Neutral Citation Number: [2020] EWHC 1704 (Comm)

Case No: CL-2019-000484

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Rolls Building,
Fetter Lane
London, EC4A 1NL

Date: 30/06/2020

Before :

THE HONOURABLE MR JUSTICE HENSHAW

- -

Between :

(1) DVB BANK SE **(formerly named DVB BANK AG)** **(2) NORDDEUTSCHE LANDESBANK - GIROZENTRALE**	**Claimants**
- and –	
(1) VEGA MARINE LTD **(2) FORTUNESHIP LTD** **(3) MR NIKOLAOS LIVANOS**	**Defendants**

- -
- -

Tom Bird (instructed by **Stephenson Harwood LLP**) for the **Claimants**
The Defendants did not appear and were not represented

- -

APPROVED JUDGMENT
ON CONSEQUENTIAL MATTERS

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 30 June 2020 at 10:30 am.

Mr Justice Henshaw:

(A) INTRODUCTION

1. Following the handing down of judgment in this case on 10 June 2020, I indicated that I would deal on paper with consequential matters arising, without the need for the parties to attend a further hearing.

2. The Claimants wrote to the court and to the Defendants on 10 June 2020 proposing a timetable for written submissions in relation to consequential matters, but the Defendants did not respond to that proposal. The Claimants filed and served their submissions on consequential matters on 15 June 2020. However, nothing was heard from the Defendants.

3. On 25 June 2020 I made a direction that, in the circumstances, unless any responsive submission were received from the Defendants by 5pm (UK time) on Monday 29 June 2020, then I would deal with the consequential matters taking account of the submissions and information I had received, and make an order accordingly. Again, nothing was heard from the Defendants. The Defendants' silence is consistent with their more general failure to engage with these proceedings as summarised in section (B) of my judgment dated 10 June 2020.

4. It is therefore appropriate now to proceed and deal with consequential matters, which concern the interest to which the Claimants are entitled, and costs.

(B) INTEREST

(1) Pre-judgment interest

5. I concluded in § 70 of my judgment dated 10 June 2020 that, subject to any further submissions as to the detailed terms of the order, the Claimants are entitled to:

   i) judgment for both Claimants against the Borrowers (the First and Second Defendants) in the sum of US$ 11,741,758.12, plus interest at the rate of 3.5% per annum pursuant to clause 7.2 of the Fourth Supplemental Agreement as from 2 March 2019 until the date of judgment; and

ii) judgment for the First Claimant against the Guarantor (the Third Defendant) in the sum of US$ 11,741,758.12, plus interest at the same rate and for the same period pursuant to clause 7.2 of the Guarantee.

6. Clause 16.3 of the underlying Loan Agreement provides that "*All interest … shall accrue from day to day and shall be calculated on the basis of the actual number of days elapsed and a 360 day year.*" The period from 2 March 2019 to the date of my judgment dated 10 June 2020 was 466 days. Interest accrued at the rate of US$ 1,141.56 a day, and the total interest that had accrued by the date of judgment was US$ 531,966.88.

(2) Post-judgment interest

7. The Claimants are entitled to interest on the judgment debts pursuant to section 17 of the Judgments Act 1838 (as amended). The normal rate of interest under section 17 is currently 8% per annum. Where, as in the present case, the judgment is expressed in a currency other than sterling, section 44A of the Administration of Justice Act 1970 (as amended) empowers the court to vary the statutory rate to such rate as the court thinks fit. In *Standard Chartered Bank v Ceylon Petroleum Corporation* [2011] EWHC 2094 (Comm), Hamblen J exercised this power, awarding interest at the US Prime Rate on a US dollar denominated debt. He said:

> "21. I am not satisfied that the inclusion of an English jurisdiction clause is a sufficient reason for the Court to refuse to exercise its statutory discretion. If it was, it would exclude the discretion in many cases. It is not a reason for excluding the Miliangos principle and, as the Law Commission makes clear, the discretion as to interest is a logical extension of that principle. The discretion is there to enable the Court to award interest at a rate appropriate to the currency in question.
>
> 22. In the circumstances of the present case I am satisfied that it would be appropriate for the Court to exercise its discretion so as to award interest at a rate suitable for the currency of the judgment. In particular, the difference between the two rates is significant; it is not due to rapidly fluctuating or highly variable factors; a much lower US dollar interest rate has been established for some time and is likely to continue for the immediately foreseeable future, and SCB has no relevant or sufficient "concern with sterling".
>
> 23. It was common ground that if I was so to decide then the appropriate rate would be US Prime Rate – see *Kuwait Airways Corp v. Kuwait Insurance Co* [2000] Lloyds Reps 678 , at 692–3 (per Langley J)."

