BETWEEN:

YUKON SOUTHERN AIR TRANSPORT LIMITED AND PHOENIX ASSURANCE COMPANY LIMITED ..... SUPPLIANTS;

1940
Sept 9 & 10.
—
1941
June 18.

AND

HIS MAJESTY THE KING..... RESPONDENT.

Crown — Petition of Right — Negligence — Exchequer Court Act, R.S.C., 1927, c. 34, s. 19, ss. 1 (c)—War Measures Act, 1914, R.S.C., 1927, c. 206, secs. 7 & 8—Evidence—Onus of proof—Res ipsa loquitur—Aeroplane accident—Damages—Subrogation.

The action is one to recover from the respondent damages suffered by the suppliant Yukon Southern Air Transport Limited through the

1942

YUKON SOUTHERN AIR TRANSPORT LTD. ET AL. v. THE KING.

total loss of an aeroplane owned by it due to the alleged negligence of officers and servants of the Crown acting within the scope of their duties or employment.

The respondent pleaded *inter alia* that this Court was without jurisdiction to entertain suppliants' petition.

The Court found that the accident was attributable to certain officers or servants of the Crown acting within the scope of their duties or employment.

Held: That the maxim *res ipsa loquitur* is applicable in suits against the Crown and that the onus was upon the respondent to establish absence of negligence on the part of its officers and servants, which he failed to do.

2. That the War Measures Act, 1914, R.S.C., 1927, c. 206, does not restrict the jurisdiction of this Court.

PETITION OF RIGHT by suppliants herein to recover from the Crown damages for the loss of an aeroplane due to the alleged negligence of officers and servants of the Crown acting within the scope of their duties or employment.

The action was tried before the Honourable Mr. Justice Angers, at Vancouver.

J. J. O'Connor, K.C., C. Becker and *H. E. Crowle* for suppliants.

A. B. McDonald, K.C. and *R. V. Prenter* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

ANGERS J. now (June 18, 1941) delivered the following judgment:

The suppliants, by their petition of right, seek to recover from His Majesty the King the sum of $49,260.48 with interest and costs.

The sum of $49,260.48 represents damages which the suppliant Yukon Southern Air Transport Limited is alleged to have suffered as a result of a collision between a Hawker Hurricane aeroplane belonging to the respondent and a Ford tri-motor aeroplane, property of the Yukon Southern Air Transport Limited, at the Vancouver airport at Sea Island, province of British Columbia, due to the negligence of officers and servants of the Crown acting within the scope of their duties or employment.

The Phoenix Assurance Company Limited was added as co-suppliant as it had allegedly paid to the Yukon Southern Air Transport Limited, in respect of the loss suffered by the latter, the sum of $15,000 pursuant to the terms of an insurance policy.

[The learned Judge here refers to the pleadings and continues].

In reply to the respondent's statement in defence, suppliants plead the Petition of Right Act (R.S.C., 1927, chap. 158) and the Exchequer Court Act (R.S.C., 1927, chap. 34) and particularly subsection 1 (*c*) of section 19 of the Exchequer Court Act as amended by section 1 of chapter 28 of the Statutes of Canada, 1938, and say that the Court has jurisdiction to entertain the present petition.

The evidence discloses the following facts.

On March 2, 1939, the Ford tri-motor aeroplane above mentioned, property of the suppliant Yukon Southern Air Transport Limited, was parked at the spot indicated by an X and initials G.A.M. on the plan of the Vancouver Airport marked 1 for identification with the examination for discovery of George Albert Mercer and filed at trial as exhibit 1. The parking of this aeroplane as well as of other aeroplanes operated by the Yukon Southern Air Transport Limited was a common occurrence with the permission of the authorities of the Sea Island Airport, at Vancouver, which, by the way, was the property of the Crown.

On the said date Sergeant Pilot Robert Lawrence Davis, in charge of a Hawker Hurricane aeroplane, property of the Crown, endeavouring to take off from the East-West runway drove it off the said runway and brought it into collision with the said Ford aeroplane and demolished it beyond repair. The Hawker Hurricane aeroplane, as a result of the collision, caught fire and was entirely destroyed.

