Neutral Citation Number: [2023] EWHC 732 (Comm)

Case No: CL-2018-000648

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

Date: 30/03/2023

Before :

MR JUSTICE FOXTON

- -

Between :

LONESTAR COMMUNICATIONS CORPORATION LLC — **Claimant**

- and -

(1) DANIEL KAYE
(2) AVISHAI MARZIANO
(3) CELLCOM TELECOMMUNICATIONS LIMITED
(4) RAN POLANI
(5) ORANGE LIBERIA, INC — **Defendants**

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Tony Singla KC, **Kyle Lawson** and **Mohammud Jaamae Hafeez-Baig** (instructed by **Freshfield Bruckhaus Deringer LLP**) for **the Claimant**
Neil Kitchener KC and **Andrew Lodder** (instructed by **Norton Rose Fulbright LLP**) for **the Fifth Defendant**

Hearing date: 22 March 2023
Draft Judgment Circulated: 23 March 2023

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE FOXTON

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 30 March 2023 at 10:00am.

The Honourable Mr Justice Foxton:

1. This judgment deals with consequential issues arising from my judgment at [2023] EWHC 421 (Comm).

Interest

2. In this case, as I explain below, a "Without Prejudice Save as to Costs" offer was made by Orange Liberia in November 2021 (**the First WPSATC Letter**) – a second, higher, offer was made on 2 February 2022. For the purpose of determining whether Lonestar has "beaten" that offer, it is necessary to resolve a dispute as to whether the court should award interest on the US$ amount which I have ordered Orange Liberia to pay at US Prime or 6-month US$ LIBOR, and, if so, with what uplift. I intend to take the issue of the starting point, and the uplift, separately.

The starting point

3. It is possible to find various observations on this issue in reported cases, and it is an issue which has become more topical since the Bank of England and the FCA committed to discontinuing LIBOR.

4. In *Black Sea & Baltic General Insurance Co Ltd v Baker* [1996] LRLR 353, 360, Staughton LJ referred to US Prime and stated "my recollection is that, unlike base rate in the United Kingdom, those are rates at which reliable borrowers, or some of them, can actually borrow money. If that be right, they would seem to be close enough to the base-rate-plus-one that is used in commercial cases for sterling awards. But, as I have said, the conventional rate can be displaced by evidence if the judge thinks that course appropriate."

5. In *Kuwait Airways Corp v Kuwait Insurance Co (No. 3)* [2000] 1 All ER (Comm) 973, 992, Langley J referred to the practice of the Commercial Court at that time being to award base rate plus 1% on sterling sums, and stated "the nearest equivalent of base rate plus 1% is US Prime rate. In normal circumstances that in my judgment would be the appropriate rate…".

6. In *Mamidoil-Jetoil v Okta Crude Oil Refinery AS* [2002] EWHC 2462 (Comm), Aikens J observed at [16]:

> "When damages are assessed in pounds sterling the conventional rate of interest that is awarded in commercial cases is "base rate plus 1%". That is the rate that a commercial borrower of good credit will have to pay to borrow sterling in London. But when the currency of the loss and the currency of damages is US dollars, then the Commercial Court will consider the cost of borrowing US dollars. That is the position in this case. The cost of borrowing US dollars is usually expressed by reference to the US Prime Rate. That is the rate that commercial banks charge their most creditworthy customers if they are borrowing US dollars. It is a short-term borrowing rate. Prime Rate includes an element of profit for a bank, so that the most creditworthy borrowers can obtain, loans at Prime Rate itself. Less creditworthy borrowers will have to pay Prime Rate plus one or more percentage points."

7. In *Fiona Trust v Privalov* [2011] EWHC 664 (Comm), [15], Andrew Smith J noted that it had become conventional, at least in the Commercial Court, for interest to be awarded at the US Prime rate on compensation awarded in US dollars, citing a number of cases in which this had been done. He said that the court would depart from this starting point if just to do so, and the burden of demonstrating this lay upon the party seeking to displace the conventional rate. In that case, Andrew Smith J heard evidence that LIBOR was widely used for setting interest rates on loans to shipping companies (London, of course, being a major centre for ship finance) and that the US Prime rate was not used for lending to borrowers outside the USA. He concluded that LIBOR should be used for determining the rate in that case ([18]).

