

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 29 January 2024

Before :

THE HON MR JUSTICE BUTCHER

Between :

AERCAP IRELAND LIMITED
(on its own behalf and on behalf of all those insured
under insurance 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 insurance policy UMR
B1752GE2100325000 other than the Third to Fifth
Defendants)

(2) LLOYD'S INSURANCE COMPANY S.A.
(on its own behalf and on behalf of all underwriters
subscribing to Section Three of insurance policy
UMR B1752GE2100325000 other than the Third to
Fifth Defendants)

(3) FIDELIS INSURANCE IRELAND DAC

(4) SWISS RE INTERNATIONAL SE

(5) CHUBB EUROPEAN GROUP SE

Defendants

-and-

(1) MCGILL AND PARTNERS LIMITED
(2) ARTHUR J. GALLAGHER (UK) LIMITED
(3) UNITED INSURANCE BROKERS LIMITED
(4) WILLIS LIMITED

Respondents

Alex Potts KC (instructed by **Eversheds Sutherland (International) LLP**) for the **First Respondent**

Hearing date: 19 January 2024

APPROVED JUDGMENT

This judgment was handed down by the court remotely by circulation to the parties' representatives by email and released to The National Archives. The date and time for hand-down is deemed to be 29 January 2024 at 10.30am

Mr Justice Butcher :

1. This judgment relates to an application by the Claimant ('AerCap') for third party disclosure under CPR PD57AD para. 31.17.

Introduction

2. In these proceedings AerCap has made claims against insurers of its Contingent and Possessed policy in respect of 116 Aircraft and 23 Engines which have not been returned by Russian airline lessees following the invasion of Ukraine. This is one of what have been called the 'Lessor Policy' or 'LP Claims' which are proceeding before this court. Separately, AerCap has also submitted claims in respect of the same Aircraft and Engines under the policies of insurance obtained by AerCap's Lessees (the Russian airline operators) from, usually Russian, insurers and under policies of reinsurance obtained by those insurers. These policies have been called the 'Operator Insurance Policies' and the 'Operator Reinsurance Policies' respectively, and, together, the 'Operator Policies'. AerCap's claims under the Operator Policies are made on the basis that it is or claims to be an additional insured under the Operator Insurance Policies and/or on the basis of a 'cut-through' clause in the Operator Reinsurance Policies. AerCap has commenced proceedings in respect of its claims under the Operator Policies, and those actions, together with other claims brought by different aircraft lessors under further operator policies, are proceeding in this court. They have been referred to as the 'OP Claims'.
3. The Respondents to this application are brokers in relation to certain of the Operator Reinsurance Policies relevant to AerCap. The Policies in question are listed in Schedule 1 to the draft Order. By this application AerCap seeks an

order for disclosure by the Respondents of copies of (a) documents constituting and evidencing the contracts of insurance and reinsurance under the relevant Operator Policies, and (b) any notices purporting to amend or cancel cover on or after 24 February 2022 and any responses thereto given by the reinsurers in relation to the cover provided under the relevant Operator Policies.

4. The application is not opposed by the Second to Fourth Respondents, although they wish an order to be made. It is opposed by the First Respondent ('McGill'), principally based on concerns that provision of the documents by it might contravene applicable sanctions.

McGill's role

5. McGill's role was as follows. From 2 November 2020, McGill acted as a reinsurance placing broker for Sealine Insurance Brokers Ltd ('Sealine'), a local Russian insurance and reinsurance producing broker. In 2021 Sealine acted as the reinsurance producing broker for three Russian insurance companies, namely AlfaStrakhovanie JSC, Insurance Company of Gaz Industry, and Ingosstrakh Insurance Company, for the placement of various aviation-related reinsurance policies, which were a sub-set of the Operator Reinsurance Policies referred to above. In turn, Sealine, as producing broker, instructed McGill as placing broker to place certain of the Operator Reinsurance Policies. The reinsurance requirements of the Russian reinsureds on the relevant Operator Reinsurance Policies were communicated to McGill by Sealine, and then reinsurances were placed by McGill on Sealine's instructions. Those reinsurances were placed with various non-Russian reinsurers, including London market and international reinsurers.

