

Neutral Citation Number: [2021] EWHC 2025 (Comm)

Case No: CL-2019-000816

**IN THE HIGH COURT OF JUSTICE**

**QUEEN'S BENCH DIVISION**

**COMMERCIAL COURT**

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 20/07/2021

**Before** :

**MRS JUSTICE COCKERILL DBE**

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**Between :**

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|  | **(1) LOMBARD NORTH CENTRAL PLC**  **(2) NATWEST MARKETS PLC** | **Claimants** |
|  | **- and -** |  |
|  | **AIRBUS HELICOPTERS SAS** | **Defendant** |

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**Fionn Pilbrow QC, Jon Lawrence and Jonathan Scott** (instructed by **Sullivan & Cromwell LLP**) for the **Claimants**

**Matthew Reeve** **and Simon Oakes** (instructed by **Knights PLC**) for the Defendant

Hearing dates: 19, 20 and 24 May 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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**Mrs Justice Cockerill :**

**Introduction**

1. This case concerns the sale of a helicopter (“MSN2707”). It was of the H225 Super Puma type, manufactured and sold by the Defendant (“Airbus”). Prior to the events giving rise to this claim, the H225 was largely sold for use in, and actually used in, the offshore oil and gas sector – in particular to transport personnel to and from offshore oil rigs. The central allegation made by the Claimants (the second hand buyers of MSN2707 and assignees under a 2007 novation agreement (“the Novation Agreement”)) is that MSN2707 was (and is) defective, in that it suffered from an inherent design defect.
2. It is the Claimants’ case that Airbus as seller (i) was bound by a warranty against hidden defects that render the helicopter unfit for its intended use and (ii) was obliged to exercise prudence, monitoring and vigilance as to the safety of the helicopters it sold. It is also the Claimants' case that those duties were transferred to them by way of the Novation Agreement. Alternatively, the Claimants say that the Novation Agreement contained an implied term as to satisfactory quality.
3. If the matter proceeds to a full trial it is common ground that the hearing will be a multi-week trial requiring expert evidence. This is the hearing of 5 issues which may, depending on the outcome, be dispositive of the entire proceedings and avoid the need for that trial. The issues for the Court are issues of limitation and contractual construction.
4. The limitation issues raise the question of whether the proceedings are time-barred under English law (the Limitation Act 1980) and/or under French law. The two issues are:
   1. **English law – knowledge:** The essential question is whether the Claimants have a legitimate foundation for alleging in fact that Airbus had actual knowledge of the alleged defect when selling and delivering the aircraft for the purposes of Section 32(2) Limitation Act 1980. If not, the proceedings are out of time by a margin of about 5 years.
   2. **French law limitation – commencement date**: Here the question is when, under French law, the 5-year limitation period provided for under Article L. 110-4 of the French Commercial Code commences. It is common ground that if Airbus succeeds in demonstrating that the commencement date is the performance of the delivery obligation it will finally dispose of all claims based on French law.
5. There are two agreed issues of contractual construction of the Novation Agreement, focussing on whether it incorporated unexpressed terms imposed or implied by law. Again there is one issue which relates to English law duty and one which relates to French law duty:
   1. **French law warranty/duty**. The Claimants allege that French law imposed duties on Airbus as seller in 2007 under the Purchase Agreement by way of a warranty against hidden defects and a duty of vigilance on sale, in favour of CHCI. It is then alleged that these duties were incorporated later in 2007 into the relationship under the English law Novation Agreement.
   2. **English law - implication of a term of suitable quality/fitness for purpose**. Alternatively, the Claimants allege that the 2007 Novation Agreement was an agreement for the sale of goods and, under English law, there was an implied term of satisfactory quality/fitness for purpose.

It is common ground that I should determine those issues of construction finally.

1. There is a further issue of construction which was not contemplated at the CMC. It was raised by the Claimants by way of an amendment on 16 April 2021 to paragraph 48 of the Reply. The issue is whether the Novation Agreement is to be construed as containing a promise by Airbus not to invoke the English law of limitation in respect of the Claimants’ claims under the alleged French law warranty/duty. It has also been agreed to be dealt with at the hearing.
2. The Claimants point out that the Construction Issues logically precede the Limitation Issues; and they are right about that. I accordingly deal with the issues in that order, and have therefore removed the Issue numbers used by the parties, which placed the Limitation Issues first.

**The Hearing and the Evidence**

1. The hearing of this combined summary judgment/strike out/preliminary issue application has been conducted over three days.
2. So far as the French Law issues were concerned these have been considered by reference to the expert evidence of Monsieur Jean Paul Béraudo, appointed by Airbus, and Professor Stéphane Torck, appointed by the Claimants. As M. Béraudo is also an Associate Professor at the Sorbonne I will refer to him as Prof. Béraudo. Prof. Torck and Prof. Béraudo both gave oral evidence remotely, through an interpreter. I am very grateful to them both for their assistance on the interesting issues of French law. I will assess their evidence in some detail below; however since there was some suggestion that Prof. Béraudo was either not qualified or less qualified than Prof. Torck, I should deal with that point here.
3. So far as that is concerned I reject the submission that Prof. Béraudo was not qualified or was relevantly less qualified than Prof. Torck. Both expert witnesses were plainly gentlemen of great knowledge and experience in French Law and both were qualified to give their opinions. It was interesting and educational to listen to them both. I do not regard the fact that Prof. Torck was a full professor with expertise more concentrated in the academic world (compared to Prof. Béraudo’s combined academic and judicial experience) rendered him better qualified to provide an opinion as to what French law is, which necessarily imports a decision as to what outcome a French Court would be likely to reach. *Dicey* is clear that a judge or legal practitioner is always a competent expert (paragraph 9-014). The two experts naturally approached their task slightly differently, perhaps reflecting their different experience and practices. The Court is however well able to take account of such differences in approach.
4. As for the submission that Prof. Béraudo’s evidence should be given less weight because it was not accepted by Roth J in another case concerning the French blocking statute in 2013, I reject that submission. In the first place, it is in the nature of the process of being an expert that one expert’s evidence has to be preferred over another’s. In the second the blocking statute is, as Mr Pilbrow QC very fairly accepted, *“a totally different kettle of fish”*.
5. There were also submissions made that Prof. Béraudo was argumentative and discursive. I would tend to accept this point. However I do not consider this should materially affect my approach to the substance of his evidence for three reasons: (i) this is hardly an unknown issue with expert witnesses in foreign law (ii) as a civil lawyer Prof. Béraudo plainly had some difficulty in accepting the efficacy of the cross-examination process (as a question he posed to me revealed) (iii) there was a lot of material to get through in what was certainly too small a scheduled slot. I would add that Prof. Torck’s evidence was (unsurprisingly) not entirely free of the same defect.

**Background**

1. Airbus is a leading international manufacturer of helicopters (formerly operating under the name Eurocopter SAS).
2. MSN2707 is an Airbus H225 twin-turbine medium heavy helicopter. On 27 July 2004, the airworthiness of the H225 helicopter type was certified by the European Aviation Safety Agency (EASA) as safe and airworthy in accordance with the requirements of JAR29 (common airworthiness requirements agreed internationally).
3. The Claimants were not the original purchasers of MSN2707. The original purchaser was CHCI, part of CHC group which carried on the business of the commercial operation of aircraft, including commercial offshore helicopter operations in support of the oil and gas industry.
4. The original Purchase Agreement was made on 1 March 2007 between Airbus as seller and CHCI as purchaser. CHCI agreed to buy 16 identified H225 helicopters from Airbus, for future delivery, with an option to purchase a further 10. MSN2707 was one of the first batch of 16 helicopters. The purchase price for it was €15,995,523. By Art 12 of the Purchase Agreement French law applied to that sale.
5. By Purchase Agreement Art 8.1 the 16 helicopters were sold with the benefit of Airbus’s express new aircraft warranty (the “Airbus Express Warranty”) against defects in material and workmanship within a period of 1000 flying hours or 24 months, whichever was sooner. The Airbus Express Warranty was assignable “*to any financial institution in connection with any novation of rights under this contract…*”: Art 8.1.8. Other conditions or warranties were excluded: Arts 13.1 and 22.2. There is an argument (though not for this hearing) that under French Law those exclusions do not operate.
6. On 31 October 2007, about a year before MSN2707 was delivered, Airbus, CHCI and a company called RBS Aero (a wholly-owned subsidiary of the Royal Bank of Scotland Group) entered into a Novation Agreement ("the Novation Agreement") under which Airbus agreed to give delivery and title to MSN2707 to RBS Aero. RBS Aero assumed some of the obligations and rights of the purchaser under the Purchase Agreement in respect of that aircraft. By Clause 12.1, the Novation Agreement was governed by English law and jurisdiction.
7. MSN2707 was delivered on 30 October 2008 and entered service. RBS Aero became the owner with “*good beneficial and legal title*” pursuant to Clause 7.1 of the Novation Agreement. The aircraft was immediately leased back by RBS Aero to CHCI on an 8-year lease, expiring 5 November 2016 as part of a wider finance transaction; no part of that wider agreement is relied on by either of the parties for present purposes.
8. From then, for the next 7½ years, the aircraft was operated apparently satisfactorily. The Airbus Express Warranty period expired on 30 October 2010. No warranty claim was made.
9. The First Claimant first obtained an interest in MSN2707 some 4 months later, on 10 March 2011, when it purchased the aircraft, second hand, from RBS Aero for the sum of US$17,958,995 (i.e. c. €12,930,000). The First Claimant is another wholly-owned subsidiary of the Royal Bank of Scotland Group. It also claims, on the same date, to have taken an English law assignment of RBS Aero’s rights in the Novation Agreement. On the same date, the First Claimant entered into a deed of assignment by way of security assignment with the Second Claimant, now called NatWest Markets plc, but at the time called The Royal Bank of Scotland plc. Whilst there are pleaded issues between the parties as to the legal consequences of all these agreements, for the purposes of determining the issues before me, such points are not in issue and I can proceed on the basis that the Claimants have a reasonable prospect of proving title to sue as RBS Aero’s assignees from 10 March 2011.

*The “LN-OJF" Incident*

1. 5 years after that purchase, on 29 April 2016, another helicopter of the same H225 type, registration LN-OJF, crashed near Turøy, Norway, killing all 13 passengers and crew on board (the “LN-OJF Incident”). LN-OJF was *en route* from the Gullfaks B oil drilling platform in the North Sea to Bergen Airport Flesland when its main rotor detached. The accident was investigated by air accident investigators of the AIBN in Norway, the equivalent of the UK AAIB. The AIBN produced an interim report on 28 April 2017 and its final report on 5 July 2018. The final report concluded that “*sub-surface cracks*” had developed undetected in a second stage planet gear in the epicyclic module within the main gear box (“MGB”). Those subsurface cracks developed until the gear suffered catastrophic fatigue failure and damage which ultimately led to the detachment of the main rotor.
2. As a result of the accident, the H225 type was grounded by the regulators including EASA, the UK CAA and the Norwegian CAA, pending investigation. The grounding started on 29 April 2016. It ended on 20 July 2017 (following new maintenance checks and procedures, and following the publication of the interim AIBN report) when the Norwegian and UK CAAs lifted the last flight prohibitions. While the point as to the effect of the grounding is in issue, for present purposes it is common ground there is a reasonable prospect of success of demonstrating that there was a loss of value of MSN2707 as a result of the grounding.
3. The manufacture, sale and use of Airbus H225 type helicopters continues. In the light of the remedial measures required by the regulators and taken by Airbus, the H225 type has been recognised as airworthy by the regulators and certified for continued use; though it appears that it is no longer used in the oil and gas industry.
4. On 5 May 2016, the CHC group filed for Chapter 11 bankruptcy in Texas and on 30 June 2016 terminated its lease of the aircraft, about 4 months before its expiry. There is an issue on the pleadings (also not for determination now) as to whether the termination of the lease was caused by the grounding of the H225 type or whether the aircraft was already idle before the date of the grounding as a result of the downturn in the oil and gas market after 2014.
5. The Final AIBN report was published on 5 July 2018.

*The nature of the Claimants’ claims in this case*

1. The Claimants therefore claim as second-hand purchasers of the aircraft and assignees pursuant to a 2011 assignment, of RBS Aero’s rights under the 2007 Novation Agreement, in respect of an aircraft which had been sold and delivered in 2008.
2. There is no claim under the Airbus Express Warranty. The Claimants rely, so far as their French law claims are concerned, on unexpressed obligations incorporated via express terms of the Novation Agreement and, so far as their English law claims are concerned, unexpressed obligations implied into the Novation Agreement. Those unexpressed terms are ones allegedly imposed by law on a seller or implied on two different bases: the French and English law terms outlined above.
3. The Claimants say that a hidden design defect in the main gear box was revealed to them by the final AIBN report for LN-OJF issued on 5 July 2018. Relying on that report, the Claimants say that the aircraft was defective in October 2008.
4. As to the basis for the claim, Airbus says and I accept that the Claimants’ formulation of the alleged hidden design defect is somewhat elusive. While this is not an issue for this hearing this point has a tangential relevance at a later stage of the analysis. There is said to have been (1) a susceptibility of the main gearbox second stage planet gears to fatigue fractures because of (a) “*the design of the MGB and second stage planet gears*” and (b) the setting of too high a service life for those planetary gears, (2) an absence of an adequate monitoring systems to detect fatigue fractures. The central allegation is that this is said to render the design insufficiently *“robust, reliable or safe for its intended use*”. Elsewhere there is reference to “*a propensity*” to such fractures.
5. The defect is said to be of the design of the type. There is no allegation of any problem with the specific aircraft MSN2707. There is no allegation of any physical defect or damage in the main gear box of this aircraft at any stage. It is not suggested that the alleged design defect had any effect on the use of the aircraft between 2008 and 2016.
6. There are four claims which will have to be considered in the course of this judgment:
   1. The main remedy which Claimants seek by way of the French law claim is the return of the entire price paid by RBS Aero for the aircraft when new in 2008 of €15,995,523 (called "the redhibitory claim").
   2. There is also under French Law what is called "an estimatory claim"; by which an expert assesses what should be returned by way of a loss of value claim.
   3. Thirdly there are compensation claims – one under the French Civil Code and one via the alternative English Law implied fitness for purpose claim.
   4. Finally there is a claim under French Law based on a "duty of vigilance" which is a judicial creation.