It was submitted on behalf of respondent that this Court has no jurisdiction to hear the present case; in support of his contention counsel relied on the War Measures Act, 1914, R.S.C., 1927, chapter 206, concluding from the fact that, in virtue of section 7, it grants jurisdiction to, among others, the Exchequer Court to fix compensation for appropriation by His Majesty of property or the use thereof despite the existing provisions contained in the Expropriation Act, R.S.C., 1927, chapter 64, that it means to exclude

1942

YUKON SOUTHERN AIR TRANSPORT LTD. ET AL. v. THE KING.

Angers J.

the jurisdiction of this Court in all other matters consequent upon activity authorized under the War Measures Act. I may note incidentally that section 7 is not the only section of the Act dealing with the powers of the Court but that section 8 also contains provisions in that respect concerning the seizure and forfeiture of ships, vessels and goods dealt with contrary to any order or regulation made under the Act; it seems to me apposite to quote these sections:

> 7. Whenever any property or the use thereof has been appropriated by His Majesty under the provisions of this Act, or any order in council, order or regulation made thereunder, and compensation is to be made therefor and has not been agreed upon, the claim shall be referred by the Minister of Justice to the Exchequer Court, or to a superior or county court of the province within which the claim arises, or to a judge of any such court.
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> 8. Any ship or vessel used or moved, or any goods, wares or merchandise dealt with, contrary to any order or regulation made under this Act, may be seized and detained and shall be liable to forfeiture, at the instance of the Minister of Justice, upon proceedings in the Exchequer Court or in any superior court.

I think that the contention advanced by counsel for the respondent that the Court "lacks jurisdiction in matters consequent upon activity authorized under the War Measures Act other than that given by sec. 7 (and sec. 8 presumably) of that statute" is unfounded. To abolish the jurisdiction of the Court, in time of war, in all matters not mentioned in the War Measures Act, it would require a definite and specific statement of the law; there is no such statement in the statutes. I do not believe that the object of the War Measures Act was to restrict the jurisdiction of the Court; in fact it rather increased it.

The Court is competent to hear the present case under the provisions of section 19 (*c*) of the Exchequer Court Act, assuming that the accident was the result of the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment; I shall deal with this question, which is the main one at issue, in a moment.

Counsel for the suppliants submitted that the maxim *res ipsa loquitur* applies in the present case and that it was incumbent upon the respondent to establish that the collision had not been the result of the negligence of an officer or servant of the Crown acting within the scope of

his duties or employment. On the other hand, it was urged on behalf of the respondent that the said maxim does not apply to the Crown seeing that paragraph (*c*) of subsection 1 of section 19 of the Exchequer Court Act (R.S.C., 1927, chap. 34), which determines the responsibility of the Crown in cases of accidents, enacts formally that every claim against the Crown arising out of any injury to property must, in order to be valid, result from the negligence of an officer or servant of the Crown. Counsel for respondent contended that the only conclusion to draw from section 19 (*c*), with respect to the burden of proof, is that the suppliant is always bound, whatever the facts may be, to prove negligence on the part of an officer or servant of the Crown while acting within the scope of his duties or employment. I must say that I cannot share this view; such an interpretation of paragraph (*c*) of subsection 1 of section 19 seems to me too strict and rigid. I am inclined to believe that the maxim applies in the case of an accident causing death or injury to the person or to property in so far as negligence is concerned; the suppliants however will have to prove that the person who caused the accident was an officer or servant of the Crown acting within the scope of his duties or employment.

There are very few decisions concerning the applicability of the maxim in suits against the Crown. In the case of *Dubé* v. *The Queen* (1), in which the claimant was seeking to recover damages for a personal injury suffered as the result of the derailment of a train of the Intercolonial Railway owned and operated by the Government, counsel for the suppliant, at the opening of the case, made the statement that it would be sufficient for him to prove that the suppliant was a passenger on the train and that he was injured as a result of the accident and that the Crown then would have to answer the *prima facie* case of negligence made out against it; replying to this statement of counsel, Burbidge J. made the following observations (p. 151):

> I do not think that is sufficient in a petition against the Crown in an accident on a Government railway. You will, I think, have to go further and show in the terms of the statute that the accident was occasioned by the negligence of some officer or servant of the Crown while acting within the scope of his duties or employment.

