Neutral Citation Number: [2024] EWHC 2662 (KB)

Case No: QB-2021-004601

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/10/2024

Before:

MR JUSTICE FREEDMAN

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Between:

(1) VIARENTIS PROPERTY MANAGEMENT LIMITED

(2) VECTRYSS LTD

Claimants

- and –

(1) VIAGEFI 1 LIMITED
(2) VIAGEFI 3 LIMITED
(3) VIAGEFI 4 LIMITED
(4) VIAGEFI 5 LIMITED
(5) VIAGEFI 6 LIMITED

Defendants

Hugo Page KC (instructed by **Watling & Co**) for the **Claimants**
Matthieu Gregoire (instructed by **Bates Wells Braithwaite London LLP & Co**) for the **Defendants**

Hearing date: 2 October 2024

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COSTS JUDGMENT
APPROVED

This judgment was handed down remotely at 10.30am on Tuesday 22nd October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

MR JUSTICE FREEDMAN:

1. The Court has given a judgment in favour of the Claimants' claims to fees against various Defendants in respect of the various Property Management Agreements and Administration Service Agreements. This is now agreed mathematically to be a total sum of €554,771.40 comprising the following sums exclusive of interest:

    (1) Viagefi 1: €107,360.63
    (2) Viagefi 3: €115,173.32
    (3) Viagefi 4: €83,062.81
    (4) Viagefi 5: €242,943.99
    (5) Viagefi 6: €6,230.65

2. It has also given judgment in respect of loans in a sum of €63,364.44 exclusive of interest, comprising €50,540.76 against Viagefi 1 and €12,823.68 in respect of outstanding loans: see para. 3 of the order of 30 January 2024 (with minor adjustments for the correct figures).

3. There now arise two questions for determination, namely whether the successful claimants are entitled to contractual interest in respect of the fees and the question of costs.

Contractual interest

4. The issue in respect of interest can be summarised shortly. The claim to interest is contractual. The submission of the Claimants is that interest is payable at the contractual amount of 2% above base per annum on the basis that the sums have been

payable since the rendering of invoices. The Defendants submit that the finding of the Court is that the invoices have been rendered on a wrong basis, and that accordingly interest should only become payable when proper invoices had been rendered or at the time that the amount payable had become agreed or ruled upon by the Court. The Defendants submit that this has only happened following the judgment and in preparation for the hearing and therefore that no interest is payable. The amount of interest as at 16 October 2024 was a sum of €158,947.43.

5. It is necessary to set out the relevant contractual clause. It is contained in clauses 8.2 and 8.6 of the various agreements which read as follows:

> *"8.2 Fees that accrue on a periodic basis under this clause 8 shall be payable to the Property Manager monthly in arrear within 14 days of the date of submission to the Fund by the Property Manager of its invoice for its fees in respect to the relevant period. Fees payable in arrears in respect of the relevant period are in respect of work performed in that period whether in respect of current or past periods.*
>
> *…*
>
> *8.6 If, for any reason, outstanding fees and expenses are not settled in accordance with the agreed terms, interest at the rate of the Bank of England base rate plus 2% may be charged".*

6. The court has already concluded that a fee may accrue due subject to a condition precedent to bring a claim that an invoice be rendered. In the first judgment which I gave in this case dated 21 December 2021 (hereafter "the Judgment"), it was found that the cause of action for fees is complete as soon as the contractual right to fees has accrued. Invoices are no more than a precondition to bringing legal proceedings [the Judgment paras. 135- 141].

7. The submission of the Defendants is that despite this, the condition precedent is not satisfied in the event that there is a wrong calculation in the invoice. In the instant case, it might be that on the findings of the Court that the value of assets under management (hereafter the "AUM") against which the percentage chargeable has been applied has been wrong due to excessive valuations. Alternatively, it might be that in making a reduction to reflect an excessive valuation of the properties, the reduction has not been calculated by reference to values but simply as a concession to encourage the defendants to pay a lesser sum. In the instant case, that is what occurred in the second half of 2017. It is further submitted that even if the concession led to a sum being calculated which was less than the sum which would have been calculated on a proper valuation, the pre-condition for payment would not be satisfied until a correct and precisely calculated invoice had been rendered. On this basis, the Defendants submitted that there was no entitlement to interest until a correct invoice had been rendered.

