Neutral Citation Number: [2023] EWHC 1071 (Comm)

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 Build
Fetter Lane, London, EC4A 1NL

Date: 05/05/2023

Before :

CHRISTOPHER HANCOCK KC

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Claim No. CL-2022-000135

B E T W E E N:

CELESTIAL AVIATION SERVICES LIMITED

Part 8 Claimant

- AND-

UNICREDIT BANK AG, LONDON BRANCH

Part 8 Defendant

Claim No. CL-2022-000216

AND B E T W E E N:

(1) CONSTITUTION AIRCRAFT LEASING (IRELAND) 3 LIMITED
(2) CONSTITUTION AIRCRAFT LEASING (IRELAND) 5 LIMITED

Part 8 Claimants

-AND-

UNICREDIT BANK AG, LONDON BRANCH

Part 8 Defendant

- -
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Fred Hobson (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Celestial Claimant**
Akhil Shah KC and Leonora Sagan (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Constitution Claimants**
James McWilliams (instructed by **Reynolds Porter Chamberlain LLP**) for the **Defendant**

Hearing dates: Friday 21 April 2023

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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 5th May 2023.

Christopher Hancock KC :

Introduction.

1. I handed down judgment in this matter on 23 March 2023. I refer to that judgment as "**the principal Judgment"**. In this judgment I deal with various consequential matters, namely:

   (1) Whether UniCredit has established an entitlement to rely on section 44 of the Sanctions and Anti Money-Laundering Act 2018 ("SAMLA").

   (2) If so, what the relevance of that fact is to:

      (a) Interest; and

      (b) Costs.

   (3) What rate of interest is applicable, if any, and for what period such interest is payable.

   (4) What the basis of assessment of costs should be.

   (5) What the amount of any interim payment should be.

Section 44 of SAMLA.

2. Under this heading, the issue is whether UniCredit had a reasonable belief that it was prohibited from making payment under the Letters of Credit such that the defence afforded by section 44 is available to it. It is common ground that there are two sub-issues in this regard, since that section involves consideration of both subjective and objective matters. Thus, I am required to decide whether:

   (1) UniCredit's decision not to make payment under the Letters of Credit was taken because it believed that Regulation 28 of the Russia (Sanctions) (EU Exit) (Amendment) (No. 3) Regulations ("Regulation 28") prohibited it from doing so; and

   (2) that belief was a reasonable one.

3. UniCredit submitted, in relation to the first of these issues, that it was not open to Celestial or Constitution to challenge UniCredit's actual motives in refusing to make payment under the Letters of Credit in circumstances where they commenced these proceedings using the Part 8 procedure and where there has been no cross-examination of UniCredit's witnesses.
4. I do not accept this submission. In my judgment, having raised the issue by way of defence to the claim, then, if UniCredit took the view that it could not properly be determined without cross-examination, then an application should have been made to change the procedure to a Part 7 procedure. No such application having been made, then in my judgment I must simply do the best that I can on the basis of the evidence that has been put forward. However, what I do accept is that, since I have not had the benefit of hearing from the witnesses, I should be very slow to refuse to accept their evidence.

5. For their part, the Claimants submitted that the correct approach did not require me, in any event, to disbelieve the witnesses. What they submitted was that the burden was on

UniCredit to establish their belief, and thus that the evidence put forward in this regard should be carefully scrutinised to ensure that it did indeed establish this. I accept this submission.

6. The evidence of UniCredit's subjective belief came from three witnesses, namely Mr Marsmann (who was Head of Transactions and Payment Sales UK and Ireland); Ms Foster (the Head of Financial Crime Compliance and the Money Laundering Reporting Officer for UniCredit London) and Ms Given, a partner at RPC, involved in advising UniCredit.

7. Mr Marsmann gave evidence as to the conclusion reached by the Financial Sanctions Compliance team, of which he was not a part. His evidence was that the bank would be in breach of sanctions "in case the bank pays the beneficiary and receives funds from the issuing bank". That opinion was challenged by Mr Marsmann's team but was confirmed.

8. Ms Foster's evidence was that by 7 March 2022 her team thought it likely that Regulation 28 would prevent payment to the beneficiaries. She goes on to say that in view of the serious consequences of breach, and UniCredit's low appetite for sanctions risks, it was agreed that the beneficiaries would not be paid at that stage. Those views, she says, did not change.

9. Ms Given, whose summary of Ms Foster's views is said by Ms Foster to be accurate, says that UniCredit was "concerned that payment under the Letters of Credit would contravene the provisions of Regulation 28". She then sets out the reasons for that belief in paragraphs 33.1 to 33.3 of her witness statement. In summary, these were as follows:

   (1) First, she says that the effect of the Lease Agreements was to make the aircraft available to the lessees, who were connected with Russia.

