



Neutral Citation Number: [2023] EWHC 2035 (Ch)

IN THE HIGH COURT OF JUSTICE

CASE NUMBER: CR-2022-004001

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

INSOLVENCY AND COMPANIES LIST (ChD)

IN THE MATTER OF EMMA PROPERTY MANAGEMENT LIMITED (IN
LIQUIDATION)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Remote Hearing

Date: 9 August 2023

BEFORE INSOLVENCY AND COMPANY COURTS JUDGE JONES

BETWEEN

MS IRENA FERME

Applicant

-and-

MR SIMON MATTHEW GWINNUTT

(as joint liquidator of Emma Property Management Limited)

Respondent

The Applicant in person

Mr Simon Jones (instructed by Excello Law Limited) for the Respondent

Hearing date: 29 June 2023

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.

.....9/8/23.....

I.C.C. JUDGE JONES

I.C.C. JUDGE JONES:

1. This judgment decides the second part of an appeal made against the refusal to admit a proof of debt. It is brought under *r.14.8 of the Insolvency (England and Wales) Rules 2016*.
2. It should first be recorded that during the hearing oral judgment was given refusing the applications of Ms Ferme for: (i) a default judgment for failure on the part of the Respondents to serve an acknowledgment of service (that not being the procedure that applies upon this appeal application); and (ii) dismissing the appeal in respect of a provable debt alleged to have resulted from an entitlement to be paid commission. A decision reached for the reason that there was no binding contract giving rise to a debt because the written “offer” relied upon by Ms Ferme to establish a contract by her acceptance was expressly written to be an “*ex gratia*” offer.
3. I will not repeat further the reasons for that decision. However, it is of deep concern and should be recorded that Ms Ferme threatened me verbally at the remote hearing as soon as I had delivered judgment. The threats, delivered in aggressive terms and manner, being implied from the words used when she asked me if I knew what happened to Judges in America who made decisions such I had, and being made expressly when she stated that personal claims would be made against me because of my decision here and abroad.
4. Absent any indication of apology or remorse from Ms Ferme, I stated at the time my disapproval, my conclusion that this was a contempt of court, and the reasons for my deciding nevertheless to continue to hear the second part of her application “without fear or favour”. The ability to do so is, after all, one of the fundamental reasons for judges having immunity from any action brought against them in reliance upon a judgment delivered by them. This was, nevertheless, wholly unacceptable conduct. As also explained, if the decision I made was in error, Ms Ferme can apply for permission to appeal. That is an application which may be made to me and/or to a High Court Judge. The solution of a dissatisfied litigant is not to threaten the judge.
5. I now put that aside and turn to this second part of the appeal. This reserved judgment concerns her claim as an assignee to be entitled to prove for interest resulting from the delay in Emma Property Management Limited (“the Company”) making payment of £40,800 to the assignor. It is her case that had the Company agreed to make that payment to the assignor on 20 December 2018 from cleared funds but had not paid it until 15 June 2020.
6. The proof of debt being appealed, dated 7 October 2022 was submitted by Dr Borut Samastur. He claimed: £5,589.16 interest for the period of non-payment “(*minus below specified solicitor’s costs and minus statutory compensation of £100.00*)”. Those costs were stated to be £900.09 plus legal interest “*of delay from 20/5/2020 by the day of payment*”. £100.00 statutory compensation was also claimed for the same period. In addition £100 was claimed for expenses concerning “(*time, collection of documents*) on this application”. The assignment relied upon by Ms Ferme is dated as made on 30 October 2022. The validity of the assignment has not been challenged.
7. The judgment was reserved in circumstances of Ms Ferme being unable to do more than assert that interest and the other sums claimed were due as a matter of law. She

had included within her evidence a document printed from the internet site which she said had been used to calculate the interest sum of £5,589.16. However, she could not identify the bases upon which that calculation had been made or assist further than to point to the document which did not further assist to identify the law relied upon for the calculation.

