

Alafco Irish Aircraft Leasing Sixteen Ltd v Hong Kong Airlines Ltd



No Substantial Judicial Treatment

Court

Queen's Bench Division (Commercial Court)

Judgment Date

22 November 2019

No.CL-2019-000329

High Court of Justice Queen's Bench Division Commercial Court

[2019] EWHC 3668 (Comm), 2019 WL 06222224

Before: Mrs Justice Moulder

Friday, 22 November 2019

Representation

Counsel appeared on behalf of the Claimant/Applicant.

Counsel appeared on behalf of the Defendant/Respondent.

Judgment

Mrs Justice Moulder:

1. Dealing now with the principle of costs, and in particular whether or not costs should be ordered on the indemnity basis, the claimant is seeking its costs of the proceedings on an indemnity basis, relying either on the conduct of the defendant in these proceedings, or on clause 25.4.2 of the lease.

2. In relation to the issue of conduct, it was submitted for the claimant that the defendant in this case filed an acknowledgement of service indicating that it would defend the claim. It then sought repeated extensions of time to file its defence. At the hearing of the application before HHJ Pelling QC for an application of time, the defendant indicated that it required a thorough investigation into both liability and quantum in order to prepare its defence. It was submitted for the claimant that the defendant was merely buying time; that there had never been a real defence; the invoices which were submitted by the claimant to the defendant were never challenged. As a result, the claimant has been put to considerable cost in responding to the defence; the cost of proving the amounts claimed; and the production of the tables by Mr Garg.

3. It was further submitted for the claimant that in relation to the summary judgment application, it was only in November that the defendant indicated that it would be appearing at this hearing, however, no indication was given by the defendant as to what points would be taken, and accordingly considerable preparation was made in order to anticipate matters which might be raised by the defendant. In the event, the summary judgment application was largely conceded, apart from the opposition to the increased amount.

4. For the defendant, it was submitted that although they did seek extensions in order to file the defence, counsel for the defendant did not in any way mislead the court or the other side as to the scope of the defence. Before HHJ Pelling QC, counsel merely stated that he was unable at that point to articulate the defence. Counsel submitted that the defendant was entitled to submit the claim to a thorough examination in order to see if there were any defences. After the defence had been filed, counsel for the defendant submitted that the defendant limited itself to arguments that were available. It did not put in evidence which would have wasted time, and overall its conduct did not take this "out of the norm".

5. In the alternative, the claimant relies on clause 25.4.2 of the lease. That provision, so far as material, states:

"The Lessee shall pay to the Lessor on demand all reasonable costs and expenses (including reasonable legal expenses) incurred by the Lessor or any Financier in connection with any amendment to, or the granting of any waiver or consent or the preservation of any rights of the Lessor under, any Relevant Document required in writing by the Lessee."

I note that the definition of "Relevant Document" includes the lease and side letter.

6. Counsel for the claimant relied on LJ Briggs in *Macleish v Littlestone* [2016] EWCA Civ 127 at [38] to [44] where the Court of Appeal ordered indemnity costs relying on a contractual provision. Counsel for the claimant drew the court's attention to the judgment of Cranston J in *Euro-Asian Oil v Crédit Suisse* [2017] Lexis citation 26, which distinguished *Macleish* on the basis that the indemnity provision considered by Briggs LJ did not contain the word "reasonable". However, counsel for the claimant maintained that this court should follow the approach of Briggs LJ and order costs under the relevant contractual provision on the indemnity basis.

7. For the defendant, it was submitted that clause 25.4.2 does not apply. Counsel focused on the words "required in writing by the lessee" which appear at the end of clause 25.4.2. Counsel submitted that this clause did not apply but applied only to documents which were required to be entered into in order to preserve the rights of the lessor.

8. In relation to the submission that the court should order costs on an indemnity basis, relying on the conduct of the defendant, I am not persuaded that there is sufficient material before the court to conclude that the conduct of the defendant took this case "outside the norm". As things have turned out there was clearly nothing of substance in the defence raised by the defendant, but I am not persuaded that there is sufficient evidence before this court to conclude that the defendant was merely engaging in delaying tactics.

9. On the alternative basis which is advanced under the contractual provision in the lease, whilst the language "required in writing by the lessee" is not entirely clear and appears potentially to be wrongly placed within the clause, I am satisfied that the correct construction of clause 24.2 is that the lessee agreed to pay all reasonable costs and expenses incurred in relation to the preservation of rights under the lease, and therefore that would extend to the costs of any litigation.

10. To the extent that the words "required in writing by the lessee" need to be given some meaning, I agree with the submission of counsel for the claimant that that must relate to the terms, "waiver or consent", and can have no meaning in relation to the words "preservation of rights".

11. As to the question as to whether or not the decision in *Euro-Asian Oil v Crédit Suisse* means that this court should conclude that the contractual provision does not mean that indemnity costs are appropriate, it is true that in *Macleish*, the relevant provision simply said, "all costs and expenses". However, Briggs LJ expressly addressed the issue of reasonableness at [42] of his judgment, noting that the contract was silent in his case as to the reasonableness of the costs and expenses but concluding that he did not think that added to or detracted from the analysis since by virtue of [CPR 44.3\(1\)](#), costs will not be allowed if they were unreasonably incurred or unreasonable in amount, whether the court is assessing costs on the standard or the indemnity basis.

12. Whilst therefore the wording in this particular case does expressly refer to "all reasonable costs and expenses", unlike the clause which was before Briggs LJ in *Macleish*, I see no reason to depart from the analysis of Lord Justice Briggs, and in my view the presence of the word "reasonable" in the relevant clause does not preclude a conclusion that costs should be ordered on the indemnity basis. The language of the clause, in my view, indicates that it was intended that the lessee should pay "all costs" and expenses provided they are reasonable. This is consistent with a conclusion that the lessor is entitled to be indemnified for costs which it incurs in enforcing its rights and the appropriate basis is the indemnity basis. I order accordingly.

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