(1) (1892) 3 Ex C.R. 147.

1942

YUKON SOUTHERN AIR TRANSPORT LTD. ET AL. v. THE KING.

Angers J.

In the case of *Western Assurance Company* v. *The King* (1), in which the suppliant subrogated to the rights of the Dominion Bridge Company, owner of the scow *Dominion No. 2,* which had been sunk in the Lachine canal, a public work of Canada, by a submerged log, Cassels J. expressed the following opinion (p. 293):

> In the case of *Dubé* v. *The Queen* (2), it is laid down that the suppliant must prove affirmatively that there was negligence. The fact of the accident is not sufficient to establish a *prima facie* case of negligence.

Counsel for the suppliant, in support of his contention that the maxim applies in cases against the Crown, relied on the decision of the Supreme Court in *Montreal Transportation Company* v. *The King* (3); this decision does not hold that the maxim is applicable.

Anglin J., dealing with the subject, says (p. 812):

> I find it unnecessary to determine whether the doctrine *res ipsa loquitur* is or is not applicable against the Crown. The authorities relied upon for the contention that it can never be invoked where the Crown is defendant in my opinion do not so decide. With the trial Judge, I am of the opinion that it does not apply in the present instance and that the Crown has discharged any burden of proof cast upon it.

Mignault J., referring to the same question, expresses a similar opinion (p. 816):

> It is unnecessary to discuss in this case the question whether the so-called rule *res ipsa loquitur* applies where the Crown is liable for the negligence of its servants. It is moreover no more than a presumption of negligence arising out of a *prima facie* case, and if the Crown had to rebut this presumption and answer this case, it has in my opinion done so.

Reference may also be had beneficially to the case of *Sincennes-McNaughton Lines Ltd.* v. *The King* (4). The suppliant, by its petition of right, sought to recover from the Crown damages for injury to one of its tug boats as a result of the gates between a basin in the Lachine canal and lock No. 1, in which she was moored, giving way.

The learned President of the Exchequer Court, after commenting upon the observations of Lord Dunedin in the case of *Ballard* v. *North British Railway Co.* (5) and those of Sir Lyman Duff (then Mr. Justice Duff) in the case of *Montreal Transportation Co.* v. *The King* (6), previously mentioned, expressed himself as follows (p. 157):

(1) (1909) 12 Ex. C.R. 289.
(2) (1892) 3 Ex. C.R. 147.
(3) (1924) 4 D.L.R. 808.
(4) (1926) Ex. C.R. 150; (1928) S.C.R. 84.
(5) (1923) S.C. (H.L.) 43, at 53.
(6) (1924) 4 D.L.R 808.

On the whole, I think it is unnecessary to debate in cases like the one at present before me. the applicability of this maxim when we have an authoritative rule of the common law, plainly and succinctly laid down for us in the well-known case *Scott* v. *London Dock Company* (1). There the plaintiff Scott sued the defendant company, for personal injuries sustained in an accident, due to the negligence of the defendant's servants, in operating a machine for lowering goods from a warehouse of the defendant company to the street. Erle C.J., delivering the judgment of the majority of the court, said:—

"There must be reasonable evidence of negligence . . . But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

Newcombe J., who delivered the judgment of the Supreme Court affirming the judgment of the President of the Exchequer Court, stated (p. 85):

The evidence is found to exclude the suggestion of any defect in the construction of the gates, but it is found that they were not well closed, or, as said by the learned trial judge, that "they broke owing to improper mitring" His view was that when, in the process of closing, the gates were swung together by the lockmen under the direction of the lockmaster, they did not meet evenly, and that in consequence the bearing surfaces did not properly articulate. The witnesses who were charged with the work maintained that the gates were safely closed. But the circumstances of the case, the appearance of the gates after the accident, and the injuries which they had received, were consistent with and suggestive of the view that the damage was produced by pressure of the gates upon each other when in contact, but not truly joined; and there was ample evidence that the closing ought to have been effected with care in order to avoid such a result, and that a faulty bevel- or mitre-joint would be potential and not improbable cause of their failure to withstand the great pressure to which they became subject when the level of the water in the lower lock was reduced.