   (2) Secondly, the payment under the Letters of Credit would be providing financial services in connection with those arrangements because the Letters of Credit, regardless of legal form, in substance provided security for the obligations of the lessees. By making payment under the Letters of Credit, UniCredit would therefore be providing funds in connection with an arrangement which had the object and effect of making the aircraft available to the lessees. In that regard, she noted that all the demands stated that they were served because the lessees had failed to comply with their obligations under the lease, and because the AAL Letters of Credit provided that they were provided in connection with the Lease Agreements.

10. In addition to the witness evidence, I was shown the licence applications to OFSI. In each case, the Claimants pointed out, the licences that were sought were to receive payment from Sberbank, as issuing bank, and pay the funds to the Claimants. The Claimants relied on this as an indication that UniCredit had either failed to appreciate, or as they contended, sought to obfuscate, the difference between receiving money from Sberbank with which to satisfy Sberbank's obligations to the beneficiaries, on the one hand, and satisfying UniCredit's own, separate obligations, owed to the beneficiaries, which they could do from their own funds.

11. Finally, the Claimants relied on the fact that none of the advice which UniCredit had been given in relation to this issue had been disclosed, privilege having been claimed in this regard.

12. As to this first, subjective, question, I have come to the conclusion that UniCredit has established, albeit not very clearly, that it did have the relevant subjective belief. It is true that this question might have been approached and answered much more clearly by a simple statement on the part of a UniCredit witness that they held this belief; but I take the view that the combination of statements in fact put forward does indeed establish this fact.

13. The next question is whether that belief was a reasonable one. In this regard, UniCredit submitted that the belief was indeed reasonable, relying in this regard on what had been said in paragraph 113 of its trial skeleton. That paragraph read as follows:

> *"Assessing all the circumstances, UniCredit's belief that payment is prohibited by the UK Regulations is clearly reasonable. Those circumstances include:*
>
> 1.1. *The breadth of the statutory language of the prohibitions;*
>
> 1.2. *The issue of a licence in May 2022 by the Bundesbank permitting payments under EU law notwithstanding Article 3c, which is materially similar to Regulation 28 of the UK Regulations. The fact that the Bundesbank considered a licence was required to enable lawful payment under EU law reinforces the reasonableness of UniCredit's belief as to the scope of Regulation 28;*
>
> 1.3. *The information from the Claimants that other confirming banks had similarly taken the view that payments could not be made unless licenced;*
>
> 1.4. *The conduct of the UK licensing authorities in respect of the Licence Applications, including latterly, ECJU's issue of a licence on 22.09.22 and the communication from OFSI on 23.09.22 demonstrates that UniCredit was and continues to be reasonable in its belief;*
>
> 1.5. *The regulatory guidance, which makes clear that OFSI "interprets prohibitions widely";*
>
> 1.6. *The use of the low test of "reasonable cause to suspect" in the relevant offence-creating provisions. In Regulation 28 this test is used in the statutory defence; in Regulations 11 and 13 it is the mental element of the offence. In both cases, suspicion is a low test, namely where one considers there is a possibility, which is more than fanciful, that the relevant facts exist. Moreover, as in these cases, an offence which may be committed where a person has "reasonable cause to suspect" is of even wider scope and includes those who objectively assessed had reasonable cause to suspect that the relevant facts exist even where they do not themselves have actual (subjective) suspicion;*
>
> 1.7. *The extent of the criminal and civil penalties for breaches of the prohibitions. A breach of Regulation 28 is an indictable offence punishable with a maximum sentence of 10 years' imprisonment or a fine or both. A breach of Regulations 11 and 13 is an indictable offence punishable with up to 7 years' imprisonment or a fine or both. In both cases, criminal liability extends to officers of corporate bodies which commit offences with the consent or connivance of such officer or where the offending is attributable to any neglect on the part of such person. The*

regulatory guidance makes clear that breaches of the sanctions regime may result in enforcement actions for serious offences; and

1.8. *The extent of civil liability (monetary penalties) for breaches and the recent amendment to establish this as strict liability. The Standard Chartered Bank penalty, both in value and its facts, underscores the serious consequences for breaches arising from honest mistakes as to the scope of Russia sanctions prohibitions."*

14. UniCredit went on to submit that consistent with the above were the facts that:

(1) Licences *were* issued by the ECJU and OFSI in response to UniCredit's applications.

