



Neutral Citation Number: [2021] EWHC 3435 (Comm)

Case No: CL-2020-000796

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 20/12/2021

Before :

CHRISTOPHER HANCOCK QC
SITTING AS A JUDGE OF THE HIGH COURT:

Between :

NAVIG8 CHEMICALS POOL INC	<u>Claimant</u>
- and -	
AETURNUM ENERGY INTERNATIONAL PTE LTD	<u>Defendant</u>

Henry Ellis (instructed by **HFW**) for the
The Defendant did not appear and was not represented

The matter was dealt with in writing

Approved Judgment
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Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 20 December 2021 at 10:30 am.

Christopher Hancock QC :

1. My judgment on this matter was handed down remotely on 23 November. In this judgment I deal with various consequential matters arising out of that judgment, namely:
 - i) Costs.
 - ii) Interest.
 - iii) The manner in which the outstanding issues in this matter are to be dealt with.

Costs.

2. The Claimant submits that it should be awarded the costs of this action to date, on the basis that it has been entirely successful, and that costs should, in the normal way, follow the event.
3. I am guided in relation to this question by the provisions of CPR Part 44. In this case, in my judgment, it is clear that the Claimant has been successful and that accordingly, in line with CPR 44.2(2)(a), the Defendant should pay the Claimant's costs.
4. The next question is whether those costs should be awarded on the standard basis or whether, as the Claimant submits, the award should be on the indemnity basis. The Claimant submits that the Defendant has acted unreasonably in a number of respects which will have had the effect of increasing costs unnecessarily. In this regard the Claimant relies on Excelsior Commercial and Industrial Holdings Ltd [2002] EWCA Civ. 879 in which the Court of Appeal held that the making of a costs order on the indemnity basis would be appropriate in circumstances where the conduct of the parties or other particular circumstances of the case (or both) were such as to take the situation "out of the norm" in a way which justifies an order for indemnity costs.
5. The Claimant relies on the Defendant's conduct as taking this case out of the norm for proceedings in the Commercial Court. In particular, the Claimant relies on (1) the Defendant's abrupt disengagement with the proceedings following the CMC as well as (2) the Defendant's wilful and continuing refusal to comply with the interim injunction granted by the Court on 9 December 2020 and continued on 18 December 2020, as being conduct that is out of the norm for a litigant in the Commercial Court, especially where the Defendant does not contest the Court's jurisdiction. The Claimant argued that if the Defendant had complied with the Court's order and provided substitute security in December 2020, then the strong likelihood is that these proceedings would have been much narrower in scope and the costs would have been significantly lower; that the Defendant's strategy of participation followed by disengagement has unquestionably increased the costs incurred by the Claimant in obtaining the relief that it was always entitled to, so that the Claimant was obliged to seek procedural assistance from the Court to address the consequences of the Defendant's disengagement; and the fact that the Defendant did not have London solicitors on the record in the proceedings placed an additional unwarranted financial burden on the Claimant as it was obliged to serve all documents in the proceedings by hand in Singapore at the Defendant's offices. Finally, the Defendant's disengagement meant the Claimant had to take the unusual step, and incur the costs, of serving the Third Witness Statement of Michael Ritter, to

update the Court as to the Defendant's status prior to the trial, a statement which exhibited documents that the Defendant ought to have disclosed, such as its audited accounts.