It must be remembered that it was the duty of the lockmaster and his men to see that an accident did not happen through lack of reasonable and proper care in the working of the gates, and the fact that such an extraordinary occurrence took place from a cause which, upon the evidence, may probably have consisted in their neglect, affords the basis of a finding, especially when, as in this case, there is no proof of any competing cause. I think there is here a preponderance of probability which constitutes sufficient ground for the finding of the learned trial judge.

As I have already said, I am of opinion that the maxim *res ipsa loquitur* applies in suits against the Crown, save the duty on the part of the suppliant to show that the cause of the accident is attributable to an officer or servant of the Crown acting within the scope of his duties or employment.

(1) (1865) 3 H. & C. 596 at p. 601.

1942

YUKON SOUTHERN AIR TRANSPORT LTD. ET AL. v. THE KING.

Angers J.

The matter at issue is governed by paragraph (*c*) of subsection 1 of section 19 of the Exchequer Court Act, which reads thus:

19. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:

(*c*) Every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.

After a careful perusal of the law and precedents, I am satisfied that Fullerton and Davis were, at all times material herein, officers and servants of the Crown within the meaning of paragraph (*c*) of subsection 1 of section 19 and that consequently, if the accident were caused by their negligence or the negligence of either of them, the respondent is responsible therefor. See *Larose* v. *The King* (1); *Moscovitz* v. *The King* (2). In the latter case Sir Lyman Duff C.J. expressed the following opinion (p. 408):

If you interpret "public work," "chantier public," as the learned President has done, as embracing a public service of that kind, then the case, of course, falls within the statute.

[The learned Judge here reviews the evidence given at trial and on discovery and continues].

The respondent, as we have seen, rests his defence on inevitable accident. The suppliants, alleging negligence on the part of officers of the Crown, rely on the maxim *res ipsa loquitur*. Having reached the conclusion that the maxim applies in suits against the Crown, the present case is one in which, in my opinion, the maxim is particularly applicable. The respondent's aeroplane collided with the Ford tri-motor of the suppliant Yukon Southern Air Transport Limited, which was stationary. In this respect the following decisions seem to me relevant: *United Motors Service, Inc.* v. *Hutson et al.* (3); *Fosbroke-Hobbes* v. *Airwork Ltd. et al.* (4).

In the case of *United Motors Service, Inc.* v. *Hutson et al.* (*ubi supra*), Duff C.J. made the following observations (p. 297):

The phrase *res ipsa loquitur* is, however, used in connection with another class of cases where, by force of a specific rule of law, if certain facts are established then the defendant is liable unless he proves that

(1) (1901) 31 S.C.R. 206.
(2) (1934) Ex. C.R. 188; (1935) S.C.R. 404.
(3) (1937) S.C.R. 294
(4) (1936) 53 T.L.R. 254.

1942

YUKON SOUTHERN AIR TRANSPORT LTD ET AL. v. THE KING

Angers J.

the occurrence out of which the damage has arisen falls within the category of inevitable accident. One of these cases is that in which a ship in motion has run into a ship at anchor. The rule of law in such a case is set forth by Fry L.J. in *The Merchant Prince* (1):

"It is a case in which a ship in motion has run into a ship at anchor. The law appertaining to that class of case appears to be clear. In the case of *The Annot Lyle* (2), it was laid down by Lord Herschell that in such a case the cause of the collision might be an inevitable accident, but unless the defendants proved this they are liable in damages. The burden rests on the defendants to shew inevitable accident."

The remarks of Goddard J. in the case of *Fosbroke-Hobbes* v. *Airwork Ltd. et al.* (*ubi supra*) at page 255 are well in point:

That this disastrous accident was due to the fault of the pilot is, in my opinion, abundantly clear. In the first place, I hold that the doctrine *res ipsa loquitur* applies. While it is unnecessary to decide whether the doctrine would apply to any accident occurring to an aeroplane in the course of a prolonged flight, here we have a disaster at the very beginning, just as the machine had taken off and well before it had attained the height at which the journey would be performed. It was an accident which, I think, all are agreed ought not to have happened. It was argued that I ought not to apply this doctrine to an aeroplane, a comparatively new means of locomotion, and one necessarily exposed to the many risks which must be encountered in flying through the air, but I cannot see that this is any reason for excluding it. Large numbers of aeroplanes are daily engaged in carrying mails and passengers all over the world and, as is well known, they arrive and depart with the regularity of express trains. They have indeed become a commonplace method of travel, supplementing, though not superseding, rail and sea transport. Railways were just as great an innovation when they took the place of the stage coach, yet the courts found no difficulty in applying to them by the year 1844 the same doctrine which had formerly been applied to stage coaches. see *Carpue* v. *London and Brighton Railway Company* (3).