Background to the application

6. AerCap requested copies of the documents in question from McGill in early 2022. McGill raised the issue of whether what was then being sought amounted to the provision of insurance intermediation services or services auxiliary to insurance contrary to regulation 29A of the Russia (Sanctions) (EU Exit) Regulations 2019 ('the Regulations').
7. On 24 June 2022, AerCap wrote to McGill, drawing to its attention updated guidance from the FCDO, to the effect that the Regulations did not prohibit the provision of insurance services in circumstances 'where the insurance is for the benefit of the non-Russian owner of the items, rather than their user or operator. Nor does it apply where the items either remain in Russia as a result of the termination of a lease and against the lessor's will; or are being flown out of Russia in the process of returning them to their owner'.
8. On 29 July 2022, the Export Control Joint Unit ('ECJU') quoted that guidance in response to a request from McGill for clarification as to whether provision of the documents sought would breach sanctions. The ECJU said: 'From the information you provided it appears that the guidance applies to the situation you describe, however it will be for you to determine that your actions are compliant with this guidance.'
9. McGill remained concerned. AerCap then wrote to the ECJU on 8 August 2022 and received a response on 15 September 2022. The ECJU said that: 'In our view, providing copies of contracts to prove that insurance was in place is not an act of providing insurance/reinsurance, therefore this activity is not likely to fall within the scope of regulations 28 and 29A'. The ECJU added that it could

not provide licensing advice by email or phone and that if the recipient was unsure about any aspect of the Regulations it should seek independent advice or submit a licence application as appropriate.

10. On 18 April 2023, in the context of a different LP Claim (albeit one which is being managed with the present LP Claim), I granted an unopposed application for disclosure of lessee airline contracts of insurance and reinsurance brought by Dubai Aerospace Enterprise Ltd against the Second Respondent. AerCap thereafter renewed its request for documents from McGill. On 2 May 2023 McGill responded that it was still of the view that it could not provide the documents, owing to the same concerns as to sanctions previously expressed. It said that it intended to submit a further guidance request to the ECJU. On 7 June 2023, McGill received a response from the ECJU to this further request. This was to the effect that the ECJU could not provide legal advice, nor could it comment by email on whether a particular scenario was licensable; and that if McGill considered that its activities might need a licence, an application should be made through SPIRE. McGill's evidence is that it did not consider that it was appropriate to use the licence procedure to seek to determine whether an activity was licensable, or to make an application for a licence at its own cost.
11. On 23 June 2023 AerCap sent a draft version of the application to the Respondents and asked for confirmation that they would not oppose it. McGill continued its opposition, and AerCap served the current application on 4 October 2023.

The Requirements of CPR PD 57AD

12. CPR PD 57AD para. 31.17 provides:

'31.17 (1) This rule applies where an application is made to the court under any Act for disclosure by a person who is not a party to the proceedings.

(2) The application must be supported by evidence.

(3) The court may make an order under this rule only where-

(a) the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings; and

(b) disclosure is necessary in order to dispose fairly of the proceedings or to save costs.

(4) An order under this rule must –

(a) specify the documents or the classes of documents which the respondent must disclose; and

(b) require the respondent, when making disclosure, to specify any of those documents –

(i) which are no longer in his control; or

(ii) in respect of which he claims a right or duty to withhold inspection.

...'

13. AerCap contends that the documents sought on the present application fall within sub-paragraph (3) of paragraph 31.17, on the following bases:

(1) That the Defendants in the action allege that the contingent coverage in both Section One and Section Three of its Contingent and Possessed Policy only responds in respect of losses which would fall within the scope of the policies taken out by lessees, and that there has been no such loss in this case. AerCap denies that construction, but if it is correct it will be necessary to investigate the scope of those lessee policies.