**The Law**

*Summary judgment*

1. There was (rightly) effectively nothing between the parties on the law relating to summary judgment and strike out.
2. As I have noted elsewhere, the leading statement of the law in relation to summary judgment remains that of Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] which has been approved by the Court of Appeal (inter alia in *AC Ward & Sons v Catlin (Five) Ltd* [2009] EWCA Civ 1098 at [24] and *Global Asset Capital v Aabar Block* [2017] EWCA Civ 37 at [27] per Hamblen LJ) - and recited in countless applications at first instance.
3. To the extent there was an issue on the law it was as to the difference between that test and the test applicable to strike out. Frequently it is stated that there is little real difference. Here, I was reminded that there may be a conceptual difference.
4. While the rule CPR 3.4(2)(a) says “*if it appears to the court that the statement of case discloses no reasonable grounds for bringing or defending the claim*” and thus *prima facie* indicates a test analogous to the summary judgment test, there are certainly some *dicta* which pitch it a little higher. Thus in *Harris v Bolt Burdon* [2000] CP Rep 70, [27] per Sedley LJ there was reference to a case which is “*absolutely unwinnable*” and the continuation of which is of no possible benefit to the claimant, while *Price Meats Ltd v Barclays Bank Plc* [2000] 2 All ER (Comm) 346 refers to a case which is not valid as a matter of law; while in *Richards v Hughes* [2004] EWCA Civ 266 at [22] Peter Gibson LJ said: “*the correct approach is not in doubt: the court must be certain that the claim is bound to fail. Unless it is certain, the case is inappropriate for striking out*”. I was also referred to: *Oysterware Ltd v Intentor Ltd and Ors.* [2018] EWHC 611 at [40] which indicates that it is a remedy only for *"plain and obvious cases"*.

*Proof of foreign law*

1. Again here the relevant principles were not really in issue.
2. Foreign law must be pleaded and proved as a fact to the satisfaction of the judge by expert evidence, save where it is admitted. *Dicey, Morris & Collins on the Conflict of Laws* (15th Ed.) at [9R-001-008].
3. CPR 32.1(b)/(c), 35.1, 35.4(1) and 35.5(1) give the Court flexibility in determining how the content of foreign law is proved at trial. In particular:
   1. The Court can direct an exchange (simultaneous or sequential) of expert reports, an experts’ meeting and joint memorandum, and (if strictly required) supplemental reports following the joint memorandum, from experts to be called to give oral evidence at trial if their evidence is not agreed.
   2. The Court can direct such an exchange of reports (etc), but on the basis that the experts will not give evidence at trial, or do so only on some of the matters covered by their reports, although their evidence, respectively their evidence on other matters, is not agreed, with the advocates making submissions at trial by reference to the reports and foreign law materials filed.
   3. The Court can limit the expert evidence to identification of the relevant sources of foreign law, and of any legal principles as to the interpretation and status of those sources, with the advocates making submissions at trial as to the relevant content of foreign law by reference to the sources thus identified.
   4. In some cases, the Court may be prepared to take judicial notice, or accept the agreement of the parties, as to the nature and importance of sources of foreign law, and have the advocates make submissions at trial as to the relevant content of foreign law by reference to the sources thus identified, providing the source materials from their own researches.
4. In this case, the first of these options was (entirely sensibly) agreed upon. The issues were less than straightforward issues of civil law. The assistance of the distinguished experts - both by their written and oral evidence - was of great significance.
5. It was also common ground that:
   1. Where expert foreign law evidence is given in relation to the interpretation of foreign statutes, the expert tells the court what the statute means, explaining his opinion, if necessary, by reference to foreign rules of construction. The court should not go beyond this. Thus if an expert witness refers to foreign statutes, decisions or books, the court is entitled to look at them as part of his evidence; but if a witness cites a section from a foreign code or a passage from a foreign decision the court will not look at other sections of the code or at other parts of the decision without the aid of the witness (Dicey 9-015).
   2. If the evidence of expert witnesses conflicts as to the effect of foreign sources, the court is entitled, and indeed bound, to look at those sources in order itself to decide between the conflicting testimony (Dicey 9-017).
   3. Considerable weight is usually given to the decisions of foreign courts as evidence of foreign law. Where foreign decisions conflict, the court may be asked to decide between them, even though in the foreign country the question still remains to be authoritatively settled (Dicey 9-020). An example is *Blue Sky One Ltd v Mahan Air* [2010] EWHC 631 (Comm) where the Court at [88] determined the ‘trajectory’ of Iranian law.

*Principles of French law interpretation*

1. The experts are broadly agreed as to the method adopted by French judges for interpreting legislation. In summary:
   1. The principal method of statutory interpretation used to be exegesis: expressing the rule of law by adhering as much as possible to the text of the law. That method is still used, but judges now also seek to determine the purpose of the law (the teleological method) using preparatory works (*Travaux Preparatoires*) to review the evolution of the draft legislation during parliamentary debates;
   2. The first step taken by a judge will be to review the jurisprudence of the Court of Cassation relating to the text to be interpreted. The French Court of Cassation (divided into various chambers) is a jurisprudential ‘regulator’, designed to harmonise interpretation of case law and the decisions of Court of Appeal - and the decisions of the Court of Cassation therefore have “*great authority*”. This commercial dispute would fall within the Commercial Chamber;
   3. It is possible for first instance and Court of Appeal judges to ignore the Court of Cassation. However, Prof. Béraudo considers that such decisions would be annulled in the event of a further appeal.

**The Construction Issues**

1. The Construction Issues are:
   1. Whether the French law obligations that the Claimants allege were owed by Airbus to CHCI under the Purchase Agreement, were incorporated into the Novation Agreement between RBS Aero and Airbus and hence came to be owed by the latter to the former.
   2. Whether, by the operation of English law, the statutory term as to satisfactory quality is implied into the Novation Agreement.
2. The parties do not plead (or adduce evidence of) any common knowledge of an extraneous factual matrix in which the Novation Agreement was negotiated, beyond what is evident from the language of the Purchase Agreement and Novation Agreement. The contracts speak for themselves. There is, accordingly, no anterior dispute of fact which requires resolution before the questions of construction can be determined.

**Were the unexpressed French law duties imported by the Novation Agreement into the contractual relationship between RBSA and Airbus?**

1. The Claimants’ case is that under the Purchase Agreement, Airbus was subject to the following obligations and/or liabilities in respect of MSN2707:
   1. A statutory warranty against hidden defects, arising under Articles 1641 to 1645 of the French Code Civil (the “Civil Code”).
   2. A liability to pay damages for compensation for any losses suffered by the buyer as a result of any hidden defect under Article 1645 of the French Civil Code.
   3. An obligation to exercise “prudence, monitoring and vigilance” as to the safety of each helicopter that it sold.
2. Whether Airbus was subject to these duties is contentious, but is accepted to be arguable. On that basis the question is, on the basis that those obligations and liabilities did arise under the Purchase Agreement, whether they were incorporated into the Novation Agreement.
3. This is an issue of contractual construction of the Novation Agreement as an English law agreement.
4. The Claimants emphasise that that document is, clearly and expressly, identified as a novation agreement; and its key operative clause for these purposes, clause 2, is headed, “Novation of Purchase Agreement”. They point to *Chitty on Contracts* (33rd ed.), para 19-087: “*Novation takes place where the two contracting parties agree that a third, who also agrees, shall stand in the relation of either of them to the other*” and contend that if RBS Aero was truly to stand, in relation to Airbus and vis-à-vis MSN2707, as CHCI had previously stood, then that would entail RBS Aero having the benefit of the same substantive obligations and/or liabilities as CHCI had, and being able to make the same substantive claims against Airbus in relation to that helicopter as CHCI could have made.
5. The Claimants say that Airbus’s case is that the agreement does something very different and very unlike that concept of a novation. They submit that if the Novation Agreement was not intended to operate as a novation agreement in these important substantive respects, one would expect the parties to have made that intention very clear in the express language of the agreement. In fact, the language of the agreement clearly evinces the contrary intention and confirms that this agreement was intended to operate as a novation agreement ordinarily would.
6. Airbus submitted:
   1. This is a question of construction of the Novation Agreement – and not the Purchase Agreement.
   2. On its true construction, in the Novation Agreement Airbus and RBS Aero agreed the unqualified imposition of English law as the proper law governing the relationship between them.
   3. The Novation Agreement is a new agreement, with a new governing law, and new rules as to construction which incorporates terms from the Purchase Agreement only insofar as they are not inconsistent.
   4. The Novation Agreement incorporated some terms expressed in the Purchase Agreement, not in conflict with the express terms of the Novation Agreement, and added other express terms to the new relationship.
   5. The Novation Agreement did not incorporate unexpressed terms or obligations imposed by the previous proper law, French law. Whilst it incorporated the previous Airbus Express Warranty and a new express warranty as to title on delivery (Clause 7.1), it expressly excluded any other terms, “conditions” or “warranties”, “*save only as provided in Clause 7.1 and in the Purchase Agreement*” (Clause 7.2). The Novation Agreement also incorporated terms from the Purchase Agreement limiting the prior obligations to the express terms, and excluding all others (especially unexpressed warranties and undefined obligations imposed by French domestic law).
   6. The alternative construction put forward by the Claimants, of the incorporation of French law obligations and some other secondary components of the French law (such as the French law of limitation):
      1. Is contrary to the singular unqualified express choice of English law in the Novation Agreement as the governing law “*in all respects*” (Clause 12).
      2. Is contrary to the express intent that the Novation Agreement and the Purchase Agreement should be read and construed together in a unitary construction “*construed as one*” (Clause 11.1), not subjected to a fragmented process of construction applying more than one law.
      3. Is contrary to the express agreement that the terms of the Novation Agreement would prevail over the Purchase Agreement, a form of “clause paramount” (Clauses 11.1 and 11.3).
      4. Would generate incongruities and uncertainties which would be unwelcome to any reasonable businessmen in the position of the parties to the Novation Agreement.

*Discussion*

1. While the points were put very skilfully by Mr Reeve for Airbus I have concluded by a fairly clear margin that the true construction of the Novation Agreements is as contended for by the Claimants, and that the French Law duties (to the extent they existed under the Purchase Agreement) are incorporated into the Novation Agreement.
2. I approach this question as a normal one of English law construction, bearing in mind that we are here dealing with formal agreements, produced between parties who had legal advice and assistance in the drafting process.
3. The starting point – which cannot be ignored, though it is but one indication – is that the agreement (bearing a well-known London law firm's name) is called a novation agreement. A novation is known under English law as something which occurs when *"the two contracting parties agree that a third, who also agrees, shall stand in the relation of either of them to the other”* (Chitty on Contracts (33rd ed.), paragraph 19-087). Absent anything else one might therefore expect any duties in the Purchase Agreement to be included in the Novation Agreement.
4. However this is far from a given – the nature of a novation is to bring the original contract to an end and replace it with a new one. It is therefore entirely possible for parties – if they are so minded – to make only a partial substitution, or to incorporate new and different terms. This point is plainly apposite in one way or another as one proceeds to look at the terms of the Novation Agreement, because it is clear that this is not a simple “entire” novation. It is a customised novation.
5. The core of the novation occurs in clause 2, signposted by the fact that it is headed "Novation of Purchase Agreement". Clauses 2.1 and 2.2 deal with warranties and representations given by CHCI/Airbus and CHCI respectively. Clause 2.3 is on its face the main clause dealing with the rearrangement of the contractual arrangements.
6. As to the substance of the clause:
   1. Under clause 2.3(a), Airbus released and discharged CHCI from *“its obligations and liabilities to [Airbus] in respect of the Novated Obligation only under the Purchase Agreement”*. (The “Novated Obligation” was, per clause 1, CHC’s obligation to pay the purchase price for MSN2707).
   2. Under clause 2.3(b), CHCI released and discharged Airbus from *“its obligations and liabilities to CHCI under the Purchase Agreement in respect of the Aircraft [i.e. MSN2707] to the extent the corresponding rights have been novated to RBS*”. In other words what is novated is released; and what is not novated, is prima facie not released. This is echoed in clause 2.4 which provides:

“For the avoidance of doubt, the obligations and liabilities of CHCI to Eurocopter under the Purchase Agreement (save for the Novated Obligation) shall remain unchanged and in full force and effect notwithstanding the execution or performance of this Agreement and CHCI hereby agrees to perform the same in favour of Eurocopter without recourse to, or any liability on the part of, the Owner.”

