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Neutral Citation Number: [2020] EWHC 1619 (Ch)

Case No: FL-2020-000012

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

7 Rolls Building
Fetter Lane, London
EC4 1NL

Date: 23 June 2020

Before :

MR JUSTICE ZACAROLI

Between :

RAWBANK S.A.	<u>Claimant</u>
- and -	
TRAVELEX BANKNOTES LIMITED	<u>Defendant</u>

Alex Cunliffe (instructed by **Singhania & Co**) for the **Claimant**
Tom Smith QC (instructed by **Sidley Austin LLP**) for the **Defendant**

Hearing dates: 19 June 2020

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.

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MR JUSTICE ZACAROLI

Mr Justice Zacaroli:

1. This is an application by the claimant, Rawbank S.A. (“Rawbank”) against the defendant, Travelex Banknotes Limited (“TBL”).
2. Rawbank is the largest bank in the Democratic Republic of Congo (“DRC), one of the poorest countries in the world. TBL is a company incorporated in England and Wales, part of the Travelex group, conducting business as a wholesale supplier of banknotes to financial institutions.
3. The claim arises under a contract contained in a proposal letter from TBL to Rawbank dated 4 October 2013, confirming the terms upon which TBL would sell banknotes to Rawbank. Under the contract once an order is accepted by TBL, Rawbank transfers the purchase price via electronic funds transfer, and TBL then delivers the banknotes in either Kinshasa or Lubumbashi.
4. On 16 March 2020 Rawbank placed an order for \$40 million in banknotes. The price, \$40,048,000, was transferred electronically on 19 March 2020. Delivery was due to take place on 23 March 2020, but concerns arose almost immediately about the effect of international travel restrictions put in place due to the coronavirus pandemic.
5. On 19 March 2020 TBL indicated that it could include a further \$20 million banknotes and that it was told by its secure delivery partner that the shipment could be delivered on 21 March 2020. Rawbank paid the purchase price for the additional \$20 million banknotes on 19 March 2020.
6. TBL, still on 19 March 2020, then informed Rawbank that delivery on 21 March was not possible but that it was possible to revert to the original date of 23 March as it seemed that DRC’s airports were not closing on that date after all. Later that same day, however, TBL was told that Kenya Airways had cancelled the flights from Nairobi to Kinshasa and Lubumbashi which meant that delivery on 23 March 2020 was no longer possible.
7. TBL then used the US dollars purchased for TBL to fulfil the order of another customer. At the end of the day on 19 March 2020, the outstanding funds in TBL’s US dollar account with Bank of New York were swept into the Travelex Group accounts, in accordance with normal practice.
8. By early April 2020, the banknotes had still not been delivered. Rawbank was facing the real possibility of a run on the bank. The total amount of the order was equivalent to roughly 50% of Rawbank’s equity.
9. Discussions then took place between TBL and Rawbank (which I deal with more fully below) in which it was made clear that TBL would not be delivering the banknotes or making a refund in the near future, because it was in serious financial difficulty and in need of a restructuring, which it hoped would be completed by the end of May 2020.