(2) Secondly, the Defendants allege that they are only liable under the possessed coverage in both Section One and Section Three of the Contingent and Possessed Policy insofar as there are no claims payable under the policies taken out by lessees. The documents are relevant to whether there are claims payable under those policies.

(3) Disclosure of the documents is necessary in order to dispose fairly of the proceedings or to save costs, as they will ensure that any arguments as to the scope of cover available to AerCap will proceed on a correct basis.

14. I did not understand McGill to contest that the requirements of sub-paragraph (3) of paragraph 31.17 are met, save by reference to its concerns as to breach of sanctions and the obligation of confidence that it owes in respect of Sealine and Sealine's Russian insurance company clients, and save insofar as AerCap is able to obtain the Relevant Documents from another source.
15. As to the latter point, Mr Midwinter KC made clear that AerCap is seeking only documents of which it has not already been able to obtain a copy from another source or sources. AerCap will provide a list of documents which it has been able to obtain from other sources, and it is not seeking to have those documents again from McGill.

16. Otherwise, and subject to the points as to sanctions and confidentiality, to which I will turn, I am satisfied that the documents sought do fall within sub-paragraph (3)(a) of paragraph 31.17, and that sub-paragraph (3)(b) is satisfied because disclosure is necessary in order to dispose fairly of the proceedings.

Confidentiality

17. In relation to McGill's concerns as to its duties of confidentiality, it accepted, as I understood it, that these would be allayed if it made any disclosure of documents under compulsion of a court order. Accordingly, if I were otherwise minded to make the order sought in the application, McGill did not put this forward as an independent reason for not doing so.

Sanctions

18. McGill's primary concern and basis of opposition to the application was that disclosure of the relevant documents might contravene the Regulations.

The Regulations

19. It is necessary to set out those of the Regulations which are said to be potentially relevant.

'Financial services and funds relating to restricted goods and restricted technology

28 (1) A person must not directly or indirectly provide, to a person connected with Russia, financial services in pursuance of or in connection with an arrangement whose object or effect is—

- (a) the export of restricted goods,
- (b) the direct or indirect supply or delivery of restricted goods,

(c) directly or indirectly making restricted goods or restricted technology available to a person,

(d) the transfer of restricted technology, or

(e) the direct or indirect provision of technical assistance relating to restricted goods or restricted technology.

(2) A person must not directly or indirectly make funds available to a person connected with Russia in pursuance of or in connection with an arrangement mentioned in paragraph (1).

(3) A person must not directly or indirectly provide financial services or funds in pursuance of or in connection with an arrangement whose object or effect is—

(a) the export of restricted goods to, or for use in, Russia;

(b) the direct or indirect supply or delivery of restricted goods to a place in Russia;

(c) directly or indirectly making restricted goods or restricted technology available—

(i) to a person connected with Russia, or

(ii) for use in Russia;

(d) the transfer of restricted technology—

(i) to a person connected with Russia, or

(ii) to a place in Russia; or

(e) the direct or indirect provision of technical assistance relating to restricted goods or restricted technology—

(i) to a person connected with Russia, or

(ii) for use in Russia.

(4) . . .

(5) . . .

(6) Paragraphs (1) to (3) are subject to Part 7 (Exceptions and licences).

(7) A person who contravenes a prohibition in any of paragraphs (1) to (3) commits an offence, but—

(a) it is a defence for a person charged with an offence of contravening paragraph (1) or (2) (“P”) to show that P did not know and had no reasonable cause to suspect that the person was connected with Russia;

(b) it is a defence for a person charged with the offence of contravening paragraph (3) to show that the person did not know and had no reasonable cause to suspect that the financial services or funds (as the case may be) were provided in pursuance of or in connection with an arrangement mentioned in that paragraph.

(c) . . .