* 1. Under clause 2.3(c), RBS Aero (the “Owner”) agreed *“to assume the rights of CHCI under the Purchase Agreement in respect of the Aircraft and obligations of CHCI in respect of the Novated Obligation only* *and undertakes to perform only the Novated Obligation under the Purchase Agreement in respect of the Aircraft and to be bound by the terms of the Purchase Agreement in respect of the Novated Obligation only in every way as if the Owner had been party to the Purchase Agreement as the "Buyer" as at the date it was executed”*.
  2. Under clause 2.3(e)(i), RBS Aero was to have *“all the rights vested in CHCI in respect of the Aircraft under or pursuant to the Purchase Agreement immediately prior to the date of this Agreement (including, without limitation, the right to buy and take title to the Aircraft, the benefit of all warranties, conditions and guarantees with respect to the Aircraft and all claims, counterclaims and rights to damages and indemnification”.*
  3. Under clause 2.3(e)(iii) RBS Aero confirmed that *“in exercising any rights or making any claims, including those identified in Clause 2.3(e)(i) above, the terms and conditions of the Purchase Agreement will apply and be binding on the Owner, and Eurocopter shall have all rights and defences available to it in response to the Owner's exercise of such rights or making of such claims, to the same extent as if the Owner had been an original party thereto.”*

1. On its face therefore the Novation Agreement puts RBS Aero in the position of CHCI insofar as concerns MSN 2707. Airbus releases CHCI from its obligations to pay for MSN2707 specifically and is accepting the liabilities and obligations of RBS Aero towards it in respect of that specific obligation: the obligation to pay for MSN2707 in place of CHCI.
2. Equally on its face in return for RBS Aero paying the price Airbus grants to RBS Aero the same rights and agrees to perform its obligations in favour of RBS Aero under the Purchase Agreement in respect of the aircraft as if the owner had been a party to the Purchase Agreement as the buyer at the date it was originally executed. Meanwhile CHCI releases Airbus from the obligations in respect of MSN2707 under the Purchase Agreement.
3. As a simple matter of reading the key provisions therefore, it appears as if to the extent that any French Law obligations were owed under the Purchase Agreement in respect of MSN2707:
   1. Those were *“obligations and liabilities to CHCI under the Purchase Agreement in respect of the Aircraft*”. It would follow that Airbus was released by CHCI to extent those were novated to RBS Aero;
   2. Equally the corresponding rights that CHCI enjoyed can only have been *“rights of CHCI under the Purchase Agreement in respect of the Aircraft”* and/or “*rights vested in CHCI in respect of the Aircraft under or pursuant to the Purchase Agreement”*. On a plain reading those would be expressly novated;
   3. Further the claims now advanced by the Claimants are “claims” and/or “rights to damages” within the meaning of clause 2.3(e)(i).
4. The preliminary conclusion which follows is that clause 2.3 on its language appears to demonstrate (in line with the title of the agreement) that the French Law obligations were novated to RBS Aero under clause 2.3 of the Novation Agreement.
5. That is further supported by the fact that the Novation Agreement contains a ‘belt and braces’ provision that makes it entirely clear, insofar as it was not clear anyway, that its intended effect was to this effect. By clause 2.5(a) of the Novation Agreement, Airbus expressly confirmed that:

“save as expressly amended by this Agreement, all of its obligations under the Purchase Agreement (as novated hereby in favour of [RBS Aero]) with respect to the Aircraft shall remain unchanged and in full force and effect in favour of the Owner and Eurocopter hereby agrees to perform the same in favour of the Owner (or as the Owner may otherwise direct in accordance with the terms of the Purchase Agreement or this Agreement).”

1. This construction also receives some support from a “commercial common sense” analysis. If the obligations were not novated to RBS Aero it would seem to follow that Airbus would not be released and CHCI could sue. That would obviously be nonsensical, because following the novation, it was RBS Aero not CHCI that was to own the aircraft, and it was therefore RBS Aero not CHCI that had an interest in the performance of those obligations.
2. Airbus of course contends that there are other indications in the Novation Agreement which should produce the contrary result.
3. The first is clause 7.2 within the "Representations and Warranties" section. Airbus submits that by clause 7.2, the parties agreed *“The Owner* [RBS Aero] *expressly agrees and acknowledges that save only as provided in Clause 7 .1 and in the Purchase Agreement, no condition, warranty or representation is given by or on behalf of* [Airbus] *in respect of the Aircraft.”* Airbus submits that this did not exclude the warranty of title nor the Airbus Express Warranty, because they were “*provided*” in Clause 7.1 and the Purchase Agreement; but it did exclude unexpressed warranties, because they were not. Any terms imposed by French law (if there were any) were excluded.
4. However this does not really engage with the meat of Clause 2.3 or how this interrelates with what must be taken to be the intended central part of the novation exercise. Further that submission does go rather further than the wording of the clause. What that clause actually says is that no condition, warranty or representation was given *“save only as provided in Clause 7.1 and in the Purchase Agreement*”. In other words, it does not use the word “expressly”. On its face therefore that wording would naturally be thought apt to include any implied or statutory warranties or obligations, such as those in issue in this case.
5. This seems to become clear beyond peradventure when actually read with clause 2.3, which expressly contemplates that rights held by CHCI *“under or pursuant to the Purchase Agreement”* were to be novated to RBS Aero. This carries with it a potential for implied terms. In my judgment therefore this point does not assist Airbus.
6. A similar point was made by reference to clause 11.4 of the Novation Agreement. In Clause 11.4 RBS Aero agreed that *“the parties do not intend to expand [Airbus's] risk or liability obligations further than already present under the terms of the Purchase Agreement*”. The purpose, Airbus says, was to impose no further obligations on Airbus beyond those set out in the express terms of the Purchase Agreement incorporated into the Novation Agreement. But again, the crucial word "express" is lacking. And even setting aside the “natural reading” point already made, in both cases the lack of the word "express" in a "lawyered" contract should probably be seen as significant.
7. Another point relied upon is that the governing law was changed from French law to English law “*in all respects*” as was jurisdiction (Clause 12). Airbus says that this an elemental change, and indicative. However given its location within the Novation Agreement this argument appears overambitious. The provision appears rather as a piece of "belt and braces" drafting.
8. A similar point arises in relation to Airbus’s contention that its case that only English law duties arose is consistent with other terms of the Novation Agreement by reference to the fact that Airbus’s obligations on delivery were changed and replaced with characteristically English risk/transfer distinction, in that Clause 7.1 added a new obligation to transfer “*good legal and beneficial title*”. Again that seems to place far more weight on what looks like overcautious or possibly even reflexive drafting, than the words can bear.
9. Airbus also relies on the fact that it was agreed that the two agreements were to be “*construed as one*” and that (by Clauses 11.1 and 11.3) the terms of the Novation Agreement would prevail over the Purchase Agreement. However again this argument reaches too far. When one looks at the terms of those clauses, they say this:

“11.1 …this Agreement shall be construed as one with the Purchase Agreement and provisions contained in the Purchase Agreement in respect of the Aircraft which are inconsistent with the terms of this Agreement shall cease to apply.

11.3 As between CHCI, the Owner and Eurocopter, in the event of any conflict between the terms of this Agreement and the Purchase Agreement, the terms of this Agreement shall prevail.”

1. It follows that that “prevailing” was only to take place if there was inconsistency – and there has been no suggestion of how the agreements were inconsistent assuming the Claimants’ reading to be correct.
2. Finally, Airbus has sought to rely on what they say are certain indications within the Purchase Agreement as to the intentions of the parties. For example, a certain amount of stress was placed by Airbus on the fact that it was expressly recognised in the Purchase Agreement that certain of the terms would be negotiable to third parties and that the involvement of later potential third parties makes it less likely that there were intended to be marketable unexpressed obligations. It was also said that there are other provisions excluding or inconsistent with the incorporation of the alleged unexpressed French law duties.
3. However I do not need to deal with these points at length, because if correct they would preclude the inclusion of the French Law obligations in the Purchase Agreement; *ex hypothesi* at this stage, that argument has failed. I do not therefore see that these arguments can add anything to the exercise of construction in relation to the Novation Agreement.
4. As a matter of the terms of the Novation Agreement therefore I find nothing in Airbus's arguments which goes any way to displace what appears to be a clear wording which would be apt to carry over any French Law obligations which did exist.
5. Airbus also however relies on its own commerciality arguments. In particular, it contends that the incorporation of a second proper law is sufficiently problematic to displace the *prima facie* reading. It contends that this would generate problems and incongruities which any reasonable businessman would have wanted to avoid. It is said that:
   1. It seems to require the simultaneous application of two very different systems of contractual construction to one contract, in conflict with the concept of contractual construction as a unitary exercise and with the agreement to a singular construction exercise (“*construed as one*”: Novation Agreement Clause 11.1).
   2. It involves the suggestion that the forum chosen by the parties (the English Courts) should apply both its home law and a foreign law, the latter necessitating expert evidence.
   3. It gives rise to uncertainty as to which law (or laws) should apply to central questions such as implication and exclusion of terms, frustration, and so forth.
   4. Some terms, including those regulating delivery, are provided for in both the Purchase Agreement and the Novation Agreement (e.g. the regulation of title transfer on delivery).
6. In this context Airbus relies on *Centrax Limited v Citibank NA & Anr* [1999] 1 All E.R. (Comm) 557 where Ward LJ approved the following passage from the then current edition of *Dicey*:

“But there is an objection in principle to what has been called “the general obligation” of a contract being governed by more than one law. Even if different parts of a contract are said to be governed by different laws, it would be highly inconvenient and contrary to principle for such issues as whether the contract is discharged by frustration, or whether the innocent party may terminate or withhold performance on account of the other party's breach, not to be governed by a single law.”

1. That there is a line of authority which says exactly this is not in issue. However at the same time it is equally not in issue that English law accepts that the parties may, by agreement, apply a secondary foreign law to specific parts of the contract.
2. The first question therefore is how clear that choice has to be. As to this, I do not accept the submission that there is anything which requires the choice of law to be demonstrated in any different way to the way it usually is – by a normal process of construction. Of course into that process of construction enters the factor, noted by *Dicey*, that having two laws risks or even courts inconvenience.
3. The second question is whether this is a case which is caught by the “general obligation” proviso. On this the answer seems to me to clearly be that it is not. Airbus has not explained how the “general obligation” in this case is said to be governed by more than one law.
4. Returning then to the first question, this is a case where the situation, the agreements and the wording compel the conclusion that - regardless of the inconveniences which may arise (such as this very argument) - the parties did intend two proper laws to governs different parts of their agreement. None of the “commerciality” arguments advanced for Airbus have sufficient weight to displace the conclusion indicated by those means. There are inconveniences, but the situation is not unprecedented (as the Claimants indicated by reference to authorities such as *Vesta v Butcher*). There is no significant uncertainty as the exercise of construction which I have carried out above indicates.

*Conclusion*

1. For the reasons above, I conclude that the answer to this question is “Yes”.

**“Contractual estoppel”: Is the Novation Agreement to be construed as containing a promise by Airbus not to invoke the English law of limitation in respect of the French Law claims?**

1. It is common ground that (i) the English law of limitation and only the English law of limitation applies to the Claimants’ alternative claim for breach of the English law implied term pleaded of satisfactory quality and (ii) the French law of limitation applies to the Claimants’ French law claims. The question is whether only the French law of limitation applies to these claims in circumstances where (it is also common ground) *prima facie*, all the Claimants' claims, including the French law claims, are subject to English limitation given they are claims for breach of the Novation Agreement.
2. This has been described as an argument of “contractual estoppel”. This is probably a slight misnomer in that a contractual estoppel is usually regarded as an agreement as to a state of affairs or facts which the contracting parties are bound not to challenge.
3. So the starting point in this case is that the result of the choice of English law as the proper law of the Novation Agreement was that the English law of limitation (i.e. the Limitation Act 1980) applied by operation of law. I agree that the parties should be taken to have known, at the time of making the Novation Agreement, that the Limitation Act would apply as matter of statute, as a result of the choice of law, unless they agreed otherwise. I bear in mind also that this was an integral part of the context in which they agreed the choice of law (in their “lawyered” contract).
4. Of course it was perfectly open to them to agree otherwise. The question is whether there is such an agreement demonstrated with sufficient clarity to modify the application of the Act.
5. The authorities here are not particularly revelatory. The first is *Lade v Trill* (1842) 11 LJ Ch 102 where there was a verbal agreement between two sets of executors to work out the result of an account which had been running between the two deceased, without reference to the length of time that they had been running. It does no more than confirm that such an agreement is capable of being enforced.
6. The second is *Lubovsky v Snelling* [1944] KB 44, a case in which in 1941, the plaintiff’s solicitors made a claim on the defendant who handed it to the society. In August 1941, the society sent a representative to negotiate. The representative said that the society had no defence and that the negotiations should proceed on the basis of an admission of liability but that a writ would have to be issued on quantum. A writ was later issued and then had to be reissued due to a defect and the society pleaded a limitation defence under section 3 of the Fatal Accidents Act.
7. Unsurprisingly the Court was not minded to allow the society to get away with this bit of sharp practice and held:

“It was just as much a contract not to plead s.3 of the Act, as if that undertaking had been put in words; and the society knew it at the time when it caused that plea to be recorded. That is why I have spoken of their conduct in terms of such grave censure.”

