

Neutral Citation Number: [2021] EWHC 2968 (QB)

Claim No. QB-2019-003093

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 5th November 2021

Before :

ROGER TER HAAR O.C.
(SITTING AS A DEPUTY HIGH COURT JUDGE)

Between :

PREMIA MARKETING LIMITED
- and -

Claimant

REGIS MUTUAL MANAGEMENT LIMITED

Defendant

PAUL ASHWELL (instructed by **Rohan Solicitors LLP**) for the **Claimant**
LAWRENCE JONES and **KYLE LECUONA** (instructed directly) for the **Defendant**

APPROVED JUDGMENT

ON COSTS AND CONSEQUENTIAL MATTERS

Covid-19 Protocol: This judgment will handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 2pm on Friday 5 November 2021.

Roger ter Haar Q.C.:

1. In this action judgment (“the judgment”) was handed down under the Covid-19 Protocol on 18 August 2021. This judgment is concerned with consequential matters, in respect of which the parties have made submissions on paper.

VAT

2. In paragraph 102 of the judgment I concluded that the Claimant is entitled to £212,294.00 up to February 2022. I had not been addressed on matters relating to VAT, and in consequence that figure is net of VAT.
3. It has been submitted by the Claimant that I should in addition award VAT: this has not been contested by the Defendant, and, in any event, appears to me to be correct. Accordingly the sum payable to February 2022 will be £212,294 plus VAT at the applicable rate: to date that has been 20%, but this may change between now and February 2022.

Terms of the Declaration

4. In paragraph 103 of the judgment I held that the Claimant is entitled to a continuing fee on the basis of 10% of the Defendant’s net profit from its relationship with the Caravan Club in the future.
5. In paragraph 2.0 of his “Round 1” submissions, Mr. Ashwell put forward proposed terms of a declaration. Paragraphs 1 and 2 of that declaration appeared to me to be entirely appropriate. Paragraph 3 of the draft presupposes late payment in the future. I decline to make a declaration in the terms suggested in paragraph 3 – any entitlement to interest in the future will depend upon a range of factors (including whether the Late Payment of Commercial Debts (Interest) Act 1998 is still in force at the relevant time).

Interest

6. The Claimant claims interest primarily under Section 1 of the Late Payment of Commercial Debts (Interest) Act 1998. Sections 1 to 5 of that Act provide:

“1. Statutory interest

“(1) It is an implied term in a contract to which this Act applies that any qualifying debt created by the contract carries simple interest subject to and in accordance with this Part.

“(2) Interest carried under that implied term (in this Act referred to as “statutory interest”) shall be treated, for the purpose of any rule of law or enactment (other than this Act) relating to interest on debts, in the same way as interest carried under an express contract term

“2. Contracts to which Act applies

“(1) This Act applies to a contract for the supply of goods or services where the purchaser and the supplier are each acting in the course of a business, other than an excepted contract.

“(2) In this Act “contract for the supply of goods or services” means –

“(a) a contract of sale of goods; or

“(b) a contract (other than a of sake of goods) by which a person does any, or any combination, of the things mentioned in subsection (3) for a consideration that is (or includes) a money consideration).

“(3) Those things are –

“... ”

“(c) agreeing to carry out a service.....”

“3. Qualifying Debts

“(1) A debt created by virtue of an obligation under a contract to which this Act applies to pay the whole or any part of the contract price is a “qualifying debt” for the purposes of this Act, unless (when created) the whole of the dent is prevented from carrying statutory interest by this section.

“(2) A debt does not carry statutory interest if or to the extent that it consists of a sum to which a right to interest or to charge interest applies by virtue of any enactment (other than section 1 of this Act).

“This subsection does not prevent a sum from carrying statutory interest by reason of the fact that a court, arbitrator or arbiter would, apart from this Act, have power to award interest on it.

....

“4. Period for which statutory interest runs

“(1) Statutory interest runs in relation to a qualifying debt in accordance with this section (unless section 5 applies).

“(2) Statutory interest starts to run on the day after the relevant day for the debt, at the rate prevailing under section 6 at the end of the relevant day.

“(2A) The relevant day for a debt is –

“(a) where there is an agreed payment day, that day;

“(b) where there is not an agreed payment day, the last day of the relevant 30-day period.

“(2B) An “agreed payment day” is a date agreed between the supplier and the purchaser for payment of the debt (that is, the day on which the debt is to be created by the contract).

“(2C) A date agreed for payment of a debt may be a fixed date or may depend on the happening of an event or the failure of an event to happen.

....