(2) As soon as UniCredit received the licenses that it considered enabled it to make payment under the Letters of Credit, it made arrangements to do so. Materially, and contrary to the (always) baseless suggestion made by Constitution and Celestial, UniCredit made this payment *without* receiving payment from Sberbank. Indeed, even now UniCredit is still to be paid by Sberbank and does not know when it will be paid.

15. The Claimants submitted that the belief was not a reasonable one, in the light of the following factors:

(1) UniCredit is a major international bank and must therefore be familiar with the principle of autonomy in the field of international commerce.

(2) UniCredit's concern seemed in fact to be to protect its cash flow, by making sure that it did not have to pay out under its confirmation before it was put in funds by Sberbank. The Claimants submitted that this was clear from the manner in which the licence requests were phrased, tying payment out to receipt of the funds from Sberbank. They further submitted that the payment was not made until UniCredit obtained the licence in relation to receipt of Sberbank monies, as is apparent from the covering letter from OFSI to which I have made reference, which said nothing about the payment to the beneficiaries from funds other than those received from Sberbank. Finally, in this regard, the Claimants made reference to an attendance note of a meeting between RPC, UniCredit and OFSI in which the UniCredit representative said that if the Court were to order UniCredit to make payment to the beneficiaries and UniCredit was unable to recover these funds from Sberbank due to the sanctions, UniCredit would be left out of pocket whilst Sberbank would be better off, which would not be in accord with the sanctions.

(3) As regards the reliance placed on the OFSI licences, I was not shown these licences, but I was shown the covering letter from OFSI. That letter made clear that OFSI was not purporting to decide whether a licence was necessary to make payment to the beneficiaries under the confirmed letter of credit (which was the subject matter of the claim before me), but was instead licensing receipt of monies from Sberbank, although the licence would also enable the funds received to be used to make payment under the confirmations. In fact, as UniCredit has itself argued, it has funded the payments made, or some of them, itself, and is still chasing Sberbank, for reimbursement of certain of the payments.

(4) The effect of holding that Regulation 28 prevented compliance with obligations undertaken in the past would be to make it retrospective, which is not a reasonable conclusion.

(5) It was unreasonable to conclude that Regulation 28 covered a payment by a German entity to an Irish entity.

(6) Finally, it was only Regulation 28 which was of relevance in this regard. No reliance was placed on Regulations 11 or 13 or US law.

16. I have come to the conclusion that UniCredit's belief was not a reasonable one. I prefer the Claimants' submissions in this regard. In particular, in my judgment, what should have been clear was that the obligation to pay the Claimants, which was a wholly independent obligation owed to the Claimants and not in any way dependent on receipt of funds from Sberbank, was unaffected by Regulation 28.

17. In the light of this conclusion, it is common ground between the parties that the Claimants are entitled to interest and costs, subject to certain limited disputes.

Interest.

18. I start with consideration of interest. Here there are two disputes. The first is as to the appropriate rate of interest. The second, which arises as between UniCredit and Constitution only, relates to the period for which it should be charged. Those issues are addressed in turn below. I should however note that both Celestial and Constitution have now accepted UniCredit's proposal that any interest be paid in a GBP equivalent sum to accounts in London.

19. Celestial and Constitution have each indicated by their letters of 6 April and 29 March 2023 respectively that they seek interest at US Prime Rate +2%. UniCredit, by contrast, contends that the appropriate rate of interest in this case is the US Prime Rate without any uplift.

20. The principles relevant to the award of interest on US$ denominated sums in the Commercial Court were the subject of a recent and comprehensive review by Foxton J in **Lonestar Communications Corp LLC v Kaye** [2023] EWHC 732 (Comm) at [3] to [17]. UniCredit submitted that the essential points are these:

(1) The default interest rate for US$ awards in the Commercial Court going forward shall 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: see [14].

(2) US Prime is the rate offered by US banks to their most creditworthy business customers. There is no default rule that there will always be an uplift over and above US Prime in an interest award: see [16].

(3) 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. Any higher uplift will, however, likely require evidence to justify them: see [16].

(4) Where it is not obvious from the general characteristics of the claimant that it would have to pay interest at a higher rate than US Prime to borrow US$ the claimant will require evidence to justify a higher rate: see [16]-[17].

21. I accept this account of the decision of Foxton J.

22. Applying those principles to these cases, UniCredit submits that:

(1) The default position is that interest should be awarded at the US Prime Rate as UniCredit has proposed.