1. Airbus contends that the parties had set up a situation whereby the claim would be a claim under Clause 2.3 of the Novation Agreement. That was a claim pursuant to an English law term in an English law contract. They must be taken to have known and to have intended that the Limitation Act would apply to any claim for breach of Clause 2.3, even if ultimately based the alleged French law obligation. That being the case clear words would be needed to demonstrate an agreement to the contrary.
2. In this regard reliance is placed on the third authority, a decision of the then Mr Briggs QC in *The Law Society v Sephton* [2004] EWHC 544 (Ch) at paragraphs [97]-[102]. That was a case where a solicitor had abstracted client funds and the partner who signed off on reports on the client accounts had failed to report this – having either negligently failed to spot it, or been involved in the peculation. A defence of limitation brought to the claim by the Law Society was met with an argument that *"the defendants are estopped from advancing a limitation defence to that action, having promised not to do so in correspondence by their solicitors prior to the issue of proceeding."*
3. However as Mr Pilbrow pointed out, that case was one specifically based on estoppel, whereas this case, like *Lubovsky,* is one which really concerns construction. However the deputy judge went on to consider, after rejecting the case in estoppel, that *"having regard to the very trenchant views of the Court of Appeal in Lubovsky, it is necessary for me to consider whether something less will suffice."* In that context he went on to pose the question thus: *"was there a sufficiently clear unequivocal unconditional promise by the defendants not to rely on their right to plead limitation?"*. That does at least tend to suggest that (as one might expect, by analogy with exclusion clauses) the choice must be demonstrated with some degree of clarity.
4. Here, despite the starting point which provides considerable ammunition for the argument in favour of English Law, I do accept the submission that there is sufficient clarity effectively "carried over" from the exercise of construction to reach this point. The essence of the point which I have already determined on construction is that as regards MN2707 RBS Aero was intended to stand in the shoes of CHCI. As I have already indicated the English law aspects of this agreement appear to have been intended to go to the Novation Agreement itself, with the rights and obligations derived from the Purchase Agreement passing in what one might term conventional novation fashion. The imposition of English Law limitation regimes on top of the French Law regime would be a significant mismatch. It would also be surprising as a matter of construction and objective intention to find that the parties intended both English and French law limitation regimes to apply.

*Conclusion*

1. I therefore conclude that the answer to this question is yes; the Novation Agreement is to be construed as containing a promise by Airbus not to invoke the English law of limitation in respect of the French Law claims.

**Implied term as to fitness**

1. It would appear that this argument does not arise, because the Claimants have made clear that this is an alternative argument which only arises if the French Law obligations are not (as I have found they are) incorporated into the Novation Agreement. I will therefore deal with this point fairly briefly.
2. The Claimants wish (to the extent necessary) to invoke Section 14 of the Sale of Goods Act 1979, to imply a term into the Novation Agreement as a contract for sale of goods:

“S. 14(2):

Where the seller sells goods in the course of a business, there is an implied term that the goods supplied under the contract are of satisfactory quality.

S. 14(3):

Where the seller sells goods in the course of a business and the buyer, expressly or by

implication, makes known—

(a) to the seller, or

(b) where the purchase price or part of it is payable by instalments and the goods were previously sold by a credit-broker to the seller, to that credit-broker, any particular purpose for which the goods are being bought, there is an implied term that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the seller or credit-broker.”

1. As Airbus points out, it is common ground that Airbus did not owe such a duty before the making of the Novation Agreement in October 2007. The proposed duty therefore involves a departure from the Claimants' thesis of “replication”; this is doubtless one reason why it is only advanced if that argument has already been rejected at the earlier stage.
2. The first issue is whether the contract is a contract for the sale of goods. I conclude, without difficulty, that it was; and indeed the contrary was not pressed orally.
3. The central question is whether the implied term is excluded by or inconsistent with the express terms of the Novation Agreement, on a true construction. Section 55(1) of the Sale of Goods Act provides:

“(1) Where a right, duty or liability would arise under a contract of sale of goods by implication of law, it may (subject to the Unfair Contract Terms Act 1977) be negatived or varied by express agreement, or by the course of dealing between the parties, or by such usage as binds both parties to the contract.

(2) An express term does not negative a term implied by this Act unless inconsistent with it.”

1. The Claimants point to *Federal Republic of Nigeria v JP Morgan Chase* [2019] EWHC 347 (Comm), a decision of Andrew Burrows QC at [37]:

“Where the entire agreement clause will have the effect of excluding an implied term that would otherwise arise, one should recognise that a party is unlikely to have agreed to give up a valuable right that it would otherwise have had without clear words. The more valuable the right, the clearer the words will need to be. It follows that an entire agreement clause may or may not exclude an implied term. This will primarily depend on the words used, in their context, but it will also be relevant to consider, for example, the nature of the implied term. So it may be that a term implied by law, at common law or by statute, as opposed to some terms implied by fact or custom, confers a particularly valuable right so that it is unlikely that a party has agreed to give up that right other than by clear wording.”

1. The question then becomes, essentially, whether the use of the word "condition" in Clause 7.2 of the Novation Agreement (which excludes any “*condition*”, “*warranty*” or “*representation*” “*save as provided in Clause 7.1 and in the Purchase Agreement*”) suffices to exclude the statutory term.
2. In *Air Transworld v Bombardier* [2012] 1 CLC 145 at [26] and [29] Cooke J stated:

“it was important to remember that any clause in a contract had to be construed in the context in which it was found, meaning both the immediate context of the other terms and the wider context of the transaction as a whole. The court was unlikely to be satisfied that a party to a contract had abandoned valuable rights arising by operation of law, unless the terms of the contract made it sufficiently clear that this was intended. The more valuable the right, the clearer the language would need to be. Similarly, the more significant the departure from obligations implied by the law or ordinarily assumed under contracts of the kind in question, the more difficult it would be to persuade the court that the parties intended that result.”

1. He went on to consider that the statutory term was excluded in the context of a term excluding *“all other... obligations... or liabilities express or implied arising by law.”*
2. In *Great Elephant Corp v Trafigura*,Teare J considered a clause in which each party acknowledged that *"it will only be entitled to remedies in respect of breach of the express terms of the contract and will not be liable in tort or under any collateral contract or warranty...”* and concluded that it did not exclude the statutory term, whereas a term “*All other conditions, warranties, or other terms whether express, implied or which would otherwise be imposed by statute with respect to quality, satisfactory quality, suitability or fitness for any purpose whatsoever of the product are hereby excluded”* would be apt to do so.
3. I conclude that the use of the word “condition” in the Novation Agreement is not sufficiently clear. The authorities seem to suggest that some direct or plainly indicated reference to implied terms is needed. This is perhaps particularly clear from Teare J’s judgment in *Great Elephant* with the dichotomy between a reference to warranty (not enough) and a reference to conditions and warranties *“express, implied or which would otherwise be imposed by statute”*. This statutory right is one of great significance – a correlative degree of clarity is required.
4. Nor is Clause 11.4, whereby the parties agreed that “*the parties do not intend to expand* [Airbus’s] *risk or liability obligations further than already present under the terms of the Purchase Agreement*”, sufficiently clear.
5. I also tend to accept the submission that Airbus's argument that it owed neither French nor English duties strains commercial credibility.

**Limitation**

1. I pass now to the second group of issues – those relating to limitation. The factual backdrop against which this point arises is that the proceedings were commenced on 23 December 2019. That was 11 years after the alleged breach of contract on the delivery of the aircraft in 2008. It was 9 years after the expiry of the Airbus Express Warranty and more than 3½ years after the grounding.
2. The issues are as follows:
   1. Whether the Claimants’ claims for breach of French-law warranties/duties are time-barred as a matter of French law. It is this issue which is the subject of the preliminary issue trial, with a final determination to be made on the basis of expert evidence.
   2. Whether the Claimants’ claims (or any of them) are time-barred as a matter of English law. The issue is whether the Claimants’ answer to the limitation defence (based on s.32 of the Limitation Act 1980) is arguable. On the basis of my conclusions so far, this only applies to the alternative English Law case.
3. It is common ground that the primary 6-year limitation period under Section 5 of the Limitation Act 1980, for a claim under an English law contract, expired in 2014, that is 7 years ago. It is also common ground that the relevant limitation period under Art L.110-4 of the French Commercial Code is 5 years.

**French law limitation: when the 5-year limitation period provided for under Article L. 110-4 of the French Commercial Code commences.**

1. The starting point here is that it is common ground that the limitation period provided for under Art L.110-4 of the French Commercial Code is applicable and that it operates as a defence to the French law claims, subject to the true commencement date.
2. There are however vibrant disputes as to when that commencement date is, and indeed how this limitation period interrelates with other limitation periods operating in French Law, particularly those which arise under the French Civil Code.

*The relevant statutory provisions*

1. Art L.110-4 is found within the French Commercial Code and specifically under:
   1. Legislative part (Articles L. 110-1 to L. 960-4)
   2. Book I: Commerce in general (Articles L. 110-1 to L. 154-1)
   3. Title 1: The commercial act (Articles L. 110-2 to L. 110-4)
2. It reads as follows:

**"Art. L. 110-4**(I):

Obligations deriving [ or “born”] from trade between traders or between traders and non-traders shall be time barred after five years unless they are subject to special shorter periods of time limitation”

[“*Les obligations* *nées à l'occasion de leur commerce entre commerçants ou entre commerçants et non-commerçants se prescrivent par cinq ans si elles ne sont pas soumises à des prescriptions spéciales plus courtes*.” ]

1. The Civil Code provisions particularly relied on by the Claimants are as follows:

“Book III: The different ways in which property is acquired (Articles 711 to 2278)

Title VI: Sale (Articles 1582 to 1701-1)

Chapter IV: Obligations of the seller (Articles 1602 to 1649)

Section 1: General provisions (Articles 1602 to 1603)

**Article 1603**: *The seller is bound to two principal obligations, that of delivering the thing and that of warranting the thing he sells*

Book III: The different ways in which property is acquired (Articles 711 to 2278)

Title VI: Sale (Articles 1582 to 1701-1)

Chapter IV: Obligations of the seller (Articles 1602 to 1649)

Section 2: Delivery (Articles 1604 to 1624)

**Article 1604**: *Delivery is the transfer of the thing sold into the power and possession of the buyer*

Book III: The different ways in which property is acquired (Articles 711 to 2278)

Title VI: Sale (Articles 1582 to 1701-1)

Chapter IV: Obligations of the seller (Articles 1602 to 1649)

Section 3: Warranty (Articles 1625 to 1649)

Sub-article 2: Warranty against defects in the thing sold (Articles 1641 to 1649)

**Article 1641**: *The seller is bound to a warranty against hidden defects in the thing sold that render it unfit for its intended use, or that so impair its use that the buyer would not have bought it, or would only have given a lesser price for it if he had known of the defects*;

**Article 1643**: *The seller is liable for hidden defects even though he did not know of them, unless he has stipulated that he would not be bound to any warranty*;

**Article 1644**: *Under Articles 1641 and 1643, the buyer has the choice either to return the thing and to have the price returned to him or to keep the thing and have a part of the price returned to him*;

**Article 1645**: *If the seller was aware of the defects in the thing, he is bound not only to return the price he received but also all damages the buyer has suffered*;

**Article 1646:** *If the seller did not know of the defects in the thing, he is bound only to return the price and to reimburse the buyer for the expenses occasioned by the sale*;

**Article 1648**: *An action in warranty against hidden defects must be brought by the buyer within two years from discovery of the defect* […].

Book III: The different ways in which property is acquired (Articles 711 to 2278)

Title XX: Extinctive time limitation (Articles 2219 to 2254)

Chapter II: Time periods and starting point of the extinctive time limitation (Articles 2224 to 2227)

**Article 2224**: *Personal actions or actions for recovery of movable property are time barred five years from the day the holder of a right knew or should have known the facts enabling him to exercise his right*.”

*The claims*

1. The issues which arise require a close focus on the claims which are brought.
2. The Claimants’ first relevant claim is a statutory warranty claim, arising out of Articles 1641 and 1644 of the Civil Code. The primary claim in this respect is a claim to return the helicopter and be refunded the full purchase price (“*une action rédhibitoire*” or in English “the Redhibitory Claim”). There is then an alternative (but still statutory warranty) claim, to retain the helicopter and be refunded part of the purchase price (“*une action estimatoire*” – or in English “the Estimatory Claim”). The nature and purpose of such a claim is remedy of the latent defect itself, by putting the purchaser back in the position he would have been in had the object sold had not had the defect in question. These alternative statutory warranty claims avoid the contract in whole or in part.
3. The second relevant claim is a claim for damages under Article 1645 (“the Compensation Claim”). There is an issue as to whether this is a claim that can, as matter of French law, be brought either alongside and as part of the statutory warranty claim, or entirely independently as a civil liability claim (“*une action en responsabilité civile, de nature purement indemnitaire*”).
4. The damages claim is compensation for loss caused by the hidden defect – as such, the sale is not (wholly or partially) undone. Compensation is not necessarily linked to the purchase price but is granted for the full scope of loss caused by the hidden defect. It is common ground that a claim under Article 1645 can be brought as part of a statutory warranty claim; and to the extent that it is brought as such, the same limitation analysis will apply to it as to the warranty claims. There is an issue as to whether the claim here is of this nature or is a self-standing civil liability claim, which is treated differently to the warranty claims for limitation purposes.
5. The third claim is one which is not reflected in the statutory codes at all. It is the claim for breach of the duty of prudence, monitoring and vigilance (“the Duty of Vigilance Claim”). This is a duty derived from the case-law of the Court of Cassation, including, in particular, a case called *Distilbene*. This duty is a “judicial creation” – and its nature and limitation treatment are in issue.

