

Neutral Citation Number: [2022] EWHC 3234 (Ch)

Case No: CR-2012-007914

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 12 December 2022

Before:

LADY JUSTICE FALK DBE

Between:

GEOFFREY CARTON-KELLY
(as Liquidator of CGL Realisations Limited)

Applicant

- and -

DARTY HOLDINGS SAS
(as successor to Kesa International Limited)

Respondent

Tiran Nersessian (instructed by **Jones Day**) for the **Applicant**
Tom Smith KC and Henry Phillips (instructed by **Sidley Austin LLP**) for the **Respondent**

Hearing date: **12th December 2022**

RULING

Lady Justice Falk DBE
(15:43 pm)

Monday, 12 December 2022

Ruling by **LADYJUSTICE FALK DBE**

Pre-judgment interest: period of accrual

1. The first point to address is the period for which pre-judgment interest should run on the judgment sum, which is £89,569,624.
2. Mr Carton-Kelly's position is that interest should run from the date Comet entered administration, 2 November 2012. Darty says that there has been an unreasonable delay in prosecuting the claim such that interest should run only from the date the claim was issued, 26 October 2018. The difference is material. On Darty's approach the pre-judgment interest is around £7.3 million, against nearly £18 million on Mr Carton-Kelly's approach, a difference of £10.7 million.
3. I have power under section 35A of the Senior Courts Act 1981 to award simple interest for all or any part of the period between the date the cause of action arose and the date of judgment. The principles were helpfully summarised by Robert Goff J in *BP Exploration (Libya) v Hunt (No.2)* [1979] 1 WLR 783 at pp.845 to 847. In particular, the award of interest is not a punishment but rather is awarded to compensate the claimant. It is to reflect the fact that the claimant has been deprived of what is due to him, i.e. kept out of his money, whereas the defendant has had the use or benefit of that amount.
4. So the general rule is that interest runs from the date of accrual of the cause of action, at least in relation to money then due. But, as Robert Goff J explained, there is no invariable rule: the power is discretionary. He identified three main groups of cases where the court might exercise its discretion to depart from that fundamental principle.
5. The second of those groups is in point here. He said this at pp.846-847:

"The second group of cases concerns the conduct of the plaintiff. If, for example, the plaintiff has been guilty of unreasonable delay in prosecuting his claim, the court may decline to award interest for the full period from the date of loss. This may be to encourage plaintiffs to prosecute their claims with diligence, and also because such conduct may lull a defendant into a false sense of security, leading him to think that the claim would not be pursued against him."

6. Both parties relied on *Claymore Services v Nautilus Properties* [2007] EWHC 805 (TCC), where Jackson J considered the earlier cases regarding unreasonable delay and summarised what he derived from them at [55].
7. Mr Carton-Kelly also referred to a more recent authority, *Sycamore Bidco v Breslin* [2013] EWHC 174 (Ch), where Mann J considered the authorities in some detail and said at [16] that the discretion was not unfettered, that the three exceptions identified by Robert Goff J in *BP Exploration* are "true exceptions...not to be taken as making significant inroads" into the basic position that interest will normally run from when the cause of action accrues, and that the court should have "a strong and particularly good reason" for departing from that starting point.
8. It is worth noting that the third exception identified by Robert Goff J was other cases in which it would be unjust in all the circumstances to award interest from the date of loss. That must reflect the underlying principle: the question must be what is just in the circumstances of the case, and in particular whether it would be unjust to apply the normal approach of awarding interest from the date that the cause of action accrued.
9. The key points I derive from the authorities are as follows. The starting point is that interest runs from the date of the accrual of the cause of action, and its purpose is to compensate the claimant for being kept out of his money. I also note that in commercial cases the courts have taken the approach of identifying a rate of interest that reflects the cost of borrowing, not by the particular

claimant in question, but claimants with the general attributes of the claimant. That is referred to in *Sycamore* at [7], citing *Tate & Lyle v GLC* [1982] 1 WLR 149 at 154.

