THE HIGH COURT

COMMERCIAL

[2024] IEHC 107
[Record No. 2019 No. 352 COS]

IN THE MATTER OF:

SECTION 212 OF THE COMPANIES ACT 2014

AND

IN THE MATTER OF:

EDMOND P HARTY & COMPANY UNLIMITED COMPANY

BETWEEN

EDMOND PATRICK HARTY

APPLICANT

AND

DR EDMOND HARTY AND

EDMOND P HARTY & COMPANY UNLIMITED COMPANY

RESPONDENTS

AND

BETWEEN

EDMOND PATRICK HARTY

APPLICANT

AND

DR EDMOND HARTY AND EDMOND P HARTY & COMPANY

UNLIMITED COMPANY

RESPONDENTS

AND

BETWEEN

DR EDMOND HARTY

COUNTERCLAIM APPLICANT

AND

EDMOND PATRICK HARTY, JOHN HARTY AND

EDMOND P HARTY & COMPANY UNLIMITED COMPANY

COUNTERCLAIM RESPONDENTS

JUDGMENT of Mr Justice Kennedy delivered on the 8th day of January 2024.

1. My earlier judgment ("the Judgment") resolved issues as to the interpretation and application of a settlement agreement ("the Settlement" or "the Agreement") in the Applicant's favour. I determined that a corporate restructuring had triggered an immediate obligation to pay €10 million to the Applicant and that the Company was not entitled to withhold payment on the basis of actual, alleged or anticipated breaches of the Agreement. The Company paid the €10 million following the Judgment, leaving interest and costs to be determined.

Interest

2. Section 22 of the Courts Act 1981 empowers the Court to award interest. The current rate is 2% per annum. It is a matter of public record that this is less than current inflation and market interest rates.

3. In *Mellowhide v. Barry* [1983] I.L.R.M. 152 ("*Mellowhide*"), Finlay P. considered the operation of the section at p. 155:

"*…Where a debt is due as the result of an ordinary trading or commercial transaction it would appear to me that the debtor delaying the due payment of his liabilities is clearly and in a sense intentionally depriving his creditor of the use and value of the money concerned*".

Finlay P. recognised that the court had a discretion and noted that plaintiffs might be well advised to give evidence as to the effects and consequences of a defendant's failure or refusal to pay, so as to justify a claim for interest, and that a defendant might also be well advised to file affidavits concerning:

"*the position and facts and merits of the case which might lead the court to refuse to exercise its discretion*".

4. As O'Donnell J. (as he then was) observed in *Reaney v. Interlink Ireland* [2022] 1 IR 213 ("*Interlink*")***:***

"*12. It is rudimentary economic theory that money has a time value. The person who has a sum of money over a period can obtain a benefit either in interest on that sum if invested (or other return on investment) or interest avoided because that sum does not have to be borrowed. By the same token a person who has not received money incurs a cost, in particular if they have had to borrow. By 1981 a decade of inflation had shown that in many cases an award of damages, Particularly in commercial or contractual situations, could fall well short of a full remedy for a wronged party because the real value of the award at the conclusion of the proceedings could be substantially less than that monetary amount had been worth in real terms at the time of the breach of contract or the failure to pay. Accordingly, s. 22 of the 1981 Act gave a discretion to courts to make an award of simple interest at a rate …*

13… the logic that money has a time value should in theory be reflected in an award of interest. Interest is not simply awarded as a remedy against inflation, it reflects the fact that there is a cost in not having the money for a certain period…

17. Here, the Court of Appeal considered that the trial judge had been in error in refusing interest because the trial judge had observed that it had not been provided for by the parties in the contract. The Court of Appeal pointed out that the 1981 Act specifically precludes the award of interest where interest is

provided for by contract. Therefore, if the absence of such a provision meant that interest should not be awarded under s. 22, then interest would never be recoverable, at least in contractual matters. However, I think it is possible that the trial judge meant perhaps no more than it was a relevant consideration in the exercise of the court's discretion that the parties' relationship was such that they had not otherwise provided that interest should accrue on payments not made. As the Court of Appeal recognised, this is indeed a relevant consideration.