*The parties' positions – introductory summary*

1. It is common ground that Article L. 110-4 does not state when the five-year limitation period starts to run. The issue of French law here is therefore when, in principle, the 5-year limitation period commences under Art L.110-4 for the purposes of the Claimants’ French law claims.
2. Airbus contends that the five-year period began to run, against all of the Claimants’ claims, on the date of delivery, being 30 October 2008 (or thereabouts). If that is correct in relation to any (or all) of the Claimants’ French-law claims, then that claim (or those claims) is/are time-barred.
3. The Claimants contend that the five-year period began to run on the date of the Claimants’ knowledge of the defect in MSN2707. If that is right, then there will be a further factual question as to when that date was: that will be an issue for trial in due course. It follows that if the Claimants are right on the legal question of what triggers the start of the limitation period, then their claims must proceed to trial rather than being dismissed at this stage.
4. Before moving to a consideration of each claim, and the expert evidence in relation to those claims, it is worth summarising some of the areas of disagreement.
5. Prof. Torck – and through him the Claimants - fundamentally disagrees with much of Prof. Béraudo’s/Airbus’s “background” analysis – that is to say the analysis of general approach and general principles.
6. As to specifics, there is an issue between the parties as to whether the article is concerned with the limitation of “obligations” (Airbus) or “actions" (Claimants).
7. The parties differ (probably as a consequence) as to whether the article is also a substantive prescription. Airbus says that Art L.110-4 operates as a form of substantive prescription, extinguishing the obligation. The Claimants say that it operates procedurally, barring the “action”. Airbus says that by extinguishing an obligation after 5 years, Art L.110-4 effectively operates as a form of “backstop” limitation in commercial cases unless there is a “*shorter limitation period*”. So, in the case of sale of goods claims for breach of the warranty against hidden defects on delivery under Articles 1641-1648 of the Civil Code, there is a 2-year procedural time bar against actions on the warranty reckoned from the date of discovery of the defect in Article 1648, but in any case the action (i.e. the claim) must be brought within 5 years before the obligation is extinguished. Accordingly, the commercial limitation period of 5 years under Art L.110-4 “*encloses*” the shorter period (in the French legal language).
8. This is probably reflective of the positions which they take on the nature of the relationship between commercial justice and commercial law and civil law and civil justice in France – in particular whether the former is autonomous (“*an autonomous law corresponding to a different world*”). That is a point which underpins Prof. Béraudo's argument. He also contends that there is a policy reason for a short limitation period in the commercial context: namely, that “*a floating starting point for the course of the limitation period would be contrary to [the] necessary requirement for predictability*” in the commercial sphere, and would put society at “*a risk of perpetual instability*”. Prof. Torck’s argument is based on the contention that civil law and commercial law are (at least nowadays) aligned, with the relevant limitation provisions in the Civil Code and Article L.110-4 dealing with the limitation of actions in an essentially harmonious way.

*Article 1644: the redhibitory & estimatory claims*

*Part 1 – the specific point*

1. This is the simplest part of the French Law limitation argument. Prof. Béraudo’s view is that, in relation to the Claimants’ statutory warranty claim, the limitation period under Article L.110-4 of the Commercial Code begins on the date of sale of the defective product. He reaches this view on the basis of the weight of authority from the Court of Cassation which has held that the limitation period under Article L.110-4, in the context of a statutory warranty claim for breach of the warranty against hidden defects, runs from the date of sale.
2. There is not a major dispute on this. It is common ground that the latest leading case says this.The Court of Cassation decision of 8 April 2021, says as follows:

"With regard to Articles 1648 of the Civil Code and L. 110-4 of the Commercial Code: … It results from these legal texts that legal action by a buyer resulting from serious defects should be taken against it within two years following the date of discovery of the defect, whilst being restricted to the five-year limitation period which applies from the date of sale between the parties, regardless of whether or not the right of the seller to take legal action against the manufacturer has expired."

1. That is essentially reflected in the Claimants’ skeleton argument:

“Prof. Torck accepts that at present, the case law of the commercial chamber of the Court of Cassation is such that, if the issue came before the commercial chamber of the Court of Cassation today, it is likely that that Court would approach the issue of limitation (consistently with the weight of recent authority) on the basis that in a claim for breach of the statutory warranty against hidden defects, the limitation period under Article L.110-4 of the Commercial Code commences on the date of sale.”

1. On one level that disposes of this part of the limitation argument.
2. However Mr Pilbrow urges me to take a bolder line, relying on Prof. Torck’s view, which is that this conclusion – and this accepted approach of the French Courts - is wrong. As it was put in the Joint Report: *“in his personal capacity, Mr Torck reiterates the criticisms that he made in his report concerning this case law.”*
3. Prof. Torck’s view (perhaps reflective of his pedigree as a pure academic) is that on a true application of French law the Article L.110-4 limitation period should not run, when one is dealing with a hidden defect under Article 1641 – 1649 (and in particular with a statutory warranty claim under Article 1644) until the claimant has knowledge of the hidden defect. He contends that there are indications in recent case law (in chambers other than the commercial chambers of the Court of Cassation) that French law is “*moving towards reaching the same conclusion*”.
4. He points in particular to a decision of the Third Civil Chamber of the Court of Cassation (specialising in construction and property law) which considered that an action should be brought within 2 years of the date of knowledge, subject only to an overall civil law longstop of 20 years from the date of the obligation. He also points to decisions of the Court of Cassation on 6 December 2018 and 1 October 2020 as being supportive of his position.
5. It is quite clear however that my job is not to determine what, in an ideal world, French law should be, but what it is. I bear in mind the following passages from the authorities:
   1. *“If [counsel] was intending to invite me to make findings which went beyond the present state of Russian law and to anticipate a rational development of it, his invitation must be declined”: Yukos Capital v Rosneft* [2014] EWHC 2188 (Comm); [2014] 2 CLC 162 at [30], per Simon J.
   2. *“In my view the … commentary sets out a proposition which is not supported by case law and I infer that it does not represent the current state of the law but is a statement as to the possible future development of the law”: Tatneft PJSC v Bogolyubov* [2021] EWHC 411 (Comm) at [675], per Moulder J.
6. The inescapable conclusion from the material which I have seen is that for Art. 1644 claims for breach of the warranty against hidden defects, the time period under Article 110-4 runs *"from the date of sale between the parties"*. On this point Prof. Béraudo's argument in this respect must be preferred.
7. It follows that the Claimants’ Art. 1644 claim is time-barred.

*Part 2: comparison to the general approach of the experts*

1. It is however worth pursuing the analysis at greater length, because the approach of the two experts to this point does feed into their approaches on the other issues. The Claimants actively sought to persuade me that I should look at the general approach of the experts first and essentially in the abstract, with the result of that consideration effectively driving the conclusion on the specific issues, including Article 1644: *"If, as the Claimants submit [Prof. Béraudo's] general thesis is wrong, then: (i) His entire approach is flawed, since his starting point is wrong and his underlying premises are wrong. … (iii) Moreover, the conclusion is not only that his fundamental underlying analysis is flawed and wrong; it is that Prof. Torck’s is correct."*
2. However it seems to me that this is not a correct approach as a matter of theory – I am urged to stay close to the underlying materials and therefore the course I have followed, of orienting myself by reference to the known facts and the one clear legal answer, is preferable.
3. However the submission that the correct approach should be capable of being accommodated in an overarching theory has obvious force. It follows that if Prof. Torck's overarching thesis is inconsistent with the known facts (or those known facts cannot easily be accommodated within Prof. Torck's thesis) that offers me a significant indication that that thesis is wrong, which may have implications for the other discrete aspects of the case insofar as they rely on that analysis.
4. Prof. Torck’s view is that the “founding principles” of the French law of limitation are (i) *actioni non natae non currit praescriptio* – there is no limitation of an action before it has arisen; and (ii) *contra non valentem agere non currit praescriptio* – limitation will not run against a party that is unable to act. He says that properly applying those principles, a limitation period should not run against a claimant before the relevant obligation is enforceable; and in the context of a breach of a warranty against hidden defects, the claimant is (by definition) not able to enforce that obligation until the defect is revealed. Hence, he says that for the period of limitation to start at the date of sale (which is by definition a date before the hidden defect is known and the warranty can be enforced) is contrary to those founding principles.
5. There is an obvious attraction to this argument based on *actioni non natae non currit praescriptio*; but in a sense it is shooting at a false target, because Airbus does not dispute the maxim, but says that in the context of the wording of Article L.110-4 it applies to obligations, not actions. That is an approach which is consistent with the approach taken by the Court of Cassation in Article 1644 claims. Prof. Torck’s overarching approach is therefore inconsistent with the established law on Article 1644. This provides an indication that “reading across” from his theories to a conclusion as to what the law is may not be a safe approach.
6. The other underpinning of Prof. Torck's analysis is that he looks across to the Civil Code and sees a mirror. He says that the same founding principles find expression in Article 2224 of the Civil Code, which applies to transactions between non-traders, and which also provides for a five-year period of limitation. Article 2224 also expressly stipulates that the period of limitation begins to run on the date that the claimant becomes or should become aware of the facts entitling them to bring the claim. Consequently, in Prof. Torck’s analysis, the Art. L.110-4 limitation period should be read consistently with this. The effect is that the five-year period would be ‘floating or rolling’, starting from the date on which the buyer knew or should have known the facts allowing him to exercise such right. This feeds into the analysis on Article 1644 specifically.
7. In this connection Prof. Torck says that the law of 17 June 2008:

“did not seek to make legal action more difficult by shortening the limitation periods; on the contrary, it sought to achieve a better balance between the exercising of litigants’ rights and the necessity for predictability and legal certainty: this is why the legislator established the sliding nature of the starting point of the limitation period, mitigated by the introduction of a long-stop date after 20 years.”

1. There is an obvious difficulty with this submission – which is that while Article 2224 does expressly say this (“*five years from the day the holder of a right knew or should have known the facts enabling him to exercise his right”*), Article L.110-4 does not – on the contrary the wording suggests five years from sale as a long-stop date (“*Obligations deriving from trade between traders or between traders and non-traders shall be time barred after five years unless they are subject to special shorter periods of time limitation”)*. As a pure matter of construction there therefore appears to be an obvious indication that the two articles should produce different results.
2. There is another obvious point of construction: unlike Article L.110-4, Art 2224 expressly refers to ‘actions’ rather than ‘obligations’. Again this provides a very good reason why a different result might be produced. Further it might well be said (as Prof. Béraudo does) that the two articles serve different purposes: because of the different “markets” they serve (traders and non-traders). Certainly no English lawyer would find this a surprising approach. On its face therefore the wording of the statute, to which I must turn as a primary resource, stands in Prof. Torck’s way.
3. Both of these points have, in my judgment, particular resonance on their face when we know that the question of reform of Article L.110-4 was considered prior to the 17 June 2008 law.
4. Prof. Torck's answer is twofold. The first aspect is to contend that the intention of the French legislature (as revealed by *travaux préparatoires*) was to repeal Article L.110-4 of the Commercial Code and expand Article 2224 of the Civil Code to apply to transactions involving traders, albeit that this has not yet in fact been done.
5. So far as this is concerned, I did not find this contention persuasive. There is nothing in the *travaux préparatoires* which supports an intention to align the two different regimes in this way. An intention to abolish Article L.110-4 was certainly floated, but the next iteration of the *travaux* shows that that suggestion was not accepted. Instead the limitation period was reduced from ten years to five years (in part to bring it more closely into line with the position in Germany and England) and because *"this period appeared too long to most economically active people"*. That resonates with Prof. Béraudo’s contention that the specific limitation in commercial cases is linked to the need for certainty. He quotes the Secretary General of the Council of State (Le Conseil d’État), Jean-Guillaume Locré in his book “*Spirit of the Commercial Code or commentary on each of the articles of the Code*”, where he said that the commission was *“suffused by this idea that the rapid movement of commercial business should not be slowed down”.* Further the report of Senator Béteille on the proposed 2008 reforms says this:

“As shown by the hearings conducted by the fact-finding mission on the civil and criminal limitation period system, this period still appears too long for the majority of economic players, particularly given the gap with our main European commercial partners, starting with Germany and the United Kingdom.

It is therefore essential, at a time when the economic effects of the rule of law are increasingly taken into consideration by trade and industry players, that the current limitation period of ten years be reduced.”

