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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
[2019] EWHC 567 (Comm)



No. CL-2016-000039

Rolls Building
Fetter Lane, London

Friday, 18 January 2019

Before:

MR JUSTICE PHILLIPS

B E T W E E N :

AIRCRAFT PURCHASE FLEET LTD

Claimant

- and -

COMPAGNIA AEREA ITALIANA SPA

Defendant

MR P. STANLEY QC and MS P. HOPKINS QC (instructed by Herbert Smith Freehills LLP)
appeared on behalf of the Claimant

MR A. WALES QC and MR H. WRIGHT (instructed by Clyde & Co LLP) appeared on behalf of
the Defendant

J U D G M E N T

MR JUSTICE PHILLIPS:

- 1 There is no dispute that the defendant is entitled to its costs of the claim. There is, however, an issue as to the basis of assessment of those costs. The defendant seeks its costs on an indemnity basis, contending, pursuant to the authorities, that this is a case which was “out of the norm”.
- 2 It is argued by Mr Wales QC, on behalf of the defendant, that the nature of the claim and the way in which it was pursued was such as to take it out of the norm. The key point, as was clear from my judgment, is that the APA was partially terminated by Airbus, and then more fully terminated by agreement pursuant to Amendment No. 11, some considerable time before APFL claimed that it accepted CAI’s repudiation of the Framework Agreement. APFL was less than forthcoming when bringing this case as to what had occurred in relation to the APA in relation to disclosure and in relation to its general dealings throughout the litigation in that regard. The defendant further relies upon my findings that APFL’s witnesses, Mr Toto and Mr Ferre, were less than truthful in their evidence.
- 3 Mr Stanley does not dispute that, at the end of the day, the decision as to whether to award indemnity costs is a matter of discretion, looking at all the circumstances and taking into account whether there are aspects that take this case out of the norm. He submits that, although the case resulted in a resounding defeat for the claimant, that does not of course take it out of the norm. The mere fact that the case was based on inference and that the inference was not, in my judgment, close to being made out at the end of the day does not in itself mean that the claimant should pay the costs on the indemnity basis, particularly where there were a large number of issues that I did not ultimately decide against the claimant or indeed decide at all.
- 4 In my judgment, the key factor is that this was a claim brought for very large amounts, US\$260m, for repudiation of an agreement to buy Airbus aircraft in circumstances where the claimant well knew that, through its own default, it had lost the ability to sell those aircraft. It was the most unpromising of situations in which to bring such a claim. The claimant was in a fundamentally difficult position. It disguised and failed to disclose to the defendant that it was unable to comply with its obligations under the APAt. The claim was based upon the pure inference that, but for CAI’s alleged breaches, it would have been possible to reinstate the APA. That claim was inherently difficult and, indeed, fanciful given the history of the relationship between Airbus and the claimant as set out in my judgment and, in particular, the claimant’s persistent breaches and aggressive assertions which were transparently untrue such that in the end, Airbus gave notice of partial termination and did so in March, prior to the first matters alleged to have been a repudiatory breach by CAI.
- 5 In my judgment, the suggestion that Airbus would have reinstated the APA was always an exceptionally difficult argument, particularly in circumstances where the claimant at no stage raised with CAI the fact that its conduct was causing it to have difficulties with reinstating the APA. It was not suggested by the claimant, at the time, that that was the case and, indeed, the claimant entered into Amendment Agreement No. 11 without having told CAI that the APA had been partially terminated and was to be fully terminated.
- 6 I am satisfied that this claim was bordering on the hopeless from the outset. I make no finding that the claimant took improper steps not to disclose matters, but it is not in doubt that the claimant it not give full disclosure of the difficulties of their position for some time

in the litigation. Even once those difficulties became entirely clear, the claim was pursued to trial at which witnesses were called to support the alleged inferences, and they did so with untruthful evidence.

- 7 In my judgment, this is a case where a very substantial commercial trial has been pursued on the basis of a borderline-hopeless argument, on the basis that the claimant sought to pursue its commercial interest over the rights and wrongs of the situation, the type of situation referred to in *Amoco (UK) Exploration v British American Offshore Ltd* [2002] BLR 135 per Langley J at para.6.
- 8 I therefore find, in my discretion, that this is an appropriate case for an order that the claimant do pay the defendant's costs of the claim on the indemnity basis.

(After a short time)

- 9 As to the costs of the counterclaim, I have made an award in the defendant's favour for a relatively small sum compared to its claim, but that was subject to its undertaking not to enforce so long as Toto pays under the settlement agreement. It is accepted by the claimant that the recovery was more than nominal and so it is fair to say that the defendant has been successful to some extent and, of course, it had to bring a counterclaim to achieve that success.
- 10 Nevertheless, as I have stated in my judgment, the commercial sense of the counterclaim was dubious and the ultimate success was minimal. Further, on most of the arguments which were run and considered by me, the claimant was successful. In those circumstances, and again in the exercise of my discretion, I make no order for costs of the counterclaim.

(After a short time)

- 11 The defendant seeks an interim payment of costs of the claim. Its total costs are just over £6 million including the costs of the counterclaim. Reducing that sum to reflect a broad estimate of what might be the counterclaim brings the amount down to £5 million. Taking 60 per cent of that sum to reflect the fact that I have awarded costs on the indemnity basis, I order an interim payment of £3 million.
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CERTIFICATE

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This transcript has been approved by the Judge