HACKERS-FOR-HIRE:

LONESTAR COMMUNICATIONS CORPORATION V KAYE

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Introduction

"In applying a foreign concept of law, we should weigh all of the benefits and choose the blessings." These words of Mabande J., delivering the judgment of the Supreme Court of Liberia in Quelo v Providence Concrete Works [1981] LRSC 29, 301 ("Quelo"), were cited as an example of what Foxton J. called the "strong discretion" of a Liberian judge when deciding the content of Liberian law (Lonestar Communications Corporation v Kaye [2023] EWHC 421 ("Lonestar")). Foxton J.'s judgment is the first time the Commercial Court of England and Wales has heard a claim for damages following a distributed denial-of-service ("DDoS") attack, a form of cyber-attack designed to overwhelm a victim's machine or network and prevent legitimate connection requests, for example from its customers (Lonestar, §39). In this article we will look at three particular areas of interest from the judgment, namely (i) the treatment of Liberian law and the approach taken by the Court in determining the claimant's cause of action; (ii) the problems with quantum faced by the claimant which led to a failure to beat a without prejudice save as to costs ("WPSATC") offer; and (iii) important guidance on the appropriate rate of interest applicable to US Dollar judgments given in the Commercial Court.

Facts

The claimant is a major provider of cellular communication and internet services in Liberia and is part of the largest mobile network operator in Africa. A series of DDoS attacks were carried out from October 2015 to February 2017 which disrupted its service. Mr Kaye, the first defendant, was a hacker-for-hire. He was hired by the second defendant, the CEO of Cellcom Liberia ("Cellcom"), a competitor of the claimant, to carry out the attack with assistance from the fourth defendant, an employee of Cellcom. Cellcom was owned by a BVI company, the third defendant, which sold its interest in April 2016 to Orange Group, with Cellcom rebranded as Orange Liberia, the fifth defendant. Mr Kaye was sentenced to 32 months in prison in England and did not take part in the trial, nor did the other individual defendants. The BVI company provided evidence of fact and expert evidence but did not attend trial. Orange Liberia defended itself at trial.

The cause of action

It was common ground that the claims were governed by Liberian law, a common law system in which decisions

of the Supreme Court constitute a source of law, alongside legislation (Lonestar, §113). Section 40 of the Liberian "General Construction Law" provides that, except where it is modified by the laws of Liberia, "the common law and usages of the courts of England and of the United States of America" are considered to be part of Liberian law ("the Reception Statute"). Lonestar's claim was predicated on four causes of action: (i) lawful means conspiracy; (ii) unlawful means conspiracy, the unlawful means being breaches of (a) the UK's Computer Misuse Act 1990 and (b) s.76 of the Liberian Telecommunications Act 2007 ("2007 Act"); (iii) unlawful interference; and (iv) a claim under the Liberian general tort of "action of damages for wrong" (Lonestar, §124). No claim was advanced under s.80 of the 2007 Act, which allows a person who has sustained loss or damage resulting from any act or commission contrary to the 2007 Act (or its subordinate legislation) to bring civil proceedings against any person who "engaged in, directed, authorized, consented to or participated in" that act or omission.

Considering the evidence of three experts, two of whom gave live evidence, including a former Chief Justice of the Liberian Supreme Court, Foxton J. rejected the English tort claims, finding it unlikely that the Reception Statute would be used to adopt these torts into Liberian law, in part because Liberia looks more to US than English jurisprudence, due to the very close links between those two countries (Lonestar, §§119, 175). Considering the development of the law of torts from the fifteenth century to modern day (and adopting a commentary of Prof. David Ibbetson on the subject; see §148), Foxton J. considered whether Liberian law had developed a full range of recognised or nominate torts (e.g., trespass and nuisance), each with their own particular rules, or whether it retained an open-ended set of "torticles" which fall outside the primary, recognised torts. Whilst finding that it was not quite as broad as the latter, Foxton J. held that there was a general Liberian tort ("the action of damages for wrong") which was sufficiently broad to encompass breach of a Liberian statute such as s.76 of the 2007 Act. On this basis, he found the individual defendants liable in damages and the corporate defendants vicariously liable as a matter of Liberian law (see §§177-201, 205-224 for the treatment of vicarious liability).

Quantum, Interest and Offers

The claimant had sought c.$50million in its claim. However, Foxton J. awarded only c.$4.3million in total for both lost profits and wasted expenditure.

The judgment for consequential matters is at [2023] EWHC 732 (Comm) ("Consequential Judgment"). Foxton J. decided that the starting point for interest on the US dollar judgment would be US Prime. He held that this should be the default rule going forward for judgments entered in US Dollars in the Commercial Court, irrespective of whether the claimant has a US place of operations or whether it is a maritime claim (as much of the previous caselaw had been) (Consequential Judgment, §14).

This was because:

(1) of several previous decisions made by the Court (§§4-7)

(2) LIBOR is in the course of being discontinued

(3) LIBOR itself is an interbank rate, rather than a commercial borrowing rate

(4) the trend of more recent authorities favoured US Prime; and

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

As US Prime is the rate offered by US banks to their most creditworthy business customers, Foxton J. held that (i) in some cases, even without evidence, it will be obvious from the general characteristics of a claimant that it would have to pay a rate higher than US Prime, and so the Court may be prepared to award US Prime plus 1 or 2%; and (ii) claims for more than US Prime plus 2% would likely require evidence. Given the nature of Lonestar, he awarded US Prime without any uplift (Consequential Judgment, §§16-17).

The total award of damages plus interest was therefore $5.4million (Consequential Judgement, §21). Before considering two WPSATC offers made by Orange Liberia, Foxton J. decided that because of, inter alia, the overexaggerated quantum of the claim, the claimant was entitled to recover 40% of its costs against Orange Liberia, subject to the offers made. On the basis of a WPSATC offer, the claimant also found itself liable for Orange Liberia's costs (see §39 for the different costs orders made between the parties).

Conclusion

Mabande J. described the law as "a dynamic and progressive science" (Quelo, 301).

The judgment in Lonestar is another example of the Commercial Court's dynamism in parsing complex issues. There are three key takeaways from the judgment. First, the Commercial Court is always willing to work outside of the recognise bounds of English tort law to carefully apply applicable foreign law. Second, the decision to apply US Prime as a default rule provides welcome clarity in cases going forward. Third, the judgment is a salutary warning to claimants overexaggerating the quantum of their claims and the risk of substantial irrecoverable costs that creates.