1. That coheres with Professor Torck’s own admission that the aim of the 2008 reform was to reduce the length of both the Commercial and Civil limitation periods. A floating period under Art. L. 110-4 would extend it. Nor did there seem to be much force in Prof. Torck’s argument that the reason why L.110-4 was not repealed was the need to maintain a special limitation in the maritime field, as (i) this provides no reason for maintaining the first paragraph of the Article (as was done) and (ii) maintaining the special maritime limitation could more easily have been done by moving the relevant provision into the law on transport.
2. The second aspect is that Prof. Torck suggests that, in various contexts, the Court of Cassation has apparently expressly aligned the limitation period under Article L.110-4 with the period under Article 2224, thus seeming to indicate a commencement for the former on the date of knowledge. He points here to four authorities, dealt with in some detail in closing. In one sense there is no need to deal with these authorities because the specific points which were sought to be drawn from them were never put to Prof. Béraudo in cross-examination. However since there was some cross-examination on three of the cases, and since they take on a somewhat totemic status in the Claimants’ submissions, it is nonetheless important to deal with them.
3. The case on which Prof. Torck placed greatest weight is the Court of Cassation decision of 6 January 2021. That was a case in which an insurer was alleged to have breached a duty to inform the insured whether the risks covered by a policy were appropriate to the insured’s personal situation. Article L. 110-4 was applicable because this case concerned relations between a trader (the insurer) and a non-trader, rather than between non-traders.
4. The Claimants rely on the facts that the Court of Cassation referred to both Article 2224 of the Civil Code and Article L.110-4 of the Commercial Code and held that *“[i]t follows from these texts that personal or movable actions between traders and non-traders are prescribed by five years from the day when the holder of a right knew or should have known the facts enabling him to exercise it”.* Applying those principles, the Court held that time started to run for limitation purposes on the date that the insurer refused to pay out under the policy.
5. The other cases on which the Claimants rely are as follows:
   1. Commercial Chamber, Court of Cassation: 26 February 2020: This was a case concerning payment of a late-issued invoice for geological surveys. The Court of Cassation began by referring to Article 2224 of the Civil Code. It went on to say: *"After having stated that, according to Article L. 110-4 of the French Commercial Code, obligations deriving from trade between traders shall be time barred after five years".* It then concluded (very briefly) that the date on which the defendant had breached its obligation to pay for the services was the date on which the provision of the services was completed (which is also when the claimant was obliged to invoice for them) and the claim was time barred. It said that the claimant *“knew, upon completion of the services, the facts enabling it to bring its action for payment of their price”.* The Claimants criticised Prof. Béraudo for quoting selectively from this judgment; the same criticism might have been made in return. Plainly this judgment had something for both sides' analyses within it.
   2. Commercial Chamber, Court of Cassation: 9 September 2020: This was a case concerning the validity of a contractual interest rate. The Court of Cassation held that time started to run against the borrower on the date of the loan agreement. It also noted that *“the company was aware of this rate when the loan agreement was signed”*. The Claimants again considered Prof. Béraudo to have quoted selectively from this judgment; in truth each party focussed rigidly on the part of the decision which they liked.
   3. Commercial Chamber Court of Cassation 12 November 2020: This case (not cross examined on) concerned an interest rate swap agreement. Once again, the Court of Cassation referred to both Article 2224 of the Civil Code and Article L.110-4 of the Commercial Code. It went on to state that *“[i]t follows from these texts that personal or movable actions relating to obligations arising in the course of trade between traders or between traders and non-traders are prescribed by five years from the day when the holder of a right knew or should have known the facts enabling him to exercise it”*.
6. Ultimately however I was not persuaded that these authorities, dealing with a variety of very different contexts, could be taken at face value or as denoting a rule of more general application. As Prof. Béraudo said in his cross-examination, each of them had features which were capable of explaining the result consistently with the application of Article L.110-4 as he approaches that Article. While there were passing remarks which favoured the Claimants’ analysis, none of them showed a result being reached by reason of that approach. So in the geological surveys case, the time ran not from knowledge (though knowledge was referred to in passing) but from the date that the works were completed. In the insurance case the duty to advise can be seen as a continuous duty. While Mr Pilbrow was somewhat dismissive of Prof. Béraudo's response that some of the dicta on which Prof. Torck relies were cases of the Court speaking in haste, a careful re-reading of the authorities seems to me to bear out the soundness of that observation. It is not unknown for there to be a degree of imprecision in dealing with points which are not actually in issue.
7. I conclude that none of these cases shows a safe consistent line. They are not a consistent body of evidence to put against the accepted line which Prof. Torck accepts prevails in the context of Article 1644 claim, and the wording of the Article together with the indications from the *travaux*. There is also a telling silence from the other potential sources of legal knowledge on this point. It follows that I can safely conclude that as regards the Article 1644 claims time runs from the date of the contract, and is long since expired. Those claims are time barred under French Law.
8. It is worth pausing here also to note that this conclusion deals also with Prof. Torck’s argument that there is a practical problem with the conventional approach, namely that certain goods are by nature likely to reveal their defects only after prolonged use and, in some cases, more than five years after the date of sale. He uses this as a reason why the limitation period should not be taken from the date of the contract, arguing that if the limitation period under Article L.110-4 starts at the date of sale, then the warranty against hidden defects is for all practical purposes neutered in relation to such goods. There is an obvious pull to such arguments as a matter of “in principle” analysis; and we see such arguments reflected in English Law – in for example section 14A of the Limitation Act.
9. But these are exactly the sort of points where policy and law intersect (as, for example, the House of Lords made clear in relation to section 14A in *Haward v Fawcetts* [2006] UKHL 9 [2006] 1 WLR 682, in particular at [32]) - and where we can see that different countries may draw the line in slightly different places. What the authorities demonstrate here is that French Law has taken a robust view on this point, one which favours certainty over what is sometimes called “palm tree justice”. It follows that arguments based on this approach cannot be assumed to be sound elsewhere in the argument, when they have been demonstrated not to be sound in relation to the warranty claim.
10. As for Prof. Torck’s arguments that (i) the limitation period specifically applicable to statutory warranty claims, provided for in Article 1648 of the Civil Code (two years from the date of knowledge) is the period that should apply on the basis of the usual principle that the special derogates from the general and (ii) that Article 2232 of the Civil Code provides for a ‘long-stop’ limitation period of twenty years from the date the relevant obligation is born; a similar problem arises as arises in relation to the construction of Article L.110-4. This is that Prof. Torck accepts that this is not what the judgments of the Court of Cassation say. As Prof. Torck says: *“the case law of the Court of Cassation, … encloses the short limitation period of Article 1648 of the French Civil Code inside the limitation period of Article L. 110-4…* *gives this limitation period the role of a deadline (“un délai butoir”)”.*
11. The result is that testing Prof. Torck’s wider approach against the law on Article 1644 and more generally indicates that that approach should not be regarded as a safe guide or justification for the conclusions to be reached on the other discrete points.

**Article 1645 “indemnity” claim for “civil liability”**

1. The Claimants plead claims for damages pursuant to Article 1645 as a result of the hidden defect both alongside and as part of *“une action rédhibitoire ou estimatoire”* and independently as *“une action en responsabilité civile, de nature purement indemnitaire”*. It is the second of these options that is in focus for these purposes.
2. The Claimants accept that to the extent that a claim under Article 1645 is brought alongside and as part of an Article 1644 warranty claim, it would fall to be considered for limitation purposes with it. Prof. Torck accepts that an Art. 1645 claim which is "linked" to the warranty regime must be brought within a floating two year period running from the buyer’s date of knowledge of the defect (pursuant to Art. 1648), and is subject to an overall limit of 5 years from the date of sale under Art L.110-4.

1. However the Claimants contend that they also make a claim independently for damages, separate from a warranty claim; and that that claim falls to be treated differently for limitation purposes. That is an argument which seems to have developed fairly late, but it is fair to say that it is squarely in play before me.
2. Airbus does not accept any useful distinction between such separate/autonomous claims and combined/non-autonomous Art. 1644/1645 claims. It says that Articles 1641 to 1648 - including Art. 1645 - constitute a warranty regime in respect of hidden defects; as a warranty claim, the same caselaw of the Commercial Court of Cassation applies to Art. 1645, and time runs under Art. L. 110-4 from the date of the obligation (i.e. sale/delivery). Airbus's case is that the claims are all founded on the same warranty obligation, originating under the same part of the Civil Code headed *“Sub-article 2: Guarantee against defects in the thing sold (Articles 1641 to 1649)”* and that to apply different limitation start dates under Art L.110-4 is wrong in principle and likely to generate incongruities.
3. The field of battle here is whether this Article 1645 claim is such a claim, or is self-standing, such that a different limitation period could conceptually apply to it – and whether, if it is self-standing, a different limitation period would indeed apply to it.
4. Prof. Béraudo relied principally on two decisions of the Court of Cassation, of 13 November 2003 and 19 March 2013, which, he says, establish that the claim for damages under Article 1645 is (always) a warranty action and not a civil liability action. In relation to the first of these cases, a case dealing with an award of compensation under Art 1645 against a professional property seller together with his claim on his professional liability insurance for an indemnity against that award, Prof. Torck accepted in cross-examination that the decision was that the character of the claims was *“guided and influenced by the central obligation, the statutory warranty against hidden defects”*. He also accepted that this case supported the position that *“the claim is not autonomous after all from latent defect warranty”*.
5. The other cases relied upon (but not cross examined upon) were:
   1. 19 March 2013. That was a case concerning the sale of printing machines. The award covered consequential damages associated with the blankets which resulted in poor quality print of the newspaper and other defects led to printing delays. *“This Court considers that, as a latent defect, which is defined as a fault which renders the thing unfit for its intended purpose, does not give rise to an action for damages on the grounds of contractual liability but rather to a warranty whose terms and conditions are set by articles 1641 et seq. of the French Civil Code”*;
   2. 4 October 2017. This was a case concerning the sale of a Land Rover. In this case the claimant argued that Art. 1645 is a civil liability claim. The Court of Cassation expressly considered this plea, and rejected it: *“if the compensation claim based on the existence of a hidden defect can be exercised independently of the reduction or rescission, it is no less subject to the dispositions of Articles 1641, 1645 and 1648 of the Civil Code […]”*
6. Prof. Torck contended that these cases did not consider, and did not address, the juridical nature of an Article 1645 damages claim. He relied instead on another portfolio of cases of the Court of Cassation:
   1. 19 June 2012: in this case, the claimant sought to bring an Article 1645 damages claim alone. The lower court held that this was not permissible. It considered an argument that the Article 1645 damages claim was only an adjunct to a statutory warranty claim and was not an autonomous source of liability. The Court of Cassation rejected that analysis, holding that:

“the indemnity action for latent defects may be brought by the buyer alone on the basis of Article 1645 of the Civil Code; Therefore, by wrongly stating that this action was only complementary and accessory to redhibitory or estimatory actions and did not replace them, so that in the absence of any redhibitory or estimatory action, the liability action for latent defects brought by the exhibitors could only be rejected, the Court of Appeal violated Article 1645 of the Civil Code by refusing to apply it”

* 1. 26 September 2012: In a case concerning a defect in a yacht the lower court held that “*the notion of hidden defect cannot be reason for a specific action for damages, which is only an additional request for rescission of the sale, when it is successfully exercised, since Article 1645 of the Civil Code does not establish a specific and independent regime of liability for hidden defect, regardless of any action for reduction or rescission”*. The Court of Cassation rejected that analysis holding that *“the buyer may obtain compensation independently or in addition to an action for reduction or rescission, when the seller was aware of the defect in the object … that by holding that the buyer only sought damages, which could not be formulated independently of an action for reduction or rescission, the Court of Appeal violated Article 1645 of the Civil Code”*;
  2. 24 June 2015: in this case, a company bought a house and developed it into flats (‘sub-lots’), which it sold. The company also procured some work on the roof. There was later a problem with the roof, and the buyers of the sub-lots (through a *syndicat des copropriétaires*) brought an Article 1645 claim against the seller and the roofing company. The Court of Cassation found that the syndicat could bring that claim against the seller, despite the fact that it could not bring an Article 1644 claim.

1. Reliance was also placed on a recent decision of the Aix-en-Provence Court of Appeal of 23 January 2018, which holds that *“the action for compensation… constitutes an action independent of the redhibitory or estimatory action”*.

*Discussion*

1. On this point I accept Prof. Torck’s case that a damages claim under Article 1645 can be brought as a civil liability action; or rather I accept that an Article 1645 claim can be brought independent of an Article 1644 claim.
2. That, it seems to me follows from the facts that:
   1. There is a line of Court of Cassation authority which holds that the action purely for compensatory damages under Article 1645 of the Civil Code is “an autonomous action” from the “*action rédhibitoire ou estimatoire*”. It seems clear that on occasion the Court of Cassation has actually had to grapple with the question of whether a claim can only be brought as an adjunct to an Article 1644 claim and has rejected that argument in terms.
   2. The Court of Cassation has held (for example in the 24 June 2015 case) that the action for purely compensatory damages under Article 1645 of the Civil Code is open to third parties (i.e. parties other than the buyer of the defective goods). That is significant because the warranty itself is given only to the buyer: and so, if the claim for damages was purely a warranty claim, it would be exercisable only by the buyer.
3. I also note that a number of academic commentators have considered these authorities and broadly speaking endorse the “autonomy” argument. While the Claimants urged the importance of these articles, I have to be somewhat cautious of them in circumstances where time did not permit these articles to be cross-examined on.
4. Ultimately, even taking these articles into account, I am not persuaded that this point gets Prof. Torck and the Claimants where they need to get. There plainly remains an element of uncertainty as to the ambit of the “autonomous” action under this article and also as to its nature – whether it is an action relating to hidden defects or one relating to warranty. The main authorities concern buyers and whether they have to bring an Article 1644 claim as well. They do not concern limitation at all. There is no real clarity on the questions of autonomy and the nature of the action (one article refers to a *“persistent vagueness”/ “un flou persistent”*) and I must therefore deduce, as best I can, the likely course of an action on this point.
5. The conclusion to which I come is that there is sufficient in the authorities to suggest that, at least where a claim is brought under Article 1645 by a person who can (and *a fortiori* where a person does) also bring a claim under Article 1644, the action would be considered to remain subject to the conditions set out in Articles 1641 to 1648 (i.e. the conditions that apply to other types of ‘warranty’ claim). This can be seen in the approach in the 13 November 2003 case, where the Court said:

“the decision handed down against M. Y... for the cost of repairs to the property was based not on the rules of civil liability, whether contractual or tortious, but on the legal obligations incumbent upon the seller to hold the buyer harmless [or: provide the buyer with a warranty”] from latent defects of the thing sold” […]”

