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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
[2020] EWHC 3819 (Comm)

No. CL-2019-000816

Rolls Building
Fetter Lane
London, EC4A 1NL

Thursday, 26 November 2020

Before:

THE HON. MR JUSTICE BRYAN

B E T W E E N :

LOMBARD NORTH CENTRAL PLC
NATWEST MARKETS PLC

Claimants

- and -

AIRBUS HELICOPTERS SAS

Defendant

MR F. PILBROW QC (instructed by Sullivan & Cromwell LLP) appeared on behalf of the Claimants.

MR M. REEVE (instructed by Knights plc) appeared on behalf of Defendant.

J U D G M E N T

MR JUSTICE BRYAN:

1 This is the first case management conference in a case between Lombard North Central and NatWest Markets plc and Airbus Helicopters SAS. A number of matters arose for consideration at this hearing, including whether or not certain matters should be dealt with hereafter by way either of preliminary issue. There have also been applications for summary judgment and strike out. Associated matters have been agreed between the parties and have received the approval of the court. It has also been agreed that matters of cost budgeting should be deferred, and also that directions to trial should await the outcome of those issues. Those issues involve both issues as to French law and limitation as well as issues of construction. This leaves for consideration at this hearing certain issues in relation to disclosure.

2 In order to understand what the issues are in relation to disclosure, it is necessary to say something about what this case is about. I largely take what follows from the case memorandum which is common ground. The case concerns a helicopter MSN2707 of H225 Super Puma type, manufactured by the defendant (Airbus) by a purchase agreement governed by French law and dated 1 March 2007. Airbus agreed to sell MSN 2707 to a third party helicopter operating company, CHC. CHC's obligation to purchase and its rights in respect of MSN2707 were novated to RBS Aero, a third party in the same corporate group as the claimants, by a novation agreement governed by English law and dated 31 October 2007. MSN2707 was subsequently leased back to CHC by RBS Aero. On 10 March 2011 RBS Aero sold the helicopter to, and assigned its rights, title and interest in the novation agreement to the first claimant (Lombard). On the same day, Lombard entered into a security assignment with the second claimant, by which it assigned its rights under the novation agreement to the second claimant (NM plc). The claimants' case is that this letter assignment was a security assignment by way of charge only and the defendants put the claimants to proof of whether Lombard acquired and, if so whether, it retains title to sue on the novation agreement.

3 The claimant's case is that,

(1) Pursuant to the purchase agreement, Airbus was subject to obligations and/or liabilities under French law in respect of the helicopter, including:

(a) A statutory warranty against hidden defects rendering the helicopter unfit for its intended use. Airbus admits the existence of the statutory warranty, but there is a dispute as to its scope and Airbus contends it was, in any event, excluded by agreement.

(b) An obligation to exercise prudence, monitoring and vigilance as to the safety of the helicopter. Airbus denies that any such obligation arose in relation to this helicopter.

(2) Pursuant to the novation agreement, Airbus assigned those French law obligations and/or liabilities to RBS Aero. Airbus dispute this.

(3) Further or alternatively, it was an implied term of the novation agreement that MSN2707, i.e. the helicopter, would be of satisfactory quality. Airbus denies any such term was implied.

4 After the sale of the helicopter by Airbus in 2007, there were a number of safety incidents involving Airbus manufactured helicopters of the same or similar type:

(1) On 1 April 2009, G-REDL, an Airbus AS332 L2 helicopter, crashed with 16 fatalities. The AS332 L2 is a predecessor to the H225, and in particular has an identical "epicyclic module," a component of the main gearbox. An investigation found that the crash was caused by a fatigue fracture in a "second stage planet gear" within the epicyclic module, which caused the main rotor to detach.

(2) In 2012 there were two non-fatal incidents involving H225s (G-REDW and G-CHCN). In each case the main gearbox lost oil pressure and the helicopter had to be ditched in the North Sea and evacuated. There is a disagreement as to whether these incidents are relevant.

(3) On 29 April 2016, LN-OJF, an Airbus H225 helicopter, crashed with 13 fatalities. An investigation found that, like the G-REDL incident, this crash was also caused by a fatigue fracture in a second stage planet gear within the epicyclic module, which caused the main rotor to detach.