10. There may be a departure from this approach in the case of an unjustifiable delay, either by not awarding interest for a period or by adjusting the rate of interest. The rationale is that, although the defendant has had the use of the money and would get a windfall to the extent that interest is not awarded, the fact that the claimant has not received funds earlier is attributable to his own fault. The claimant has himself caused the loss of use of funds by choosing to delay. That is clear from the cases summarised in *Claymore* at [52] to [54].
11. Applying these principles to the facts here, there is no dispute that the cause of action should be treated as accruing on the date that Comet entered administration. There clearly has been a very significant delay. The administration commenced on 2 November 2012. The original liquidators only applied for directions in February 2018, Mr Carton-Kelly was appointed in June 2018 with a mandate to investigate, and the claim was issued on 26 October 2018, just within the limitation period. It was served on 23 January 2019.
12. Mr Carton-Kelly is not at fault. That is not in dispute. He took action once he was in a position to do so and prosecuted the claim. Darty was right to accept that there has been no material delay on his part, and I make the point that he obviously did need some time to make the investigations that he was mandated to make.
13. However, that does not fully address the point. Mr Carton-Kelly is an office holder. He is not taking action personally but in a representative capacity. Before he was appointed there were individuals holding the same office, liquidators of Comet, who had responsibility for this matter and who failed to take action in circumstances that have led to material criticism.
14. As Mr Smith pointed out, the cause of action vests in whoever is the liquidator or liquidators for the time being. Before Mr Carton-Kelly was appointed, the responsibility for this aspect of the liquidation, as well as the other aspects, vested in the Deloitte liquidators.

15. Mr Carton-Kelly obviously has to accept that those previous liquidators failed to do their jobs properly. So office holders in the role of liquidators of Comet have failed to take action and have been guilty of delay. The result has been to keep unsecured creditors out of their money.
16. Any proceeds from the litigation will be received by Mr Carton-Kelly as a representative, for the benefit of the insolvent estate. The fact that he has been brought in as an additional liquidator and cannot, himself, be subject to criticism cannot make all the difference. I agree with Mr Smith's submission that it is necessary to take account of the overall delay by those holding the office of liquidator. It would be wrong in principle to allow a change in office holder to have the effect of wiping the slate clean.
17. However, it remains the case that unsecured creditors have been kept out of funds for a very material period and Darty, or its predecessor entities, have had use of the funds. I pause here to note that the fact that Darty is itself a successor entity cannot, in my view, make any difference.
18. The 2% interest rate that the parties had agreed as a rate was, as I understand it, intended to be a broad proxy for the 1% over base rate often awarded in the Commercial Court. Base rate was below 1% for all periods up to May 2022. In fact, it was 0.5% for most of the relevant period to 2018. 1% over base is obviously not a rule. Higher rates are common.
19. But it is also worth taking into account that section 35A only permits awards of simple interest, which can make a material difference over a lengthy period. Further, Mr Carton-Kelly has pointed out that Darty issued 7-year loan notes in 2016 at a rate of 3.25% (I note that is a Euro rate). I also bear in mind that the defendant's cost of funds – the respondent Darty's cost of funds in this case – is not the right test to apply to determine the appropriate rate, but it is relevant to the assessment of whether there is a material windfall.
20. I remind myself that the purpose of interest under section 35A is to compensate a claimant for being kept out of funds. In my view, simply acceding to Darty's proposal would involve too

much of a windfall to Darty. I think it is fairer to reflect an adjustment for conduct by adjusting the rate at which interest is awarded.

21. In my view, the fair approach, taking account of the starting point that interest typically runs from the date the cause of action accrues, is that interest should run at 1% from the date of the commencement of the administration until the date of appointment of Mr Carton-Kelly in June 2018, and then at 2% up to the date of judgment.
22. That approach makes an effective allowance for the fact that, even if the original liquidators had acted properly, there would have needed to be a period of investigation. Mr Carton-Kelly obviously carried out that investigation after he was appointed in June 2018.