1. Prof. Torck explicitly accepted, as noted above that this case *“pleads in favour of a position that consists in saying that the claim is not autonomous after all from a latent defect warranty”*. That approach is also seen in the19 March 2013 and 4 October 2017 cases.
2. While there may be other important aspects of the claim for damages under Article 1645 in relation to which French courts apply the principles of contractual civil liability, including the legal consequences of force majeure to such a claim, these appear to be somewhat at a distance from the central issue and they do not seem likely to change the central analysis.
3. The approach which I conclude a French Court would take in the present case reflects the *prima facie* nature of the claim – as indicated by its location in the civil code (“*Sub-article 2: Warranty against defects in the thing sold (Articles 1641 to 1649)*”), and the normal understanding which flows from that.As one student textbooks says: “*it is not a civil liability, in contract or in tort, but a legal warranty*”: *Malaurie, Aynès, Gautier, “Droit des Contrats Spéciaux”,* 11th edition, no. 322. It also is internally consistent with the other claims actually brought.
4. I consider that the arguments which posit the Article 1645 claim as autonomous both procedurally and in its nature build on the more extreme cases and do not seem to come back to this fundamental point. Nor do they seem to grapple with the fact that it would seem to be illogical for the limitation period to vary by the remedy sought by a buyer who could bring a warranty claim. It would seem wrong that a buyer could choose the warranty regime available by decoupling a damages claim (including a claim for at least some of the price) from the statutory warranty claim.
5. I should note that this conclusion is based, as authority tells me it should be, essentially on Court of Cassation authority in partnership with the statutory wording.
6. In the context of limitation itself each party also relied on specific judgments of lower courts. Neither of these are strictly speaking ones which should be regarded as authoritative or persuasive; and one might say that they balance each other out. However considering that they are the authorities on the topic of limitation under this Article and the weight placed on them, it is right that I deal with them.
7. Airbus relied on a decision of the Court of Appeal of Chambéry of 6 June 2018,holding that “*It is of settled case law that the action in guarantee against hidden defects must be brought by the buyer before expiry of the common law time limitation period of Article L. 110-4 of the French Commercial Code, which begins on the date of the initial sale*.” It also looked at the limitation point in the context of Article 1648 and held that *“Article 1648 of the Civil Code only provides a procedural time frame which, while it may not start until the hidden defect has been discovered, cannot under any circumstances counter the substantive timeframe of the limitation period of article L 110-4 of the Code of Commerce which starts on the date of the initial sale”.*
8. As a lower Court judgment this is not something on which should I place much weight. However it seems to me that the judgment gains some further authority because it was further approved by the Court of Cassation (1st Civil Chamber) which held that “*the Court of Appeal was right to uphold that the starting point of the extinctive limitation period laid down in Article L. 110-4 of the French Commercial Code, amended by Law no. 2008-561 of 17 June 2008, began to run from the initial sale*”: 6 June 2018. I would therefore regard the Chambéry decision as being of slightly greater weight than might at first appear.
9. For the Claimants, their lead lower court judgment was the decision of the Aix-en-Provence tribunal, to which I have referred above. This lacks that extra fragment of weight gained in the previous case by higher approval. I am also not persuaded of the force of the Aix-en-Provence judgment for two other reasons. The first is that it may well be considered an outlier – it is not really consistent with the other cases and it is again based in an area where “palm tree justice” results can perhaps be expected. It is essentially a consumer claim – it was a claim in relation to a defective Jeep vehicle. Secondly the judgment itself slightly suggests that an Art. 1645 claim is a part of the mechanism of warranty claims and does not deal with Art. L.110-4. While therefore on one level the case does grapple with the limitation period under Article 1645, it does not do so with the extra dimension of Article L.110-4 informing the court's views.
10. I also broadly accept the submission that Prof. Torck’s approach leads to incongruities which seem unlikely companions to the correct legal analysis. The main one which troubles me is that question of what role remains for Art. L.110-4. The Claimants accept that if they are right, the date in Article L.110-4 is meaningless when one is dealing with claims that engage the Article 1648 two-year limitation period. While the Claimants submitted that I should not be troubled by this, that is a conclusion which I find very difficult to accept. In circumstances where the article has been designedly (after careful consideration) kept as part of the limitation spectrum within French Law, it seems highly implausible that it has no real role.
11. I also consider that the “surviving claims” anomaly is indicative; if the Claimants were right a claim which would be time barred under Article 1644 could be given a new lease of life – and a lease of life with possibly no end date – by reformulating it as an Article 1645 claim. That would seem a very strange result. That strangeness is not really met by the argument that the claims are conceptually distinct and serve different purposes, when it is acknowledged that the Article 1645 certainly offers considerable scope for a claim which heavily overlaps with the claim for the price which would be brought under Article 1644.
12. The “no end date” argument also has force. The answer to this was that Prof. Torck was not suggesting that there was no end date, merely a twenty year "long-stop". Even if one regards there as being a "long-stop" limitation period of twenty years from the date the relevant obligation is born (a “*délai butoir*”), via Article 2232 of the Civil Code (as Prof. Torck suggested in re-examination, though not in his report) there remains a real tension between that result and the requirements of legal certainty, which appear to underpin the wording of the Article and its retention with a shorter limitation period post 2008 – and which are very clearly reflected in the *travaux* to which I have already referred.
13. I therefore conclude that Prof. Béraudo's conclusions on this issue are to be preferred and that it is likely that a French Court would conclude that the Article 1645 claim is time barred. I consider Prof. Torck's arguments, though interesting and with some evidence base, are effectively (as with Article 1644) arguments as to the course which French jurisprudence might in future take. That is supported by the emphasis which was placed on the academic articles as the main source for the line of analysis which Prof. Torck advocated.
14. Although I reach my conclusion on this issue on the basis of the above points, it is perhaps worthy of note as being consistent with this conclusion that Prof. Torck’s arguments are more urged as logical developments than statements of the legal status quo. In addition it seems that the argument as finally advanced at the hearing was plainly not Prof. Torck's starting point. The pleaded claim had undergone considerable changes over the course of the case and Prof. Torck's argument was ultimately advanced partly in a very late supplemental note and partly in re-examination.

**The duty of vigilance claim**

1. That leaves the question of the duty of vigilance. That is a safety obligation imposed on sellers on sale or delivery, such that a product can be used without risk to persons or property. To a large extent the dispute here focussed on the pleaded claim.
2. Airbus contended that on the Claimants’ own pleading, it arises under the Purchase Agreement and from Articles 1603 and 1604 of the Civil Code which give rise to obligations of delivery and warranty. The Claimants however contended that the duty of vigilance, as pleaded, is not part of, and is separate from, the obligation of *“délivrance”* (i.e. the obligation to deliver a good that conforms to its contractual specification).
3. The background to the duty as found in French law is that in the case of *Distilbène*. In that case a claim was brought against the drug company that manufactured the drug Distilbène by a woman who had been exposed to it *in utero*. Obviously the claimant had no contractual relationship with the drug company: the drug had been purchased by the claimant’s mother, before the claimant had been born. The claimant’s claim in that case therefore was not (and could not have been) a purely contractual claim for non-compliance of the drug with its specification.
4. The expert evidence on this point was not particularly strong on either side. Prof. Torck clearly explained his understanding of the distinction between the duty of délivrance and the duty of prudence, monitoring and vigilance in the course of his oral evidence. However it was apparent that he had not given any real thought to how the duty might apply in this case. As Prof. Torck said:

“the duty of vigilance has been very much in the heart of the Distilbène case. But it hasn't been asked of me to test whether the duty of vigilance could be implemented in the case before us today.”

While one might argue (as the Claimants did) that the application of the duty to the present case is a matter for another day, in the context of testing the arguments as to that duty it would have been helpful to understand how it is said that the duty is said to operate in this case.

1. In contrast, in his oral evidence, Prof. Béraudo repeatedly asserted that the *Distilbène* duty/duty of vigilance has no application to the facts of the instant case (an argument that is not available to Airbus at the present hearing), but did not really grapple in any depth with the juridical nature of the duty, which would have been a useful base for testing his arguments as to limitation in this context.
2. Airbus rightly says that I do nonetheless have to decide on the nature of the claim for the purposes of limitation in the event that a claim could be made in relation to this duty; and I must do the best I can with the material which there is.
3. Here I tend to agree with Airbus that one has to have some regard to the conceptual underpinnings of the duty. So far as this is concerned, I accept the evidence of Prof. Béraudo, that the origin of the requirement is that upon “handover”, goods must comply with the stipulations of the sale contract and that the duty therefore has its origins in complaints about nonconformity of the materials. Perhaps unsurprisingly given the unusual nature of the claim the authority on this aspect of the argument was not extensive. Prof. Béraudo cites one authority in support of that proposition. However, that authority was not entirely on point, as it was overtly concerned with “the sale of a defective product”: i.e., in that context, a product that does comply with its contractual specification.
4. Nonetheless it seems to me that the link to the contractual regime is made out on the consideration of the *Distilbène* case itself. As Prof. Torck said it is an action in *“contractual civil liability”* where it *“seems logical to refer to the provisions of the Civil Code on sale and delivery”*. That linkage is also logical; a defective product has necessarily not complied with contractual specifications. It is also, essentially, the way in which the claim is pleaded which is thus:

"…the Purchase Agreement entailed a legal obligation derived by French courts from Articles 1603 and 1604 of the Code, pursuant to which Airbus was obliged to exercise prudence, monitoring and vigilance as to the safety of each of the helicopters it sold, as per the decision of the Versailles Court d' Appel in the Distilbène case"

1. While it is tempting to see this duty as itself some form of backstop, whose *sui generis* nature produces a different result, I am not persuaded by Prof. Torck’s analysis. In part this hinges on the fact that Prof. Torck accepts that if the defect consisted of a failure to comply with contractual specifications then limitation would run from delivery; logically, a defective product has necessarily not complied with contractual specifications, such that Prof. Torck’s concession is significant.
2. Prof. Torck nonetheless contends that the duty of vigilance is *“of a completely different nature”* to the duty to deliver a product that complies with its contractual specification, and is concerned with the fault of the manufacturer / seller rather than with the ‘strict liability’ issue of compliance or otherwise with contractual specifications. While that may well be so in the sense that it is a claim which is available to a third party and regardless of the contractual position, when the claim is one brought by a contracting party it is hard to see how the fault is not also one which would be applicable as a contractual claim.
3. Further Prof. Torck’s assertion that because the duty is concerned with the sale of potentially defective products, limitation must run from the date that a buyer discovered the risks the product poses really follows a similar line to the arguments which I have already rejected – and is not consistent with the authorities such as the decisions of 26 June 2002 and 24 January 2006 which point at the date of delivery.
4. The conclusion that delivery is the key date in this context makes sense, because textually, the duty of vigilance under Arts. 1603 and 1604 derives from and is inherent in the obligation of delivery in the contract of sale. Consequently, since Art L. 110-4 runs from the "birth of the obligation" the limitation period must run from the date of delivery or sale. It therefore follows that the same answer is given as was given on those points: the claim (if it exists in this context) is time barred.

*Conclusion*

1. I conclude that the commencement date of the limitation period, for all the French law claims alleged by the Claimants, is the date of delivery and that consequently all those claims are time barred.

**English Law Limitation: section 32(1)(b) section 32(2) and knowledge**

1. In the light of my previous conclusions this aspect of the case is academic. I consider it briefly for completeness.
2. The issue here is whether the Claimants have a sustainable case that Airbus had actual knowledge of the alleged hidden defect in the aircraft type design at the time of the sale and/or delivery of MSN2707 and deliberate wrongdoing in circumstances where it was unlikely to be discovered for the purposes of seeking to disapply, under section 32 of the Limitation Act 1980, the 6 year limitation period under section 5.
3. Paragraph 37 of the RRAPOC pleads that it should be inferred that Airbus knew of the hidden defect in the H225 type as at the date of delivery of MSN2707. The basis for the inference is set out thus:

“(1) Airbus was the designer and manufacturer of the H225s.

(2) In 2000, Airbus requested that the manufacturer of the epicyclic module planet gears in the AS332 L2 model helicopter re-evaluate those gears for use in the more powerful H225. They did so and returned the results of their calculation to Airbus (see paragraph 1.6.8.2 of the AIBN report on the LN-OJF Incident).

(3) Airbus purported to compensate for the additional load that would be placed on the second stage planet gears by reducing the Operational Time Limit applicable to those gears to 4,400 flying hours, down from 6,000 flying hours for the same component in the AS332 L2 (see paragraphs 1.6.8.2 and 2.9.3.2 of the AIBN report).

(4) During its investigations following the LN-OJF Incident, the AIBN was not provided with and did not find any additional substantiating data to support the chosen Operational Time Limit for the second stage planet gears of the H225 (see paragraph 2.9.3.2 of the AIBN report).

(5) According to the AIBN, in the Failure Mode Effects and Criticality Analysis (“FMECA”) prepared by Airbus for the H225 Airbus classified the severity of a potential breakage of the second stage planet gears as “hazardous to catastrophic” and the probability of such breakage as “extremely improbable”. The AIBN found that, given service experience, Airbus should have classified the severity of such breakage as “catastrophic” and should have recognised that the probability of such breakage was greater than “extremely improbable” (see paragraph 2.9.4 of the AIBN report). It is averred that, as a leading international manufacturer of helicopters, Airbus knew or should have known that the classifications they adopted in the FMECA understated the risk.”

1. This passage was originally pleaded in relation to the knowledge component in the French Law claims. However in paragraph 48 of the original Reply an allegation of deliberate misconduct involving actual knowledge under Section 32(2) was made, effectively repurposing the alleged inference of knowledge advanced in paragraph 37, thus:

“(a) As pleaded at paragraph 37 of the RRAPOC, Airbus knew of the hidden defect in MSN2707 specifically and in H225s generally as at the date of the Purchase Agreement (and also, therefore, as at the date of delivery of MSN2707).

(b)As such, in delivering MSN2707 in the defective state in which it was delivered and given the hidden nature of the defect, Airbus deliberately committed the breach of contract pleaded at paragraph 52 of the RRAPOC in circumstances in which it was unlikely to be discovered for some time. That amounted to deliberate concealment of facts relevant to the Claimants’ cause of action pursuant to section 32 of the Limitation Act 1980.”