8. In *Vis Trading Co Ltd v Nazarov* [2013] EWHC 491 (QB), Leggatt J referred to *Fiona Trust* and made the following observations:

> "[10] Andrew Smith J went on to note (at paragraphs 17-18) that a different practice prevails in arbitrations, where LIBOR is more commonly used as a benchmark – at least where the claimant operates outside the United States. That is because commercial parties outside the United States are not accustomed to using the US prime rate as a reference point for loans, whereas LIBOR rates have acquired international recognition.
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> [11] Mr Nazarov and Ansol have submitted that a more appropriate rate of interest to apply would be 1% above the 6-month US$ LIBOR rate. They argue that this is much more closely equivalent than the US prime rate to the rate of 1% above base rate which is conventionally used in the Commercial Court for sterling interest awards.
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> [12] The purpose of an award of interest is to compensate the claimant for the loss of use of the principal sums owed. In the absence of proof of actual loss suffered, the assumption is made that the loss is fairly measured by the rate of interest which the claimant could reasonably been expected to pay to borrow an equivalent amount of money. As stated in *Kuwait Airways v Kuwait Insurance* [2000] 1 All ER (Comm) 973 at 991–2 and confirmed in *Fiona Trust* at paragraph 21, the appropriate rate for this purpose is that which would be charged for a short-term unsecured loan and should reflect the creditworthiness of the claimant.
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> [14] In my view, the 6-month US$ LIBOR rate is a more appropriate rate to use as a benchmark in a case of this kind than the US prime rate for the reason already indicated that LIBOR has become the most widely used benchmark outside the United States for lending denominated in US dollars. That is so not only in the shipping field but generally in international commerce".

9. In *Certain Underwriters at Lloyd's London v Syria* [2018] EWHC 385 (Comm), in which the defendant did not appear, the US Prime rate was awarded both pre and post judgment. That was a claim based on a final judgment rendered in the claimants' favour in the US District Court for the District of Columbia. The use of US Prime was justified on the basis that: (a) it is used as a benchmark in the US market; (b) US cases have held it to be the most appropriate rate of pre-judgment interest as it best approximates the market rate of

borrowing; and (c) it is generally considered the starting point for awards in US$ in the English courts (para. [82]).

10. In *Orexim Trading Ltd v Mahavir Port and Terminal Private Ltd* [2019] EWHC 2338 (Comm) (another case in which the defendant did not appear), an award of interest on a US$ amount was made at a rate of 6-month LIBOR, plus 2.25%. The use of LIBOR as the starting point was justified on the basis that the claimant was not a US company and carried on business outside the USA.

11. In *Aercap Ireland Ltd v Hainan Airlines Holding Co Ltd* [2020] EWHC 2025 (Comm), [109]-[110], there was an issue as to the amount of interest which should be awarded post judgment (applying the discretion in relation to non-sterling judgment sums afforded by s.44A of the Administration of Justice Act 1970). The court awarded 2% above US Prime.

12. In *Trafigura Maritime Logistics Pte Ltd v Clearlake Shipping Pte Ltd* [2022] EWHC 2625 (Comm), [2] (a shipping case), HHJ Pelling KC stated:

> "My attention has been drawn to one authority which is relevant to the issues I have to determine, and that is the decision of Leggatt J in *VIS Trading Co Ltd v Nazarov* ... The relevant part of the judgment starts at para 9, where Leggatt J cites from the relatively well-known decision of *Fiona Trust and Holding Corp* v *Privalov* … Leggatt J observed that Andrew Smith J had noted a different practice in relation to arbitrations where LIBOR was more commonly used as a benchmark rate, and then he concluded at para 14 as follows:
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> 'In my view, the six-month US LIBOR rate is a more appropriate rate to use as a benchmark in a case of this kind than the US prime rate for the reason already indicated that LIBOR has become the most widely used benchmark outside the United States for lending denominated in US dollars. That is so not only in the shipping field but generally in international commerce …'
>
> I respectfully concur with that analysis, which reflects my experience in the Commercial Court and the London Circuit Commercial Court. For those reasons, I conclude that in principle the appropriate base rate is the six-month US LIBOR rate."

13. Finally, in *Pisante v Logothetis* [2022] EWHC 2575 (Comm), [74], Mr Justice Andrew Baker held:

> "The task of the court is to choose an interest rate it considers will be a realistic reflection of the cost of borrowing for a claimant such as Swindon, in the absence of evidence seeking to prove its actual borrowing costs (since no such evidence was provided). Given the factors set out in the previous paragraph, I consider that US Prime + 2%, as proposed by the claimants, is such a rate. The defendants proposed US$ libor + 2½%. It suffices to say that there is no presumption or practice favouring the use of US$ libor over US Prime. If anything, the court has for some time now tended to accept that US Prime represents more realistically than does US$ libor a base line for real-world US$ borrowing costs, at all events away from the world of major financial institutions or other businesses of that sort of magnitude."