18…To the extent that any claim can be said to approximate to a claim for a price paid or a debt due, then interest might relatively routinely be awarded… In general, therefore, to the extent to which it can be said that, at the conclusion of a case, a trial judge can conclude that the defendant ought to have paid the money earlier, then interest could properly be awarded. Thus, if the defendant has refused to pay a contractual price, and in particular in those cases in which it has raised a counter claim for unliquidated damages, which has been dismissed, it would be appropriate to award interest unless other features are apparent. On the other hand, where there is a genuine dispute which requires to be resolved, and perhaps some merits on either side, it may be much more difficult to say that the sum awarded ought to have been paid at a much earlier date, and therefore that interest should accrue.…

19. I would distinguish therefore between the different amounts in this case. Here, the Parcel Line claim was in the nature of a commission which arguably should have been paid once the parcels were delivered. Similarly, the Pulsar claim appears a straightforward claim under the contract. The bulk of the claim for interest however concerns clause 13. That clause distinguishes between two amounts. The figure of just over €95,000 was a figure agreed as the portion of the purchase price attributable to the relevant franchise area, which was always obliged to be paid no matter what the final figure under clause 13 was. Interest could properly be awarded in all three of these items. Accordingly, I would not interfere with the Court of Appeal's decision to award interest in respect of these three items. However, the bulk of the complaints concern the amount assessed as due under clause 13. That clause is somewhat imprecise. The parties took very different views as to what it entailed. At a minimum, I do not think it could be plausibly said that the defendant ought to have paid the amount assessed at a much earlier date, precisely because the amount due had not been assessed until

the outcome of the High Court proceedings. Clause 13 called for an agreement between the parties, and that was not forthcoming. In default of agreement it called for independent assessment of the sum. To put it at its lowest, I do not think that that lack of agreement can be laid at the door of the defendant alone so that it would be appropriate to determine that it should be required to pay interest. …Far from the sum being one that was ascertained or ascertainable at the date of termination, it was one which required a process of assessment and determination before it was, eventually, ascertained. In the circumstances, I think the trial judge was fully entitled not to award interest on this aspect of the claim …"

5. Accordingly, the Supreme Court in *Interlink* had no hesitation in unanimously affirming the award of interest in respect of the liquidated sums which were unequivocally due under the contract. However, the majority did not award interest in respect of the figure awarded by way of consideration for the sale of a franchise agreement because the amount due had not been determined until the outcome of the proceedings and therefore it could not be said that the defendant ought to have paid the figure sooner. The failure to determine the figure could not be laid solely at the defendant's door. Accordingly, the Supreme Court reversed the decision to award interest on the element of the claim where the amount due "*required a process of assessment and determination before it was, eventually, ascertained*".

6. The Company submitted that I should not exercise my discretion to award interest for the following reasons:

a) The logic of my Judgment was that €10 million fell due to the Applicant on 29 October 2022, when the restructuring was completed. However, but for that transaction, the monies would have fallen due in October 2023 and 2024. The judgment sum has been paid. Accordingly, the Applicant received final payment a year earlier than the Settlement provided for (absent a sale and a consequent

payment acceleration). Interest is therefore not necessary to ensure that the Applicant is justly compensated and would involve an unjustified windfall.

b) The Settlement, a heavily negotiated and sophisticated agreement, does not give the Applicant a contractual entitlement to interest. Dr. Harty's claim for interest is therefore founded upon the Courts Act 1981. Section 22 accords judges a discretion as to whether to award interest at all and as to the period for which interest should run. Authorities such as *Mellowhide* and *Interlink* confirm that it should not be assumed that the recovery of interest with regard to any claim for liquidated damages was automatic. No evidence was filed by either party on this occasion as to whether interest was appropriate, but the Company submitted that the onus primarily remained on the Applicant as the party claiming interest.