Assuming, as I do, that the maxim *res ipsa loquitur* is applicable in suits against the Crown and that it applies particularly in the present instance, the onus was upon the respondent to establish absence of negligence on the part of its officers and servants. I do not think that the respondent has succeeded in doing that; on the contrary, after a careful perusal of the evidence, I believe that the weight thereof is favourable to the suppliants' contention. I am satisfied that the accident is attributable to the negligence of officers or servants of the Crown acting within the scope of their duties or employment, namely, Squadron Leader Elmer G. Fullerton and Sergeant Robert Lawrence Davis.

(1) (1892) P. 179, at 189. (2) (1886) 11 P.D. 114.
(3) (1844) 5 Q.B. 747.

1942

YUKON SOUTHERN AIR TRANSPORT LTD ET AL. v. THE KING.

Angers J.

Fullerton was negligent in allowing Davis to fly a Hawker Hurricane when he knew that the latter had no experience with this type of aeroplane, that the Hawker Hurricane was more than any other plane yet flown by Davis subject to torque, that as a consequence the Hawker Hurricane, unless properly driven, was liable to swerve to the left instead of following a straight line and to hit any obstacle in its way, e.g., the Ford tri-motor or the administration building, and in not advising Yukon Southern Air Transport Limited that its aeroplane was liable to be struck and that it should be removed and parked elsewhere.

Davis was negligent in not properly listening to or at least not following the instructions which I am inclined to believe were given to him by Fullerton, in putting on inconsiderately full power at the start, in not shutting off the throttle as soon as he noticed that his plane was leaving the runway and swerving to the left and in not stopping it when he had plenty of room to do it; I may note incidentally that on this last point all the witnesses are unanimous.

There remains the question of determining the damages suffered by the suppliants as a consequence of the accident.

It is established beyond doubt that the Ford tri-motor aeroplane of the Yukon Southern Air Transport Limited was a total loss, save for the pontoons, the skis, the radio equipment and spare engines and propellers. It is also abundantly proved that the suppliant Yukon Southern Air Transport Limited endeavoured to replace the said aeroplane by a similar machine but that it did not succeed. The Ford tri-motor was obsolete and was no longer manufactured; more modern and improved types of machines had taken its place. On the other hand, the evidence discloses that if this all metal aeroplane had been kept in good condition and carefuly handled it could have lasted almost indefinitely. Yukon Southern Air Transport Limited made a thorough investigation, both in Canada and in the United States, to secure another Ford tri-motor or another plane of the same type, but was unable to get one and it had to purchase a Barkley Grow at a much higher cost.

Notwithstanding the fact that the Ford tri-motor aeroplane was giving to Yukon Southern Air Transport Limited entire satisfaction and that it could be depended upon for

an almost indefinite period of time, provided it was properly taken care of, I do not think that the said suppliant is entitled to recover from the respondent the price which it paid for its Barkley Grow; it has a new, modern and better machine than it had before the accident; if Yukon Southern Air Transport Limited were awarded the sum which it paid for the Barkley Grow, it would be put in a more advantageous position than the one in which it was prior to the accident.

One cannot, in the present circumstances, get at the market value; there was no market for this obsolete type of plane. The suppliant Yukon Southern Air Transport Limited is however entitled, as I think, to full and complete indemnity for the loss it has sustained. After giving the matter my best consideration, I have reached the conclusion that the damages suffered by the said suppliant comprise the value of the Ford tri-motor aeroplane to its owner at the time of the accident, which, in my opinion, includes the purchase price and the amount of repairs, improvements and additions made thereto, and the accessories thereof as well as the revenue derivable therefrom lost as a result of being deprived of its use. See *The Harmonides* (1); *The Ironmaster* (2); *F. K. Warren & R. P. and W. F. Starr Limited* v. *The Ship Perene* (3); *The Trustees of the Clyde Navigation* v. *The Bowring Steamship Company Limited* (4).

