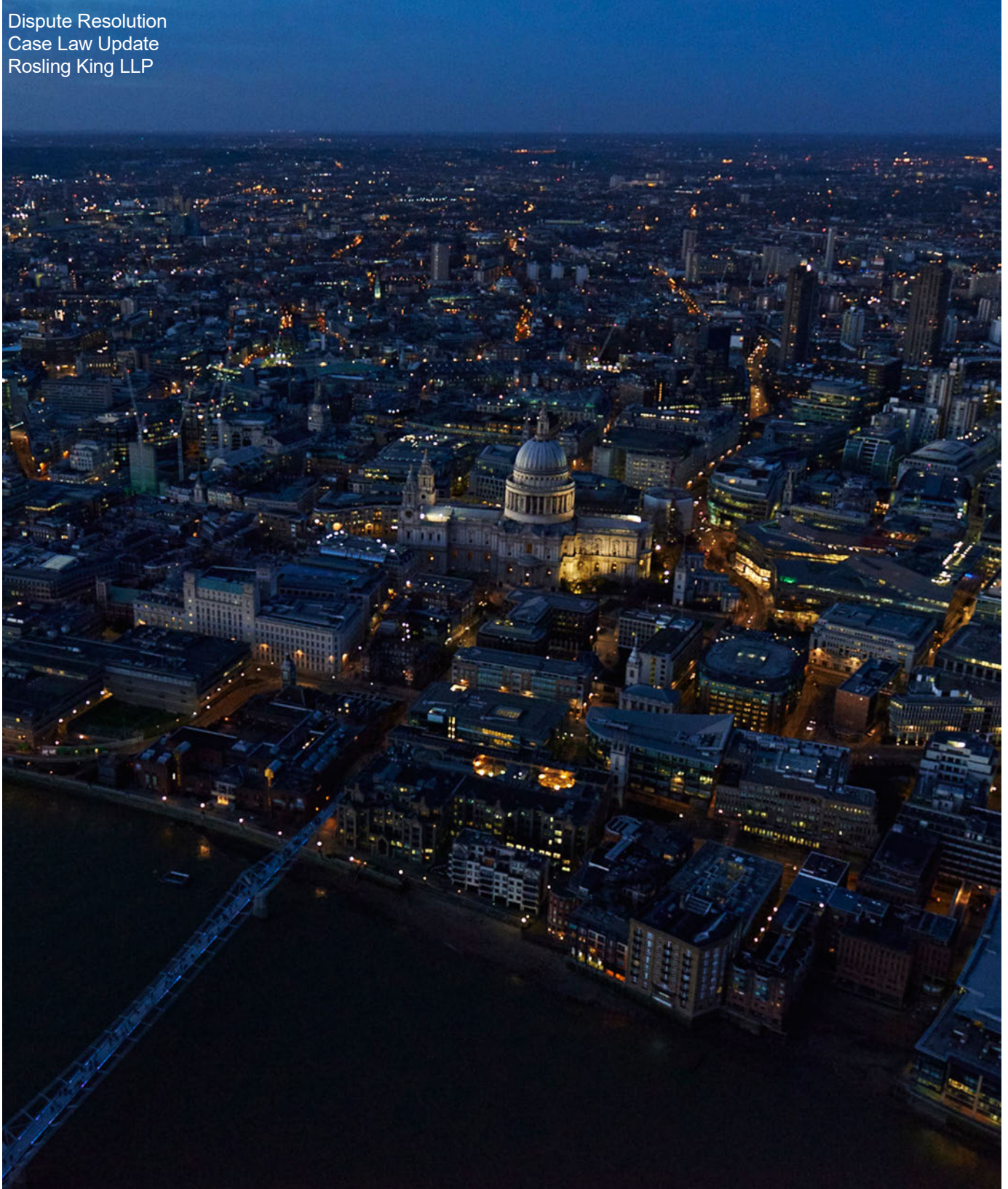


Dispute Resolution
Case Law Update
Rosling King LLP



Background

Alafco Irish Aircraft Leasing Sixteen (the “**Claimant**”) had been in dispute with Hong Kong Airlines (the “**Defendant**”), over the leasing of Airbus planes, which led to the Claimant initiating proceedings for the Defendant’s failure to settle a payment of more than US\$34.5 million. The Defendant filed an Acknowledgment of Service, then sought several extensions of time to file its defence. The Claimant accordingly filed for summary Judgment, contending that the Defendant had never properly indicated the basis of its defences. The Claimant was granted Summary Judgment after the Defendant had largely conceded the claim at the hearing. The Claimant sought its costs on an indemnity basis.