Post-judgment interest

23. I now move on to the question of post judgment interest. The parties have agreed that the entire amount ordered to be paid, including the costs which the parties have agreed, should be paid into court. The issue between the parties is whether, as Mr Carton-Kelly says, interest should nonetheless run at the judgment rate of 8% from the date of judgment, or as Darty says, should run at the rate that the Court Funds Office would pay.
24. The background to this is Darty's concern that funds paid over to Mr Carton-Kelly may not be recoverable in the event of a successful appeal. As regards the bulk of the amount in question, which might otherwise go to the unsecured creditors, Mr Carton-Kelly had offered an undertaking that sums would not be distributed pending any appeal. Darty's concerns appear to relate primarily to an amount totalling around £22 million, the most significant component of which is an amount of about £15.4 million due to LCM, Mr Carton-Kelly's litigation funder. The remainder comprises £1.3 million due by way of ATE insurance premium, together with other sums primarily in respect of legal fees.

25. Mr Carton-Kelly's position is that any amount paid to LCM would be recoverable from it in the event of a successful appeal, and the ATE sum would also be recoverable, but Darty has not been prepared to accept this and believes there to be a material risk.
26. This has led to an agreement between the parties that the entire amount should be paid into court. That is a development from what was presented in the skeleton arguments, from which I had understood that the sum in excess of c.£22 million would be paid into court, and the proposal being discussed was that the balance would be paid over to Jones Day, Mr Carton-Kelly's solicitors, and held in their client account pending the obtaining of insurance to cover the risk of non-recovery. The parties explained to me that it has proved to be impossible to reach agreement on the details of that proposal.
27. I need to make clear what I am actually permitted to do. As I explained earlier to the parties, and I think is also clear from a proper reading of the cases cited to me, I have no power to award a different rate of interest between the date of judgment and any later date, which is essentially what Darty is asking me to do.
28. I have power under the Judgments Act and CPR 40.8 to defer the date from which the 8% judgment rate runs. Section 35A of the Senior Courts Act allows me to award interest only up to the date of judgment. The only way I can fill the “void”, such that interest is payable in the interim between the date of judgment and any later date to which I defer the starting point for interest to accrue at 8% under CPR 40.8, is I think some form of undertaking or condition from Darty that they would pay interest on the judgment debt at a certain rate in that interim period.
29. This is important because it underlines the fact that the judgment rate of 8% is a statutory rate. That is the starting point and in most cases, I suspect, the finishing point.
30. The case that discusses this clearly and helpfully is *AssetCo v Grant Thornton* [2019] 1 Costs LR 197, a judgment of Bryan J. He considered the principles, in particular at [69] and [70]. He noted the possibility of postponing the time from which interest would run to a later date against

an undertaking to pay interest at, in that case, 2% over LIBOR. But he went on to apply that to the facts of the case. He made the point that AssetCo had a monetary judgment. He said at [70]:

"The effect of a stay with a payment into court is that they will be out of their money and will not have received any money. I consider therefore, that the correct approach is that post-judgment interest rate be at 8%."

He went on to say that that was the starting point, unless he postponed interest from running, but thought it was the right outcome because that is the rate provided for under the Judgments Act.

31. The context there was that AssetCo had refused to give any form of undertaking not to distribute funds, which is, I note, different from this case at least as regards a large part of the judgment debt.

32. Mr Smith relied on *School Facility Management Ltd v Governing Body of Christ the King College* [2020] 1 WLR 4825, a decision of Foxton J, at [46] and [47]. My reading of that passage is that Foxton J similarly recognised that there is no power of the court to order a lower rate than the judgment rate to be paid, but only to defer the date from which interest would run under CPR 40.8.

33. Foxton J does speculate, at [47], that it "might be appropriate" to make an order the effect of which would be that a lower rate would run where a stay was granted, because of the risk that a judgment creditor would be unable to effect repayment. But it is very much *obiter* and was not relevant on the facts of that case.

34. I note that in neither case was a lower rate actually awarded. In my view, Bryan J's observations about the general principle, that 8% is the correct rate, are important ones. The court should not readily seek to find a mechanism to circumvent that statutory provision, which is effectively what Darty is seeking to do.

35. In my view, there is no sufficiently good reason to depart from the 8% rate in this case. In reaching that conclusion I must and do take into account the fact that even if a stay was sought

and ordered, the 8% interest would typically run. Payment into court has been agreed by the parties, taking account of Darty's concerns about the risk of repayment not occurring, despite Mr Carton-Kelly offering to undertake not to distribute the vast majority and stating that the other sums ought to be recoverable. I note that this is a statement from a person who acts in a professional capacity and as an officer of the court, and clearly takes his responsibilities seriously.