[The learned Judge here considers the various items of damage suffered by Yukon Southern Air Transport Limited and continues.]

The damages suffered by Yukon Southern Air Transport Limited as a consequence of the collision in question amount to $20,025.17.

The evidence shows that the suppliant Phoenix Assurance Company Limited paid to Yukon Southern Air Transport Limited the sum of $14,500 in virtue of an insurance policy issued by the former to McConachie Air Transport Limited and United Air Transport Limited, dated January 1, 1939 (exhibit 5). As appears by a document attached to the said policy, dated June 23, 1939, the name of the assured was changed to Yukon Southern Air Transport

(1) (1903) 72 L J P. 9
(2) (1859) 166 E R. 1206.
(3) (1924) Ex C.R. 229, at 233; (1925) S.C.R. 1.
(4) (1929) Sess. Cas. 715.

1942

YUKON SOUTHERN AIR TRANSPORT LTD ET AL. v. THE KING.

Angers J.

Limited. The evidence also discloses that Phoenix Assurance Company Limited received $1,500 from salvage. This reduces the total of the damages recoverable by the suppliants from the respondent to $18,525.17.

The policy contains the usual clause regarding subrogation, which reads thus:

> 18. This company may require from the assured an assignment of all right of recovery against any party for loss or damage to the extent that payment therefor is made by this company.

No evidence was adduced to show that the assured Yukon Southern Air Transport Limited had assigned to the insurance company its claim against the respondent. Nevertheless, I am of opinion that the principle of subrogation applies in the present case where the suppliant Yukon Southern Air Transport Limited obtains a judgment against the respondent for the full amount of the damages which it has suffered and will eventually recover the same, assuming that the judgment which I am now delivering is upheld. The assured is entitled to be fully indemnified for the loss it has suffered but is entitled to no more: Porter's Laws of Insurance, 8th ed., pp. 223 *et seq.;* Laverty, The Insurance Law of Canada, 2nd ed., pp. 329 *et seq.; Globe & Rutgers Fire Insurance Company* v. *Truedell* (1). Stone's Insurance Cases, vol. I, p. 626.

I believe it is convenient to quote a passage from Laverty's treatise, which is clear, concise yet comprehensive, and well in point (p. 329):

> The principle of subrogation applies in all cases where a third party is liable to make good the loss as well as the insurer, and it is immaterial whether the liability of such third party arises from contract, or rests upon delict or negligence. But it goes further than that in indemnity insurance, for it then becomes merged into the principle of indemnity, so that under no condition of affairs can the insured be twice indemnified for the same loss. Therefore, the insurer is not only substituted for the insured in respect of any indemnity the latter is entitled to recover from the *tort feasor,* but he is entitled to recover from the insured, after paying him his entire loss, any indemnity over and above the actual loss the latter has received or may receive from a third party causing the loss, whether such indemnity be paid or handed over voluntarily or not. The true test of the right to subrogation is whether the enforcement of the right will diminish the insurer's loss.
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> Under the English law subrogation is an equitable right and partakes of all the ordinary incidents of such rights, one of which is that in administering relief, the court will regard not so much the form as the substance of the transaction. The primary consideration is to see that

(1) (1927) 60 O.L.R. 227, at 237.

the insured gets full compensation for the property destroyed and the expenses incurred in making good his loss. The next thing is to see that he holds any surplus for the benefit of the company.

In the absence of anything to the contrary, upon payment of the loss the right of subrogation follows without any assignment from the insured, and the insurer is entitled to bring action in the insured's name.

The authorities mentioned in the above quotation may be consulted with benefit.

There will be judgment in favour of the suppliants against the respondent for the sum of $18,525.17, with interest at the rate of 5% per annum from the date on which the petition of right was left with the Secretary of State, such date to be determined by the Registrar when the minutes of the judgment are settled, the said sum to be paid as follows: $5,525.17 to the suppliant Yukon Southern Air Transport Limited and $13,000 to the suppliant Phoenix Assurance Company Limited.

The suppliants will be entitled to their costs.

Judgment accordingly.