8. I needed time to consider the merits of her case in the light of the absence of further assistance from her (recognising as I do the difficulties for a litigant in person) and in the context of counsel for the liquidators, Mr Jones, fulfilling his duty by providing as much assistance to the Court as he could. That included a detailed analysis of the law and him drawing attention to evidence that Ms Ferme might have referred to if she had had the assistance of lawyers. I consider her behaviour towards him during the hearing and her repeated insistence that he had no right to be at the hearing completely inappropriate.
9. Mr Jones submitted that it appeared from the break-down of the sums claimed that Ms Ferme was probably relying upon *The Late Payment of Commercial Debts Interest Act 1998* (“*the 1998 Act*”). He referred in particular to the interest rate used and to the £100 compensation appearing to be derived from its s.5A(2)(c). He submitted, however, that *the 1998 Act* did not apply to this case. I will address that first.
10. Factually, the claim for interest relies principally upon an email from the Company sent by its director on 20 December 2018 stating that cleared funds would be available by 29 December 2018. This email refers to a transaction for the purchase of two flats by Dr Borut Samastur for which contracts had been exchanged (although they were not produced in evidence) but for which completion had not occurred. The email correspondence revealed that the Company and Dr Borut Samastur had agreed during November 2018 to the termination of those contracts, and to the return of his deposit plus £3,500 for his legal costs and interest. This gave rise to the debt that was paid on 15 June 2020 but which Ms Ferme contends should have been paid on 29 December 2018.
11. As a result of non-payment by 29 December 2018, Dr Borut Samastur instructed Mr Mark Davies of Healys LLP which caused him additional costs. Mr Davies estimated his costs at £1500, although it is unclear from Mr Dr Borut Samastur’s witness statement if that is an estimate of costs incurred or which might be incurred.
12. Nevertheless the point that flows, and is not in dispute, is that the proof of debt relates to the consequences flowing from the delayed return of deposits for the purchase of the two flats, a delay of over 18 months. I will first address the main part of the proof, the claim for interest.
13. *The 1998 Act* provides for interest to apply to any “*qualifying debt*”. **Section 2** defines the circumstances in which the Act will apply as follows:

(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 contract of sale 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—

(a) transferring or agreeing to transfer to another the property in goods;

(b) bailing or agreeing to bail goods to another by way of hire or, in Scotland, hiring or agreeing to hire goods to another; and

(c) agreeing to carry out a service.

(4) For the avoidance of doubt a contract of service or apprenticeship is not a contract for the supply of goods or services.

(5) The following are excepted contracts—

(a) a consumer credit agreement;

(b) a contract intended to operate by way of mortgage, pledge, charge or other security; and

(c)

(6)

(7) In this section—

- *“business” includes a profession and the activities of any government department or local or public authority;*
- *“consumer credit agreement” has the same meaning as in the Consumer Credit Act 1974;*
- *“contract of sale of goods” and “goods” have the same meaning as in the Sale of Goods Act 1979;*
- *“government department” includes any part of the Scottish Administration;*
- *“property in goods” means the general property in them and not merely a special property.*

14. Applying those provisions, I accept Mr Jones’s submission that ***the 1998 Act*** only applies to commercial contracts for the supply of good or services. I accept his submission that an agreement to return a deposit for the purchase of land is not a contract for the supply of goods or services. There was no qualifying debt and, therefore, the claim for interest and for the other sums sought cannot be made in reliance upon ***the 1998 Act***.
15. A purpose of ***The 1998 Act*** was to address the fact that the common law did not provide for interest to be paid if debts were not paid on time unless there was a contractual agreement providing for the payment of interest. The email correspondence relied upon by Ms Ferme makes no reference to interest. There is no evidence of any contractual term providing for interest.
16. If Dr Borut Samastur had started proceedings to recover the debt before it was paid, he would have been able to claim interest pursuant to the Courts had statutory jurisdiction to award interest on the debt (see ***section 35A of the Senior Courts Act 1981*** together with ***s.69 of the County Courts Act 1984***). However, that jurisdiction only applies if proceedings are commenced and cannot be relied upon for the purposes of the proof of debt if that has not been the case.
17. There are three potential other routes to consider, however. The first is that the deposit was presumably due and payable under the contracts exchanged for the purchase of the

flats. Those contracts might contain an interest provision. However, no contract has not been provided. Ms Ferme objected to the possibility of production when that was raised by me, albeit that it was raised in her potential interest. Absent the contract, this potential route can be taken no further, although I did ask the liquidators to consider the position further in the course of conducting the liquidation.

18. The second route has been addressed in detail within the skeleton argument of Mr Jones. Whilst he reaches the conclusion on behalf of his client that it does not ultimately assist Ms Ferme, it demonstrates the fulfilment of his duty to the Court. His skeleton argument reads as follows:

“In respect of claims for interest, that is essentially a claim for interest as damages. In this respect:

a. The position for an extended period was that damages were not available for simple late payment of a debt; see Chitty on Contracts at §29-287

*b. The House of Lords in **Sempra Metals v Inland Revenue Commissioners** [2008] 1 AC 561, however, considered (obiter) that damages for loss as a result of late payment could be recoverable; see §16.1*

