Neutral Citation Number: [2018] EWHC 2913 (Ch)

Claim No. HC-2015-000268

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

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

Date: 1 November 2018

Before :

THE HONOURABLE MR JUSTICE MARCUS SMITH

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Between :

BRITNED DEVELOPMENT LIMITED

Claimant

- and -

(1) ABB AB
(2) ABB LTD

Defendants

- -
- -

Mr Robert O'Donoghue, QC and **Mr Hugo Leith** (instructed by **Squire Patton Boggs (UK) LLP**) for the **Claimant**
Ms Sarah Ford, QC and **Ms Jennifer MacLeod** (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Defendants**

Hearing date: 18 October 2018

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Mr Justice Marcus Smith:

A. INTRODUCTION

1. On 9 October 2018, I handed down judgment in this matter (the "Judgment"). This Supplemental Judgment takes the Judgment as read and adopts the terms and abbreviations listed in Annex 1 to the Judgment.

2. A hearing of matters consequential to the Judgment took place on 18 October 2018 (the "Consequentials Hearing"). This Supplemental Judgment disposes of various of the consequential matters that were argued before me on 18 October 2018, namely:

   (1) The implications of BritNed's disinclination to provide an undertaking along the lines articulated in paragraphs 540 to 541 of the Judgment. This is considered in Section C below.

   (2) Interest, considered in Section D below.

   (3) Permission to appeal, considered in Section E below.

3. Although the question of costs was before me on 18 October 2018, and was addressed in the parties' written submissions, the question of costs was not argued before me at the Consequentials Hearing, nor determined by me on that occasion. It is necessary to explain why: this is done in Section B below.

B. COSTS NOT ADDRESSED

4. The Judgment dismissed BritNed's claim for compound interest (Section L of the Judgment), but concluded that simple interest pursuant to section 35A of the Senior Courts Act 1981 was recoverable by BritNed.[1] Because there had been no submissions on the rate of interest or the period over which interest should be charged, the question of interest was one of the matters reserved to the Consequentials Hearing. That meant that although damages of €13,009,568 had been assessed,[2] the final sum payable by ABB – to include interest – had not been, and could not be, calculated.

5. There were Part 36 offers made in the course of this case. It is possible that the interest amount – when finally calculated – may make a difference as to the incidence of costs. For this reason, the question of costs cannot be addressed until the question of interest is resolved.

6. Until I was sent ABB's written submissions in anticipation of the Consequentials Hearing, I was (as I should have been) ignorant of the fact that Part 36 offers had been made. ABB's written submissions, however, made reference to the Part 36 offers.[3] It is unsurprising, if regrettable, that this should be the case: costs was explicitly on the agenda for the Consequentials Hearing.[4]

[1] See paragraph 550(4) of the Judgment.
[2] See paragraph 550(1) of the Judgment.
[3] These were sent to the court in advance of BritNed's written submissions.
[4] See Mr O'Donoghue QC's email of 3 October 2018.

7. It is unfortunate that the potential interplay between interest and the Part 36 offers was overlooked, and that the existence of these Part 36 offers was drawn to my attention – as it turns out – prematurely. The need for me not to consider the terms of the Part 36 offers was only adverted to in BritNed's written submissions, which were received by the court after ABB's written submissions.

8. On reading ABB's written submissions, I did not consider it appropriate to consider the terms of the Part 36 offers and I tried not to do so.[5] Nevertheless, I am clearly aware of the existence of these Part 36 offers, which is knowledge that I should not have. I have done my best to put it out of my mind, and not let it influence the matters I must decide in this Supplemental Judgment.

9. Clearly, after a long hearing like the BritNed trial, a hearing of consequential matters may well raise numerous and complex issues. It seems to me that the parties must ensure that, in such a case, costs is the last item on the agenda. The parties should specifically consider *inter se* whether it is appropriate, in light of the consequential matters outstanding, to address costs in any written submissions and, if so, how.

