Neutral Citation Number: [2023] EWHC 96 (Comm)

Case No: CL-2022-000294

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/01/2023

Before :

THE HON MR JUSTICE BUTCHER

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Between :

AERCAP IRELAND LIMITED
(on its own behalf and on behalf of all those insured under policy UMR B1752GE2100325000) **Claimant**

- and –

(1) AIG EUROPE S.A.
(on its own behalf and on behalf of all underwriters subscribing to Section One of policy UMR B1752GE2100325000)

(2) LLOYD'S INSURANCE COMPANY S.A.
(on its own behalf and on behalf of all underwriters subscribing to Section Three of policy UMR B1752GE2100325000) **Defendants**

- and –

FIDELIS INSURANCE IRELAND DAC
Applicant

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Dominic Kendrick KC, Peter MacDonald Eggers KC and Rebecca Jacobs (instructed by **Reynolds Porter Chamberlain LLP**) for the **Applicant**
Stephen Midwinter KC and Edward Ho (instructed by **Herbert Smith Freehills LLP**) for the **Claimant**
Gavin Kealey KC, Andrew Wales KC and David Murray (instructed by **Holman Fenwick LLP**) for the **First Defendant**
Richard Waller KC and Michael Ryan (instructed by **Kennedys Law LLP**) for the **Second Defendant**

Hearing date: 13 January 2023

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Approved Judgment

This judgment was handed down remotely at 10.00am on Wednesday 25 January 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives
(see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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MR JUSTICE BUTCHER

Mr Justice Butcher:

1. This is an application by the Applicant, Fidelis Insurance Ireland DAC ('Fidelis') to be joined as the Third Defendant to these proceedings, and for consequential directions to be given.

2. At the conclusion of the hearing on 13 January 2023, I told the parties that the application to join would be granted, and that I would give reasons for that decision in due course. These are those reasons.

Background

3. The background may, in large part, be taken from the Claimant's ('AerCap's') Skeleton Argument, and, as far as material, is as follows. This summary is not intended to be contentious or to decide any matter which may be in dispute between the parties.

4. Following the Russian invasion of Ukraine, the EU, and subsequently the UK, imposed sanctions prohibiting AerCap and other related lessors (collectively the 'Insureds') from continuing the leasing of aircraft and aircraft parts to Russian airlines, with effect from 28 March 2022. Between 2 and 9 March 2022, notices were issued by AerCap and its related lessor entities to their Russian lessees, terminating the leasing of all aircraft and engines which had been on lease to them, and requiring those lessees to return the assets to specified locations. In the majority of cases the lessees declined to do so.

5. The Defendants are the insurers under Section One ('All Risks') and Section Three ('War Risks') of the Insureds' aircraft hull, spares and equipment policy for the period 1 November 2021 to 31 October 2022 ('the Policy').

6. On 10 March 2022 AerCap wrote to its insurers under Section One and Section Three of the Policy notifying them of what was said to be the 'happening of an event likely to give rise to a claim.' On 24 March 2022 AerCap submitted a claim to those insurers seeking an indemnity of nearly US$3.5 billion in respect of what was said to be a total loss of 116 aircraft and 23 engines which had not been returned by lessees contrary to AerCap's request. AerCap advanced its claim principally under Section One, with an alternative claim under Section Three.

7. The insurers did not accept AerCap's claims. AerCap proceeded to issue the present proceedings on 9 June 2022. The claim is advanced against Section One insurers in the amount of some US$3.5 billion. The alternative claim against Section Three insurers is, as is common ground, capped at the Section Three aggregate limit of US$1.2 billion.

8. The way in which AerCap advanced its claim, in its Claim Form, was as a representative action, whereby the First Defendant ('AIG') was sued as a representative on its own behalf and on behalf of the Section One insurers; and the Second Defendant ('LIC') was sued as a representative on its own behalf and on behalf of the Section Three insurers.

9. Fidelis is one of a number of insurers which subscribed to both Section One and Section Three of the Policy. On 22 August 2022, shortly before the First and Second Defendants served their defences, solicitors instructed on behalf of Fidelis wrote to the

parties seeking their consent to Fidelis being joined to the action. As, in the event, neither the First Defendant nor AerCap consented to the joinder, Fidelis issued the present application on 22 September 2022.

The CPR

10. Fidelis's application is brought primarily under CPR r. 19.2. This provides, in part, as follows:

> 19.2— Changes of parties—general
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> 19.2 (1) This rule applies where a party is to be added or substituted except where the case falls within rule 19.5 (special provisions about changing parties after the end of a relevant limitation period).
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> (2) The court may order a person to be added as a new party if—
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> (a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or
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> (b) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue.

