Neutral Citation Number [2022] EWHC 3361 (Comm)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (KBD)

Case No:LM-2019-000213

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

Date: 22 December 2022

B E T W E E N :

SETHIA LONDON LIMITED

Claimant

-and-

(1) AJAY SETHI
(2) DEEPNA SETHI

Defendants

APPROVED JUDGMENT ON THE DEFENDANTS' APPLICATION DATED 14 OCTOBER 2022

William Edwards (instructed by CND Parker) for the Claimant,

Michael Patchett-Joyce (instructed by M B Kemp LLP) for the First Defendant,

Hearing date: 21 December 2022

I direct that pursuant to CPR PD 29A 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.

MR ANDREW HOCHHAUSER KC

Introduction

1. By an Application Notice dated 14 October 2022 (the "**Application**"), the First Defendant sought a variety of forms of relief running to 13 paragraphs, after I had handed down two judgments in this matter, one on 22 February 2021 (the "**February 2021 Judgment**"), resulting in an Order of the same date (the "**February 2021 Order**") and 4 November 2021 (the "**November 2021 Judgment**"), resulting in an Order of the same date (the "**November 2021 Order**").

2. The Application came before HHJ Pelling KC on 3 November 2022, when he struck out paragraphs 2-11 (inclusive) thereof. He ordered that:

   (1) Paragraph 1, which provided "*the Claimant (whether by itself or by its directors, officers, employees or agents) shall not pursue or take any further steps in enforcing/executing the Feb Order or Nov Order or Form 110 dated July 2021 in UAE or any other jurisdiction*", be treated as an application under CPR r.40.8A, which provides:

   > *"Stay of execution and other relief*
   >
   > *40.8A Without prejudice to rule 83.7(1), a party against whom a judgment has been given or an order made may apply to the court for—*
   >
   > *(a) a stay of execution of the judgment or order; or*
   >
   > *(b) other relief,*
   >
   > *on the ground of matters which have occurred since the date of the judgment or order, and the court may by order grant such relief, and on such terms, as it thinks just."*

   (2) the First Defendant file and serve a Schedule of Points in Dispute by 10 November 2022,

   (3) the Claimant file and serve evidence in answer by 4pm on Thursday 24 November 2022.

   (4) The First Defendant file and serve evidence in reply by 4pm on 1 December 2022.

3. The Schedule of Points in Dispute were served on 10 November 2022. On 17 November 2022 the First Defendant served his fourth witness statement, together with an exhibit

and on 24 November 2022 Mr Abhijit Khandeparker, a partner in CND Parker, solicitors acting for the Claimant, served his fourth witness statement in answer. No reply evidence was served.

4. In essence the First Defendant's position was that, until just before 6pm yesterday evening, having paid two sums on or about 19 December 2022, one payment of £110,000 in respect of the costs order and US$163,000 in relation to the judgment debt, no further sums are due. This is hotly contested by the Claimant, which maintains the sum of US$787,275[1] remains outstanding. In an email timed 17:56 yesterday, however, Mr Patchett-Joyce indicated that the First Defendant no longer advanced this submission and accepted that the Outstanding Amount is in the region of US$700,000.

Representation

5. The Application came on for hearing yesterday. The Claimant was represented by the same legal team that had appeared on earlier occasions, namely Mr William Edwards instructed by CND Parker. The First Defendant had a new legal team, Mr Michael Patchett-Joyce instructed by M B Kemp LLP. I am grateful to Counsel for their oral and written submissions.

The Background

6. The claim was issued on 13 November 2019. The Claimant sued the First Defendant on a loan agreement and the Second Defendant on a guarantee. The Defences were served on 18 December 2019.

7. On 5 March 2020, the Claimant applied for summary judgment. On 26 July 2020, the Defendants applied for a stay and an adjournment. Those applications were first before the Court on 27 July 2020, when only the Defendants' application was heard. It was adjourned part-heard, and the Claimant's application was adjourned.

8. On 18 September 2020, the Defendants served further evidence and a draft Amended Defence. This sought to advance, for the first time, defences by reference to an undated cheque in the amount of AED 7.9 million (the "**Cheque**"). The Cheque had been drawn in favour of NS Investments Ltd ("**NSI**"), which had obtained judgment on it before the courts of the UAE (the UAE courts subsequently ordered payment by instalments).