14. There are some contexts (for example which side of the road to drive on) when the existence of a clear default rule is important, even if there is much which can be said for both competing options. I am satisfied that the default interest rate for US$ awards in the Commercial Court going forward should be US Prime, irrespective of whether the claimant has a US place of operations or not and irrespective of whether the claim is a maritime claim or not. I have reached that conclusion for the following reasons:

    i) There are long-standing decisions of the Commercial Court which have referred to US Prime as a starting point for US$ awards: see [4]-[7]. That practice is referred to in *Civil Procedure* §16AI.2.

    ii) LIBOR is in the course of being discontinued.

    iii) LIBOR itself is an interbank rate, rather than a commercial borrowing rate.

    iv) The trend of the more recent authorities has been to favour the use of US Prime.

    v) A default rule would not achieve the requisite clarity if it did not apply to particular commercial sectors of indeterminate scope.

15. There being no contrary evidence in this case, the starting point will be US Prime.

The uplift

16. As its name indicates, US Prime is the rate offered by US banks to their most creditworthy business customers. In these circumstances, it would not be appropriate to have a default rule that there will always be an uplift over and above US Prime in an interest award. In some cases, even without evidence, it will be obvious from the general characteristics of the claimant that it would have to pay a higher rate to borrow US$ than a bank's most creditworthy customers. In such cases, the court may well be persuaded to order interest at US Prime plus 1% or US Prime plus 2% for certain types of claimant. Higher uplifts than that are likely to require evidence to justify them.

17. In this case, Lonestar is part of MTN, a multi-national company of substantial size and reputation, with activities across a number of countries. In the absence of evidence to that effect, I am not willing to assume that the rate at which it could borrow US$ would be higher than US Prime. Accordingly, interest will be awarded at US Prime without an uplift.

18. Mr Kitchener KC submitted that I should reduce the interest rate for the period after any effective WPSATC Letter, on the basis that the only reason Lonestar has been kept out of its money after that date was its failure to accept the offer. I will deal with this issue below.

Costs independent of the WPSATC Letters

19. I shall not set out the terms of CPR 44.2. As is well-known, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, but the court may make a different order. In this case, Mr Singla KC contends that Lonestar should be awarded all its costs for the period up to any effective WPSATC Letter. Mr Kitchener KC argues that

no order for costs should be made in relation to the period prior to any effective WPSATC Letter.

20. *Civil Procedure* 2022, Vol 1, p.1475, notes:

> "Routinely, judges approach the matter by asking themselves three questions: first, who has won?; secondly, has the winning party lost on an issue which is suitably circumscribed so as to deprive that party of the costs of that issue?; and thirdly, is it appropriate in all the circumstances of the individual case not merely to deprive the winning party of its costs of an issue in relation to which it has lost, but also to require it to pay the other side's costs".

21. Adopting that approach, I am satisfied that, for present purposes, Lonestar has won, recovering damages and interest of about $5.4m, a significant sum by any standards.

22. As to the second issue, I am satisfied it is appropriate to deprive Lonestar of a significant proportion of its costs for the following reasons:

i) The amount recovered is only 10% of the amount claimed, in circumstances in which the material relevant to the determination of Lonestar's loss was to a significant extent in its own control.

ii) The size of the claim has proved a significant engine in the case, driving the dispute forward, and leading to it being litigated by both parties on a grand scale, with total costs of $23m. That level of costs might, possibly, be proportionate to a US$50m claim, but it is wholly disproportionate to a $5m claim.

iii) I do not find Lonestar advanced a dishonestly exaggerated claim. The issue of loss of profits is one where what Tomlinson LJ described in *Sugar Hut Group Limited v AJ Insurance Service* [2016] EWCA Civ 46, [25] as "the bounds of permissible optimism" may prove particularly elastic, as the enquiry inevitably involves an exercise in counterfactual analysis rather than, for example, "hard fact" issues such as whether particular property was lost or damaged. It is all too easy for parties to persuade themselves that, but for some intervening event, their business would have reached the sunlit uplands, and where the event is in the nature of a targeted criminal act, such optimism is likely to be fuelled by a sense of righteous indignation. Further, Lonestar's case was supported by expert reports.

iv) Nonetheless, it should have been obvious to Lonestar that there was a huge disconnect between the case it was advancing through expert evidence as to the start date, duration and effect of the DDOS Attacks, and its contemporary documentation and assessment. It should also have been obvious that Lonestar was not able to call any witness capable of giving factual evidence which chimed with that expert case. In these circumstances, it must have been clear that a significant part of the amount claimed was wholly speculative, even if reasonable views might have been held as to the extent of a more solid core.