8. It is a question of construction of the particular terms of the relevant clauses. In my judgment, where bona fide invoices are provided, even though they turn out to be overstated in the ways which have been found in this action, that nonetheless satisfies the precondition for bringing an action for payment. It is then in this case a defence as regards the quantum of the payment to the extent that those sums have been overstated. Applying the iterative construction referred to in para. 128 of the Judgment, neither does the language of the agreements by itself nor seen in its commercial context support the construction contended for by the Defendants.

9. It would not be a sensible commercial construction that any mistake in the amount of quantum of the invoices would be such as to render invalid the invoices and to postpone the time from which payment was to run to such time as a correct invoice was rendered. Even more so where there was a reduction in the amount of the invoice to a sum less than the sum payable, as may have been the case in the second half of 2017. It would not be a sensible commercial construction to say that invoices did not qualify as such because the correct calculation had not been applied even though such calculation would have given rise to a greater fee.

10. There is nothing in the express language used which indicates that the sums are not payable until invoices calculated correctly have been rendered. The contractual terms are to the effect that the sums accrue due, but there is a requirement to issue an invoice. Once the invoices have been rendered, the sums become payable, but to the extent that the invoices are excessive, that might give rise to a defence to the extent of overcharge. Alternatively, if there is a counterclaim arising out of overcharge, but intimately connected with the charging of the sums, this might give rise to defence of set off to the extent of the Counterclaim. Neither of these events, in my judgment, gives rise to the free use of money to the debtor which would arise if the invoices were to be treated as nullity and/or no interest was to be paid during the period (which might, as in this case, be years) leading to the adjudication of the true amount payable.

11. It would require clear words in the agreements to support the construction contended for by the Defendants, especially bearing in mind the context of the agreements and the commercial sense of the arrangement. In my judgment, there are no clear words

in this case which would have such a result. An invoice is required, and the invoice is the claim for the moneys said to be due under the contract. Bearing in mind that the fees accrue at the times set out in the agreements, and the sending of an invoice is a pre-condition to payment as referred to in the Judgment and the consequentials judgment dated 30 January 2024, the Claimants are entitled to interest at the contractual rate of 2% above base rate from time to time from 14 days after the submission of the invoice for its fees in any relevant period. Any difference between the invoice and the correct amount as ascertainment by the Court does not render the original invoice ineffective nor does it provide an answer to a claim for contractual interest from 14 days after the date of the invoices. The interest is confined to the correct amount as determined by the Court or as agreed between the parties.

Costs

12. The Claimants' case is that it has been the successful party and there is no reason to depart from the starting point that the cost should be paid by the unsuccessful party to the successful party. Alternatively, if a deduction is appropriate, that deduction should be minimal and restricted to 5% - 10%.

13. The Defendants' case is that on the preponderance of issues between the parties, it has been the successful party and that accordingly costs should be paid by the Claimants to the Defendants. Alternatively, the Defendants submit that the costs should be paid on an issue by issue basis which should lead to an overall payment in favour of the Defendants for the same reason, namely that the Defendants succeeded on the preponderance of the issues. Alternatively still, if, contrary the above, the Court is to make an order by reference to the success of the Claimants, the Defendants ought to

be ordered to pay none of the Claimants' costs or a small part only of the Claimants' costs.

14. Under the CPR, the relevant rule is CPR 44.2 which reads as follows:

> *"If the court decides to make an order about costs-*
> *the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but the court may make a different order."*

15. In *Kastor Navigation v Axa Global Risks* [2004] 2 Lloyd's Rep 119, the Court of Appeal stated that the question of who is the "*successful party*" for the purposes of the general rule is to be determined by reference to the litigation as a whole (per Rix LJ, [143]). In *Travellers Casualty v Sun Life* [2006] EWHC 2885 (Comm), Clarke J (as he then was) said that the court's aim should be to "*make an order that reflects the overall justice of the case*".