10. On 14 April 2020 Rawbank made an application for a freezing order, based on an allegation of fraud. The application was made without notice, but adjourned by Fancourt J until 17 April so that notice could be given to TBL. On 17 April 2020 the matter was adjourned by consent by Trower J to the week commencing 4 May 2020.
11. On 4 May 2020, Rawbank issued the claim form, in which the allegation of fraud had been abandoned. The claim was now based simply on breach of contract and/or misrepresentation.
12. On the same date, Rawbank's solicitors wrote to TBL's solicitors, without prejudice save as to costs, making an offer under Part 36 of the CPR. I will return to the details of this offer below.
13. The injunction application was heard by Birss J on 7 May 2020. In a judgment delivered on 11 May 2020 he declined to grant an injunction but made a limited disclosure order and ordered TBL to give seven days' advance notice of any disposal of assets that would reduce its assets by more than £5 million.
14. Rawbank issued this application for summary judgment on 18 May 2020. TBL filed an acknowledgment of service on 27 May 2020 ticking the box that indicated an intention to defend the whole of the claim.
15. On 1 June 2020, TBL issued an application for a stay of the proceedings, alternatively a stay of the judgment, on the grounds that it wished the opportunity to agree a restructuring with its lenders or an M&A deal, in order to avoid its insolvency and to obtain a better outcome for its creditors as a whole.
16. Aside from ticking the box indicating an intention to defend the claim, no substantive defence has ever been advanced by TBL. On 15 June 2020 its solicitors wrote to Rawbank's solicitors agreeing to judgment being entered against it in respect of the contractual claim in the amount of \$60,072,000. It also withdrew its stay application, because while significant progress had been made in discussions with its lenders, they had not reached a stage that would enable TBL to adduce an agreed set of terms.
17. In these circumstances, TBL accepts that there should be judgment entered against it and that it should be ordered to pay Rawbank's costs of the action, the summary judgment application and the stay application. Three matters, however, remain in issue.
 - i) First, Rawbank seeks an order that pre-judgment interest be paid at the rate of 4.67163%. TBL submits that it should be paid at 2% above Barclays Bank's base rate.
 - ii) Second, Rawbank seeks an order giving effect to the consequences set out in CPR 36.17(4) on the basis that it has achieved an outcome that was at least as advantageous as the proposals contained in its Part 36 offer.

- iii) Third, Rawbank seeks an order requiring the judgment sum to be paid immediately. TBL submits that the amount should be payable within 14 days.

Interest

18. Mr Cunliffe, who appears for Rawbank, submitted that interest should be paid at a commercial rate and that the best indication of an appropriate commercial rate was the rate applicable to default interest under TBL's revolving credit facility with its lenders. That rate is 3.5% over Libor or Euribor (depending on the currency of the borrowing) plus an additional 1% to take account of the default. Mr Cunliffe said that on the basis of 3-month Libor (which was appropriate in view of the fact that the debt had been outstanding for 3 months) the rate was 4.67163%.
19. Mr Smith QC, who appears for TBL, submitted that the rate of interest at which TBL can borrow funds has no relevance. What might be of relevance would be the rate at which Rawbank could borrow, as to which there is no evidence. In any event, he submitted, the best guide to an appropriate rate of interest is that which the parties had agreed upon in the contract between them. By clause 4.4 of the terms and conditions annexed to the agreement date 4 October 2013, "if either party fails to pay to the other party any amount payable by it under the Contract such other party shall be entitled to interest on the overdue amount..." at the rate of 2% over Barclays Bank's base rate.
20. TBL's failure to deliver banknotes is not properly characterised as a failure to pay an "amount" due under the contract. Nor is there any express provision in the contract for the payment of a refund, or for liquidated damages. Nevertheless, while the claim is not for the payment of a sum due by way of primary obligation under the contract, it is for payment of a secondary obligation (payment of damages) arising from the contract as a result of a breach of a primary obligation. It is difficult to see why the parties would have intended that TBL should pay interest at 2% over Barclays' base rate in circumstances where it failed to comply with a primary obligation to pay money (as envisaged, for example, by clause 6) but should pay interest at a different rate if it failed to comply with a secondary obligation to pay the value of banknotes it promised to deliver, in case of breach of that promise. Even if that is wrong, it seems to me that the contractually agreed rate in respect of overdue payments under the contract is a reasonable proxy for an appropriate commercial rate to be applied to this claim for breach of the same contract. I agree with Mr Smith that the rate of interest at which TBL can borrow from its lenders has no relevance in determining an appropriate commercial rate at which it should pay interest to Rawbank.
21. For these reasons, I prefer the submissions of Mr Smith on this issue, and I will order (subject to my conclusions below in respect of the Part 36 offer) that pre-judgment interest shall be payable on the principal judgment sum at the rate of 2% over Barclays Bank's base rate. It is common ground that interest is payable on the judgment sum at 8% per annum.