Brokering services: non-UK activity relating to restricted goods and restricted technology

29.—(1) A person must not directly or indirectly provide brokering services in relation to an arrangement (“arrangement A”) whose object or effect is—

(a) the direct or indirect supply or delivery of restricted goods from a third country to a place in Russia;

(b) directly or indirectly making restricted goods available in a third country for direct or indirect supply or delivery—

(i) to a person connected with Russia, or

(ii) to a place in Russia;

(c) directly or indirectly making restricted technology available in a third country for transfer—

(i) to a person connected with Russia, or

(ii) to a place in Russia;

(d) the transfer of restricted technology from a place in a third country—

(i) to a person connected with Russia, or

(ii) to a place in Russia;

(e) the direct or indirect provision, in a non-UK country, of technical assistance relating to restricted goods or restricted technology—

(i) to a person connected with Russia, or

(ii) for use in Russia;

- (f) the direct or indirect provision, in a non-UK country, of financial services—
- (i) to a person connected with Russia, where arrangement A, or any other arrangement in connection with which arrangement A is entered into, is an arrangement mentioned in regulation 28(1), or
- (ii) where arrangement A, or any other arrangement in connection with which arrangement A is entered into, is an arrangement mentioned in regulation 28(3);
- (g) directly or indirectly making funds available, in a non-UK country, to a person connected with Russia, where arrangement A, or any other arrangement in connection with which arrangement A is entered into, is an arrangement mentioned in regulation 28(1); or
- (h) the direct or indirect provision of funds from a non-UK country, where arrangement A, or any other arrangement in connection with which arrangement A is entered into, is an arrangement mentioned in regulation 28(3).

(2) Paragraph (1) is subject to Part 7 (Exceptions and licences).

(3) A person who contravenes a prohibition in paragraph (1) commits an offence, but it is a defence for a person charged with that offence to show that the person did not know and had no reasonable cause to suspect that the brokering services were provided in relation to an arrangement mentioned in that paragraph.

(4) In this regulation—

“non-UK country” means a country that is not the United Kingdom;

“third country” means—

(a) for the purposes of paragraph (1)(a) and (b), a country that is not the United Kingdom, the Isle of Man or Russia,

(b) for the purposes of any other provision of paragraph (1), a country that is not the United Kingdom or Russia.

Insurance and reinsurance services relating to aviation and space goods and aviation and space technology

29A.—(1) A person must not directly or indirectly provide insurance or reinsurance services relating to aviation and space goods or aviation and space technology—

(a) to a person connected with Russia, or

(b) for use in Russia.

(2) Paragraph (1) is subject to Part 7 (Exceptions and licences).

(3) A person who contravenes a prohibition in paragraph (1) commits an offence, but—

(a) it is a defence for a person charged with an offence of contravening paragraph (1)(a) (“P”) to show that P did not know and had no reasonable cause to suspect that the person was connected with Russia;

(b) it is a defence for a person charged with an offence of contravening paragraph (1)(b) to show that the person did not know and had no reasonable cause to suspect that the goods or technology were for use in Russia.’

20. ‘Restricted goods and technology’ for the purposes of Regulations 28 and 29 include, pursuant to Regulation 21, aviation and space goods/technology. The definition of ‘person connected with Russia’ includes a person, other than an individual, which is incorporated or constituted under the law of Russia. ‘Brokering services’ means, in accordance with Regulation 21, ‘any service to secure, or otherwise in relation to, an arrangement...’

Analysis

21. In my judgment, the simple and sufficient answer to McGill’s concerns is that disclosure of the documents sought in this application pursuant to an order of this court made pursuant to CPR PD 57AD will not contravene any of the Regulations cited.
22. Disclosure pursuant to such a third party disclosure order is not the ‘provision of financial services’, within Regulation 28(1) and (3), or the ‘provision of brokering services’ within Regulation 29(1) or the ‘provision of insurance or

reinsurance services' within Regulation 29A. In my view, the making of disclosure pursuant to such an order does not constitute the provision of any 'service' or 'services', but is, instead, obedience to an order of the court made for the purposes of the fair disposal of proceedings before it.