16. In *Straker v Tudor Rose (a firm)* [2007] EWCA Civ 368, Waller LJ gave guidance on the approach to 'between the parties' costs:

(i) First is it appropriate to make an order for costs?
(ii) Second, if it is, the general rule is that the unsuccessful party will pay the costs of the successful party.
(iii) Third, identify the successful party.
(iv) Fourth, consider whether there are any reasons for departing from the general rule in whole or in part. If so, the court should make clear findings of the factors justifying the departure.

17. In *A L Barnes Ltd v Time Talk (UK) Ltd* [2003] EWCA Civ 402, Longmore LJ set out at para 28 a formulation that the trial judge ought to adopt to determine the identity of the successful party: *'In deciding who is the successful party the most important thing is to identify the party who is to pay money to the other. That is the surest indicator of success and failure.'* He indicated that if the trial judge had asked himself this question: *'. . . he would in my judgment have had to answer that it was the claimants who recovered more than the defendants had ever offered and thus it must be the claimants who were the successful party.'*

18. Applying the above to the instant case, the Defendants have to pay money to the Claimants totalling a sum of €554,771.40 in respect of the various agreements and the sum of €63,364.44 in respect of the loans exclusive of interest. The sums are neither nominal nor small. In those circumstances, the identity of the successful party can be ascertained by identifying who had to pay money to whom. Whilst there was scope for a protective payment or offer to have been made, the only offer was one of €100,000 just before the trial, which was far less than the sum in which the Claimants have succeeded. In other words, the Claimants had to go to court in order to be able to recover the sums due to them.

19. Against this, the overall claim was in the region of €2,410,661.06 including interest then claimed at a higher rate of 8%. Even when interest is added, the sums which are the subject of the judgments will be in the region of a third of the sums claimed. It follows that the Defendants have succeeded in defending the majority in money terms

of the value of the claim. In particular, the Defendants have successfully defended invoices during the period of suspension when the court held that no sums were due for that. Further, the Defendants have successfully defended the claim that the contract was repudiated by breach of the defendants. Further, a large part of the case has been dedicated to the defence or counterclaim in respect of the invoices being overcharged because of inappropriate valuations being used.

20. None of this detracts from the fact that the overall successful party has been the Claimants. The analysis of who is the successful party has been followed over the years on the basis that the identification of the successful party should be straightforward leaving to the more nuanced stage the question of the extent to which the Court may depart from the starting point identified in CPR 44.2. There are no other particular circumstances in this case which make it more just to regard the Defendants as the successful party or to find that neither has been successful.

21. As for the argument that there should be an issue based costs order, the courts are very reluctant to make such an order. That is because experience shows that it is very difficult to apportion costs to a certain issue. In the instant case, there were so many issues in the case, and a single witness typically gave evidence in respect of more than one issue. Further, the injustice of simply looking at an issue by issue basis is that it would depart too greatly from the starting point about the Claimants being overall the successful parties. For like reasons, in a case like this where the counterclaim is so intimately connected with the claim such as to be set off technically or in substance

against the overall claim, the court will generally not make separate orders on the claim and the counterclaim, but make one order in respect of the action as a whole.

22. The next part of the exercise, having identified that the Claimants were the successful parties, is to identify the extent to which there are substantial reasons to depart from the starting point that the successful party should have all of its costs. The first reason is that the successful party has only succeeded in financial terms in the region of a third of the value of its claims. This factor is reduced in importance because of the scope for a protective payment or offer as referred to in paragraph 17 above. That was not easy in this case because the provision of overvaluations and the AUM being worked on that basis has made it difficult to ascertain what is the true amount of money owed, but the more information which became available to the Defendants in the litigation, the more feasible it would have been. It therefore follows that the failure of a large part of the claim is a relevant factor, albeit one reduced in impact by the possibility of a payment or an offer.