v) A significant element of the costs claimed – disclosure, forensic expert evidence and trial – was devoted to the dispute as to quantum, on which Orange Liberia was

substantially successful. In particular in opening and closing submissions and cross-examination, it was the amount of any loss which took up the greater proportion of the time. Mr Singla KC rightly described these issues at trial as "the real battleground".

vi) I am satisfied that there is force in Orange Liberia's point that Lonestar did very little to explain the quantum of its claim until "without prejudice" communications in November 2020 offered some insight, with a properly explained case only emerging with the expert evidence in August 2022, and particulars of its mitigation expenses claim only when it served its skeleton argument for the adjourned trial in February 2022.

23. However, I am not persuaded, that it would be appropriate to make a costs order in Orange Liberia's favour:

i) There was no separate issue on which Orange Liberia succeeded (as opposed to Lonestar enjoying heavily diminished success on the issue of loss of profits), in contrast to *Capita (Banstead 2011) v RFIB* [2017] 4 Costs LR 669, on which Mr Kitchener KC relied.

ii) The fact remains that Lonestar obtained a $5m judgment. The significance of that recovery is very different from the types of case considered by Zacaroli J in *Brent LBC v Davies* [2018] EWHC 3129 (Ch), [46]-[48].

iii) In considering the issue of whether (in effect) a reverse costs order should be made, Orange Liberia's ability to protect itself by a payment into court is a relevant factor (although I accept doing so in this case would have involved a greater exercise in subjective judgment than in many others). As I explain below, I am satisfied that Lonestar has not beaten the First WPSATC Letter.

24. However, the extent of Lonestar's failure, the extent to which the size of its claim influenced the shape and scope of the claim and the level of costs incurred, and the speculative nature of the claim and its irreconcilability with Lonestar's contemporaneous documents, all justify a very significant reduction in the costs award in its favour. I am not persuaded that Lonestar's failure to preserve documents justifies a reduction. I found that the failure was not deliberate.

25. For those reasons, the appropriate order is that Lonestar should recover 40% of its costs incurred in proceedings against Orange Liberia, subject to any effective WPSATC Letter.

Costs as between the Defendants

26. I am satisfied that, in respect of common costs, the Defendants should be jointly and severally liable for those costs, reflecting the conspiracy in which I have found that Mr Kaye, Mr Marziano and Mr Polani were involved, for which Cellcom BVI and Orange Liberia were vicariously liable. However that liability will need to reflect their percentage shares.

27. However, to the extent that Lonestar incurred costs solely in respect of a particular defendant (e.g., on service, or when corresponding with Cellcom BVI), those do not form part of the costs order made in Lonestar's favour against Orange Liberia.

The First WPSATC Letter

28. The amount of Lonestar's claim at the date of the First WPSATC Letter including interest is $5.08m, against an offered amount of $5.05m plus "a payment in respect of Lonestar's "reasonable and proportionate costs" which, in the absence of agreement, were to be the subject of a detailed assessment. Lonestar's costs at that stage were about £4.5m. There can be no doubt, therefore, that in economic terms Lonestar would have been appreciably better off if they had accepted the WPSATC Letter than they have been by continuing to trial.

29. Mr Singla KC submitted that it was necessary to ignore the costs order made at trial in this exercise. In this case, I am not concerned with a Part 36 offer, and I do not, therefore, need to consider how far the strictures of that self-contained code dictate the answer. Rather I am concerned with an offer which I am permitted to take into account under CPR 44.2(4)(c). I can see no reason why I cannot take account of the costs order I have made, when determining what account to take of the First WPSATC Letter under CPR 44.2(4)(c). I note Mr Justice Popplewell appears to have reached the same conclusion in his first instance judgment upheld, although not commented upon, by the Court of Appeal in *Capita (Banstead 2011) Ltd v RFIB Group Ltd* [2017] EWCA Civ 1032, [32]. After the hearing, I was referred to further authority supporting that conclusion: *Coward v Phaestos* [2014] EWCA Civ 1256, [70]-[72] and *Walker Construction (UK) Ltd v Quayside Homes Ltd* [2014] EWCA Civ 93, [85]-[92].

30. That leaves the issue of interest and Mr Kitchener KC's submission that Lonestar should recover no (or less) interest from the date of the offer because it is the failure to accept the offer which has led to it being "out of the money". I was referred to no authority identifying this as a consequence of a *Calderbank* offer, and it does not form part of the "complete code" set out in Part 36. Orange Liberia has, of course, retained the use of the money it would have had to pay out if the First WPSATC Letter had been accepted. Even under RSC Order 22, when the party making the payment lost use of the funds paid, I have not found any authority in which the interest award was reduced on that basis.