[1] This figure was provided in a Schedule sent at18:03 yesterday evening.

9. The matter came back before the Court on 29 September to 1 October 2020, when the Claimant accepted that recoveries made in respect of the Cheque were to be applied against the loan debt. Judgment was reserved.

10. The judgment was handed down on 22 February 2021. I found in favour of the Claimant and summary judgment was entered against the Defendants. The Defendants' applications were dismissed. Paragraph 120 of the February 2021 Judgment stated:

> *"I have reached the conclusion that SLL are entitled to default interest under Clause 7. I prefer SLL's submissions on both the construction of Clause 7 and whether a default period arose under the Loan Agreement. First, Clause 7.1 provides that the 'Borrower shall pay interest under this clause 7'. Secondly, Clause 7.3 provides for the 'Default Interest Period shall begin on the due date for payment of the relevant unpaid amount'. Thirdly, Clause 7.6 provides that interest 'if not previously demanded, shall be paid on the last day of each Default Interest Period.* (Emphasis added). *These are mandatory provisions. In my view, in the absence of an express nomination by the Lender, seven day is the 'default' provision under Clause 7.2 of the Loan Agreement."*

Among the Claimant's submissions on clause 7 were those set out at paragraph 119(1), which stated:

> *"Clauses 7.1 and 7.6 impose an absolute and unconditional obligation to pay default interest. Clause 7.2 provides merely for calculation, and in particular permits (but does not require) it to elect to calculate by reference shorter than 7 days. Absent an election to calculate by reference to shorter rests, default interest is calculated by reference to 7 day rests. It should be noted that SLL has in fact calculated the default by using 1 month rests. But like any compounding exercise, longer rests work to the advantage of the paying rather than the receiving party."*

11. There were some remaining issues, and so a payment on account in the minimum amount said to be contractually due by way of principal and interest was ordered. Paragraph 1(1) of the February 2021 Order required US$2,382,622.07 to be paid by the Defendants by 6 pm on 23 March 2021. This figure, which included compound interest with monthly rests, was agreed between the parties' respective legal representatives, as described in paragraphs 7 to 10 inclusive of the fourth witness statement of Mr Khandeparker.

12. Paragraph 1(2) of the February Order provided:

> *"The issues (a) whether the Claimant is entitled to be indemnified by the Defendants against the costs incurred in the UAE proceedings and if so in what amount and/or whether it is entitled to appropriate payments made*

> *by, or attributable to, the Defendants against the costs incurred in the UAE proceedings and (b) for what final sum (including, for the avoidance of doubt, any further contractual interest due) the Claimant is entitled to judgment be decided pursuant to the directions given in paragraph 2 below. **Interest on the final sum for which judgment is entered shall be payable at the rate provided by clause 7 of the Loan Agreement dated 31 August 2017.**"* [emphasis added]

13. The Defendants were also ordered to pay the costs of the Claim and both applications and further to pay £110,000 on account of those costs by the same date.

14. The Claimant gave undertakings, set out in the Schedule to the Order, reflecting the fact that recoveries made in respect of the Cheque were to be credited against the judgment sum. It is those undertakings (in particular in relation to what was called the Outstanding Amount – essentially the contractual debt plus costs and interest less sums paid in respect of the Cheque) that are at the centre of the Application. The issue now before the Court is focused on the Outstanding Amount, which is defined as:

> *"the amount of the English Judgment (including, for the avoidance of doubt, all costs orders in favour of SLL in this action), plus interest payable at the rate provided by clause 7 of the Loan Agreement dated 31 August 2017, less any Recoveries made from time to time;"*

15. The outstanding issues left for decision in February 2021 were resolved by the November 2021 Judgment. I concluded that a particular payment made by the Defendants (and which had been included in the calculation of the payment on account) was properly to be applied against the loan debt. Because the payment on account already reflected the application of that payment, no variation was required, and paragraph 2 of the November 2021 Order declared that the amount contractually due and owing as at 22 February 2021 was the amount of the payment on account, namely US$2,382,622.07.