23. The second reason is that the most major issue in this case in terms of time spent at trial was the over-valuation issue. This was not just about nature and extent of the over-valuation, but about what knowledge, and, at what stage, the Claimants had or ought to have had of the over-valuation. This then gave rise as to what steps the Claimants took or ought to have taken of the same, and at what stage they ought to have adjusted the management charges, and in what way.

24. A perusal of the Defence and Counterclaim in this action shows that this issue was at the heart of the dispute between the parties. The danger of simply setting out a list of issues and analysing the result of each issue is that this does not weed out issues which were conceded or which required little evidence or court time. The big picture of this case is that the Garcia over-valuation issue generated from the inception of the claim to trial a large part of the evidence straddled by the factual and expert witnesses.

25. A perusal of the judgment provides evidence of the factual and expert evidence generated. Relevant parts of the judgment include the history of the Garcia valuation at paras. 28-45, the evidence of over-valuation of properties at paras.58-61 and the question whether Garcia overvalued the properties at paras. 101-116. Likewise, an examination of the opening skeletons shows how prominent these matters were in the case as a whole. Related to this issue was also the issue whether the Defendants had been in repudiatory breach by withholding payments now found to be due. This gave rise to a claim for loss of profits of about 12 months of fees. The issue arising out of the Garcia over-valuations infected and informed in respect of the issue about whether the Defendants had been in repudiatory breach. This is apparent from paras. 145-158 of the Judgment, and especially the matters set out in para. 156. That set out how the result of the overvaluations was a lack of clarity as to how much, if anything, was due which was inconsistent with the Defendants being in repudiatory breach of the agreements.

26. There are respects in which this aspect of the success was qualified. First, the Court did not accept that the sums had to be adjusted for the entire time of the overvaluation because it was only for the time when the Claimants ought to have known and

addressed the overvaluations. Thus, the period of March 2016 to December 2016 was a period of time during which the sums contained in the invoices were not to be adjusted. Second, in respect of the latter part of 2017, it has turned out to be the case that where the Claimants have adjusted the sums in the invoices such as not to follow the contractual formula, the invoices rendered appear to be less than may have been capable of being claimed if proper calculations had been made and reflected in invoices. All of this has contributed to the effect of the overvaluations being about €190,000 rather than a higher sum.

27. Nevertheless, the sum of €190,000 is still a substantial sum, and the amount of work required to get a finding of this sum is little different from the sums which would have been incurred if a larger sum had been found referable to the Garcia overvaluation issue. The issue of the alleged repudiatory breach and 12 months loss of fees was a major part of the case in which the Claimants' case failed. As already noted, the failure of this issue was due in large part to the uncertainty of the amounts which were due to the Claimants due to the Garcia over-valuations. Put this way, although the effect on the invoices was not as great as was counterclaimed for, it was a major factor leading to the dismissal of the claim for damages for repudiatory breach which was a claim for €663,358.61.

28. A further issue on which the Claimants failed was in respect of the fees charged during the many months of suspension of the agreements. This gave rise to extensive argument as is reflected in the Judgment at paras. 123-134. These two aspects of the Claimants' claim which failed account for a large proportion of the parts of the claim where the Claimants were unsuccessful.

29. Against this, in addition to the overall success financially of the Claimants, judgment has been entered in respect of the loans. Further, there have been some discrete significant issues where the Claimants have succeeded. This includes the following:

(1) the failure of the counterclaim against the Second Claimant, Vectryss: see the Judgment at paras. 195-196;

(2) the issue as to whether Mr Hugon waived fees for the arrears: see the Judgment at paras. 118-122;

(3) an attempt to create new issues at trial failed including that the valuations should have been by reference to an occupied basis (Judgment paras. 95, 98) and whether the Claimants had to make a quarterly valuation issue (Judgment paras. 95, 99).