c) The majority in *Interlink*:

i) emphasised the broad discretion afforded to the trial judge with trial judges attempting to compensate the plaintiff where necessary but without imposing an undue burden on defendants. Fair compensation is the touchstone.

ii) observed at paragraph 17 that the absence of a contractual entitlement to interest was a relevant consideration in deciding whether to award statutory interest (the Company emphasised that the Agreement in this case was heavily negotiated by sophisticated lawyers but did not provide for interest).

iii) contrasted the situation where a refusal to discharge a contractual debt to a genuine dispute observing (at pp. 228 – 229) that:

> "*On the other hand, where there is a genuine dispute which requires to be resolved, and perhaps some merits on either side, it may be much more difficult to say that the sum awarded ought to have been paid at a much earlier date, and therefore that interest should accrue*."

d) There was a *bona fide* dispute as to whether the payment obligation had been accelerated, with merit on each side and the following factors militated against my exercising the discretion to award interest:

i) This was essentially a family dispute, unlike the commercial disputes in which interest have typically been awarded. The Settlement was intended to achieve a clean break, and the €10 million payment achieved that.

ii) The Settlement did not provide for interest on unpaid sums, a significant omission in such a detailed document, which was essentially a share purchase agreement with staged payments, in respect of which the Applicant was an unsecured creditor.

e) The Applicant had adduced no evidence as recommended in *Mellowhide* regarding the consequences of the fact that the €10 million was only paid in October 2023. There was no evidence of a financial loss due to the delay, nor any suggestion that he had been forced to borrow. Accordingly, the compensation principle does not require an award of interest.

f) The purpose of the acceleration clause, as found in the Judgment, was to protect the Plaintiff's right to payment in the event of a sale: that provision has served its purpose and the payment was made shortly after judgment was delivered (and before a formal order was drawn). The Plaintiff has received the full agreed consideration for his shares. Any additional sums would overcompensate the Plaintiff and would impose an undue burden on the Company.

g) The Applicant was paid his full consideration under the Settlement a year earlier than expected and agreed. The contractual default position was that he would not be paid in full until 31 October 2024.

h) I should disregard the suggestion that the Company has "had the benefit of €10 million" for almost 12 months. The focus of the inquiry is on whether an award of interest is necessary to compensate the Plaintiff, rather than whether the Defendants reaped some financial benefit. More importantly, there is no evidence before the Court that the Company had the benefit of €10 million, with an investment return for the almost twelve months referred to.

i) The Applicant has not discharged the burden of demonstrating that this is an appropriate case in which to award interest. No evidence has been adduced to show that such an award is necessary to compensate him. In the alternative, even if I considered that the material before it *might* justify an award of interest, I should refuse to exercise its discretion in the circumstances.

Contractual Provisions

7. It is important to note the terms of the contractual provisions because they reveal the determination to ensure that the contractual instalments were paid without delay, failing which the Applicant would have immediate remedies. In particular:

a) Clause 3.6 provided that, in the event of a sale, all outstanding amounts would immediately become due and payable by the company to him.

b) Clause 3.7 provided as follows:

> "*The Company agrees and warrants that it will irrevocably consent to judgment in the High Court in respect of any amount payable by the Company under Clause 3.2, Clause 3.6 or Clause 3.18 that is not paid by the due date*".

Findings

8. In *Action Alarms Limited T/A Action Security System v. Emmett O'Rafferty & Top Security Limited* [2022] IEHC 33, Humphreys J. adopted the approach outlined by

McKechnie J. in *First Active plc v. Cunningham* [2018] IESC 11, in terms of the factors to be considered in the context of the judicial discretion to award Courts Act interest. My application of those factors to this case would militate in favour of awarding interest for the following reasons:

(a) the nature of the case

9. The Agreement provided for the sale/redemption of the Applicant's controlling stake in the Company, a multi-million-euro international enterprise. The Company was in breach of express contractual obligations to pay a liquidated sum immediately and to consent to judgment in default of so doing. The contract did not permit deferral of payments pending the amount being "ascertained or assessed" or while the Company pursued a counterclaim. The summary judgment application would not have been necessary if the Company had honoured its contractual commitments. It is also significant that if, in default of payment, the Company had honoured its separate contractual commitment to consent to judgment, then Courts Act interest would have accrued automatically from October 2022. It would be perverse if the Company's breach of Clause 3.7 relieved it of obligations that would have arisen if it had complied with that provision.