C. THE UNDERTAKING

10. What came to be known as the Regulatory Cap Issue was considered in Section K of the Judgment. I rejected ABB's contentions on this point. An essential part of my reasoning was that any damages awarded to BritNed would be taken into account for the purposes of calculating the level of the IRR Cap.[6] The Judgment was explicitly based on the assumption that any damages awarded would be subject to the IRR Cap.[7] Unfortunately, for the reasons given in paragraphs 538 to 540 of the Judgment, it was not appropriate to determine the point.

11. If the IRR Cap is exceeded or – taking damages into account, would be exceeded – then any failure to include damages when calculating the IRR Cap would result in over-compensation to BritNed.[8]

12. Accordingly, because it was not appropriate to determine the true meaning of the Amended Exemption Order in the absence of the regulators, I considered that the better course was to require BritNed to furnish an undertaking – formulated in paragraph 540 of the Judgment – to treat damages as if subject to the IRR Cap.

13. In a short note dated 17 October 2018 submitted just before the Consequentials Hearing, BritNed made clear that it was unwilling to provide an undertaking in these terms. Although not completely clear, the note appeared also to suggest that, as a matter of law, I was not entitled to ask for an undertaking.

14. That latter suggestion, as it seems to me, entirely misses the point. The need for an undertaking is explained in paragraphs 538 to 540 of the Judgment and my award of damages is explicitly predicated on the existence of such an undertaking so as to avoid the risk of over-compensation to BritNed. However, the Judgment does not, and cannot, seek to compel an undertaking from BritNed. As was made clear at the Consequentials

[5] Transcript/p.2.
[6] See paragraph 538 of the Judgment.
[7] See paragraph 539 of the Judgment.
[8] See paragraph 539 of the Judgment.

Hearing,[9] the court has no jurisdiction to require an undertaking of a party, and so – in the absence of BritNed's willingness to provide one – this part of the Judgment must be re-visited. Given that an order setting out the consequences of the Judgment has yet to be made in these proceedings, and given the explicit reference to the need for an undertaking in the Judgment, the suggestion[10] that the court is *functus* is obviously wrong.

15. In these circumstances, there are three options:

(1) *Option 1: To decide the issue of the true effect of the Amended Exemption Order*. I have re-visited my thinking in paragraph 540 of the Judgment. For the reasons there given, I do not consider that I can satisfactorily decide this question, in a manner that binds BritNed. The documents imposing the Regulatory Cap are binding as between BritNed and its respective UK and Dutch regulators, who are not before the court. ABB is not party to these transactions. Accordingly, there does not seem to me to be a *lis* before the court that entitles me to determine the issue; and, as was noted in the Judgment, were I to determine the issue, I would be doing so in the absence of the regulators who are party to these transactions. I do not consider that Option 1 is open to me.

(2) *Option 2: To treat the requirement of an undertaking as the "price" for a damages award.* It is trite that in the context of an application for an interim injunction, the court will generally require the applicant to provide an undertaking in damages[11] (sometimes fortified) as the "price" for granting the injunction. In such cases there is, as here, no right in the court to require the undertaking, but in most cases the court will not grant the injunction without the undertaking being proffered. I have considered whether the same course is open to me in this case. That is, to decline the remedy of damages because an undertaking, explicitly required to avoid over-compensation, has not been proferred. In many respects, this is the neatest and fairest solution. The undertaking is not, in my judgment, an onerous one; and it ensures that BritNed is not overcompensated. However, I do not consider Option 2 to be open to me:

(a) An interim injunction is a discretionary remedy, where the harm to the respondent caused by the injunction is a highly material factor. That harm can be avoided – or at least, minimised – by the undertaking in damages. The failure of an applicant to proffer the undertaking will – in many, if not most, cases – alter the balance of factors going to the court's discretion and oftentimes render the granting of the interim injunction inappropriate.

(b) By contrast, given the findings in the Judgment, BritNed is entitled to damages as a matter of law, not discretion. Self-evidently, this is not the case of an interim remedy pending trial, but a final order for damages, to which BritNed has a right.