(4) the issue as to whether invoices could be raised after termination (Judgment paras. 135-141) and the issue raised in the consequentials hearing whether the claim could be maintained for fees other than on the basis set out in the invoices: see the second Judgment dated 30 January 2024;

(5) other issues sought to be raised at trial including alleged failure of the Vectryss to supervise accounts in payments to Paingris (Judgment paras. 198-209) and damages for misrepresentation in accounts (Judgment paras. 210-211), and breach of contract in the payment of £255,000 to Viarentis (Judgment paras. 212-213).

30. I am satisfied that the issue arising out of Garcia over-valuations comprised the largest part of the case and would have generated a considerable amount of work from

the inception of the claim to trial including the preparation of factual and expert witnesses. I am satisfied that at least 50%, and probably more, of the time and the expense of the action must have been in respect of the over-valuations of Garcia and the resultant issues between the parties. Whilst the Claimants are entitled to point to issues on which they have succeeded, there is a danger of listing issues which have involved very little time at trial and evidence. In any event, I am satisfied that the issues listed by the Defendants were not as extensive even cumulatively as the issues arising out of the Garcia over-valuations (which includes also the repudiatory breach issue).

31. In my judgment, this is a case where a costs order ought to be made in favour of the Claimants as the overall successful party. However, there ought to be a substantial deduction to reflect the major issues on which the Claimants have failed. I also take the view that notwithstanding the scope for payment or a protective offer, it is appropriate to reflect the large proportion of the claim in a financial sense in which the Claimants have been unsuccessful. Further still, such is the number and significance of the issues on which the Claimants have failed that this is not a case where a successful party recovers its costs because losing on some points is a usual incident of litigation. This is a case where the complexion of the case and the complexity of the issues would have been significantly different if the overvaluations had not occurred or had been rectified by the Claimants.

32. The secondary submission of the Defendants is that any reduction should be limited to 5-10%. In my judgment, that is far too small, bearing in mind the matters identified

in the preceding paragraphs. On the other hand, it is important that the extent of the deduction does not depart so much from the starting point that no or no substantial effect is given to the starting point in favour of the successful party.

33. I temper the amount of the deduction by the fact that this is not a case where the issues raised by the Claimants could be classed as being in bad faith (this was not argued for the purpose of costs) or tenuous and spurious (this was contended). Insofar as the Defendants relied on the case of *Various Claimants v Wm Morrison Supermarkets PLC [2018] EWHC 1123 (QB),* where the Court made a deduction so that the Claimants only recovered 40% of the costs, that was a case of tenuous claims. In any event, there is limited assistance to be derived from previous cases because each precedent is usually so different from the case in question.

34. An issue based costs order might have been more favourable in result to the Defendants than a deduction of costs. Its effect on the issues identified would have been that not only would the Claimants not have **Bates Wells Braithwaite London LLP** been able to recover some of their costs, but the Defendants would have made a recovery of some of their costs against the Claimants. This is to be borne in mind in the extent of the deduction of the Claimants' costs. It might have been more favourable than a simple deduction of the Claimants' costs, but by itself it would not give sufficient weight to the fact that the Claimants are overall the successful parties. The Court has taken into account the numerous factors advocated by the parties and set out in this judgment in arriving at an order designed to reflect the overall justice of the case.

Disposal

35. In all the circumstances, the deduction which will be made in this case will be one of 50%. This gives effect to the success of the Claimants by the overall order being made in favour of the Claimants, but such are the factors going the other way that a 50% reduction in the costs is an appropriate recognition of the only partial nature of the success of the Claimants by reference to the sum ordered in its favour, the important issues resolved against the Claimants and the time and expense incurred on these issues. The effect is that whilst the Claimants are not to have to pay any costs to the Defendants and they are to recover one half of their costs, justice is done by limiting the order of costs in their favour to one half.

36. The parties are asked to agree the terms of an order to reflect the foregoing. In view of the short time since the last hearing, there should only be one order. Accordingly, the draft order sent at the end of last week should be consolidated with this draft order so that there will be only one order for the Court to approve instead of two.