10. The claim for a liquidated contractual debt correlates to the heads in respect of which interest was awarded in *Interlink*. The Supreme Court noted that *"interest might relatively routinely be awarded*" for *"a claim for a price paid or a debt due*". The payment here, the final instalments of the price for the redemption of the Applicant's shares, fell squarely within that category. Unlike the head of damage where interest was refused in *Interlink*, the claim did not need to be ascertained or assessed. The Company's unmeritorious denial of liability did not mean that the claim ceased to be a liquidated sum contractually due or that the sums required to be ascertained or assessed.

The Applicant should have been paid the monies, without deduction or delay. While I have seen no basis to doubt the *bona fides* of the Company or its principals, their legal arguments were not well founded. No genuine dispute that needed to be resolved, nor were there competing merits as with one issue in *Interlink* which clearly required a factual assessment.

11. I attach no weight to the fact that the Applicant has been paid earlier as a result of the restructuring. The contract provided for different scenarios. The Company cannot take an *à la carte* approach to the Agreement, suggesting that the Court should look at what would have happened in a counterfactual scenario, rather than applying the provisions applicable to the actual scenario. The parties agreed what should happen in the event of a sale. The Applicant had agreed to surrender his majority stake in the business. Payment was staggered to enable the Company to fund the transaction. As is common in such contexts, the parties agreed that the monies would be immediately payable in certain circumstances. The Company and its principals did in fact trigger the immediate payment obligation.

12. Nor was I persuaded that I should adopt a different approach to interest because this could be seen as a family dispute, rather than a typical commercial dispute. This submission sits uncomfortably with the Company's alternative submissions that the Settlement was a "heavily negotiated and sophisticated agreement" and "essentially a share purchase agreement". I was asked to interpret a complex commercial agreement for the sale of a majority stake in a multi-million-euro international business. Normal rules apply. The Company's principals initiated this litigation. They applied for admission to the commercial list, rendering it difficult for them or for the Company to characterise it as anything other than a commercial dispute. The litigation did have its origins in an unfortunate family dispute, and it is a great pity that the parties should

have collectively failed to avert successive litigation battles. However, the issue which led to the current application directly resulted from a commercial agreement and an international tax driven corporate restructuring. There is no basis to deal with interest in what is now a purely commercial context other than on a commercial basis.

(b) the reasons why the debt was not discharged sooner; and

(d) the reason for the passage of time or delay in the litigation

13. The delay was entirely due to the Company's refusal to honour its obligation. It relied on two misconceived and unjustified legal grounds. The situation is similar to the heads of damage in *Interlink* in respect of which the Supreme Court awarded interest and different from the head where interest was not awarded (because the assessment and quantification of that head still had to be determined). There was no suggestion of any delay by the Applicant.

(c) *each party's conduct*

14. The Respondents should have disclosed the details of the restructuring transactions and the documentation earlier. However, I have not concluded that they acted in bad faith. Nor is there any issue as to the Applicant's conduct in respect of the issue giving rise to the cost order. In terms of the Applicant's conduct, my Judgment did recognise that the Company (and other parties) may have serious (but entirely separate and as yet largely unsubstantiated) claims against the Applicant in respect of his alleged actions in respect of other issues. If substantiated, such claims might give rise to an entitlement to injunctive relief and to substantial damages (possibly going beyond purely compensatory damages in a sufficiently egregious case). However, I concluded that such claims did not affect the Company's payment obligations. The

merits of those allegations have yet to be determined and the Agreement envisaged that such issues must be litigated separately. Accordingly, those unproven allegations are irrelevant for present purposes.