“(2H) “The relevant 30-day period” is the period beginning with the later or latest of –

“(a) the day on which the obligation of the supplier to which the debt relates is performed;

“(b) the day on which the purchaser has notice of the amount of the debt or (where that amount is unascertained) the sum which the supplier claims is the amount of the debt”

“5. Remission of statutory interest

“(1) This section applies where, by reason of any conduct of the supplier, the interests of justice require that statutory interest should be remitted in whole or in part in respect of a period for which it would otherwise run in relation to a qualifying debt.

“(2) If the interests of justice require that the supplier should receive no statutory interest for a period, statutory interest shall not run for that period.

“(3) If the interests of justice require that the supplier should receive statutory interest at a reduced rate for a period, statutory interest shall run at such rate as meets the justice of the case for that period.

“(4) Remission of statutory interest under this section may be required –

“(a) by reason of conduct at any time (whether before or after the time at which the debt is created); and

“(b) for the whole period for which statutory interest would otherwise run for one or more parts of that period.

“(5) In this section “conduct” includes any act or omission.”

7. The Claimant contends that interest is payable under the Act in a total sum of £45,930.92.
8. The parties' initial submissions on this point were short and, in my view, required expansion.
9. I provided to the parties a copy of this judgment in draft which dealt with all the consequential matters save in respect of interest.
10. In respect of interest, I indicated in my draft judgment that, in particular, I would wish to have the benefit of submissions from the parties on the following matters:
 - (1) The application of Section 4 of the Act, including the calculation of the 30 day period in the circumstances of this case and:
 - (a) The date(s) upon which the Defendant had notice of the sum which the Claimant claimed was the amount of the debt;
 - (b) Any points under sub-section 4(7A) which may be applicable;
 - (2) The parties' submissions on the matters which I could take into account in applying section 5 of the Act.
11. I indicated that it would be particularly helpful if the parties could draw to my attention any relevant authorities on the Act.
12. I indicated that it would be helpful to have alternative calculations on the amounts due if the 1998 Act or the Supreme Court 1981 applies.
13. I invited submissions upon these matters and said that the judgment would remain in draft until those submissions had been received.
14. I have now received helpful submissions from both parties on the issues in respect of interest and am very grateful for the submissions received.
15. In my judgment the Claimant is right that the amount which I have awarded falls within the definition of a qualifying debt (or possibly debts). I have held in the Claimant's favour on the issue as to whether there was a contractual obligation on the part of the Defendant to make payment. That obligation related to the carrying out of a service by the Claimant, thus engaging sections 2 and 3 of the Act.
16. Where I have difficulty is in respect of the machinery of section 4 of the Act. The Act is relatively simple to apply in the case of a simple supplies of services, such as the execution of an audit by an accountant, or the provision of legal advice by a solicitor: an invoice or fee note is issued and payment is expected and due normally within a fixed period such as 28 days.

17. Here there was no pre-existing understanding between the parties as to when the Claimant would receive payment, not least because whether the Claimant would receive payment and, if so, on what basis, was never agreed between the parties with any degree of precision.
18. I do not accept the Claimant's submission that there was an (implicitly) agreed payment day within the meaning of section 4(2A). What was agreed, as I held in paragraph 69 of the principal judgment, was that the Defendant would pay a reasonable fee for the introductory service provided by the Claimant. It is difficult to spell out from that understanding a further express or implied agreement as to precisely when payment should be made, particularly where the amount to be paid would, as I held, depend upon the profit which the Defendant would in due course make on an uncertain timescale on its arrangement with the Caravan Club.
19. Thus, in respect of the machinery for the start of "the relevant 30-day period", I reject the suggestion that there was an agreed payment date.
20. In those circumstances, it seems to me that I am thrown back onto the start date of the 30 day period set out in section 4(2H), namely
 "the period beginning with the later or latest of –
 "(a) the day on which the obligation of the supplier to which the debt relates is performed;
 "(b) the day on which the purchaser has notice of the amount of the debt or (where that amount is unascertained) the sum which the supplier claims is the amount of the debt"
21. In this case the date on which the Claimant performed its obligation was at latest when the Defendant entered into a contract with the Caravan Club: but at that date on any view the Claimant had not given notice of the sum which it claimed was the amount of the debt – accordingly the date under sub-sub-section (b) is later than that under sub-sub-section (a), and must take precedence.
22. The Defendant contends that it did not have notice of the amount claimed by the Claimant until service of the claim form. In my judgment there is strength in this: it was at that point that the way in which the claim was being put was crystallised.
23. Whilst at the date of the service of proceedings the amount of the Claimant's entitlement had yet to be ascertained by this Court, I read sub-sub-section (4)(2H)(b) as starting the clock running when the claim for a previously unascertained sum is quantified, even if that quantification is later rejected or modified in some significant regard.
24. The date of service of proceedings was 30 August 2019.
25. Accordingly, I reject the Claimant's case insofar as it suggests that the 30-day period started earlier than the date of the service of the proceedings: however,

subject to the points next considered, I do accept that the starting point for the 30 day period is 30 August 2019.