16. It is instructive to note how that figure was arrived at. Paragraph 50 of the November 2021 judgment stated:

> *"I would ask Counsel to agree a draft Order reflecting the conclusions set out above in relation to the questions posed in paragraph 2 above by 4pm on Wednesday 3 November 2021. The final sum should take account of all four payments already made by Mr Sethi, which I believe has already been done in paragraph 1 of the Order, but there may need to be some interest adjustments. If there are any disagreements between the parties in relation to the terms of the draft Order, please could their respective positions be*

set out in track-changes. I would ask that any consequential applications with skeleton arguments be submitted at the same time."

17. The Defendants' legal team was then Mr Duncan MacPherson instructed by Zaiwalla & Co. They agreed a draft Order which included an agreement that the amount due and owing under the Loan Agreement as at 22 February 2021 was US$2,382,622.07. As Mr Patchett-Joyce accepted this was on the basis of a schedule earlier provided by the Claimant, which was based upon compound interest with monthly rests, on which the payment on account referred to at paragraph 11 above was agreed. He made clear that there was no challenge to this figure or to the Claimant's entitlement to compound interest with monthly rests until judgment. His position was that this acceptance did not preclude him from arguing now, over a year after the November 2021 Order, that post-judgment the Claimant's entitlement was limited to simple interest at the rate of 20% p.a.

18. Finally, in relation to the background, the Defendants did not pay the entirety of the sums they were ordered to pay by paragraph 1(1) of the February 2021 Order. Mr Sethi, however, continued to make instalment payments in respect of the UAE judgment on the Cheque. As stated at paragraph 4 above, on or about 19 December 2022, the Claimant made one payment of £110,000 in respect of the costs order and US$163,000 in relation to the judgment debt, although the latter payment was not received by the Claimant until yesterday. Mr Patchett-Joyce now accepts that even on the First Defendant's case as to the Outstanding Amount, there is still money due, and paragraph 20 of Mr Sethi's calculation (where he refers to it as the "Outstanding Sum") is incorrect.

The issues raised by the First Defendant

19. The First Defendant's Points of Dispute advances, in summary, three contentions:

    (1) First, it is alleged that the judgment sum carries interest at 20% p.a. simple, rather than 20% p.a. compounded with monthly rests (see paragraphs 1-3, 9).

    (2) Secondly, it is alleged that there is no contractual entitlement to compound with monthly rests (see paragraph 7).

    (3) Thirdly, it is alleged that interest only runs from 23 March 2021 (see paragraph 5).

20. In addition, there is a further point raised in the fourth witness statement of Mr Sethi, namely that the Claimant had failed to give the First Defendant credit for payments made in the sum of US$541,717.12. That point is now no longer pursued, following Mr Patchett-Joyce's email sent yesterday at 17:56.

21. I turn therefore to the three outstanding points.

Is there an entitlement to compound interest?

22. This turns upon the construction of the last sentence in paragraph 1(2) of the February 2021 Order, which provided:

> *"Interest on the final sum for which judgment is entered shall be payable at the rate provided by clause 7 of the Loan Agreement dated 31 August 2017."*

23. The First Defendant accepted that whilst this provided for a rate of interest at 20% p.a., reflecting the contractual interest provided by clauses 6 and 7, it dealt only with the **rate** and, properly construed did not make any provision for compound interest with monthly rests or at all. Further, the claim for compound interest was not properly pleaded in accordance with CPR 16.4(2)(b), either in the Claim Form or the Particulars of Claim. This is set out in detail at paragraphs 20 and 21 of Mr Patchett-Joyce's skeleton argument.

24. In addition, Mr Patchett-Joyce submitted that despite the fact that he could not go behind the declaration in paragraph 2 of the November 2021 Order as to the amount of the outstanding judgment sum, which was based upon compound interest with monthly rests, he nonetheless contended that, in relation to the post-judgment position, the provisions of clause 7 of the Loan Agreement had not been properly complied with for the reasons set out at paragraphs 23-25 of his skeleton argument, and for this additional reason the Claimant was not entitled to claim compound interest.

The Claimant's submissions

25. The Claimant contended that, on a proper construction, the last sentence of paragraph 1(2) had to be looked at against the background that the parties had agreed that there was an entitlement for the Claimant to charge compound interest with monthly rests, being consistent with paragraph 120 of the February 2021 Judgment. It was obviously the intention of the parties that a similar situation should continue post-judgment and the last sentence was intended to reflect this.