(e) the absence of any contractual clause dealing with interest in circumstances where its existence might be expected

15. *Interlink* shows that the contract's failure to provide for interest may be a relevant consideration in determining whether to award Courts Act interest but is not necessarily determinative. Indeed, it was not in that case and the judgments noted that it is axiomatic that Courts Act interest can only be awarded in the absence of a contractual interest stipulation. I attach little weight to the absence of such a clause here. The contract envisaged that the monies would be paid forthwith. Protections were provided for, in terms of consent to immediate judgment. Interest would inexorably have immediately been payable as a matter of law if the Respondents had complied with Clause 3.7. Accordingly, the logic of the Agreement is consistent with the award of interest. While the need for interest would, by definition, not arise if the Company had honoured its obligations as agreed, it is consistent with the Agreement's commercial logic that interest should be payable in the event of a default.

(f) the desire to achieve full restoration, but no more for the judgment creditor

16. The award of interest is necessary to achieve full restoration. The money would have been paid a year earlier if the Company met its commitments. The value of a payment a year late is less than that of a timely payment. Indeed, because of the disparity between the Court's Act rate and current market rates the award will not achieve full restoration. To borrow the terminology of Finlay P. in *Mellowhide*, by

delaying payment the Company deprived its creditor of the use and value of the money. It is wrong to suggest that the Applicant obtained a windfall or that his invoking the contract was opportunistic. He relied on agreed terms and invoked agreed entitlements. He should have been paid promptly. However, he had to issue this application and litigate for a year to elicit payment.

17. The equity of the situation is not with the Company on this issue. There would have been no interest award if the accelerated payments had been made as the contract required. Accordingly, an award of interest would not constitute a windfall. To the contrary, failing to award interest would give the Company a significant and unjustified commercial benefit. This would be a perverse incentive to commercial enterprises to disregard their contractual commitments and to litigate if only to obtain interest free finance. I would respectfully adopt the *obiter* observations of McKechnie J. in *Interlink* that interest was "*anything but a windfall for a plaintiff, nor can it be considered a mere add-on or some form of unjust enrichment to which he is not entitled: indeed, quite the contrary: where interest was required but not given, he or she is undercompensated*", which "*would be a most unjust outcome*".

18. In *Mellowhide*, Finlay P. suggested that it would be prudent for litigants to adduce evidence of the financial impact of a delayed payment. However, the courts have not characterised such evidence as an essential precondition to the award of Courts Act interest. I would not deem it appropriate to impose such a mandatory precondition (which would increase the evidence required - and the loser's costs exposure - in *every* case in which Courts Act interest was sought). Such evidence appears superfluous when the Courts Act rate is so much less than market rates. As the Supreme Court noted in *Interlink*, "*rudimentary economic theory*" confirms that money has a time value and parties with the use of such money over a period can obtain a benefit either in interest

if invested or interest avoided. The affidavits in the original application confirmed both sides' commercial acumen. It can be assumed that such acumen would lead them to act rationally in economic terms and the Court can safely assume that the Company benefitted from the retention of the overdue payment. Correspondingly, if the contract had been honoured without delay the applicant could have invested the money for a return.

(g) the avoidance of penalising the judgment debtor

19. The award is not intended to and does not constitute a penalty. The judgment debtor has had the use of the €10m for 12 months. The commercial benefit is sufficiently greater than the interest award so there is no sense in which the Company can be regarded as being penalised.

