

# Commercial Court considers when a ‘represented party’ can be joined to proceedings as a separate defendant in order to represent its own interests

24 February 2023

## Aercap Ireland Limited v (1) AIG Europe S.A. (2) Lloyd’s Insurance Company S.A. and Fidelis Insurance Ireland DAC

On 13 January 2023, the Commercial Court held that Fidelis Insurance Ireland DAC (“Fidelis”) could be joined as a separate defendant to the representative proceedings that had been commenced by Aercap Ireland Limited (“Aercap”) against AIG Europe S.A. (“AIG”) and Lloyd’s Insurance Company S.A. (“LIC”) following losses arising out of Russia’s invasion of Ukraine.

AIG and LIC had been sued (by Aercap) on their own behalf and on behalf of various following insurers subscribing to different sections of an aviation policy. Although Fidelis subscribed to both sections of the policy and could have been represented by either AIG or LIC, the Commercial Court found that it was sufficient that Fidelis had a *bona fide* desire to conduct its own case, with its own lawyers that had only its interests at heart.

Accordingly, the Court allowed Fidelis to join the proceedings as the Third Defendant.

## Background

Following the Russian invasion of Ukraine, the EU and the UK imposed sanctions prohibiting Aercap and other related lessors (collectively the “Insureds”) from continuing to lease aircraft and aircraft parts to Russian airlines with effect from 28 March 2022. Prior to this date, notices were issued by Aercap to the Russian lessees terminating the leasing of the aircraft and requiring the aircraft to be returned to specific locations. These requests were mostly declined.

The Defendants were insurers under Section One (‘All Risks’) and Section Three (‘War Risks’) of the Insureds’ Aircraft Hull, Spares and Equipment policy (“**the Policy**”). After the insurers rejected Aercap’s initial claim, Aercap issued proceedings against Section One insurers for US\$3.5bn and against Section Three insurers for US\$1.2bn. Aercap brought its claim by way of a representative action whereby AIG was sued on its own behalf and on behalf of the Section One insurers and LIC was sued on its own behalf and on behalf of the Section Three insurers. Fidelis subscribed to both sections of the Policy.

Shortly before defences were served, Fidelis sought consent to be joined to the action as a separate defendant. Aercap and AIG did not consent to the joinder and LIC took a neutral position. Fidelis therefore applied to the Court.

## The position of the parties

Fidelis contended that a representative action was a procedural device that operated as a matter of convenience. It should not be used as a tool to preclude a party that wants to defend a claim against it at its own risk and expense. Fidelis accepted that it should not be entitled to unnecessarily lengthen the proceedings but argued that this could be avoided using the Court’s case management powers.

Fidelis wanted to conduct its own defence as its interests were not completely aligned with the other insurers and it wanted to put forward a consistent position across its book of business. In addition, the position being advanced by the representative Defendant insurers was being used against Fidelis as being inconsistent with the position it was taking in defence of bad faith allegations in US proceedings.

Fidelis argued that there were other English proceedings involving similar claims where each insurer was being sued individually which showed that a representative action was not necessarily the obvious way to structure these types of proceedings.

AIG contended that adding Fidelis as a party would not solve any perceived issue raised by Fidelis, add any value to the determination of the proceedings or protect the interests of Fidelis. AIG's position was that Fidelis could be represented adequately by AIG and LIC whose interests were entirely aligned with those of Fidelis.

Aercap's concern was to ensure the proceedings were conducted as efficiently as possible.

## Decision of the Commercial Court

Mr Justice Butcher found that AIG's arguments lacked conviction and agreed with Proudman J in **PNPF Trust Co Ltd v Taylor [2009] EWHC 1693 (Ch)** that the 'essential purpose' of representative proceedings was to include, not exclude, a party that was ready and willing to represent its own interests at its own risk and cost.

Where a party has a significant financial interest, aside from any exceptional circumstances, it should be allowed to join the proceedings and not be represented against its will.

The Judge found that joining Fidelis as a party to the proceedings would assist the Court to resolve the matters in dispute and it was not necessary for Fidelis to show that its position would not be adequately put forward by the representative parties. The test was not whether a party seeking to join would be able to "bring something to the party" (**LB Holdings Intermediate 2 Ltd (In Administration) v Lehman Brothers Holdings Scottish LP 3 and others [2018] EWHC 2017 (Ch)**) but whether Fidelis had shown a sufficiently different perspective to make it appropriate to join the proceedings.

The Judge noted that it was clear that there were difficulties in the current case as AIG's solicitors had recognised that they were not able to represent Fidelis and were not sharing privileged documents with them.

Further, Fidelis had legitimate concerns about the inconsistent positions being taken in the UK and US proceedings.

Mr Justice Butcher was satisfied that the Court could protect against any unnecessary duplication of evidence and there was no concern about an 'inequality of arms' as the fact that an argument was supported by more than one party did not add to its cogency. He found AIG's argument that it may lead to other insurers taking the same position lacked conviction and 'at worst' would lead to these proceedings being constituted in the same way as other actions involving similar claims.

Accordingly, the Judge allowed Fidelis's application to join the proceedings and recommended consequential directions be given.

## Comment

This case is a reminder that although representative proceedings are an effective tool for conducting proceedings involving multiple parties with similar interests in a way that is efficient and practical, this should not go against the fundamental principle that a party is entitled to defend itself in a claim made against it.

There will need to be exceptional reasons to exclude a party from joining the proceedings and this case shows that technical arguments and case management concerns will hold little weight against a party's legitimate desire to conduct its own defence.

This is just one action in a raft of litigation that has arisen (and continues to arise) from the conflict in Ukraine. It is likely that similar issues will arise in the future, and not just in the aviation arena. It is a reminder that the interests of a party may not always align with those purporting to represent it and this is particularly relevant in large, complex litigation where each party has a significant financial interest in the outcome.

If 'represented parties' have a *bona fide* concern that their interests are not being protected, especially considering the nuances of how cases are presented and how interests may change throughout the litigation, they should consider joining the proceedings to be represented by their own lawyers who have their interests at heart.

## Key contacts



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