31. For these reasons, I reject this part of Mr Kitchener KC's submissions.

Costs after the date of the First WPSATC Letter

32. It is agreed that Lonestar should pay Orange Liberia's costs from 6 December 2021.

33. However, an issue arises as to whether those costs should be ordered on an indemnity basis. As is well-established, such an order will be appropriate when the conduct of a party has taken the situation out of the norm: *Excelsior v Salisbury Hammer* [2002] EWCA Civ 879.

34. It is helpful first to consider the position assuming that no WPSATC Letter had been sent. In that scenario, it would clearly be important not to double-count the factors I have already taken into account in awarding Lonestar only 40% of its costs, which are essentially the same matters which Orange Liberia relies upon in support of the indemnity costs

application. In particular, I am not persuaded that there are any matters sufficiently independent of the matters I have already taken into account which would justify an order for indemnity costs in that scenario. For the same reason, I am satisfied that no separate costs order is appropriate in respect of Mr Toriola's second witness statement.

35. Does the First WPSATC Letter make a difference? It might be argued that, in the period up to the First WPSATC Letter, Orange Liberia has the benefit of a reduction in its costs liability to Lonestar to reflect the various matters relied upon in relation to the issues impacting the quantum of the claim, whereas there is no equivalent benefit in the period after the First WPSATC Letter. In my view, that argument would have no merit – the First WPSATC Letter is giving Orange Liberia the benefit of avoiding the liability to Lonestar's costs which it would otherwise have, and giving it a costs order in its favour.

36. In these circumstances, I am not persuaded that an order for indemnity costs would be appropriate.

Costs orders against the other Defendants

37. I am satisfied that Lonestar is entitled to costs orders against the other Defendants:

i) on a joint and several basis for their common costs; and

ii) against each Defendant for any costs incurred solely in the claim against that Defendant.

38. The issue then arises as to whether there should be any reduction in those costs orders to reflect the matters which led to a reduction in the costs order made against Orange Liberia before the First WPSATC Letter. As to this:

i) While Cellcom BVI did write a letter indicating that it "welcome[d]" Orange Liberia's offer, and agreeing "with the outline" of the proposal, it made no offer itself, merely indicating a willingness "in principle" to contribute to any settlement. That letter did not contain any offer capable of acceptance by Lonestar, and I am satisfied it should not be taken into account under CPR 44.2.

ii) The costs order I made in relation to Orange Liberia reflected both the costs incurred by Lonestar and the costs incurred by Orange Liberia. Cellcom BVI is in a similar position up to 13 December 2021 when it ceased to have legal representation. For reasons of simplicity, and given that there is likely to have been a reduction in Cellcom BVI's legal spend before the letter was sent notifying Lonestar, I will order that Lonestar is entitled to a costs order against Cellcom BVI in respect of the period up to 5 December 2021, in the same terms as the order against Orange Liberia. In respect of the period after that date, Cellcom BVI did not incur legal costs, and for that period Lonestar is entitled to 60% of its costs from Cellcom BVI.

iii) The Individual Defendants have not incurred any legal expenses in the case. They must pay 60% of Lonestar's costs.

Summary of the costs orders

39. By way of a summary:

i) In respect of the period up to 5 December 2021:

a) all of the Defendants are jointly and severally liable for 40% of Lonestar's common costs, and the Individual Defendants are jointly and severally liable for a further 20% of Lonestar's common costs.

b) Orange Liberia is liable for 40% of Lonestar's costs solely referable to it, and Cellcom BVI for 40% of Lonestar's costs solely referable to it.

c) Each Individual Defendant is liable for 60% of Lonestar's costs solely referable to it.

ii) In respect of the period from 6 December 2021:

a) Cellcom BVI and the Individual Defendants are jointly and severally liable for 60% of Lonestar's common costs.

b) Each of Cellcom BVI and the Individual Defendants is liable for 60% of Lonestar's costs solely referable to it.

c) Lonestar is liable for 100% of Orange Liberia's costs, subject to the order of Moulder J dated 24 February 2022.

iii) All costs are to be assessed on a standard basis.

Contribution as between the Defendants

40. In respect of those costs I have ordered Orange Liberia to pay which are subject to a joint and several order with the other Defendants, I order that the other Defendants are obliged to contribute to those costs in the same proportions as the order I made for contribution as to damages: *Mouchel Ltd v Van Oord (UK) Ltd* [2022] PNLR 26.