20. Nor is there any basis for the submission that an award of interest would penalise the Company's principals who had effectively bought out the Applicant. It is true that the Applicant's father and brother enjoy virtually complete ownership and control of the Company. However, in legal terms, the Company is the party obliged to make the payment. It must meet the consequences of its contractual default. It is fundamentally misconceived for the Company to suggest that the Court can have regard to the fact that, in reality, the cost would ultimately be borne by the Company's two principals. Such a submission ignores the basic tenet of Company law that a Company has a different legal personality to its principals. The Company must live with the structure deliberately chosen by its principals, a choice made for very good reason on the basis of expert Irish and international advice. Any suggestion that a court should be reluctant to award interest against a multi-million-euro company with two very large individual

shareholders (as opposed to a corporate entity with many small shareholders) would be unattractive. Paragraph 68 of my Judgment noted that:

> "*The Company and its owners are entitled to structure their affairs to their advantage, but such decisions may have unintended consequences such as, in this case, bringing forward a payment obligation. They and their Irish and international advisors doubtless confirmed that the new offshore shell company allowed the owners to maintain a limited liability shield (protecting them from creditors) while avoiding the disclosure obligations which would have been required but for the Isle of Man company. The Company cannot enjoy such advantages while disavowing the legal significance of its chosen structure. To borrow a phrase from the Company's own submissions, it cannot "reprobate and approbate" by disregarding the reorganisation for the purposes of the Settlement Agreement. Nor would the Court endorse the Company's characterisation of the changes as merely "(moving) the corporate 'boxes' around within the group" or as "a technical papering exercise" …Choices of corporate structures have consequences. They are crucial in any insolvency context, impacting unsecured creditors such as the Plaintiff. The Company (and its owners) committed to major transactions which involved selling the assets of the Company and almost all of its shares to benefit the owners (maintaining limited liability and confidentiality for them). They must accept the legal consequences. They cannot have it both ways*".

The evidence from the Company on the summary judgment application referenced the extensive Irish and international legal advice available to it and the introduction of expertise on corporate governance to the Company's board. Such advice and expertise are welcome and timely. In any substantial or sophisticated corporation, it is prudent to introduce such board level expertise. This is particularly desirable when a family business makes the difficult transition to a corporation, with the need to adopt a sophisticated mindset which respects corporate boundaries and responsibilities and their consequences. The expertise added to the Company board will hopefully ensure that the Company and its principals are fully appraised of all applicable statutory,

regulatory, fiduciary and contractual obligations, including the need for the directors to act in the Company's best interests and the need for the Company to comply with its legal commitments to third parties, including the Applicant.

21. In the circumstances, an award of interest is required to reflect the justice of the situation and to ensure that the Applicant receives fair compensation for the Company's delay in meeting its contractual obligations, a delay justified on a misconceived view of its legal position. The Applicant claimed €195,618.15 by way of interest, based on a daily rate of €547.95 for a 357-day period. The period ran from 25 October 2022 (the approximate date of the restructuring) to 16 October 2023 (the date of judgment). In terms of the relevant period, there were various dates in late October 2022 in the transaction documents, with the transaction documents giving effect to the sale of the DMG Central shares dated 28 October 2022. It was reasonable for there to have been some delay while the Company clarified its legal position and took legal advice. Although, strictly speaking, the payment should have been made on the conclusion of the transaction in late October 2022, it would not have been unreasonable for the Company to take a few weeks to clarify the position. In *Interlink*, the Supreme Court noted the essential crudeness of the attempt to make an interest award which is fair to the parties in the circumstances. In the circumstances, I will award €158,357.55 by way of Courts Act interest for the period from 31 December 2022 to 16 October 2023, the date of the Judgment.

Costs

22. It was accepted that costs should follow the event, with the Company simply reserving its position on the costs depending to the outcome of the interest question, which has now been resolved in the Applicant's favour. Accordingly, the Applicant will

be awarded the full costs of the application and the hearings (including in respect of the substantive application and the interest and costs hearing etc.). There are no special circumstances to warrant departure from the normal rule.

Conclusion

23. Accordingly, the final order will award the Applicant Courts Act interest in the sum of €158,357.55 and the costs of the application for summary judgment (to include any reserved costs) to be adjudicated in default of agreement.