Part 36 Offer

22. The letter from Rawbank’s solicitors dated 4 May 2020 begins by pointing out that “given the admissions contained in your client’s evidence, we are confident that our client will obtain an early judgment against your client”. This refers to the witness statements of Ms Angela Smith, head of Wholesale Banknotes at TBL, and of Mr Andrew Thompson, a Senior Banknote Dealer at TBL. These statements contained a description of the facts which demonstrated the existence of the contract and TBL’s failure to comply with it. While not containing a formal admission of liability, which is perhaps not surprising in that at the time Rawbank was alleging fraud against TBL, they clearly admit the facts which establish Rawbank’s claim for breach of contract, and do not offer anything by way of defence to that claim. At the hearing before Birss J on 7 May 2020, TBL accepted that there was a claim for breach of contract and did not identify any defence. Birss J noted, in his judgment on 11 May 2020 that “the truth is, there is no defence.”
23. The Part 36 offer letter continued by making an offer to settle the entire proceedings on terms that TBL paid £48,290,000 within 14 days of accepting the offer. The settlement sum excluded costs but was stated to be inclusive of interest until the end of the 21-day period provided for in CPR Part 36. The end of the relevant period was 25 May 2020. The letter pointed out the consequences of failing to accept the offer if Rawbank succeeded in obtaining a judgment equal to or more advantageous than the offer. These included the payment of indemnity costs, interest on the principal sum and costs at up to 10% from the end of the relevant period, and an additional amount of 10% of the damages up to £500,000 and 5% of damages awarded about that figure.
24. This reflected the terms of CPR Rule 36.17(4), which provides that where the judgment ordered against the defendant is at least as advantageous to the claimant as the proposals contained in its Part 36 offer, then

“the court must, unless it considers it unjust to do so, order that the claimant is entitled to (a) interest on the whole or part of any sum of money (excluding interest) awarded, at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired; (b) costs (including any recoverable pre-action costs) on the indemnity basis from the date on which the relevant period expired; (c) interest on those costs at a rate not exceeding 10% above base rate; and (d) provided that the case has been decided and there has not been a previous order under this subparagraph, an additional amount, which shall not exceed £75,000, calculated by applying the prescribed percentage set out below to an amount which is (i) the sum awarded to the claimant by the court...” (The prescribed percentage is 10% of the first £500,000 and 5% of any amount over that figure.)

25. In considering whether it would be unjust to make the orders referred to in Rule 36.17(4), the court must take into account all the circumstances of the case, including: (a) the terms of the Part 36 offer; (b) the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made; (c) the information available to the parties at the time when the Party 36 offer was made; (d) the conduct of the parties with regard to the giving or refusal to give information for the purposes of enabling the offer to be evaluated; and (e) whether the offer was a genuine attempt to settle the proceedings.
26. Mr Smith made the preliminary point that Rawbank had not identified, for example in its skeleton for this application, that it would be seeking orders under Rule 36.17(4)(a), (c) and (d). That is true, but it does not preclude orders being made given that the court is mandated to make such orders in every case, unless it is unjust to do so, and the Part 36 offer letter made express reference to these consequences.
27. TBL contends that the offer was not a genuine attempt to settle the proceedings and for that reason it would be unjust to make any of the orders referred to in rule 36.17(4). Mr Smith referred me to *AB v CD* [2011] EWHC 602 (Ch), per Henderson J at [22], where he held that the offer must contain some genuine element of concession, so that an “offer” to accept the full amount claimed would not fall within the rule. Henderson J noted that a settlement that was all take and no give would not be a settlement at all. Mr Smith also referred me to *Huck v Robson* [2002] EWCA Civ 398, in which an offer to settle at 95% of the sum claimed on liability was considered to be a genuine offer to settle. Mr Smith relies on a passage in the decision of Tuckey LJ, at [71]:
- “...if it was self-evident that the offer made was merely a tactical step designed to secure the benefit of the incentives provided by the rule (e.g. an offer to settle for 99.9% of the full value of the claim) I would agree with Jonathan Parker LJ that the judge would have a discretion to refuse indemnity costs. But that cannot be said of the offer made in this case.”
28. As I have noted, the Part 36 in this case was that TBL pay £48,290,000 (inclusive of interest to 25 May 2020). The principal amount of the claim is \$60,072,000. On the first page of the Claim Form the sterling equivalent of the amount claimed was stated to be £48,311,860. I was told that on the basis that interest is payable at 2% above Barclays Bank’s base rate, then, together with interest to 25 May 2020, the sterling equivalent of the amount claimed in the proceedings is £48,448,059. The discount being offered (assuming exchange rates remained constant thereafter) was therefore only £158,059, or 0.3% of the total amount claimed.