36. I therefore award interest at 8%. I do note that I have been presented with orders that only give me the choice of 8% or Darty's preferred rate. Both assume that the full amount is paid into court. I have observed to the parties that there may be scope to reach some different agreement, and I think there should be liberty to the parties to do so, but I do not see a good reason to depart from the 8% rate.

Permission to appeal

37. I now turn to permission to appeal. Permission to appeal has been sought on three grounds. I am not going to go through those grounds in detail. I am going to give my views on individual points.

38. First, I will briefly address ground 2. The subject matter is the "Triptych Amount", and whether I was right to decide that this element formed part of the factual preference (see the judgment at [190]-[192]). In my view, this ground has no real prospect of success. I gave full reasons for that in the judgment. I therefore refuse permission on ground 2.

39. Grounds 1 and 3, which relate respectively to balance sheet insolvency and desire to prefer, both include some aspects that are weak. By way of example, I believe that I did pose the right question on insolvency, and it is important to look at the whole discussion, especially from [155] of the judgment. The point relied on at [176] addressed an argument that Darty made, but in any event the submissions do not appear to take full account of the statutory test in section 123(2).

40. However, both the insolvency ground and desire to prefer raise some difficult issues. In principle, I am prepared to grant permission to appeal on somewhat tighter versions of those grounds. Important issues are raised, the sums involved are obviously large, and I cannot say that the points raised, or at least a number of the points raised, are fanciful.
41. I do make the point that the inference of desire to prefer is a question of fact. So, I do have real doubt about the high threshold for overturning factual findings on at least aspects of ground 3, as well as parts of ground 1, but on balance I would grant permission, as I said on tighter grounds.
42. Specifically, the tightening that I would require is as follows:
- a. As regards ground 1, the argument that the KIL RCF was a contingent liability is clearly wrong. I will not give permission in relation to that aspect. I would also ask it to be made clear that the comfort letter relied on, the 2011 comfort letter, was expressly dependent on Comet staying in Kesa's ownership. It was also non-binding.
 - b. More importantly, I do not give permission to challenge factual findings in respect of ground 1. That is relevant to the point made about lease liabilities at unnumbered page 6 of the draft grounds, paragraph 8(a)(ii). That was a finding of fact on the expert evidence. I do not give permission in relation to that.
 - c. The same applies in relation to the present value of the pension scheme, paragraph 8(b)(i). To the extent that Darty may be seeking to challenge those specific findings of fact (in respect of leases and pensions), they should be excised from the version that I give permission for.
 - d. In relation to ground 3, I do not believe that there was any serious procedural irregularity and I will not grant permission for grounds that make that allegation. I have set out my reasoning very fully in the judgment. This affects the reference to procedural irregularity in paragraph 14 and would require the deletion of paragraph 15. The pleading points were carefully considered and the decision was within the ambit of the revised pleading;

see paragraph [254] of the judgment, to be read with paragraphs [111] and [238] in particular.

43. Subject to those points, I grant permission on grounds 1 and 3.

Extension of time

44. Darty seeks an extension of time of 14 days in which to file their appeal, taking account of the Christmas period. Mr Smith says he is away from 14 December for a couple of weeks. Darty say they have not started work on a skeleton argument.

45. That extension is resisted by Mr Carton-Kelly on the basis that Darty has had plenty of time and there are potential problems with the Mr Carton-Kelly's funding arrangements. Darty counters by saying that this was a very late claim and there is no objective urgency.

46. I am not entirely sympathetic to this extension application. It is frankly up to Darty how they organise themselves and their advisers, and when they start work on a skeleton argument. Whether or not I had given them permission to appeal they would know what the Court of Appeal rules are and the fact that they would be required to file a skeleton argument relatively promptly.

47. I am prepared to give an element of extension but not the full amount sought. I think I am being relatively generous in giving a 10-day extension to 12 January, which is around the beginning of term. I take account of the fact that it is highly unlikely that if I insisted on an earlier date, it would mean that it would be dealt with earlier, but it really needs to be filed roughly at the start of term.