8. However, the parties can agree that a contractual rate of interest shall apply after judgment as well as before judgment, as Hamblen J also noted in *Standard Chartered Bank:*

> "In the light of the guidance provided by that decision the position may be summarised as follows:

> (1) The starting point is that, absent special provision, a right to interest merges into a judgment, so that the creditor is no longer entitled to contractual interest. It follows that if the Judgments Act rate of interest is higher than the contractual rate, the creditor receives a sum higher than that to which it would have been contractually entitled. Conversely, if the Judgments Act rate of interest is lower than the contractual rate, the creditor receives a lesser sum than that to which it would have been contractually entitled.
>
> (2) The usual purpose of a contractual provision preserving a right to interest post-judgment is to prevent that merger. It has the effect that the contractual right to post-judgment interest is preserved so that the creditor is protected if the Judgments Act rate is lower than the contractual rate.
>
> (3) But the incorporation of such a term is not generally intended to deprive a debt ordered to be paid by the court of its status of a judgment debt, and the creditor of its statutory right to payment of interest under the Judgments Act." (§ 12)

9. In the present case, clause 7.2 of the Fourth Supplemental Agreement and of the Guarantee, quoted in §§ 28 and 37 of my judgment dated 10 June 2020, provide for the contractual rate of interest to apply "*as well after as before judgment*".

10. Sources in the public domain indicate that the US Prime Rate is presently 3.25% per annum, which is lower than the contractual rate of interest (3.5% per annum).

11. Thus, the contractual rate is slightly higher than the rate which the court would otherwise be likely to award. In my view the Claimants are entitled by reason of clauses 7.2 to seek the contractual rate after as well as before judgment.

12. I deal in section (C) below with interest on costs.

(C) COSTS

13. The Claimants seek an order that the Defendants pay the Claimants' costs of the proceedings within 14 days, and invite the court to make a summary assessment of those costs.

(1) Basis of costs award

14. Applying ordinary principles, the Claimants should receive their costs from the Defendants, having been the successful party on each of their applications (see CPR 44.2(2)(a)), and there being no reason in the present case to depart from that starting point.

15. The Claimants also claim to be contractually entitled to recover their costs from the Defendants pursuant to clause 8.1 of the Fourth Supplemental Agreement:

> "For the avoidance of doubt, each of the Borrowers and the Personal Guarantor undertakes to pay to the Creditor Parties upon demand and

> from time to time, all costs, charges, legal fees and expenses (including VAT, if applicable) incurred by the Creditor Parties in connection with the preparation, negotiation, execution and (if required) registration or preservation of rights under, or the enforcement or attempting enforcement of, the Loan Agreement, the Corporate Guarantee, the other Finance Documents, this Supplemental Agreement, the Personal Guarantee or otherwise in connection with the Indebtedness or any part thereof. …"

16. This provision requires a demand to have been made for any sums said to be due. On 15 June 2020 the Claimants sent a demand for payment of their costs, together with a copy of the statement of costs, to the Defendants by email to the Third Defendant's email address.

17. The Claimants also attempted to fax the demand to the fax number stated in clause 11.4 of the Fourth Supplemental Agreement, but the fax transmission failed.

18. Clause 11.6 of the Fourth Supplemental Agreement provides, in relevant part, that:

> "A notice under or in connection with this Supplemental Agreement shall not be invalid by reason that its contents or the manner of serving it do not comply with the requirements of this Supplemental Agreement if:
>
> (a) the failure to serve it in accordance with the requirements of this Supplemental Agreement has not caused any party to suffer any significant loss or prejudice …"

19. At §55 of my judgment dated 10 June 2020, I concluded that documents sent to the Third Defendant's email address would "*have come to his attention (and thereby to the attention to the First and Second Defendants as well*". I agree with the Claimants that similar considerations apply here. There is no reason to suppose that the service of the Claimants' demand by email, rather than by fax or post, would have caused any of the Defendants to suffer significant (or any) loss or prejudice. Accordingly, the Claimants' costs are also payable under clause 8.1 of the Fourth Supplemental Agreement.

(2) Appropriateness of summary Assessment

20. The Claimants seek a summary assessment of their costs, referring to CPR PD 44, §9.2:

> "The general rule is that the court should make a summary assessment of the costs – …
>
> (b) at the conclusion of any other hearing, which has lasted not more than one day, in which case the order will deal with the costs of the application or matter to which the hearing related. If this hearing disposes of the claim, the order may deal with the costs of the whole claim,

> unless there is good reason not to do so, for example where the paying party shows substantial grounds for disputing the sum claimed for costs that cannot be dealt with summarily."

21. In addition, § 9.1 provides that "*Whenever a court makes an order about costs which does not provide only for fixed costs to be paid the court should consider whether to make a summary assessment of costs*". Further, CPR 44.6(1) provides that "*Where the court orders a party to pay costs to another party (other than fixed costs) it may either (a) make a summary assessment of the costs; or (b) order detailed assessment of the costs by a costs officer, unless any rule, practice direction or other enactment provides otherwise*".

22. The court therefore has the power to make a summary assessment in the present case.

23. Paragraph F.14.2 of *The Commercial Court Guide* (10th Ed. 2017) states:

> "Active consideration will generally be given by the Court to adopting the summary assessment procedure in all cases where the schedule of costs of the successful party is no more than £100,000, but the parties should always be prepared for the Court to assess costs summarily even where the costs exceed this amount."