29. In those circumstances, Mr Smith submitted that this was clearly not a genuine offer to settle, but was a tactical move, designed solely to engage the enhanced payments set out in Rule 36.17(4). While I see the force of that submission, I do not accept it. The critical question is not a mathematical one – the proportion of the discount – but whether it is possible to infer from the size of the discount that there is no genuine attempt to settle the proceedings.
30. In considering that question in the circumstances of this case, I take particular note, first, of the fact that there was no issue as to the quantum of the claim, so that there were only two possible outcomes: success (in which case the sum of \$60,072,000 would be payable) or failure (in which case nothing would be payable). Second, I take note of the fact that, as pointed out in the letter of 4 May 2020, in light of the evidence contained in the witness statements filed on behalf of TBL, there was clearly no defence to the claim. From Rawbank’s perspective, therefore, there was no realistic possibility of failure. In other words, a discount of any amount would involve Rawbank giving up something which it had a near-certainty of obtaining. Moreover, while £158,059 is a very small amount in comparison with the principal amount of the claim, it is larger than the interest that would accrue during the period of the offer and is likely to have been greater than the costs incurred by Rawbank. Although the offer was not structured in this way (because it was inclusive of interest and would have required costs to be paid), in circumstances where a claimant has near-certain chances of success, then an offer to settle on the basis that the claimant foregoes an amount equal to interest or costs is still capable of being characterised as a genuine offer of settlement. That conclusion is bolstered here by the circumstance that the claimant had a desperate need for the money and was at a loss to understand why its money had not been returned to it.
31. Mr Smith also relied on the fact that it was the case that TBL was simply not in a position to pay. I do not regard this as demonstrating that there was no genuine attempt to settle. Rawbank was entitled not to accept TBL’s word that it could not pay, and so long as it believed there was a possibility that TBL could pay, it could not be said that it was acting otherwise than genuinely in trying to encourage early payment.
32. I consider, on the other hand, that TBL’s inability to pay is relevant to the question, more generally, whether it would be unjust to order it to pay the amounts identified in Rule 36.17(4).
33. Prompted by a WhatsApp request on 3 April 2020 from Rawbank’s CEO, Mr Mustafa Rawji, requesting a refund of the price paid for the banknotes, on 6 April 2020 Mr Nathan Best, a director of TBL, spoke to Mr Rawji and told him that the banknotes would not be delivered and that no refund would be made at that time because the Travelex group was in financial difficulties and was undergoing a restructuring. Mr Best said that the group had to have regard to its duties to act in the best interests of all of its creditors and to the risk that payment of one creditor could be construed as a preference. He indicated that the group needed a cash injection in order to be able to pay all of its creditors, and that on the current timescale the restructuring was intended to be completed by the end of May 2020.