23. On that basis if, as I intend to, I make an order for disclosure of the documents sought under CPR PD 57AD para. 31.17, and if McGill complies with that order, in my judgment no question of breach of the Regulations will arise.
24. I was, however, invited also to consider and express my views upon the matter somewhat more broadly because, it was suggested, that might be of assistance to brokers facing requests for the production of types of document similar to those at issue here. Thus I have considered the question of whether the production of such documents in response to requests analogous to those made by AerCap of McGill here might constitute a contravention of the Regulations, in the absence of a court order providing for their production.
25. McGill particularly emphasised that their role was as a *reinsurance*, not direct insurance, broker. I will consider below whether this is a matter of significance. I will begin, however, by considering whether the provision by an insurance broker who had placed insurances on behalf of Russian lessees of Operator Policy documents to a non-Russian lessor such as AerCap for the purposes of establishing the extent of that lessor's coverage under the insurance would contravene the Regulations.
26. In my judgment it would not. I say that for the following reasons:

(1) The correct approach to interpretation of the Regulations is to ascertain the meaning of the words in the light of their context and the purpose of the provision. It is thus important to consider the purpose of the Regulations. In this I agree with Christopher Hancock KC, sitting as a judge of this court, in Celestial Aviation Services Ltd v Unicredit Bank AG (London Branch) [2023] EWHC 663 (Comm) at [79]-[85].

(2) The purpose of the Regulations as a whole is stated in Regulation 4, insofar as relevant, as being to ‘encourag[e] Russia to cease actions destabilising Ukraine or undermining or threatening the territorial integrity, sovereignty or independence of Ukraine’. At its most basic, they are intended to have an adverse impact on the Russian state, Russian industry or Russian persons; and a key purpose of the trade sanctions in Chapter 2 of Part 5 of the Regulations (which includes each of Regulations 28, 29 and 29A) is to stop the supply of restricted goods to Russia, in order to exert pressure on Russia.

(3) Viewed in the light of those purposes, Regulation 28 is not contravened by a broker supplying documents in the situation I have hypothesised in the preceding paragraph. Regulation 28(1) is not engaged because, even if the provision of the documents could be regarded as a ‘financial service’ it would not be to a person connected with Russia, but rather to AerCap or other non-Russian lessor. Equally, Regulation 28(3) would not be contravened because the provision of the documents cannot be regarded as being ‘in pursuance of or in connection with an arrangement whose object or effect is [one of the matters in (3)(a)-(c)]’. The relevant ‘arrangement’ in pursuance of or in connection with which the documents are being provided is, in my view, the making of a claim

by the lessor under the insurance, or, perhaps, the insurance itself. Neither has as its object or effect any of the matters in (3)(a)-(c). The only ‘arrangement’ which might be said to have had as its object or effect one of those matters would have been the original aircraft lease, but the link between the provision of the relevant documents and that lease, which was entered into before the sanctions were imposed and which has been terminated, is too tenuous to qualify as a relevant ‘connection’, when that protean word is considered in context and in light of the purpose of the Regulations.

(4) In relation to Regulation 29, the position is closely similar, notwithstanding the width of the definition of ‘brokering services’. In my view, the provision of documents in the situation hypothesised would not be ‘in relation to an arrangement’ whose object or effect was any of the matters in 29(1)(a)-(h). Instead, the ‘arrangement’ ‘in relation to’ which they were being provided would be the claim by the lessor under the insurance, or, perhaps, the insurance itself. Any ‘brokering services’ involved cannot be regarded as being ‘in relation to’ the original lease: the link is too tenuous. This is especially so as the lease was entered into before sanctions were imposed and has been terminated. The Regulations are not aimed at preventing a non-Russian party from seeking (or being assisted in seeking) compensation or an indemnity in respect of the consequences of non-performance or termination of such a lease.