5 Subsequently, flight bans were imposed on the H225 and the AS322 L2 type. The claimants say that, since the LN-OJF incident, the market value of helicopters of the H225 type, including the helicopter, has substantially diminished as a result of the alleged defect in their design, which caused the LN-OJF incident and which was subsequently revealed by the publication of the accident report into that incident. The claimants also allege that the grounding of the H225 type caused the first claimant to forego income it would otherwise have earned from the lease of the helicopter to CHC and to incur costs it would not otherwise have incurred.

6 The claimants' case is that the helicopter was (and all H225 helicopters were) defective in design, particularly in relation to the second stage planet gears of the epicyclic module and the risk of fatigue fractures thereto; that this placed Airbus in breach of the French law and/or English law obligations that I have already referred to, and that those breaches entitle the claimants to be refunded the purchase price of the helicopter and/or to recover damages in respect of the losses referred to.

7 The defendant denies that the helicopter was defective and/or contends that any relevant defect was rectified. The defendant also contends that the claimants' claims (a) are time barred under French law and/or English law, as applicable; and/or (b) are for indirect or consequential losses and therefore excluded by art.13.1 of the purchase agreement; and/or (c) are barred by an "acceptance certificate" which it alleges is likely to have been issued on delivery of the helicopter.

8 That then is the backdrop to the disclosure applications which are before the court today. I am pleased to say that many of the requests have been agreed on the back of the list of issues and, in particular, many of the requests that relate to the claimants' disclosure. However, one issue that remains where there is disagreement is Issue 1(a). Issue 1(a) is: were the CHC group of companies aware of: (i) the maintenance and airworthiness of the gearbox and monitoring systems of G-REDL, G-REDW and/or LN-OJF; (ii) accident investigations in respect of those aircraft as they developed; and (iii) the accident reports when they were published?

9 So, it would seem that the focus is upon, in this category, the knowledge of the CHC group. But this request relates to disclosure that the respondent, Airbus, has in relation to that. The request of the claimant is in terms, which I am satisfied, tracks the pleaded issues. It asks for electronic and hardcopy correspondence, including letters, emails, notes of meetings and/or telephone calls, including any annotated versions of any such documents and other documents exchanged between the CHC group of companies and the defendant, including internal reports and/or notes of meetings, and/or telephone calls that took place between those entities concerning:

(i) The maintenance and airworthiness of the gearbox and monitoring systems of G-REDL prior to 1 April 2009, the accident investigations in respect of that aircraft between 1 April 2009 and 24 November 2011, and the accident report published on 24 November 2011.

(ii) The maintenance and airworthiness of the gearbox and monitoring systems of G-REDW prior to 10 May 2012, the accident investigations in respect of that aircraft between 10 May 2012 and 11 June 2014.

(iii) The maintenance and airworthiness of the gearbox and monitoring systems of LN-OJF prior to 29 April 2016, the accident investigations in respect of that aircraft.

10 The response of Airbus as respondent was that this request was not agreed and a number of points were made. The first one was that Airbus do not have a duty to maintain or monitor continuing airworthiness for those aircraft - role of the MRO. Airbus only collects in-service information transmitted by operators MRO. Secondly, it was said the relevance of the helicopter G-REDW was not established. Thirdly, Model C disclosure by the defendant ought to be searches for: documents in respect of MGB maintenance, in service and airworthiness issues declared to Airbus by the CHC group for helicopters G-REDL and LN-OJF. It is said that that was all that was required. It is suggested that for Airbus to search on the basis of the requests identified by the claimant would be an over onerous burden and that requests should be as narrow as possible.

11 I consider that the problem with the approach of Airbus is that their formulation does not track that of the pleaded issues. For example, the relevance of G-REDW is, on the face of the pleadings, an issue and whether or not they disagree in relation to that, it should be within the scope of any searches. Secondly, it is not clear and remains unclear what is meant by documents in respect of MGB maintenance, in service and airworthiness issues declared to Airbus by CHC group. I consider that the claimant's formulation more closely and more appropriately tracks the pleaded issues and I also consider that, to the extent that it may involve a search over an extended period of time in relation to the relationship between Airbus and CHC, that can be ameliorated by appropriate custodians and search terms which will be an exercise to be done at the next CMC, if not agreed.