26. It was common ground between the parties that the starting point is that, absent special provisions, a right to interest merges into a judgment, so that the creditor is no longer entitled to contractual interest: see *Standard Chartered Bank v Ceylon Petroleum Corporation* [2011] EWHC 2094 (Comm), per Hamblen J as he then was, at [12]. Clause 7.1, however, provided that "*the Borrower* [the First Defendant] *shall pay under this clause 7 on the Unpaid Amount from time to time outstanding for the period*

beginning on its due date and ending on the date the Lender [the Claimant] *receives it, both before and after judgment*." Again, it was agreed between the parties that a special provision, such as this, preserving the right of interest post-judgment was intended to protect a creditor from a situation where the rate under the Judgments Act 1838 is lower than the contractual rate.

27. There was no submission made on behalf of the First Defendant when the November 2021 Order was made, the draft having been agreed between Counsel, that the position regarding interest agreed between the parties in relation to the judgment sum should not continue post-judgment. Mr Edwards further submitted that it was not open to the First Defendant over a year later to raise this issue now, the matter only being live because the First Defendant had failed to pay the judgment sum when ordered to do so.

28. It was also too late for the First Defendant to take pleading points now. The time for doing so was prior to the finalisation of the November 2021 Order.

29. In relation to compliance with clause 7 of the Loan Agreement, Mr Edwards submitted there had been compliance with its provisions for the reasons set out at paragraph 23 of his skeleton argument. Further the construction argument had been abandoned by the time of the summary judgment hearing and in any event was not pursued by the Defendants when the judgment came to be entered. In relation to the construction argument, it appears to me from paragraphs 116-120 inclusive of the February 2021 Judgment that the construction argument was pursued at the summary judgment hearing, but I preferred the Claimant's construction.

Discussion and conclusion

30. In my judgment on a proper construction of the last sentence of paragraph 1(2) of the February 2021 Order, the Claimant is entitled to claim compound interest with monthly rests, which reflected the basis on which the judgment sum had been agreed between the parties and was consistent with the provisions of clause 7.1, which the parties intended should continue, post-judgment. There was no suggestion to the contrary made on behalf of the First Defendant at the "consequentials" hearing leading to the February and November 2021 Orders. If these points were to be taken, they should have been taken then. In my judgment it is not open to the First Defendant by the Application made almost a year after the November 2021 Order, to seek to reopen this now, and take pleading points and issues relating to the construction of clause 7 of the Loan Agreement,

particularly given the finding at paragraph 120 of the February 2021 Judgment. CPR 40.8A refers to an application being made for relief *on the ground of matters which have occurred since the date of the judgment or order*…". The only matter which has occurred since the November 2021 Judgment and the November 2021 Order is the omission of the First Defendant to pay the judgment sum when it fell due. I find that does not establish a basis for any relief under this provision.

31. I would add that the difference between simple and compound interest with monthly rests amounts to about £16,000 on the sum outstanding. The real issue, which made no appearance in the Points of Dispute, related to whether there had been a failure on the part of the Claimant to give the First Defendant credit for the sum of US$541,717.12. As stated at paragraph 20 above, that point is now no longer pursued.

32. That leaves outstanding the final point taken by the First Defendant, namely whether, given that paragraph 1(1) of the February 2021 Order provided that the payment of US$2,382,622.07 was to be paid by 23 March 2021, whether the Claimant was only entitled to any post-judgment interest at all from that date. Mr Edwards submitted that the answer was to be found in the provisions of CPR 40.8 which provides:

> "*(1) Where interest is payable on a judgment pursuant to section 17 of the Judgments Act 1838 or section 74 of the County Courts Act 1984, the interest shall begin to run from the date that judgment is given unless— (a) a rule in another Part or a practice direction makes different provision; or (b) the court orders otherwise. (2) The court may order that interest shall begin to run from a date before the date that judgment is given."*

33. Here no different provision was made and therefore interest began to accrue from the date the judgment was given. I accept that submission and I would record that in reply Mr Patchett-Joyce did not appear to challenge it.

Conclusion

34. For the reasons given above, I dismiss the First Defendant's application.