1. Mr Howard, the deponent for the Claimants, confirms that the Claimants’ pleaded case under Section 32(2) is of “*actual knowledge of the defect*”. However it was clear in the course of argument that the way that the case is sought to be put is not confined to actual knowledge of a defect, but extends to knowledge of a risk. As Mr Pilbrow put it: *“We are talking about actual knowledge … Knowledge of the existence of the defect or knowledge of the risk of the existence of a defect”.*
2. The first question is whether this pleading suffices. Airbus says that proof at trial of the primary facts alleged in sub-paragraphs (1)-(5) of 37 of the RRAPOC would not and could not justify an inference of actual knowledge of the alleged defect or deliberate wrongdoing in 2008: those facts (even if proved) are equally consistent with ignorance.
3. The Claimants say that the pleaded facts should in any event be assumed true for the purposes of the strike-out and summary judgment applications and that on that basis there is a perfectly pleadable case that the inference is one that could properly be drawn at trial, and the Claimants’ case is not certain to fail.
4. There is also an issue of law, as to whether the Claimants can rely on knowledge of risk of a defect in this context at all.
5. Section 32 provides:

“(1) Subject to subsections (3) and (4A)below, where in the case of any action for which a period of limitation is prescribed by this Act, either—

(a) the action is based upon the fraud of the defendant; or

(b) any fact relevant to the plaintiff’s right of action has been deliberately concealed from him by the defendant; or

(c) the action is for relief from the consequences of a mistake;

the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it….

(2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty”

1. The leading case on actual knowledge for the purposes of Section 32(2) is *Cave v Robinson Jarvis & Rolf* [2003] 1 AC 384 (HL). Lord Millett stated:

“24. Given that section 32(2) is (or at least may be) required to cover cases of non-disclosure rather than active concealment, the reason for limiting it to the deliberate commission of a breach of duty becomes clear. It is only where the defendant is aware of his own deliberate wrongdoing that it is appropriate to penalise him for failing to disclose it.

25. In my opinion, [section 32](https://uk.westlaw.com/Document/IEB0352A0E44911DA8D70A0E70A78ED65/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) deprives a defendant of a limitation defence in two situations: (i) where he takes active steps to conceal his own breach of duty after he has become aware of it; and (ii) where he is guilty of deliberate wrongdoing and conceals or fails to disclose it in circumstances where it is unlikely to be discovered for some time. But it does not deprive a defendant of a limitation defence where he is charged with negligence if, being unaware of his error or that he has failed to take proper care, there has been nothing for him to disclose.”

1. These provisions were recently considered in some detail by the Court of Appeal in *Canada Square Operations Ltd v Potter* [2021] EWCA Civ 339. Rose LJ (with whom Males LJ and Flaux CHC agreed) held at [137] that the word “deliberate”, as used in sections 32(1)(b) and 32(2), does not require subjective intention on the part of the defendant; recklessness (as to the concealment or the breach of duty) suffices.
2. It was held at [137(i)] that if the lender realised that there was a risk that the non-disclosure resulted in the relationship being unfair, and it was not reasonable to take that risk, there might be deliberate wrongdoing under Section 32(2). The relevant passage says this:

"My conclusion following this survey is therefore that the pre-1980 case law establishes that recklessness was a sufficient mental element for the old section 26 and the Parliamentary materials relied on by Mrs Potter show that the test under section 32 was not intended to be any more difficult for the claimant to overcome.

Expressed in modern terms, the test is that set out by Lord Bingham in R v G. Applying that test to the present case I would hold that:

(i) Mrs Potter can rely on section 32(2) if she can show that Canada Square realised that there was a risk that their failure to disclose the fact and extent of the commission resulted in their relationship with her being unfair within the meaning of section 140A, and it was not reasonable for them to take that risk of creating an unfair relationship; or

(ii) Mrs Potter can rely on section 32(1)(b) if she can show that Canada Square realised that there was a risk that they had a duty to tell Mrs Potter about the commission charge, such that their failure to do so meant that they deliberately concealed that fact from her."

1. There is an issue between the parties as to whether at [137] Rose LJ makes a general determination as to “the test” under section 32. The Claimants say that she did do so. Airbus submits that the case is not relevant to the present situation - where the Claimants’ allegation is (and has to be) one of actual knowledge.

*Discussion*

*The available inference*

1. As to the first issue, I am entirely satisfied that the pleaded case is not sufficient to justify an inference of actual knowledge.
2. I accept the submission that the allegation made as regards actual knowledge of a defect is one of the utmost seriousness and that – particularly bearing in mind the wording of s. 32(1) – the authorities on pleading fraud should be borne well in mind. In that context it is established that for a valid plea of fraud/dishonesty *“[t]he correct test is whether, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence. There must be some fact or facts which tilts the balance and justifies an inference of dishonesty.”* See *Barrowfen Properties v Patel* [2020] EWHC 1145 (Ch), at [7], Birss J (by reference to *Three Rivers DC v Bank of England* [2003] 2 A.C. 1 and *JSC Bank of Moscow v Kekhman* [2015] EWHC 3073 (Comm), at [12]-[23]).
3. That is not in any tension with, but rather entirely consistent with the authorities which the Claimants cited, emphasising the high bar for a strike out; a case in dishonesty is properly described as unwinnable if, even if the pleaded facts were proved, an inference of honesty/negligence would be more likely than one of dishonesty. Otherwise one is permitting the pleading of fraud on a speculative basis; and that is not permissible.
4. Here, if one runs through the pleaded facts, the inescapable conclusion is that even if all of these facts were proved the court would conclude that there was insufficient evidence to justify a conclusion that Airbus had known of a defect. The inference of dishonesty is not more likely than negligence. There is no fact which tilts the balance.
5. Indeed it is noteworthy that (to return briefly to a point I made earlier in this judgment – see paragraph 29) there is no explanation in the pleaded case of what the defect is which is said to have been known of. The plea effectively does no more than suggest that an error has been revealed by a thorough *ex post facto* investigation. There is not in the pleading or in the evidence any other material to support the allegation of actual knowledge. There is no reliance on any documentary evidence. There is no pleading or evidence saying why a conclusion of actual knowledge should flow from these very limited facts.

*Knowledge of a risk of a defect*

1. How does the matter change if one recasts the case as knowledge of a risk? This is significant because if there were a feasible case based simply on knowledge of some risk of a defect I would probably conclude that the pleading would be sufficient for the knowledge component.
2. However that begs the question of whether there is any feasible claim based on risk pleaded. That throws into focus the question of what *Canada Square* decided.
3. On this I conclude that Airbus’s point. that the position is very different here to that in *Canada Square*,and that the judgment should not be seen as permitting a case of deliberate concealment to be run on the basis of recklessness as to risk only, is well founded.
4. *Canada Square* was not about deliberate concealment of knowledge of a risk. The issue in that case was about "deliberation". The case was about whether the defendant lender “deliberately” withheld from the borrower the fact that over 95% of the premium for the PPI cover she purchased with the loan was being paid to the defendant. The fact said to have been withheld was a concrete fact. The relevant claim was that the non-disclosure of that fact made the relationship “unfair” for the purposes of Section 104A of the Consumer Credit Act; and that the requirement of “deliberate” was met if it knew that there was a risk that the failure to disclose led to a risk that the relationship was unfair.
5. There are two major points of distinction between that case and this. The first is that, in that special case, the non-disclosure related to the cause of action and the allegation of deliberate wrongdoing. The argument here is very different; it is not about whether Airbus was aware of the duty to deliver a safe aircraft – is about whether it actually knew of the alleged defect when selling it, and sold it in that knowledge.
6. But secondly - and relatedly - the question of risk was not there fundamental to what was being argued as regards the fault. Risk only entered into the debate by a sidewind. At [87], in the context of considering what was the correct mental element for section 32, Rose LJ said:

"The third potential test is recklessness with both a subjective and objective element. This is the mental element of recklessness described by Lord Bingham of Cornhill at [41] of R v G and anor [2003] UKHL 50, [2004] AC 1034. In that case the House of Lords considered the meaning of recklessness for the offence of arson. The trial judge had directed the jury that (i) recklessness would be established if it would have been obvious to a reasonable person watching the small fire set by the defendants that it might spread to destroy the premises that had in fact been destroyed; (ii) that they must leave out of account that what was obvious to the reasonable bystander might not have been obvious to the defendants who were aged 11 and 12; and (iii) as to the state of mind of the two boys, the jury must be satisfied either that they had given no thought to there being such a risk or that, having recognised that there was such a risk, they none the less went on and did the act. Having reviewed the earlier case law, Lord Bingham (with whom the other members of the Judicial Committee agreed) held that the correct test was that a person acts recklessly with respect to a circumstance when he is aware of a risk that it exists or will exist and it is, in the circumstances known to him, unreasonable to take the risk. A person acts recklessly with respect to a result when he is aware of the risk that it will occur and it is, in the circumstances known to him, unreasonable to take that risk."

1. Against this background at [105] she stated that she disagreed with the "*submission that Cave decides that recklessness is not sufficient for deliberate concealment; it was addressing a different question"*. It was also this consideration of what is meant by "deliberate" which gives rise to the wording at [137].
2. It follows that *Canada Square* is not deciding that knowledge of a risk is enough to give rise to a s. 32 defence. What it is saying is that a known fact may be said to be deliberately concealed if there was knowledge of a risk that not disclosing that fact was a breach of duty.
3. Where does this leave the pleading and the case here? A claim based on risk might arise if it were said (by analogy with *Canada Square*) that the risk of existence of a defect was not disclosed in knowledge that there was a risk that the non-disclosure of that risk was a breach of duty. Where knowledge of a defect is in issue there is no question of knowledge of a risk that there is a breach of duty, because plainly there is such a breach, in circumstances where there is a complex procedure for certifying safety. But matters are more difficult if all that is known is a risk of a defect. For example it is plain that some marginal risk was appreciated and accepted by the safety authorities; nothing is without risk. The question would have to be: is knowledge and non-disclosure of some degree of greater risk, short of knowledge of a defect, capable of being a breach of duty such that ignoring that possibility is reckless behaviour which can be equated with deliberation.
4. Such a case might be possible; the problem for the Claimants is that they have not begun to plead it. There is no plea of a mental element. There is no explanation of the extent of the risk and why in the circumstances it was not reasonable to run the risk so as to show an arguable breach of duty. It is not enough to say *"knowledge of risk of defect" = "deliberate concealment"*. That is to elide the risk of defect with the breach of duty; and that is a logical and legal error. To do so would be to elevate acts falling short even of negligence to deliberate concealment.
5. What was ultimately submitted is that sufficient could be found in the pleading already to amount to recklessness. It was suggested that the necessary material was found in paragraphs 37(3) to 37(5) of the RRAPOC, i.e. that:
   1. Airbus set the operational time limit without there being any substantiating data to support it. The Claimants submitted that it can be inferred that in setting those time limits without supporting data, Airbus knew there was a risk that they were set too high, and that was a risk that it was unreasonable for Airbus to run.
   2. Airbus wrongly classified the risk in the FMECA if, as alleged, Airbus knew the risks in relation to the failure of the second stage planet gears were greater than disclosed in the FMECA that are provided to the regulator, that was a risk it was not reasonable for Airbus to run.
6. However it seems to me that this amounts to no more than a plea of negligence. A risk of error is not a risk of breach of duty. It is insufficient material to amount to a case in deliberate concealment.
7. It follows that I conclude that the pleaded case on section 32 must fail and falls to be struck out.

**The summary judgment application**

1. In the circumstances, the summary judgment application, which engages with the factual base for the case, does not arise. In such circumstances it is particularly difficult to second-guess what the result would have been if the opposite conclusion had been reached on strike out and I do not propose to deal with this point at any length. It is likely that - had I concluded that the strike out hurdle had been surmounted - I would not have been minded to grant summary judgment; however the case would have been close to the line and it seems probable that I would have concluded that this was a case for a conditional order.
2. I give this indication because there is a real mismatch between the seriousness of the allegations and the evidence base. On the one hand, this is an allegation of wrongdoing at a very high end of the scale of seriousness. It would involve an allegation that Airbus marketed not just this specific aircraft but this entire aircraft type, for the carriage of passengers, knowing that it was defective, from before 2004 until at least 2016, and knowingly risked their safety. It seems likely also to carry with it an allegation that Airbus also misled at least the regulator (EASA), who was responsible for certifying the aircraft as airworthy and for continuing airworthiness oversight of the type; and perhaps also the AIBN investigators.
3. Against this there is an evidence base which suggests that narrative lacks plausibility. In particular:
   1. In seeking type approval for the design from EASA, Airbus had to satisfy EASA, in an application process which took 4 years and involved sharing its thinking on every aspect of the design safety with EASA.
   2. Airbus's contemporary design thinking was fully investigated by the AIBN, as its report into the incident demonstrates. The Convention on International Civil Aviation (ICAO) Annex 13 sets common international standards for air accident investigation. The result is that AIBN investigators have rights to take evidence and to summon witnesses; they report independently on the evidence they take and their reports are admissible as evidence with particular value in civil proceedings. The AIBN report does not begin to suggest that there was actual knowledge.
   3. M. Martin, a Senior Accident Investigator with Airbus who was directly involved as a technical adviser in the investigations in respect of the H225 type MGB epicyclic gear design, including the 2-year AIBN investigation into LN-OJF, has given evidence that, in all his investigations and the documents he saw, he had seen nothing to suggest actual knowledge, even of error.
4. However as I have already indicated, this indication in relation to summary judgment is solely for completeness. As I have stated in the earlier sections of this judgment, I conclude that the Preliminary Issues fall to be answered thus:
   1. *Were the French-law obligations that the Claimants allege, at paragraph 9 of the RRAPOC, were owed by Airbus to CHCI under the Purchase Agreement, incorporated into the Novation Agreement between RBS Aero and Airbus?* Yes
   2. *Are English-law limitation arguments available in relation to all of the Claimants’ claims (or only the English law claims)?* No (English Law claims only)
   3. *(If no inclusion of French Law terms) Was the term alleged in paragraph 13 of the RRAPOC implied into the Novation Agreement?* Yes.
   4. *Are the Claimants’ claims for breach of French-law warranties / duties time-barred as a matter of French law?* Yes.
   5. *To the extent that English-law limitation is applicable, should the Claimants’ answer to the limitation defence (based on s.32 of the Limitation Act 1980) be summarily dismissed?* Yes.