34. It is true, as Mr Cunliffe submitted, that the position stated by TBL was not that it had *no funds* with which to pay Rawbank but that its poor financial situation was such that it needed to take into account the interests of all creditors, that it could not properly pay one creditor without risking the payment being construed as a preference, and that a restructuring was necessary in order to be able to pay all of its creditors. TBL's financial circumstances were explored at the hearing before Birss J who held there was no basis for inferring that the proposed restructuring was anything other than a bona fide process.
35. Mr Cunliffe submitted that TBL was favouring the interests of its western financial creditors over the interests of Rawbank and the citizens of the DRC. It is impossible not to have the greatest sympathy for the plight of Rawbank and those whom it serves, but if, as the evidence indicates, TBL is insolvent, its ability to pay its unsecured creditors is restricted by matters beyond its current control. I note that TBL is a guarantor of the group's debt to the syndicate of lenders under the revolving credit facility, and has given security over all its assets in favour of those lenders. Rawbank, on the other hand, is an unsecured creditor of TBL.
36. Acceptance of the Part 36 offer could only be made by actually paying the sum referred to in it. In my judgment, the fact that due to circumstances beyond its control TBL is, and has been since the date of the Part 36 offer, unable by reason of its insolvency to pay that sum means that it would be unjust to make at least some of the orders identified in Rule 36.17(4). This is not a case where TBL fought on in the hope of beating the Part 36 offer.
37. That does not mean, however, that it is necessarily unjust to require *all* of the amounts set out in Rule 36.17(4) to be paid on the ground of TBL's inability to pay. Taking into account all of the circumstances of the case, as I am required to do under Rule 36.17(5), I do not consider it would be unjust to require TBL to pay, as from 25 May 2020, (1) the costs of the proceedings on the indemnity basis and (2) interest on the principal sum owed at the Judgments Act rate of 8%. While TBL was (as I have held) unable to pay the settlement sum, it was within its power to bring an end to the proceedings by accepting that judgment be entered against it. Had TBL not sought to delay judgment then, first, no further costs would have been incurred by Rawbank in the proceedings and, second, judgment would have been entered earlier with the consequence that interest at the Judgments Act rate would have started to run in Rawbank's favour from that earlier date.
38. Mr Smith candidly accepted that TBL never had a defence to the breach of contract claim and that its strategy was to delay judgment being entered against it so that it could explore restructuring options. It was for this reason that its formal concession to judgment being entered against it was only made as recently as 15 June 2020. That strategy included, as I have noted above, filing an acknowledgment of service which, contrary to TBL's acknowledgment that it never had a defence, indicated an intention to defend the whole of the proceedings.

39. TBL's application for a stay to enable it to pursue a restructuring has not been pursued before me. I am not in a position, therefore, to comment on the merits of the application to stay the proceedings, as opposed to the application to stay enforcement of any judgment. (Shortly before sending out this judgment in draft, Mr Smith provided me with a copy of *Bluecrest Mercantile BV v Vietnam Shipbuilding Industry Group* [2013] EWHC 1146 (Comm), a decision of Blair J in which he stayed proceedings in order not to disrupt a restructuring. The circumstances of that case were far removed from the present case, however, and I have not considered it necessary to invite argument on the point.)
40. Notwithstanding that it may be possible to stay proceedings, as opposed to staying enforcement of a judgment, there is a clear distinction between the two. As Mr Smith accepted, entering judgment against TBL would not in itself interfere with the proposed restructuring; TBL's concern is as to the enforcement action that would inevitably follow. Accordingly, I am not persuaded that TBL's inability to pay and its desire to pursue restructuring negotiations are sufficient to mean it is unjust to require it to compensate Rawbank for the higher rate of interest Rawbank would have obtained had it obtained judgment earlier and in requiring it to pay Rawbank's costs on the indemnity basis. I will therefore order both as from 25 May 2020.