*c. Sempra Metals was departed from in **Prudential Assurance Co Ltd v Revenue and Customs Commissioners** [2019] AC 929 insofar as the earlier decision related to the availability of compound interest in restitutionary claims. However, the obiter comments that compound interest may be available as damages was not in issue before the Supreme Court in Prudential Assurance and was not considered; see §44 and §79.*

*d. More recently, the approach of the Court to awarding interest as damages was considered by the Privy Council in **Sagicor Bank Jamaica Ltd v Seaton** [2023] 1 WLR 1759. The Board conducted an examination of the principles to be derived from Sempra Metals and concluded at §37: ‘In summary, interest, including compound interest, may be awarded as damages for breach of contract. A plaintiff seeking interest as damages where the defendant has withheld money in breach of contract must plead and prove its loss.’”*

19. Mr Jones’s skeleton argument addressed that potential jurisdiction as follows:

*“The modern development of the law recognises that a delay in payment can be causative of loss. However, such loss must be actual or real, not theoretical; **Sagicor Bank** at §33. The loss must be pleaded and proved. 37. This, neither A nor Dr Samastur do. The proof of debt, such as exists, merely states that the Company “declined to refund me the payment of interests of delay from 29/12/2018 to 15/6/2020” [CB/48]. No further information is provided in Dr Samastur’s statement ([CB/100]) or in A’s evidence supporting this application. 38. What A and Dr Samastur do is essentially state that there has been a delay in payment, and therefore there is a right to interest. That is not right in law. Whilst theoretically a delay in payment can be the basis of a claim in damages it is necessary to prove loss was caused by the delay. This has not been attempted by A.”*

20. My decision on the second route resulting from the matters above is:
- a) The legislative purpose underpinning the 1986 interest proving rules was to simplify the insolvency regime by providing a complete statutory code for the recovery of interest on proved debts in administrations and liquidations. Therefore, **Rule 14.23 of the Insolvency Rules 2016** determines the interest that can be proved. The contractual or any other right to interest (whether to recover interest or to be paid at a particular rate) has been replaced by those legislative rules (as decided by the Supreme Court in **Waterfall I** ([2017] UKSC 38; [2017] 2 W.L.R. 1497; [2017] B.C.C. 235).
 - b) The term “debt” used in **Rule 14.23 of the Insolvency Rules 2016** includes all creditor claims for debt or liability whether present, future, certain or contingent, ascertained or sounding only in damages (see **Rules 14.1(3)(c) and 14.2**).
 - c) **Rule 14.23(1) of the Insolvency Rules 2016** entitles a person to prove in the insolvency for the interest a debt bears as part of the debt being proved except in so far as it is payable in respect of any period after the date the company went into liquidation (see the definition of “relevant period” in **Rule 14.1(3)(c)**).
 - d) **Rules 14.23(2)-(6) of the Insolvency Rules 2016** set out the other circumstances in which interest can be claimed but will be considered separately below as the third potential route.
 - e) Applying **Rule 14.23(1) of the Insolvency Rules 2016**, the previous payment of the £40,800 debt before the liquidation means there is no unpaid contractual debt accruing interest entitling Ms Ferme as assignee to prove for interest.
 - f) However, consideration needs to be given to whether she can claim interest as a damages claim for delayed repayment of the debt. If so, it would be a provable debt in accordance with sub-paragraphs (a) – (c) above.
 - g) In **Sempra Metals v Inland Revenue Commissioners** (above) the House of Lords decided that:

“... in principle it would always be open to a claimant to plead and prove his actual interest losses caused by late payment of a debt ... ; that such losses would be subject to the principles governing all claims for damages for breach of contract, such as remoteness and failure to mitigate; and that, accordingly, the courts had a common law jurisdiction to award interest, simple and compound, as damages on claims for non-payment of debts as well as on other claims for breach of contract and tort.”
 - h) Although decisions of the Privy Council are not binding as precedent, the opinion of the Privy Council in **Sagicor Bank Jamaica Ltd v Seaton** concerning the ratio of **Sempra Metals v Inland Revenue Commissions** should be treated as being highly persuasive. It is therefore to be noted that the Privy Council decided in their second holding:

“... a claimant who had been deprived of his money in a commercial context would have to plead and prove that he had thereby suffered relevant loss if he were to claim and receive as damages for breach of contract interest on the withheld sums that was calculated by reference to the cost of borrowing such sums at a conventional rate; that, although it would be open to the court to infer that a claimant who had been deprived of

his money had suffered financial loss by having to borrow replacement funds, such an inference could not be drawn unless the claimant had proved facts and circumstances from which the court might properly infer on the balance of probability that the claimant had borrowed funds to replace the withheld sums; that the question of what evidence would suffice to enable the court to draw such an inference would depend upon the facts of the particular case;”