12 In fact, both parties also say, although it is not the primary purpose of disclosure within this category, that this disclosure may be of relevance to some of the other issues in the case and, for example, could shed some light as to what knowledge Airbus acquired, not only from its own knowledge but also from its dealings with CHC. I consider that, for that reason as well, it is important that the requests within category C are comprehensive and appropriate. For those reasons, I prefer the request of the claimant.

13 The next concern is a group of issues starting at Issue 4 and going through 4, 5 and 6, which it is common ground are at the heart of the case.

14 Issue 4, as described for disclosure purposes by the claimants, is as follows:

> "Were the second stage planet gears of the epicyclic module of the MGB of the H225 type susceptible to fatigue fractures as a result of (a) their design, and/or (b) the serviceable life of second stage planet gears before mandatory replacement being set too high."

In answer to the question, "Is this issue agreed"? the response of the defendant was, "No, as expressed, an expert question", and the defendant suggested a disclosure issue as follows:

> "When designing the MGB of the H225 type and setting the serviceable life of the second stage planetary gears, what assessment did the defendant in fact make of the risk of fatigue fractures?"

It will be seen that the focus of that categorisation of the disclosure issue is by reference to the design.

15 In order to assess that, one has to look at the pleaded issues. If one looks at the relevant pleaded issue that is at para.34, it provides:

> "MSN 2207 and all H225 helicopters were defective in their design so as to render them unfit for their intended use, being the long-range transport of passengers in the offshore oil and gas market. The nature of the defect, as found by the AIBN in its report summarised at paragraph 25 above, was as follows:
>
> PARTICULARS OF THE DEFECT
>
> (1) The second stage planet gears of the epicyclic module of the MGB were susceptible to fatigue fractures, as a result of:
>
> (a) the design of the MGB and second stage planet gears; and
>
> (b) the serviceable life of second stage planet gears before mandatory replacement being set too high and at an unsafe level."

So, it will be seen that the plaintiff's formulations very much track that pleaded case at para34(1). Indeed, Mr Reeve's criticism of that is that it is merely a track of the pleaded issue and not what documents may be relevant and the crystallisation of the formulation as a disclosure issue, which he says involves you standing back and looking at what sort of documents there actually are.

16 I consider that the difficulty with Mr Reeve's formulation is that it does not capture all the matters which are in issue between the parties. So, if, in fact, that formulation was to be adopted as the basis for the disclosure issue, the answer to that question would not, in fact, answer, ultimately, the pleaded issue, because, for example, although one is looking at the design stage, relevant documents in relation to that issue will include subsequent documents which come into existence. The clue possibly is in the context of the obligation, which is in

relation to hidden defects. Because it is hidden, it may well be subsequent events which lead to that which was hidden to be revealed and, once revealed, that may reveal that there was a design defect.

17 I consider that, therefore, Mr Reeve's formulation does not encompass satisfactorily the full width of the disclosure issue which there needs to be. Mr Reeve may well be right that there are cases where it is inappropriate for there to be a rigid tracking of the pleaded issue, but I consider that, in the context here of an issue which is at the very heart of case, it is an appropriate formulation to formulate the disclosure issue by reference to the pleaded issue.

18 Another way to test whether or not the defendant's formulation is appropriate is, in fact, to jump forward to another exercise, which is to look at the actual requests themselves. Mr Reeve rightly acknowledged that they (Airbus) recognises that some subsequent documentation may be relevant. When one looks forward, some of the categories of the document or descriptions of document which Airbus identifies appropriate to be searched for do indeed involve such a category. That shows, in my view, that the category as proposed by the defendant is too narrow because the description should surely include that which is then encompassed and particularised thereafter.

19 I would add that I only have those two competing versions before me and I do not consider that it would have been appropriate for the Court itself to attempt to draft a further formulation had the request been considered to be too wide. However I consider that the claimants' formulation is appropriate, tracking, as it does, the pleaded issues on a central issue. For those reasons, I rule in favour of the claimants' formulation.