(2) There is nothing in the general characteristics of either Celestial or Constitution that suggests that they are likely to face a borrowing rate higher than US Prime. On the contrary, one would expect them to pay interest at or below that rate in circumstances where:

(a) as Celestial described itself in these proceedings, it is "*a wholly-owned subsidiary of AerCap Holdings N.B. ("AerCap"), a Dutch company which is the world's largest aircraft leasing company"*;

(b) Constitution described itself in these proceedings as a wholly-owned subsidiary of Aircastle Limited, "*an aircraft lessor which acquires, leases and sells commercial jet aircraft to airlines around the world"* and which has a "*a portfolio of over 260 aircraft, servicing approximately 80 customers in over 40 countries"*.

(3) Neither Celestial nor Constitution have adduced any evidence to show that they have to pay interest at a rate higher than US Prime on their US$ borrowings.

23. Turning to the cases put forward by the Claimants:

(1) Celestial rely on the judgment of Cockerill J in AerCap Ireland v Hainan Airlines Holding Co Ltd [2020] EWHC 2025 (Comm) in which Mrs Justice Cockerill granted post-judgment interest at the US Prime Rate +2%". Celestial argues that "[t]he 2% uplift applied in AerCap was applied to a claimant in the same corporate group as our client and that fairly approximates our client's likely cost of borrowing". This was a case decided before Lonestar, and I do not read it as laying down any general principle.

(2) Constitution argue that the rate claimed was "in accordance with the Commercial Court's practice in respect of USD denominated judgment debt", citing **Pisante v Logothetis** [2022] EWHC 2575 (Comm). However, Pisante again laid down no new principle, but simply reflected the task of the Court, namely "to choose an interest rate it considers will be a realistic reflection of the cost of borrowing for [the] claimant".

24. I have concluded that, in the absence of any evidence, I should award interest at the US Prime rate without uplift.

25. UniCredit and Constitution are agreed as to the date from which any interest should run on the sums outstanding under the Letters of Credit but there is a small difference as to the date on which it should cease to run. I have concluded that it is appropriate to order interest to run up to and including the date of payment.

Costs

26. I turn next to questions of costs, beginning with the basis of assessment. The relevant principles were explained by the Court of Appeal in **Excelsior Commercial and Industrial Holdings Ltd** [2002] EWCA Civ 879; [2002] CP Rep 67, and were common ground. An award of costs on the indemnity basis will be appropriate in circumstances where: (i) the conduct of the parties; or (ii) other particular circumstances of the case (or both) are such to take the situation "out of the norm". The discretion is ultimately to be exercised so as to deal with the case justly: see, generally, **White Book 2023**, Vol. 1, at §§44.3.9 – 44.3.10.

27. Applying those principles, I have concluded that this is not an appropriate case for the award of indemnity costs. In my view, there is nothing in this case outside of the norm which would warrant an order for costs on the indemnity basis against UniCredit. On the basis of my findings, UniCredit has throughout proceeded in good faith, albeit unreasonably, on the basis of what it understood to be its regulatory obligations rather than any desire to obtain for itself a commercial advantage. I bear in mind, too, its desire to err on the side of caution in its approach to these important regulations.

28. The parties are in agreement that costs have to be subject to detailed assessment. However, the Claimants each seek an interim payment. Celestial ask for 70% of their costs, in an amount of £639,535.40, whilst Constitution seek £660,000, again being 70% of their costs.

29. As for the amount of any interim payment, CPR r. 44.2(8) is clear that an interim payment should be a reasonable sum, namely one that is an estimate of the likely level of recovery, subject to an approximate margin to allow for error in the estimation: see **Excalibur Ventures LLC v Texas Keystone Inc** [2015] EWHC 566 (Comm) at [23]-[24] per Christopher Clarke LJ .

30. Applying those principles, UniCredit submits that the amounts sought by Celestial and Constitution – respectively £639,535.40 and £660,000, in each case said to be approximately 70% of their incurred costs as at the date of their respective letters – are well in excess of a reasonable sum. They submit that they are accordingly likely to be substantially reduced on any detailed assessment. The Court should reflect that likely reduction, together with a margin of error in its assessment of that reduction, in determining the appropriate interim payment, and their submission is that only some 40% of those sums should be awarded.

31. This is inevitably a question of first impression which has to be approached on a broad brush basis. In this regard, I have determined that costs should be paid on the standard basis, and in the light of that finding, I would conclude that about 65% of the costs claimed would generally be recovered. Allowing a margin for error of 10%, I have concluded that the sums claimed should be reduced by about 15%, to £550,000 in the case of Celestial and £570,000 in the case of Constitution.

32. I would be very grateful if the parties could draw up an Order to give effect to this judgment.