The date of payment

41. The first issue to decide, in considering the appropriate date upon which the judgment sum should be payable, is the basis of the application for judgment. The only formal application before the court is for summary judgment under CPR Part 24. Since the application was issued before TBL had filed an acknowledgment of service the court's permission is required: see CPR Rule 24.4(1). TBL raised no objection and I accordingly grant permission.
42. CPR Rule 40.11 provides that a party must comply with a judgment or order for the payment of an amount of money within 14 days of the date of the judgment or order, unless the judgment or order specifies a different date for payment, the CPR provide for a different date or the court has stayed the proceedings or judgment.
43. Rawbank contends, however, that it is entitled to judgment on admissions under CPR Part 14 and that, pursuant to Rule 14.4(6)(b) the judgment sum is payable immediately.
44. Rule 14.3 enables a party to apply for judgment following an admission made in writing. It is accepted that the letter from TBL's solicitors dated 15 June 2020 amounts to an admission in respect of the claim.
45. Rule 14.4 applies where the only remedy which the claimant is seeking is the payment of a specified amount of money. I am prepared to accept that, although the claim form contains both a claim for breach of contract (with damages being identified as the sum of money paid by Rawbank to acquire the banknotes) and a claim for rescission, since the rescission claim is a stepping stone to recover the same amount of money the claim falls within Rule 14.4.

46. Rawbank has not, however, followed the procedure laid down in Rule 14. Rule 14.4(3) provides that a claimant may obtain judgment by filing a request in the relevant practice form. Rule 14.4(6) specifies that the date for payment of the judgment will be the date specified in the request for judgment or, if none is specified, immediately. This rule is not directly applicable, because no request for judgment has been filed. I note, in addition, that Rule 14.4(6) only applies in circumstances where the defendant does not seek time to pay the judgment sum. If it does, then the procedure in Rule 14.9 applies, under which there is an exchange of notices between the parties following which the court makes a determination as to the time of payment. Had a request for judgment been made in the appropriate form, I infer that TBL is likely to have invoked that procedure, given its stance on the applications before me.
47. I conclude that CPR Part 14 is not directly applicable to this case, which is instead governed by CPR Rule 40.11.
48. Neither party has identified any authority where the court has shortened the period of 14 days under Rule 40.11. Rawbank nevertheless contends that the provisions of Part 14 should be applied by analogy. There is a powerful argument that the logic driving my conclusion in relation to the Part 36 offer also leads to the conclusion that the judgment should be payable immediately: had TBL not sought to delay judgment, the judgment sum would by now have become payable. Nevertheless, I have decided that the normal period provided for under Rule 40.11 should apply in this case.
49. As Birss J commented, there is no reason to believe other than that TBL is making genuine efforts to restructure so that it can pay its creditors. There seem to me to be at least three possible outcomes within the 14 day period (as the law currently stands, and without taking into account any possible change to insolvency law as a result of the Corporate Insolvency and Governance Bill currently passing through Parliament): first, although this may be least likely as a matter of timing, there is a successful restructuring which enables TBL to pay the judgment debt; second, restructuring negotiations reach a point where TBL can properly apply for a stay on the basis that this gives the best chance of the judgment debt being paid; and third, the restructuring negotiations do not proceed in that way and at the end of the 14 day period TBL is forced to take steps to implement formal insolvency proceedings.
50. As an unsecured creditor of TBL, there is at least a strong likelihood that the third option would be the least favourable for Rawbank. It is only if, (contrary to its stance to date) TBL finds itself able to pay the judgment sum notwithstanding the lack of a viable restructuring plan, in order to involve insolvency proceedings, that Rawbank would benefit from requiring the judgment sum to be paid immediately. While I cannot rule out that possibility, I do not think it weighs sufficiently in the balance to deny TBL the usual period of 14 days in which to pay the judgment sum.

Conclusion

51. Accordingly, I shall order as follows:

- i) TBL shall pay the judgment sum within 14 days of the date of the order giving effect to this judgment;
- ii) Interest is payable on the principal sum claimed at the rate of 2% per annum above Barclays Bank's base rate until 25 May 2020;
- iii) Interest is payable on the principle sum claimed at the rate of 8% per annum from 25 May 2020;
- iv) TBL shall pay Rawbank's costs of the action (including the application for summary judgment) to be assessed on the standard basis until 25 May 2020 and on the indemnity basis from 25 May 2020.