20 The next issue that arises is in relation to the model of disclosure that is to be adopted. Mr Reeve identifies and stresses, by reference, for example, to the judgment of Peter MacDonald Eggers QC, sitting a Deputy High Court Judge, in the case of *Lonestar v Kaye* [2020] EWHC 1890 (Comm), that:

> "...the Pilot Scheme for Disclosure was not a re-serving of CPR Part 31, exemplified by standard disclosure (equivalent to Model D Extended Disclosure CPR PD 51U), dressed in another garnish. Rather, the Pilot Scheme represents a 'culture change' to the management and disclosure in the Business and Property Courts."

And with the exponential growth of storage, etc., there is a recognition that in many cases a 'leave no stone unturned' approach to disclosure is no longer appropriate.

21 He also refers to para.54 of the same judgment where Mr MacDonald Eggers opined that:

> "Model C in one sense occupies an implicitly preferred position within the choices available amongst the Extended Disclosure models in that the more expansive models of Extended Disclosure, Models D and E, should be selected by the parties and approved by the court where Model C is not appropriate or sufficient (paragraph 6.5 CPR PD 51U). Indeed, the wider Models D and E are not presumed as the appropriate models for Extended Disclosure (paragraph 8.2 of CPR PD 51U)."

22 For his part, at this initial high level, Mr Pilbrow accepts all those propositions. He says that, if one looks at the disclosure material as a whole, there is a menu of available

disclosure models and that the parties have properly engaged with that, because, in relation to other aspects of disclosure, Model C disclosure, for example, has been adopted by both parties.

23 What he says, though, is that the issues we are now concerned with, Issues 4, 5 and 6, are at the very heart of the claim and the issues for determination. I have already identified Issue 4 and it has now been formulated in the terms that the claimants request. It focusses on whether the second stage planet gears of the epicyclic module of the MGB type were susceptible to fatigue fractures as a result of (a) their design, (b) the serviceable life of second stage the planet gears before mandatory replacement being set too high.

24 Mr Pilbrow says that, because we are here concerned with that absolutely central issue in the case, the appropriate model is Model D. In this regard he relied upon what was said by the Chancellor in *McParland & Partners v Whitehead* [2020] EWHC 298 (Ch) at para.51. In that case, the Chancellor identified that many of the issues, and indeed the preceding issue under paragraph 50 in that judgment was a classic one for Model C. But, in relation to what was said to be a central issue, the central nub of the dispute, it was appropriate for Model D. So, therefore, it is not simply a case where the parties are actually not trusting each other where Model D may be appropriate, but also in circumstances where it is a central issue, the central nub of the dispute.

25 Both parties, in order to illustrate their position as to whether Model C or Model D is appropriate, have in fact looked at the responses in the context of Issue 4 and what would be appropriate Category C requests.

26 For his part, Mr Pilbrow says that the categories he has identified (i. to v.) are, in essence, an informed analytical effort and an attempt to break down the categories, but, nevertheless, he is not confident that that he has captured all those documents which are necessary in order to resolve this particular issue fairly. He also says, and it is a difficult tightrope to walk, that in fact there is something in Mr Reeve's point that the elaboration and the level at which one is identifying those matters, it is not individual documents, it is not very narrow, focused categories, but it is all those categories which would appear to be relevant in order to fairly deal with the issue. He says, in fact, that that is a hallmark, that actually if those categories (categories i. to v.) are appropriate in this case on what is a central issue, then that should tell the Court that in fact this is really a Category D case.

27 Mr Reeve, for his part, says that those categories are not agreed and he also says that if one looks at the categories that his client has identified, those are appropriate Model C requests and that they capture the documents which are necessary to resolve the matters fairly. He says that some aspects of the claimants' skeleton argument mischaracterises the reasons why Airbus say that Model D is not appropriate. He says that Airbus do not say that just because they are a large organisation and there could be a lot of documentation, etc., Model D would not be appropriate. That would not be an appropriate approach. He does say, however, that it is relevant to consider, when considering Model C or Model D, the nature of the entity and what volume of documents would be created, and he says that one can also test whether it should be Model C or Model D by reference to looking at the Model C requests that have been formulated by Airbus. He says these are the main milestones and these would reveal what had gone wrong with the design. He identifies, in fact, nine categories. They are defined categories of documents, he says, they are narrow and in the aviation industry those are the sort of documentation which would come into existence.