6. I have concluded that this is a case in which the award of indemnity costs is justifiable, largely because of the fact that the Defendant has, in effect, chosen to disengage with the proceedings part way through and had undoubtedly increased the costs as a result.
7. Finally, I am asked to summarily assess the costs, since this trial has taken less than a day. I have been provided with a schedule of costs. The total amount claimed is £161,496.30, which is significantly less than the amount budgeted. I have considered that schedule carefully. I have come to the conclusion that there are a very limited number of the costs which are on their face not justified. However, on the broad brush basis that an exercise such as this must be carried out, I have concluded that the amount which should be awarded is £155,000.
8. The Court has awarded the Claimant USD 390,838 as damages for loss of use of the Vessel during the period of her detention. The Claimant claimed interest on this sum under section 35A of the Senior Courts Act 1981 at such rate and for such period as the Court considered just.
9. The Claimant contends that the rate of interest should be the US Prime Rate (which was 3.25% throughout the relevant period), alternatively, it should be USD three-month LIBOR with an uplift of 2.5% (which, including the uplift, was between 2.62% - 2.78% during the relevant period). In either case the interest should be calculated on the basis of three-monthly rests and run from the date of the release of the vessel, 22 December 2020, to the date of the Court's Order, which is to be taken to the date on which I gave judgment, ie 23 November 2021.
10. The claimed rates are those considered by Andrew Smith J in the leading case on the award of interest in commercial shipping cases: Fiona Trust & Holding Corporation v Privalov [2011] EWHC 664 (Comm).
11. In that case the judge stated at [15]:

“...the courts have adopted a convention of awarding interest upon sterling compensation of the UK Clearing Banks' Base Lending Rate plus 1%, and this is for pragmatic reasons. It has also become conventional, at least in the Commercial Court, for interest to be awarded at US Prime Rate on compensation awarded in US dollars: see, for example, Kinetics Technology v Cross Seas Shipping (“The Mosconici”), [2001] 2 Lloyd's Reports 313 at p.316 per David Steel J, Mamidoil-Jetoil Greek Petroleum Company SA v Okta Crude Oil Refinery, AD, [2003] 1 Lloyd's Rep 42 at paragraph 16 per Aikens J and AXL Resources Ltd v Antares Underwriting Services Ltd & another, [2010] EWHC 3244 (Comm) per Gloster J. This rate was described by Langley J in Kuwait Airways v Kuwait Insurance, [2000] 1 All ER (Comm) 973 at p. 992d/e as “The nearest equivalent of base rate plus 1%”, and he considered that “in normal circumstances” US prime rate would be the appropriate rate for interest on a US dollars award. The court will depart from these conventional rates if it would be just to do so, and the burden of demonstrating this is upon the party who seeks to displace the conventional rate: Shearson Lehmann Hutton Inc v Maclaine Watson & Co Ltd and ors (No 2), (loc cit) at p. 733L per Webster J.”

12. However the Claimant, very properly, in the absence of the Defendant drew the Court's attention to the fact that in Fiona Trust itself, the Court, in reliance on (i) evidence regarding the successful parties' borrowing practices and on (ii) the practice in LMAA arbitrations (at least where the claimant operates outside the US), held that it was instead appropriate to award interest by reference to US LIBOR plus an uplift of 2.5%, compounded at three-monthly rests: see [17]-[22]. The Court's rationale was that LIBOR reflected more closely what was used for shipping finance: see [19].
13. Accordingly, the Claimant seeks an award of interest on the damages awarded to it calculated either by reference to the US Prime Rate or US Dollar LIBOR, compounded at three monthly rests, namely:
 - i) USD 11,860.88 (US Prime), or
 - ii) USD 9,768.39 (US LIBOR).
14. I have concluded that the appropriate rate is US Dollar LIBOR, compounded at three monthly rests. I have been provided with a calculation as to the amount of interest calculated on this basis which totals USD 9,768.39. The total amount to be awarded to the Claimant is thus USD 400,606.39. Interest will then run on this amount at the Judgment Act rate of 8%.
15. This leaves the question of how the remainder of these proceedings should be conducted. I concluded that the proceedings should be adjourned in part to enable the Court to take account of what is about to occur in Singapore, where a hearing is fixed for early December. A date will have to be fixed early in 2022, after the result of the Singapore hearing is known. I do not think that a date can be fixed at present. However, I propose to give liberty to the Claimant to apply for a further half day hearing, and I propose to order that this be reserved to me, to be fixed on the first available date convenient to me and to Counsel for the Claimant following the delivery of judgment in Singapore.
16. I would be grateful if a draft order could be prepared in the light of this and my earlier judgment.