



Neutral Citation Number: [2023] EWHC 671 (Comm)

Case No: CL-2019-000742

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: 24/03/2023

Before :

Christopher Hancock KC
Sitting as a Judge of the High Court

Between :

(1) VIRGIN AVIATION TM LIMITED	<u>Claimants</u>
(2) VIRGIN ENTERPRISES LIMITED	
- and -	
ALASKA AIRLINES INC	<u>Defendant</u>
(formerly VIRGIN AMERICA INC)	

Daniel Toledano KC and Joshua Crow (instructed by **Slaughter and May**) for the
Claimants

Tom Weisselberg KC and Edward Ho (instructed by **Jones Day**) for the **Defendant**

JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:00 on Friday 24 March 2023.

Christopher Hancock KC :

1. I gave judgment in this matter on 16th February 2023 by remote hand down. The parties are in agreement on all consequential matters save one. The one outstanding matter that I have to deal with is the application made by the Defendant for permission to appeal from my judgment.
2. I start in this regard with Issue 1, as set out in my judgment.
3. The relevant principles are not in dispute between the parties. I must be satisfied that the Defendant's appeal would have a realistic prospect of success. In this context realistic means more than fanciful.
4. As I recorded in my judgment, the parties were, at trial, essentially in agreement that the dispute in this case was one of contractual construction, and they were, further, in agreement, at least in large part, as to what the correct principles of construction were.
5. The Defendant, however, argues that I misapplied those principles in the following respects:
 - a. I failed to give appropriate weight to clause 3.7, which, it was argued, "trumped" all other provisions in the contract, including clause 8;
 - b. I failed to recognise that the Minimum Royalty was in truth a royalty, so that it was caught by the bar on recovery of royalties earned without the use of the Names or Marks;
 - c. I failed to give due weight to the factual background and in particular the desire of the DOT's concerns that Virgin should not earn royalties where no use was made of the Names or Marks;
 - d. I gave too much weight to the increase in risks undertaken by Virgin as a result of the changes between the 2007 TMLA and the Current TMLA;
 - e. I did not approach the question of business common-sense correctly, and failed in this regard to give effect to the principles enunciated in Rainy Sky SA [2011] 1 WLR 2900, at [29]-[30], because I viewed the matter from the perspective of Virgin and not from the perspective of both parties;

- f. I failed to take due account of the fact that the result, from Alaska's perspective, of the construction that I adopted was to impose a lengthy obligation on Virgin America to make payment for rights that Virgin America no longer wished to use;
 - g. I failed to give proper weight to the fact that Virgin had the right to terminate the agreement and relicense the Names and Marks if Virgin America elected not to continue to use them.
6. For its part, Virgin contended that any appeal had no real prospect of success. Virgin made the following points:
 - a. My judgment was based on a number of factual findings with which the Court of Appeal would be very unlikely to interfere, relating to the commercial and statutory background to the Current TMLA, as set out in paragraph 162 of my judgment.
 - b. My conclusion was that Virgin's construction of the contract was clearly correct. There is accordingly no room for doubt on the point.
7. Despite the Defendant's criticisms, which were essentially the same arguments which were made at trial which I considered fully and rejected, I am left in no doubt as to the correctness of my decision. Accordingly, essentially for the reasons I have already set out in my judgment, I take the view that Alaska has no real prospect of success on appeal. I further accept that my conclusion was to some extent at least based on my factual conclusions, making it still more inappropriate to grant permission to appeal.
8. It follows from this conclusion that I regard an appeal on Issues 2 and 3 as hopeless. I would in any event have refused leave since I do not agree that the outcome on these issues is dependent on the answer to Issue 1.