



Neutral Citation Number: [2019] EWHC 2338 (Comm)

Case No: CL-2016-000527

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/09/2019

Before :

CHRISTOPHER HANCOCK QC
(Sitting as a Judge of the High Court)

Between :

OREXIM TRADING LIMITED

- and -

**MAHAVIR PORT AND TERMINAL PRIVATE
LIMITED (formerly known as FOURCEE PORT
AND TERMINAL PRIVATE LIMITED)**

Claimant

Defendant

Mr Stuart Adair (instructed by Druces LLP) for the Claimant
The Defendant did not appear and was not represented

Hearing dates: 28 June 2019

Judgment Approved

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Christopher Hancock QC :

Introduction

1. I heard the Claimant's application to strike out the Defendant's defence on 28th June 2019. I concluded that the appropriate course was to make an "unless order" in respect of the damages claim and directed that the applications for judgment in respect of the claims for injunctive and declaratory relief be adjourned with liberty to restore the same on an expedited basis if necessary.
2. This further judgment deals with issues of interest and costs, which were not dealt with at the oral hearing on 28th June 2019, although counsel for the Claimant stated at the conclusion of that hearing that it would be necessary in due course to address me on those issues.

Interest

3. The Claimant seeks interest on its damages claim pursuant to section 35A of the Senior Courts Act 1981. The claim is for a sum expressed in US dollars. In these circumstances, by virtue of section 44A of the Administration of Justice Act 1970 I accept that the court may order that the applicable interest rate shall be such rate as the court thinks fit.
4. Given that the Claimant is not an American company and carries on business outside the United States, the Claimant submits that the 6 month US\$ LIBOR rate is the appropriate rate to use as a benchmark (see paragraphs 8 to 17 of the judgment of Leggatt J (as he then was) in *Vis Trading Co Ltd v Nazarov* [2013] EWHC 491 (QB). I accept that submission.
5. As was awarded by Leggatt J in *Vis Trading Co Ltd v Nazarov* the Claimant seeks interest at 2.25% above the 6 month US\$ LIBOR rate. The calculation of interest at this rate has been carried out and is reflected in paragraph 1(1) of the draft order that has been provided to me. Again, I accept that this is an appropriate rate.
6. The Claimant has provided a spreadsheet which calculates the interest through to 19th August 2019 on the basis of the actual daily figures. The interest for the 8 days to 27th August 2019 has been calculated on the basis that 6 month US\$ LIBOR was 2% for those days, which is in my judgment a reasonable assumption and is indeed likely to be favourable to the Defendant.

Costs

7. In the event that the Defendant fails to comply with the unless order and judgment is entered, the Claimant would clearly be entitled to the costs of the claim to be assessed if not agreed. Although the Claimant has asked for an order that costs be paid on an indemnity basis, I am not prepared to make such an order, since I do not take the view that the Defendant can be said to have behaved so unreasonably as to justify this form of order.
8. The Claimant additionally seeks an order that the Defendant make a payment of £369,000 on account of the costs of the claim.

9. The Claimant's Precedent H which was considered by Mr Andrew Burrows QC at the CMC was in the total sum of £1,073,535.81, including pre-action costs of £48,537.60 and costs of £266,731.50 in respect of issuing and statements of case (which had been incurred) at the time of the CMC. As set out in paragraph 25 of the Order of Andrew Burrows QC dated 9th November 2018, save that the costs of expert reports was reduced from £59,000 to £50,000, the costs set out in the Claimant's Precedent H were approved.
10. In her Eighth Witness Statement, Ms Novikova of Druces, the Claimant's solicitors, analyses and explains the costs incurred to date in prosecuting these proceedings and the costs approved by Andrew Burrows QC. That analysis shows that the total costs incurred by Orexim to date are £410,004.31. This figure does not include the costs of this application which total £29,352.00.
11. At paragraphs 25 to 29 of his judgment in *McInnes v Gross* [2017] EWHC 127 (QB) (attached hereto) Coulson J sets out the approach to be adopted to a payment on account where there is an approved costs budget. At paragraphs 25 and 28 of his judgment Coulson J states:
 - “25. *I reject Mr Mansfield's submission on the materiality of the costs budget figure. In my view, the first defendant's approved costs budget is the appropriate starting point for the calculation of any interim payment on account of costs. CPR 3.18 makes plain that, where there is an approved or agreed costs budget, when costs are assessed on a standard basis at the end of the case, “the court will...not depart from such approved or agreed budget unless satisfied that there is good reason to do so.” The significance of this rule cannot be understated. It means that, when costs are assessed, the costs judge will start with the figure in the approved costs budget. If there is no good reason to depart from that figure, he or she is likely to conclude the assessment at the same figure: see Silvia Henry v News Group Newspapers Ltd [2013] EWCA Civ 19...*
 28. *Accordingly I take, as my starting point for the calculation of the interim payment, the approved costs budget figure of £570,000. I make a reduction of 10% (£57,000) which I regard as the maximum deduction that is appropriate in a case where there is an approved costs budget. I add back £15,000 to reflect the interest on costs which I have awarded. That produces a figure of £528,000.”*
12. Using the same approach, 90% of £410,004.31 is £369,003.88. The Claimant seeks a payment on account of £369,000.
13. In view of the fact that I have not ordered indemnity costs, I have concluded that a slightly lower figure should be adopted, and I order that, if the unless order is not complied with, an interim payment on account of costs in the amount of £350,000 should be paid within 28 days of judgment being entered and served on the Defendant.

Costs of the application

14. The application was clearly necessary due to the serious breach of the order of Andrew Burrows QC, as I have found. It has been successful in that I have made an “unless order”. In these circumstances, costs should follow the event, and I conclude that the Claimant is entitled to the costs of the application. As identified in the costs schedule filed and served for the hearing and included in the replacement bundle and the Eighth Witness Statement of Victoria Novikova, those costs are £29,352.00. I approve that sum, and order that that sum be paid within 28 days of the date of the order made pursuant to my initial judgment