- i) Proofs of debt are not pleadings but nevertheless (applying the two decisions and in particular the passages quoted above) for a proof claiming interest as damages to be accepted there will need to be sufficient information to establish not only a breach of contract but also loss resulting from the absence of the payment.
 - j) Appeals under **r.14.8 of the Insolvency Rules 2016** are re-hearings at which the Court will decide afresh whether there a debt (using the wide meaning of the term above) is established on the balance of probabilities and, in the case of interest, can be claimed under **Rule 14.23 of the Insolvency Rules 2016**. So far as a claim for interest as damages for breach is concerned, the requirement to prove loss established by the House of Lords and as observed by the Privy Council (as above) will be applied.
 - k) In this case there is evidence of breach. The delay in payment of the money but no evidence of resulting loss. There is only the claim that Dr Borut Samastur was entitled to interest as a matter of law. It follows that the appeal cannot be allowed on the basis of the second route.
 - l) That said, this may be attributable to a lack of knowledge. I have not been asked to decide whether the proof can be amended or a new proof submitted and I also do not know enough concerning the factual circumstances to reach a decision in any event. However, this is a matter to be considered by Ms Ferme, as is the point previously made concerning contractual provisions within the contracts exchanged for the purchase of the flats.
 - m) As matters stand, however, an appeal relying upon this second route cannot succeed.
21. That leaves the third of the three additional routes. The statutory regime for the recovery of interest on proved debts in administrations and liquidations contained within **Rule 14.23 of the Insolvency Rules 2016** includes the further rights within **Rules 14.23(2)-(6) of the Insolvency Rules 2016**, namely that:

“(2) ... the creditor’s claim may include interest for periods before the [date the liquidation commenced] although not previously agreed or reserved ...

(3) If the debt is due by virtue of a written instrument and payable at a certain time [when] interest may be claimed ... from that time to the [date the liquidation began]”. The rate to be applied will be the rate specified by s.17 of the Judgments Act 1838 at the date the liquidation began.

And

“(4) *If the debt is due otherwise, interest may only be claimed if demand for payment of the debt was made in writing by or on behalf of the creditor and notice was delivered that interest would be payable from the date of demand to the date of payment.*” That must occur before the liquidation began but if so, interest at the rate specified by *s.17 of the Judgments Act 1838* at the date the liquidation began will apply from the date of the demand to the date the liquidation commenced.

22. The problem for this potential route for Ms Ferme is that “the debt” referred to is the debt identified within **Rules 14.23(1)**. That is to say, the “*debt proved in insolvency proceedings [which] bears interest*”. As explained in paragraph 20(e) above, the fact that the £40,800 debt was paid before the liquidation means there is no debt remaining to be proved in the insolvency for which statutory interest can be claimed under **Rules 14.23(2)-(6) of the Insolvency Rules 2016**.
23. There might be an argument applying a literal construction of **Rules 14.23(2)-(6) of the Insolvency Rules 2016** that this statutory interest might be claimed upon a damages claim for loss arising from delayed payment providing the factual requirements of **Rules 14.23(2)-(6) of the Insolvency Rules 2016** are met. That is far beyond the scope of this appeal but the concept of seeking interest upon interest claimed as damages does not appear right even assuming the literal construction can be successfully maintained. The possibility only appears to arise because **Rule 14.23 of the Insolvency Rules 2016** repeated its predecessor. At that stage the law did not recognise a common law claim for interest resulting from non-payment of the debt and there has been no apparent consideration within **Rule 14.23 of the Insolvency Rules 2016** of the effect of the decision of the Supreme Court in *Sempra Metals v Inland Revenue Commissions*. Bearing in mind, however, that the claim would be in effect for compound interest, any such argument would have to face the difficulties of a purposive construction. In any event that is not a matter before this Court.
24. In conclusion, therefore, despite four potential routes having been identified to potentially support this appeal, none of those routes assist Ms Ferme. As a result the appeal is dismissed but attention is drawn to the comments or observations made at paragraph 17 and sub-paragraph 20(1) above.
25. I did not address in the draft judgment sent to the parties the other matters identified at paragraph 6 above. To avoid the costs of a transcript to obtain an approved judgment I repeat here what I said on handing down judgment. I have not been able to identify a cause of action entitling Dr Borut Samastur to prove for solicitors costs. It has not been shown to me why there is an entitlement to statutory compensation. The expenses related to this application will be matters to be addressed when deciding costs but only should costs be awarded in favour of Ms Ferme.

Order Accordingly