In these circumstances, I have no right in effect to compel an undertaking that BritNed is not prepared to give by making that undertaking a precondition to damages. Rather, I must do what I sought to avoid in the Judgment: I must consider the risk of the IRR Cap being exceeded in circumstances where – if the IRR Cap is

[9] Transcript, p.4.
[10] Made in paragraph 8 of BritNed's note.
[11] Ie, to hold the respondent harmless against any loss sustained through the granting of the injunction, should it prove to be the case that the interim injunction was "wrongly" granted.

exceeded – BritNed will retain monies it is not entitled to. That brings me to the third option: adjusting the award of damages.

(3) *Option 3: Adjusting the award of damages.* As to this:

(a) In paragraph 542 of the Judgment, I considered (but very briefly) what my findings would have been had ABB's arguments succeeded. Had ABB's arguments succeeded, then even if the IRR Cap applied, and BritNed was obliged to use the excess in the manner described in paragraph 522 of the Judgment, the amount representing *x* in Figure 2 at paragraph 525 of the Judgment would still represent over-compensation. In these circumstances, and given the size of the award of damages, I would have made only a nominal deduction in BritNed's damages.[12]

(b) The present case is rather different: I consider, and it is the basis for my rejection of ABB's argument, that the Exemption Condition described in paragraph 522 applies but, for the reasons given in paragraph 15(1) above, I am precluded from making a holding in this regard. BritNed clearly does not consider that damages awarded in this action will go towards the calculation of whether the IRR Cap is breached and so will side-step the Exemption Condition. That, to my mind, is the only explanation for BritNed's disinclination to engage on this point[13] and, indeed, for BritNed's disinclination to provide an undertaking. Clearly, then, there is a risk of overcompensation to BritNed that must be reflected in the award of damages.

(c) Given the uncertainties referred to in paragraph 542(2) of the Judgment, and the fact that the damages I am minded to award are small compared to the overall costs and revenues (see paragraph 542(3) of the Judgment), the adjustment to the award should not be large. But it cannot be nominal. The question I considered in paragraph 542 was the alternative question assuming ABB's contentions (contrary to my findings in the Judgment) were right. The present question arises out of an explicit assumption that I made in rejecting ABB's contentions. If that assumption is wrongly founded – as clearly it may be – the risk of over-compensation to BritNed is patent, and the rule described in paragraph 12(9) of the Judgment is engaged. I remind myself: where a court is compelled to use a broad brush in the absence of precision in the evidence of the harm suffered by a claimant, it should err on the side of under-compensation, so as to *(i)* reflect the uncertainty as to the loss actually suffered and *(ii)* to give the defendant the benefit of any doubts in the calculation.

(d) In my assessment of quantum, I have been using a broad brush and I have sought to ensure that BritNed is fully compensated according to law, but not over-compensated. The assumption in paragraph 538 of the Judgment was a material part of that approach. In light of the present position, that assumption may very well not hold good. In these circumstances, once-again wielding a broad brush, I consider that the award of €13,009,568 must

[12] See paragraph 542.
[13] See paragraph 538 of the Judgment.

be reduced by 10% to reflect the risk of over-compensation and the need to give ABB the benefit of any doubts in my calculation of damages generally.

For these reasons, the damages described in paragraph 550(1) of the Judgment are reduced by 10% (€1,300,956.80) from €13,009,568 to €11,708,611.20.

D. INTEREST

16. Section 35A of the Senior Courts Act 1981 provides that this court may include in any sum for which judgment is given "simple interest, at such rate as the court thinks fit…on all or any part of the debt or damages in respect of which judgment is given…for all or any part of the period between the date when the cause of action arose and…the date of the judgment".