24. Here, the Claimants' statement of costs for the whole claim amounts to £96,834.11. Unless the Defendants show substantial grounds for disputing that sum which cannot be dealt with summarily, this is an appropriate case for the summary assessment procedure. No such grounds have been shown.

(3) Quantum of costs

25. CPR 44.5 provides:

> (1) Subject to paragraphs (2) and (3), where the court assesses (whether by summary or detailed assessment) costs which are payable by the paying party to the receiving party under the terms of a contract, the costs payable under those terms are, unless the contract expressly provides otherwise, to be presumed to be costs which –
>
> (a) have been reasonably incurred; and
>
> (b) are reasonable in amount,
>
> and the court will assess them accordingly.
>
> (2) The presumptions in paragraph (1) are rebuttable. Practice Direction 44 – General rules about costs sets out circumstances where the court may order otherwise.

> (3) Paragraph (1) does not apply where the contract is between a solicitor and client."

26. As a result, on the basis that the Claimants are entitled to their costs pursuant to clause 8.1 of the Fourth Supplemental Agreement, their costs are presumed to be reasonably incurred and reasonable in amount.

27. In case I am wrong in my conclusion that the Claimants are entitled to their costs pursuant to contract, I go to consider what costs the Claimants would be entitled to recover on an assessment on the standard basis. Because the presumption in CPR 44.5 is rebuttable, I consider that it is in any event necessary for me to consider whether the Claimants' costs claim is in any respect unreasonable.

28. CPR r.44.3(2) provides:

> "Where the amount of costs is to be assessed on the standard basis the court will – (a) only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred; and (b) resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party."

29. In assessing the amount of costs, the court should have regard to all the circumstances of the case, as well as the factors set out in CPR 44.4(3). These include the "*conduct of the parties*" (CPR 44.4(3)(a), "*the amount of value of any money or property involved*" (CPR 44.4(3)(b), "*particular complexity of the matter or the difficulty or novelty of the questions raised*" (CPR 44.4(3)(d)); "*the skill, effort, specialised knowledge and responsibility involved*" (CPR 44.4(3)(e)); and "*the time spent on the case*" (CPR 44.4(3)(f)).

30. The Claimants submit that their costs should be assessed at (or near) the figure set out in their statement of costs, because:

    i) the costs incurred (about £97,000) are proportionate to the sum in dispute (around US$ 12 million);

    ii) the profit costs (solicitors' costs excluding disbursements) set out in the schedule already include a substantial discount bringing the total of those costs down by about 30% from £93,386.70 to £63,241.98;

    iii) whilst it might be said that the headline hourly rates exceed those set out in the 2010 Guideline Hourly Rates, such an objection would overlook the discount that has been applied to the profit costs. In any event, it has been recognised that the guideline rates from over a decade ago are not helpful in determining reasonable rates today: see *Ohpen Operations UK Ltd v Invesco Fund Managers Ltd* [2019] EWHC 2504 (TCC) per O'Farrell J at §14. The rates claimed are reasonable in light of the nature of the work and the specialist skill and knowledge required to conduct it;

iv) as can be seen from the schedule of work done on documents, about 70% of the work was carried out by associates or trainees. Moreover, the Claimants are not claiming for any partner time in relation to the preparation for or attendance at the hearing; and

v) the work covered by the statement includes the issue of proceedings, the preparation of particulars of claim, the issue of the applications, the preparation of the supporting evidence and the hearing itself. Although this was on one view a relatively straightforward claim for debts, the Defendants' failure to engage in the proceedings generated additional work and it was necessary for the Claimants to obtain foreign law advice as to the enforceability of an English judgment in Greece.

31. I accept these submissions. I have carefully considered the Claimants' statement of costs, in the sum of £96,384.11. The hearing before me and the evidence filed has given me a good sense of the amount and complexity of work involved in the proceedings. I am satisfied that the hourly rates, the hours spent, the division of work between more and less senior staff, and the disbursements, are broadly reasonable. On the basis that there will be no detailed assessment, and given that I have not received any submissions from the Defendants about the Claimants' costs, however, I do not think it would be right to assess the costs at 100%. A full costs recovery is rare in English court proceedings, even in those cases where costs are assessed on an indemnity basis (which under CPR 44.3(3) involves a somewhat similar presumption to that set out in CPR 44.5 for cases where a party has a contractual entitlement to costs). The summary assessment of costs was not intended to be a 100% costs recovery regime. On the other hand, I do not see any good basis in the present case on which to make any very substantial discount to the sum claimed in order to reflect the uncertainties involved, and I accept that the costs claimed already include a significant discount to the Claimants' solicitors ordinary rates. In all the circumstances I summarily assess the Claimants' costs at £91,500.

32. The Claimants also seek post-judgment interest on their costs, at the rate of 8% per annum as from the date of judgment until payment, pursuant to section 17 of the Judgments Act 1838 (as amended). I consider it appropriate in the present case, where the Claimants are likely to have been out of pocket for considerable periods of time as regards reasonably significant amounts of costs, to order interest on costs pursuant to CPR 44.2(6)(g). The standard Judgment Act rate of 8% is appropriate here because the costs will largely have been incurred in pounds sterling.