11. It is also germane to refer to the terms of CPR r. 19.6. It provides in part:

> 19.6— Representative parties with same interest
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> (1) Where more than one person has the same interest in a claim—
> (a) the claim may be begun; or
> (b) the court may order that the claim be continued,
> by or against one or more of the persons who have the same interest as representatives of any other persons who have that interest.
> (2) The court may direct that a person may not act as a representative.
> (3) Any party may apply to the court for an order under paragraph (2).
> (4) Unless the court otherwise directs any judgment or order given in a claim in which a party is acting as a representative under this rule—
> (a) is binding on all persons represented in the claim; but
> (b) may only be enforced by or against a person who is not a party to the claim with the permission of the court.

The Parties' Positions

12. Fidelis's contentions may be summarised as follows:

> (1) That a representative action is a procedural device which operates as a matter of convenience. It does not, and was never intended to, cut across the principle that a party against whom an enforceable judgment is claimed should be entitled to defend that claim by its own lawyers at its own risk and expense.

(2) A claimant is not entitled, by the simple act of selecting a representative action, to preclude a defendant, especially one with a large financial exposure, from defending the action in the way it wishes, by its chosen lawyers. A fortiori a co-defendant had no right to do so, but that is exactly what AIG is seeking to do.

(3) A distinction must be drawn between the right of a party to defend a claim against it as it chooses and with lawyers of its choice, and matters of case and trial management. Fidelis accepts that it should not be entitled unnecessarily to lengthen the trial, repeat submissions or duplicate evidence. All these can be prevented by the exercise of the court's case management powers. That is a different matter from whether it should be permitted to be joined to the proceedings.

(4) Insofar as relevant, Fidelis has good reasons for wanting to conduct its own defence. In particular it wishes to put forward a consistent position across its whole book of business: namely that there is no loss within the scope of the Policy, or of similar contingent policies, but if there is, it was caused by an All Risks peril. Moreover, Fidelis, or related entities, is facing bad faith allegations in Florida and California which appear to rely in part on the representative defence filed on behalf of Fidelis and others in the present action as being inconsistent with its stance in the US litigation.

(5) A representative action was not the only, or indeed the obvious, way in which these proceedings could have been structured. In other English proceedings involving similar claims, each insurer has been sued individually. In particular, this is the case in the proceedings issued by Dubai Aerospace and Falcon 2019-1 Aircraft 3 Limited, in which Fidelis has or will serve one defence, which responds to all claims against it.

13. The position of the other parties may be summarised as follows:

(1) AerCap did not initially oppose Fidelis's conducting its own defence, provided that neither AIG nor LIC objected. In the end AIG did object, and on that basis AerCap did not consent. But in its Skeleton Argument, and in Mr Midwinter KC's submissions, AerCap made it clear that its 'sole concern' is to ensure that the proceedings are conducted as efficiently as possible, and that if Fidelis's joinder was not permitted to lead to duplication and waste, it did not object to it.

(2) AIG has objected to the joinder of Fidelis. It contends that the requirements for the joinder of a party under CPR r.19(2) are not met. Fidelis can be represented by LIC, with whose interests its are entirely aligned. There is also no problem in Fidelis being represented by AIG in relation to its Section One participation. Fidelis's addition as a defendant 'would not solve any problem and would not add any value, either to the fair determination of the proceedings or to the protection of Fidelis's interests'.

(3) LIC is neutral as to whether Fidelis should be joined.

PNPF Trust Co Ltd v Taylor

14. An authority which is of assistance in the present context, which was cited by Mr Kendrick KC, is PNPF Trust Co Ltd v Taylor [2009] EWHC 1693 (Ch). In that case, the court was required to determine an application for the joining of a participating body of a pension scheme (Teesport) as a separate defendant in proceedings brought by the claimant trustee of the scheme (PNPF) against the defendant members and bodies of

the scheme, and an application for representation orders. The pension scheme, which had several participating bodies and members, was in substantial deficit, and PNPF had brought proceedings under CPR Pt 8 to determine the scope of its powers and identify which parties could be liable to contribute further. It was proposed that, under an interest/issue-based representation structure, the relevant issues would be divided up and allocated to particular members who would each act as representative defendants for other members. Each represented member would be able to introduce input in consultation with the other defendants and could require its defendant representative, with whom it had a community of interest, to take any point that was reasonably arguable. Teesport claimed that its potential liability to make further significant contributions under the scheme was extremely high and it therefore applied to be added as a separate defendant, represented at trial by its own independent legal advisers. That application was contested by PNPF and by another defendant. PNPF instead sought representation orders which, if granted, would result in Teesport being represented by up to four other defendants.