28 During the course of the oral argument, he recognised that the categories he identifies would not necessarily capture every category which would, he accepts, be necessary fairly to resolve matters. He identifies one, that he would, I believe, characterise as an add-on or a tweak, in relation to documentation in relation to further in-service incidents which had been recognised, but he said that that could be added to his categories. Equally, when I asked him about a part of ii. of the claimants' requests, which would be records of degradation, for example, in the context of a service undertaken by an operator or routine maintenance, or something like that, he accepted that would not be caught within his categories. But, again, he said his categories could be expanded to do that.

29 He urges the Court, however, simply because it is possible to identify additional classes of documents beyond that which he has identified not to regard that as, in of itself, a reason to indicate that Model C is inappropriate, but rather as indicating a need for a refining of the categories. He also urges strongly that the primary lever and the primary tool is the initial categorisation of D or C and that one should not pay too much heed to whether or not by use of appropriate custodians and search term it is possible to narrow down to make, in other words, Model D more palatable than it might otherwise be. He says that, under the Pilot and on the facts of this case, Model C is the appropriate way forward.

30 I am satisfied that, in relation to Issue 4 (and, in the interests of time, Issues 5 and 6, although if there is any distinguishing feature I will hear from the parties further), the appropriate way forward is in fact Model D disclosure. That is not a reversion to old practices; it is a recognition of these being central issues in the case, as reflected in the sentiments identified by the Chancellor in *McParland*, supra.

31 The formulation in both parties' Model C requests is informative in this regard. I consider that what Mr Reeve said, in fact in response to an earlier aspect of this matter, which was that these are very expansive categories and not narrow and focused, is indeed right in terms of what the claimants are saying, but I consider that the matters which are identified in i. to v. are relevant and are necessary to fairly resolve matters. What that illustrates, in my view, is that, in relation to this central documentation, Category D disclosure is appropriate. That Category D disclosure will clearly encompass the matters identified by the claimants in their Model C request, but goes beyond that, not only, I have no doubt, in relation to the two examples that I have given, but simply because the Category D test will have to be applied to the request formulation that I have already identified. Accordingly, and for those reasons, I am satisfied that Category D disclosure is appropriate.

32 In the light of my reasoning in relation to Issue 4, the parties accept that the same approach follows in relation to issues 5 and 6. Issue 7, it is also accepted, is to be defined by reference to the pleading, which is the approach that I have given my approval to and accordingly by reference to the defects pleaded at paragraphs 31.1 to 34.4 of the Particulars of Claim and whether Airbus took any or any adequate steps to remedy them, including the steps pleaded at paragraph 34.5 of the Particulars of Claim. I am also satisfied that this is another central allegation which is part of the central nub of the allegations in relation to which Model D disclosure is appropriate for the reasons I have given earlier.

33 Mr Reeve made specific reference and critique of some of the narrative that is set out in terms of what the request for disclosure would be as sought by the claimants if this was Model C. In the light of the available time, and also because I am not today persuaded either way as to whether Model D disclosure would extend to all these matters but I am satisfied that Model D disclosure is appropriate, and such Model D disclosure should be focused upon what is encompassed by Issue 7. If there is any ongoing lack of clarity

between the parties as to relevance of particular documents, I would hope that that could be explored further in correspondence prior to the disclosure exercise under Model D, which may help frame that Model D disclosure. Of course, if ultimately there remains a difference of view as to what is within such disclosure, that would in all likelihood shake itself out after that disclosure has been given, either in correspondence or, if need be, in targeted, focused requests for specific disclosure.

34 I am alive to Mr Reeve's point about his categories of disclosure under Model C and as to whether or not they would capture that in relation to remedial actions. But, in the context of what is a central allegation, I consider that Model D is more appropriate than Model C, and I so find.

CERTIFICATE

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This transcript has been approved by the Judge.