The lease contained a clause whereby:

“the Lessee (the Defendant) shall pay to the Lessor all reasonable costs and expenses (including reasonable legal expenses) incurred by the Lessor... in preserving its rights...under any Relevant Document required in writing...”

The Relevant Documents in this case included both the lease and side letter. The Claimant submitted that it was entitled to its costs on an indemnity basis on two grounds; (1) the Defendant’s conduct had put the Claimant to considerable costs due to having to anticipate unknown points of defence; and/or (2) the reference to “all reasonable costs” being paid created a contractual entitlement to indemnity costs.

The Decision

The Commercial Court granted the Claimant’s application, finding that the Claimant was entitled to have all of its reasonable legal costs and expenses paid on an indemnity basis.

Conduct

The Commercial Court decided that the Defendant’s conduct did not justify an award of costs on an indemnity basis. The Court was not persuaded that there was sufficient material before it to conclude that the Defendant’s conduct took the case ‘outside the norm’. The Defendant did not in any way mislead the Court, or the Claimant, as to the scope of its defences. The Court found that whilst there had been nothing of substance raised in the defence, the Defendant was not merely engaging in delaying tactics.

Contractual basis

The Claimant relied on LJ Briggs in *Littlestone v MacLeish*, where the Court of Appeal ordered indemnity costs relying on a contractual provision of “all costs”, albeit without the inclusion of “reasonable”. The Claimant submitted that its contractual entitlement to all reasonable costs and expenses, including reasonable legal expenses, incurred in preserving its rights under the lease, granted it an entitlement to indemnity costs. The Claimant maintained that the Court should follow the approach of LJ Briggs, and order costs on an indemnity basis pursuant to the relevant contractual provision. The Defendant argued that this clause of the lease did not apply, and only applied to documents required to be entered into to preserve the rights of the Claimant.

The Court first considered the correct construction of the relevant clause of the lease, and decided it should be interpreted as follows; ‘the lessee agreed to pay all reasonable costs and expenses incurred in relation to the preservation of rights under the lease, and therefore that would extend to the costs of any litigation’.

The Court then considered the reference to “*all reasonable costs and expenses*” in the relevant clause and decided that the presence of the word “reasonable” does not preclude a conclusion that costs should be awarded on an indemnity basis. The Court found the reference to “reasonableness” does not add to or detract from the analysis, given that pursuant to CPR r44.3(1) costs will not be allowed if they were unreasonably incurred or unreasonable in amount, whether the Court is assessing costs on the standard or indemnity basis. The Court concluded that the language of the clause indicates that it was intended that the lessee (the Defendant) should pay “all costs” and expenses provided they are reasonable. This was consistent with the Court’s finding that the lessor is entitled to be indemnified for costs which it incurs in enforcing its rights, and the appropriate basis is the indemnity basis. The Claimant is therefore entitled to have all of its reasonable legal costs and expenses paid on an indemnity basis.

Commentary

The Commercial Court’s decision provides clarity for legal practitioners as to the meaning of a recovery of costs clause. The relevant clause in *Alafco* was found in a lease, but it is important for practitioners and contracting parties to remember that similar costs recovery provisions are likely to also be found in commercial contracts.

The decision shows that the inclusion of the word “reasonable” will not preclude the Courts from awarding costs on an indemnity basis, particularly as costs are subject to reasonableness on both the standard and indemnity basis pursuant to CPR 44.3(1). It is worth noting the Commercial Court ruled a recovery of costs clause in a lease, whether it be all costs or all reasonable costs, is a contractual entitlement for the party seeking to recover its costs to do so on an indemnity basis.

For further information, please contact [Georgina Squire](#) or the Partner with whom you usually deal.