15. Proudman J permitted PNPF to be joined to the proceedings. At paragraphs 37-38 of her judgment she referred to a part of the history and justification for representative proceedings. She said:

> 37. The necessity (and I say that neutrally as far as joining Teesport is concerned) for representation orders in complex proceedings is evident and has been recognised by the Court for centuries. As far back as the early 19th century, Lord Eldon said in Adair v. New River Co (1805) 11 Ves 429 at 444 (cited by Purchas LJ in Irish Shipping Ltd v. Commercial Union [1991] 2 QB 206 at 235):
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> "…it is not necessary to bring all the individuals: why? Not, that it is inexpedient, but, that it is impracticable, to bring them all. The court therefore has required so many, that it can be justly said, they will fairly and honestly try the legal right between themselves, and all other persons interested, and the plaintiff…"
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> 38. In John v Rees [1970] Ch 345 at 370, Megarry J, citing Duke of Bedford v. Ellis [1901] AC 1 and various 19th century cases, spoke of the rule about representation being treated not as a rigid matter of principle but "a flexible tool of convenience in the administration of justice".

16. At paragraph 47 Proudman J noted that it was not necessary that a party should consent to being represented. She said:

> 47. It is settled law that a person may be represented without obtaining his consent, even where he can be found and his opinion sought. In such circumstances, if the requirements of the rules are made out, no party to the action can complain that the consent of the person represented has not in fact been given. Consent is not a requirement of the rules: see Independiente Ltd v. Music Trading On-Line (HK) Ltd and Others [2003] EWHC 470 (Ch).

17. At paragraph 64 Proudman J said:

> …To my mind the cases cited support Mr Martin's proposition that the historical purpose of representation orders was to enable all relevant parties to be heard in circumstances where that would otherwise be impracticable. The procedure was (and

> is) intended to include people within the ambit of an action rather than to exclude them. The purpose was (and is) not to shut someone out who is ready and willing to appear to represent his own interests at his own risk as to costs.

18. The objections to Teesport being separately represented included concerns as to potential delays, increased costs and duplication of arguments. Notwithstanding these matters, Proudman J considered that the interest in allowing Teesport to conduct its own case outweighed those concerns. At paragraphs 108 - 110 she said:

> 108. Teesport wants to conduct its own case with its own lawyers who have only its own interests at heart and who will act only on its own instructions. Teesport does not wish to trust to the other defendants to argue all the points that it may want to raise, for the reasons I gave at the outset. There are difficulties for both a representative (and its lawyers) and for the person represented where that person is unwilling to be represented.
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> 109. It is true that Teesport has every opportunity to contribute to the proceedings through those others and that some of the specific matters mentioned in CPR r.1.1(2) as included in the overriding objective would be secured if Teesport were not joined.
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> 110. However, I have no doubt that the fair course is to allow Teesport to be heard through its own voice with the corollary that it will be bound by the outcome of the action. To quote Lord Eldon, it is better to go as far as possible towards justice than to deny it altogether.

Analysis

19. As I indicated at the conclusion of the hearing, in my judgment Fidelis's application to be joined should succeed. I agree with Proudman J's statement, in PNPF, that the essential purpose of representative proceedings is to include, not to exclude, and is not to shut out someone who is ready and willing to appear to represent his own interests at his risk as to costs. In my judgment, where a party has a direct and significant financial interest in the litigation such as Fidelis's interest here, then, exceptional circumstances apart, if that party wishes to conduct his own defence at his own risk as to costs he should ordinarily be allowed to be joined to the proceedings and not be represented against his will.

20. In the present case, there is no doubt that Fidelis faces a very significant potential liability: it has a line of 2.75% on Section One and of 20% on Section Three. Fidelis is prepared to accept that, if joined, a judgment would be enforceable against it without the Court's permission, and that it would be liable for its own costs if it lost (rather than the representative being liable for costs). There are no exceptional circumstances, as demonstrated by the fact that the other actions involving similar claims have been structured so that all insurers are joined. In those circumstances I have no doubt that the fair and appropriate course is to allow Fidelis to be joined.

21. The objections made by AIG to permitting Fidelis to be joined, in my judgment lacked force.

22. One such objection, as I understood it, was that Fidelis had not applied under the correct rule, in that it had applied under CPR 19.2 for joinder, rather than under CPR 19.6 for

an order that it should not be represented by AIG. I do not accept that an application for joinder under CPR 19.2 was incorrect. In any event, Mr Kendrick KC made it clear that Fidelis was applying, to the extent necessary, under CPR 19.6. Given that there can be no doubt that the parties were in a position to deal with the question of whether AIG and LIC should continue as representatives of Fidelis, the point was, at best, a technical one without underlying substance.

