetic flight instructor or examiner. For reasons similar to those I have given above as to Mr Montague-Trenchard's likely retirement age, I consider that he would have continued to work until his 72nd birthday. In this regard, I also accept the joint view of Mr Carter and Captain Warner that Mr Montague-Trenchard would have pursued this opportunity on a part-time consultancy basis within the UK.

[492] On this basis, I have calculated Mr Montague-Trenchard's future loss of earnings as follows.

[493] First, in respect of Mr Montague-Trenchard's final 2 years working for Etihad, I have used the figures contained in Appendix II of Captain Warner's report dated 4 December 2023 excluding, as with the past earnings, the inapplicable allowances. I also consider it appropriate to include, as did Captain Warner, an end of service payment payable in accordance with UAE labour law. I have also deducted the advance which Mr Montague-Trenchard had received in February 2012. This brings out a sub-total of £568,495. The parties were agreed that as a future loss, this sub-total required to be multiplied by 1.99 (in accordance with Ogden Table 9 and taking account the discount rate of -0.25%) and 0.75 (in respect of other contingencies per Ogden Section B, Table A). This brings out a total of £848,478.80.

[494] Second, in respect of Mr Montague-Trenchard's post-retirement employment as a synthetic flight instructor or examiner, I am satisfied that the figure submitted by the pursuers of £164,587.50 is correct. This figure is based on what had been agreed by Mr Carter and Captain Warner.

[495] For completeness, I do not consider that Mr Montague-Trenchard has any residual earning capacity. Although this issue was considered by Mr Carter, he was careful to make clear that he deferred to those with medical expertise. In that regard, I do not consider that Dr Davenport's evidence provided a proper basis to conclude that either pursuer had such capacity.

[496] Accordingly, I calculate Mr Montague-Trenchard's total loss of earnings is £2,835,829.85

Pension losses

[497] On the basis of my findings above, neither pursuer suffered a pension loss.

[498] In the case of Mr Gough, on the basis of my conclusion that he would have retired in 2019, there is no pension loss arising. In Mr Montague-Trenchard's case, no pension loss arises because his employment by Etihad was non-pensionable.

Conclusion

[499] Accordingly, taking into account my assessment of each pursuer's lost chance at 40%, I conclude that Mr Gough's loss is £24,762.80. In the case of Mr Montague-Trenchard, I conclude his loss is £1,159,094.74.

Disposal

[500] In light of the foregoing, in Mr Gough's case, I will sustain his first and second pleas-in-law and grant decree in favour of the pursuer in the sum of £24,762.80. In Mr Montague-Trenchard's case, I will sustain his first and second pleas-in-law and grant

decree in favour of the pursuer in the sum of £1,159,094.74. In both cases, interest shall run at the judicial rate from the date of decree until payment.

[501] I will reserve all questions of expenses meantime.