17. Section 35A thus confers a broad discretion on the court. This discretion has been considered in a number of cases, and the following propositions emerge:[14]

(1) An award of interest is not punitive and the use to which the party paying interest would have put the funds (and the returns that such party may or may not have made) is irrelevant.[15]

(2) There is a convention that at least the starting point for the award of simple interest (at least where the award is in £ sterling) is Bank of England base rate plus 1%.[16] However, where the award is in another currency, like US$, the US$ Prime Rate plus 1% will be used as the starting point.[17]

(3) This conventional rate will, usually, be less than what a claimant would have to pay as a borrower, but more than a claimant could earn as a lender. The appropriate benchmark, however, is not to regard the claimant as the lender of monies (inferentially, to the defendant), but rather as having had to borrow money in order to fund the loss that has been vindicated by the award of damages in the judgment.[18] It is this that informs the court's departure from the conventional starting point: the overall aim is to determine a fair rate to compensate the claimant.[19]

[14] The point was made by BritNed that the payment of interest constitutes an essential component of compensation, and that this held good for competition claims. I accept this as a proposition, but do not consider (and do not understand BritNed to contend) that the principles of equivalence and effectiveness in relation to EU law require any departure from, or augmentation of, the rules regarding section 35A interest. That seems to be confirmed – in the distinct area of repayments of VAT – by the decisions of the European Court of Justice and the UK Supreme Court in *Littlewoods v. Revenue and Customs Commissioners*. See, generally, the Supreme Court's decision at [2017] UKSC 70.

[15] *Fiona Trust & Holding Corporation v. Privalov* [2011] EWHC 664 (Comm) at [13]; *Sycamore Bidco Ltd v. Breslin* [2013] EWHC 174 (Ch) at [6].

[16] *Shearson Lehman Hutton Inc v. Maclaine Watson & Co Ltd* [1990] 3 All ER 723 at 733; *Fiona Trust* at [14], [15].

[17] *Fiona Trust* at [15].

[18] *Fiona Trust* at [14]; *Reinhard v. ONDRA* [2015] EWHC 2943 (Ch) at [31]. In the latter case, Warren J differentiated between cases such as this, where money has been lost by the claimant which might have to be replaced by borrowing; and cases unlike this where the award is an accretion to the claimant's assets.

[19] *Fiona Trust* at [25].

(4) When considering the departure from the conventional starting point, a broad brush approach must be taken. In *Fiona Trust*, Andrew Smith J put the point as follows:[20]

> "A "broad brush" is taken to determine what rate of interest is just and appropriate: it would be neither practical nor proportionate (even in a case involving as large sums as these) to attempt a minute assessment of what will precisely compensate the recipient. In particular, the courts do not have regard to the rate at which a particular recipient of compensation might have borrowed funds. This policy is adopted in order to control the extent of the inquiry to ascertain an appropriate rate…The court will, however, consider the general characteristics of the recipient in order to decide whether to assess interest at a rate that is higher or lower than is conventional."

(5) Specific evidence (eg as to the claimant's borrowing rates) may be adduced to support a particular departure from the conventional rate or as regards the particular circumstances of the claimant.[21]

18. In the present case, both parties presented me with contentions regarding interest of excessive complexity given the approach described in paragraph 17(4) above. Thus, BritNed invited me to consider the riskiness of the Interconnector project and the provisions in the contract between BritNed and ABB regarding interest. On the other hand, ABB amongst other points invited an assessment of interest that took into account the tranches in which the purchase price for the Interconnector was paid – the purchase was not paid, as I accept, entirely "up front".

19. I regard these contentions as substantially inconsistent with the broad-brush approach that the courts adopt when assessing interest pursuant to section 35A. Using that broad brush, I must seek to determine a "fair rate". I should point out that a "fair rate" is (whatever the rate) going to be very far removed from the commercial rate at which a claimant will borrow. That is because a claimant will borrow at a certain rate compounded, whereas section 35A explicitly only allows an award of simple interest. If a compounded rate is sought by a claimant, then the claim is one of damages which must be pleaded and proved. The exercise under section 35A is very different.

20. In this case, damages are denominated in €, which neither party invited me to convert to £ sterling before assessing interest. On this basis, I adopt the 12 month EURIBOR rate for Euro borrowings, and I do not understand this to be controversial between the parties.