26. However, the Claimant recognises that certain amounts of the profit had not yet materialised by 30 August 2019.
27. It would have been possible for the Defendant to submit dates as to when it received payments from the Caravan Club. I do not have that information.
28. In my view I have to take a broad brush approach in respect of interest. I do so in this way: I assume that the amounts to be received by the Defendant from the Caravan Club would have been received by the Defendant at latest 30 days after the end of each of the periods ending on 28 or 29 February (depending on the leap year). Accordingly by 30 August 2019 (the date of service of proceedings) the profit share in respect of the years ending 28 February 2017, 28 February 2018 and 28 February 2019 would all have become payable, and therefore interest in respect of each of those years runs from 30 days after 30 August 2019.
29. In respect of the years ending 29 February 2020 and 28 February 2021 the interest starts to run 30 days after each of those dates.
30. In reaching the above conclusions, I reject the suggestion by the Defendant that grounds for remission of interest under the Act are made out. This is a case in this respect similar to *Crema v Cenkos Securities Plc* [2011] EWCA Civ 10 where it was held that the fact that the Defendant bona fide contested liability did not prevent the application of the Act.
31. Whilst I did not accept the Claimant's case at its highest, the presentation by the Claimant of a claim greater than that eventually accepted seems to me the sort of conduct by a party seeking legitimately to maximise an arguable claim rather than the sort of conduct which engages the "interests of justice" in requiring the remission of interest, particularly in the circumstances discussed elsewhere in this judgment where the Defendant launched a full fronted attack upon the Claimant, and Mr Stone.
32. The position would have been very different if the Defendant had openly offered, and maintained an offer of, payment.
33. The Defendant also contended that to order payment of interest under the Act would be grossly unfair under sub-section 4(7A) of that Act. The Act contains a safety net in sub-section (2F) in cases where ordering statutory interest to be paid would be "grossly unfair", in respect of which sub-section 4(7A) provides:

"In determining whether something is grossly unfair, all circumstances of the case shall be considered; and for that purpose, the circumstances of the case include in particular –

“(a) anything that is a gross deviation from good commercial practice and contrary to good faith and fair dealing;

“(b) the nature of the goods or services in question; and

“(c) whether the purchaser has any objective reason to deviate from the result which is provided for by subsection (2E) or (5C)”.

34. In my judgment there is nothing put forward by the Defendant which comes close to satisfying sub-section 4(7A). In this case the Claimant and the Defendant disagreed as to whether any introductory fee was payable, and, if so, on what basis.
35. This was a familiar commercial dispute on which the Claimant was substantially the victor.
36. I see no reason why the statutory interest machinery should not apply on the basis set out at paragraphs 28 and 29 above.
37. I would hope that the calculation of interest can now be agreed.¹

Costs

38. As is conventional, the first question which I must answer is “who was the successful party”. To that question I have no doubt that the answer is that the Claimant was the successful party.
39. This is not a case in which there was any Part 36 offer which the Claimant failed to beat. The best case for the Defendant is based upon the offer to which I referred in paragraph 41 of the judgment. It can be said that that offer was as good as the conclusion at which I arrived in the judgment.
40. The difficulties for the Defendant are not only that the offer was informal in nature and not capable of acceptance, but also that it was withdrawn almost as soon as it was made. Since then, all offers by the Defendant have been significantly worse than the result which the Claimant achieved in the judgment.
41. Moreover I am entitled and required to take into account the conduct of the parties: in that respect it seems to me highly relevant that the Defendant (or its lawyers) launched an entirely unjustified attack upon Mr Stone personally – see paragraphs 53 to 55 of the judgment. If I otherwise regarded the decision whether to award costs to the Claimant as being marginal, this would have tipped the balance in the Claimant’s favour. However, my answer to the primary question as to how the successful party leads me to conclude that the Claimant is entitled to an order that the Defendant pay its costs of this action.

Interim payment

42. The Order will be for costs to be assessed on the standard basis. The Claimant seeks an order for an interim payment.
43. This is conventional and fully justified in this case.

¹ After this judgment was distributed in draft, the amount of interest payable was agreed between the Parties.

44. The Claimant starts by seeking 90% of the amount allowed by way of cost budgeting: £152,635.18. This seems appropriate given that the Defendant's agreed costs budget was in the sum of £184,700.
45. In addition, the Claimant seeks costs pursuant to a consent order made by Ms Heather Williams Q.C., sitting as a Deputy High Court Judge. These are said to amount to £16,790 net of VAT.
46. I have some hesitation about this: I do not have details of the costs sought. However only 50% is sought, namely £8,395. I will allow £7,500 on an interim basis, bringing the total for an interim payment as to costs to £160,135.