23. A further objection was to the effect that, in order for there to be an order for joinder under CPR 19.2, Fidelis had to demonstrate either that it could 'assist the court' in resolving all matters in dispute (for the purposes of CPR 19.2(2)(a)) or that there is an issue between Fidelis and an existing party which Fidelis's joinder would assist to resolve (for the purposes of CPR 19.2(2)(b)), and that Fidelis could satisfy neither. In my judgment, the conditions of both CPR 19.2(2)(a) and (b) are met. Fidelis can 'assist the court to resolve all matters in dispute', by participating in the proceedings, and ensuring that its position, in relation to a significant claim made against it, is put before the court, and it is desirable to add it to achieve that end, rather than have it unwillingly represented by other parties. Further there are issues between Fidelis and AerCap and, because a significant claim is made against it and it does not wish to be represented by other parties, it is desirable for Fidelis to be added as a party so that the court can resolve those issues.

24. I do not consider that it is necessary for Fidelis to show, at the stage of seeking joinder, that its position will not be adequately put forward by the representative parties. I consider that it is sufficient that Fidelis has a *bona fide* desire 'to conduct its own case with its own lawyers who have only its own interests at heart'. I see no basis for doubting that Fidelis does have such a *bona fide* desire. Nor, if relevant, can it be said to be irrational. For one thing, parties' positions, and also the nuances of how cases are presented, may change during the course of proceedings. Secondly, as Proudman J said in PNPF, there are typically difficulties for both a representative (and its lawyers) and for the person represented where that person is unwilling to be represented. It is clear that there are such difficulties in this case, in that AIG's solicitors have recognised that they are unable to represent Fidelis, and are not sharing privileged documents with Fidelis. Thirdly, I accept that Fidelis has legitimate concerns about the allegations of bad faith made against related companies in proceedings in the USA arising from the position taken by insurers in this action.

25. Mr Kealey KC, for AIG, sought to argue, by reference to LB Holdings Intermediate 2 Ltd (In Administration) v Lehman Brothers Holdings Scottish LP 3 and Others [2018] EWHC 2017 (Ch), that the correct approach was to ask whether Fidelis could show that it 'can, or might with sufficient certainty, be able to bring something to the party without at the same time imposing any unnecessary, unfair or disproportionate burdens on the other parties to the proceedings' (to quote from para. 11 of Mann J's judgment), and that as Fidelis could not show that, the court should refuse the application for joinder. LB Holdings involved a significantly different situation from the present. Neither of the parties seeking to be joined was in a position analogous to Fidelis's here, in which the claimant is already seeking a binding determination that it is contractually liable for very substantial sums. In a case such as the present, I do not consider that a test of what the party seeking joinder can or might be able 'to bring to the party' is apt. If it is, what a party in a position such as Fidelis's may 'bring to the party' is not to be judged exclusively or even mainly by whether it will in the event put forward arguments which

are not advanced by someone else. Further, and in any event, I consider that Fidelis has a 'sufficiently different and differentiated "perspective", and a vigour' (to quote from para. 15 of Mann J's judgment) to make it appropriate to join it to the proceedings. As Fidelis says, it wishes to take a consistent approach throughout all the litigation in which it is involved, and not (whether as represented party or otherwise) to put forward an argument that the War Risks exclusion to Section One is applicable.

26. Mr Kealey KC further argued that Fidelis's joinder was undesirable because it might lead to other insurers seeking to be separately represented. I considered that this point lacked conviction. No other insurer has yet sought to be separately represented, notwithstanding that (1) full defences have now been provided by both representatives, and (2) Fidelis's position has been known for a considerable time and its joinder application was issued last September. In any event, even if other insurers did apply to be joined, the result at 'worst' (to adopt a viewpoint suggested by AIG's submissions), would be that the present action came to be constituted in the same way as the other actions involving similar claims, to which I have referred, are constituted.

27. Mr Kealey KC also urged that AIG was concerned about 'inequality of arms' and about the addition of a further party (in addition to LIC) arguing against the application of the War Risks exclusion. I was unable to attach any weight to this argument. As I said at the hearing, and as I return to below, the court will be astute to ensure that there is no unnecessary duplication of argument or evidence. Furthermore, and in any event, the fact that an argument is supported by more than one party, even if it is put forward by more than one advocate, will not add to its cogency.

Case Management

28. As I have already said, the court will not permit there to be unnecessary duplication of evidence or argument, and it will be astute to ensure that the joinder of Fidelis does not impose unnecessary costs on other parties. The directions which will be given in the case will seek to ensure that these objectives are met.

Conclusion

29. For the reasons I have given, Fidelis's application to be joined is granted. Further directions as to its participation, if not agreed, will need to be made by the court, either on a separate application, or failing that at the forthcoming CMC.