21. So far as period and rate of interest are concerned:

(1) The period will run from the date the contract between BritNed and ABB was concluded, which was 21 May 2007.[22] This is the date on which BritNed's cause of action accrued.[23] Interest should run to the date of this Supplemental Judgment, which is 31 October 2018.

(2) The rate of interest will be EURIBOR plus 1%. I consider this to be a fair rate in all the circumstances:

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[20] At [16]. See also *Ahmed v Jaura* [2002] EWCA Civ 210 at [20] and [26]; *Sempra Metals v.IRC* [2006] QB 37 at [47] (in the Court of Appeal); *Reinhard* at [9].
[21] *Fiona Trust* at [25].
[22] See paragraph 169 of the Judgment.
[23] See paragraph 428 of the Judgment.

(a) BritNed itself incurred no borrowing costs. It was a joint venture funded by its two parents, National Grid and TenneT. To the extent the parents' position is relevant – and I frankly do not consider that it is – these are large commercial organisations. There would be no reason to increase the rate because these are "small businessmen" who have been kept out of their money.[24] However, the key point, to my mind, is that because BritNed incurred no borrowing costs, there is really nothing to justify a substantial move away from the conventional rate, either way.

(b) I appreciate that because BritNed paid the purchase price for the Interconnector in tranches, the rate I have ordered is actually materially higher than EURIBOR plus 1%. I am satisfied that it is fair to apply the rate of EURIBOR plus 1% to the full €11,708,611.20 from 21 May 2007: that is the date on which BritNed committed to pay an inflated price, and it will have had to be assured at that time that it had funds available from that date to pay for the Interconnector. Consistently with my broad brush approach, I am satisfied that this award is fair.

22. I leave it to the parties to calculate the precise amount due as at 31 October 2018. From 1 November 2018, I accept BritNed's submission that the post-judgment rate stipulated under the Judgments Act 1838 should be applied at 8% *per annum*. This is an interest charge that ABB can easily avoid or minimise, should it be inclined to do so.

E. PERMISSION TO APPEAL

23. At the Consequentials Hearing, I indicated that I was prepared to give permission to appeal my orders in relation to the Overcharge Claim, the Lost Profit Claim and the Regulatory Cap Issue.

24. As regards the Overcharge Claim, I did so with some hesitation. My assessment of the overcharge explicitly weighs multiple factors, including consideration of the negotiating history between ABB and BritNed, the manner in which ABB's tender was compiled and the expert analyses. Inevitably this involved assessment of the witnesses and of the approach of the two experts. On the face of it, an appeal against my order in the Overcharge Claim appears, *par excellence*, to be a case where a decision to entertain the appeal ought to be left to the Court of Appeal.

25. Both parties, however, stressed the novel nature of the Overcharge Claim. They stressed that the Judgment is the first occasion on which damages in a case such as this have been awarded. They also stressed that there are a number of other cases – no doubt rooted in different facts – where the same sort of claim is being advanced. Although the Overcharge Claim is very fact heavy, the approach I have taken is one that ought to be reviewed by a higher court. In these circumstances, I am satisfied that there are compelling reasons for the appeal to be heard.

26. Given my conclusions in relation to the Overcharge Claim, the Lost Proft Claim was a relatively straightforward one to resolve. That was because the counter-factual situation, as I found it to be, did not differ very much from the actual situation in which BritNed opted for the 1,000MW capacity. However, having given permission to appeal my order

[24] See the consideration in *Fiona Trust* at [16].

in relation to the Overcharge Claim, it makes sense to give permission to appeal the Lost Profit Claim, given the close relationship between these two claims.

27. The Regulatory Cap Issue raises novel and difficult issues regarding the compensatory nature of damages and collateral benefits. It, too, is related to the Overcharge Claim. I am satisfied that there are compelling reasons for an appeal of my order in relation to the Regulatory Cap Issue to be heard.