

Article

Indemnity Costs Awarded Based on the Contractual Terms of a Contract Providing for “All Reasonable Costs”

Authors: Jonathon Milne, Partner | Róisín Liddy-Murphy, Attorney

In a recent decision of the English Commercial Court, in *Alafco Irish Aircraft Leasing Sixteen Ltd v. Hong Kong Airlines Ltd* [2019] EWHC 3668 (Comm) (*Alafco*), it was ordered that costs of proceedings are to be assessed on the indemnity basis if there is a contractual provision that specifies that a party must pay all reasonable costs and expenses incurred in preserving its rights, including legal costs.

Background

This case involved a dispute in relation to a lease agreement. Following a successful summary judgment application, the plaintiff sought costs to be awarded on the indemnity, as opposed to standard, basis. The plaintiff grounded its application for seeking indemnity costs on: 1) the conduct of the defendant in the relevant proceedings; and/or 2) a contractual provision in the lease which specified that the defendant was entitled to “all reasonable costs and expenses” of litigation.

[2017] EWHC B7 (Comm) which distinguished *Macleish* on the basis that the indemnity provision considered by Briggs LJ did not contain the word “reasonable”. Moulder J considered that the reference in the subject clause to “all reasonable costs” rather than “all costs” did not alter the position. Like Briggs LJ before him, he concluded that the presence of the word “reasonable” in the relevant clause did not preclude a conclusion that costs should be ordered on the indemnity basis.

Indemnity Costs

Moulder J did not consider it was appropriate to grant indemnity costs based on the conduct of the defendant. In particular, he was not persuaded that there was sufficient material before the Court to conclude that the conduct of the defendant took this case “outside the norm” to warrant an indemnity costs order. However, the Court was satisfied that the defendant had agreed to pay all reasonable costs and expenses incurred in relation to the preservation of rights under the lease, and held that would extend to the costs of any litigation. Moulder J saw no reason to depart from Briggs LJ in *Macleish v. Littlestone* [2016] EWCA Civ 127 (*Macleish*) where the Court of Appeal ordered indemnity costs in reliance upon a similar contractual provision. The Court declined to follow the decision of Cranston J in *Euro-Asian Oil SA v. Credit Suisse*

Conclusion

This decision is helpful for those negotiating similar clauses or seeking to exercise contractual rights to recover legal costs. It is important to bear in mind that the conduct of the defendant is not the only basis for seeking costs on an indemnity basis. *Alafco* and *Macleish* establish that the costs position in such cases is heavily weighted in favour of the party claiming costs.

A copy of the judgment is available here:

<https://www.conyers.com/wp-content/uploads/2020/01/Alafco-Irish-Aircraft-Leasing-Sixteen-Ltd-v-HK-Airlines.pdf>

Authors:

Jonathon Milne

Partner

jonathon.milne@conyers.com

+1 345 814 7797

Róisín Liddy-Murphy

Attorney

roisin.liddy-murphy@conyers.com

+1 345 814 7371

This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.

For further information please contact: media@conyers.com