(5) As to Regulation 29A, if any ‘insurance or reinsurance service’ was involved in the provision of the documents, it would not be provided ‘to a person connected with Russia’ but to AerCap or other non-Russian lessor. Nor would any such service properly be regarded as ‘relating to aviation ... goods ... for

use in Russia’, because the insurance does not cover (or facilitate) the use of the Aircraft and Engines in Russia, but is rather, at least on one of AerCap’s cases, to provide cover in circumstances where the items remain in Russia as a result of the termination of a lease and against the lessor’s will.

27. As I have said, McGill stressed that their role was as reinsurance brokers, who placed reinsurances on behalf of Russian insurers. I do not consider that this makes any significant difference to the analysis.

(1) Even if the provision of documents could be regarded as a ‘financial service’ provided to ‘a person connected with Russia’, viz the Russian insurers, for the purposes of Regulation 28(1), it would not be ‘in pursuance of or in connection with an arrangement whose object or effect’ was one of the matters in 28(1)(a)-(e), but rather with the lessor’s claim under the insurance, or perhaps with the insurance under which the lessor was covered. That is also the reason why Regulation 28(3) would not be contravened.

(2) Similarly with Regulation 29. Even if the provision of the documents is regarded as the provision of a ‘brokering service’ to the broker’s insurer client, it was ‘in relation to’ the lessor’s claim on the insurance, or possibly the insurance insofar as the lessor had a claim under it, and not to any arrangement which had any of 29(1)(a) to (h) as its object or effect.

(3) In relation to Regulation 29A, the provision of the documents to a non-Russian lessor would not, in my view, constitute the provision, directly or indirectly, of an insurance or reinsurance service to a person connected with Russia. The documents would not be being provided in fulfilment of any obligation owed by the Russian insurers to provide documents to lessors in order

to make, or establish whether they can make, a claim against those insurers or their reinsurers. They would be being provided, instead, because they are potentially relevant to an action which has been brought in this court, and the reinsurance broker, though not a party, holds those documents. In those circumstances, I do not consider that a broker situated as McGill is can be regarded as providing an ‘insurance or reinsurance service’ to the insurer in making such documents available to the lessor. Insofar as there is an ‘insurance or reinsurance service’ provided to anyone, it is to the lessor, as putative additional insured under the insurance and as allegedly having a claim under the reinsurance pursuant to a ‘cut-through’ clause. The lessor, however, is not a ‘person connected with Russia’ within 29A(1)(a). Any ‘insurance or reinsurance service’ involved would not relate to aviation goods ‘for use in Russia’, within 29A(1)(b) for the reason I have already given in paragraph 25(5) above: the (re)insurance does not cover (and facilitate) the use of the Aircraft and Engines in Russia, but is rather, at least on one of AerCap’s cases, to provide an indemnity in circumstances where the items remain in Russia as a result of the termination of a lease and against the lessor’s will.

28. Thus, even in the absence of a court order, I would conclude that the Regulations would not be contravened by a broker in the position of McGill providing the type of documents sought in this application to a lessor in the position of AerCap.

Collateral Use

29. The other point raised at the hearing was as to the extent to which documents which might be disclosed by the Respondents pursuant to the application might

be used for other proceedings: ie the extent of collateral use which would be permitted.

30. AerCap's initial draft order sought that documents disclosed by the Respondents could be used, inter alia, for the purpose of 'commencing and/or pursuing civil proceedings in relation to the policies of insurance and reinsurance to which this application relates.' McGill objected to that as being unduly wide. At the hearing, it was clarified that the use for which AerCap was seeking permission was only for the purposes of these proceedings and of OP claims which have already been commenced in this court. That appeared to me to be sufficiently confined.

31. If documents are disclosed pursuant to this application, they should be considered as 'Operator Policy Documents' for the purposes of the order which I made on 14 December 2023. That order, and in particular paragraph 7 will then, I consider, provide appropriate protection and regulation in relation to what further use may be made of such documents.

Conclusion

32. For these reasons I will make orders substantially in the terms sought in AerCap's application. If there remain any issues as to the precise terms of the orders which should be made, I will resolve them in writing.