Neutral Citation Number: [2021] EWHC 2781 (TCC)

Case No: HT-2018-000335

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

Royal Courts of Justice
7 Rolls Buildings, Holborn, London EC4A 1NL

Date: 19/10/2021

Before :

MR JUSTICE KERR

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Between :

EQUITIX EEEF BIOMASS 2 LIMITED	**Claimant**
- and -	
(1) MICHAEL FOX	**Defendants**
(2) THE ESTATE OF MICHAELA HARRISON-FOX	
(3) DICKINSON ALEXANDER	
(4) DAVID BOTTERILL	
(5) TÖNNIS VAN DER SLUIS	
(6) SARAH-JANE GRAHAM-PEDEL	
(7) CAROLYN JACKSON-SMITH	
(8) THOMAS FOX	
(9) AQUA VENTURES INTERNATIONAL FZE	

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Mr Richard Coplin and Mr Tom Coulson (instructed by **Addleshaw Goddard LLP**) for the **Claimant**
Mr Simon Hargreaves QC and Mr Charlie Thompson (instructed by **Bracewell (UK) LLP**) for the **Defendants**

Hearing dates: 15-18, 22-25 and 29-31 March and 7 May 2021

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Approved Judgment (2) on Consequential Matters

MR JUSTICE KERR

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 12 noon on Tuesday 19 October 2021.

Mr Justice Kerr :

Introduction

1. This supplemental judgment should be read together with my main judgment, handed down on 27 September 2021, which is publicly available: see [2021] EWHC 2531 (TCC). I gave judgment for Equitix for £11 million on its claim and I dismissed the counterclaim.

2. On handing down my main judgment remotely, I adjourned the hand down hearing so that time for any appeal would not start running. I then received helpful written submissions on consequential matters, as well as two witness statements dealing with the financial position of the parties. I am grateful for these further materials.

The Liability Cap

3. The defendants submit that Schedule 5 to the SSA, paragraphs 3.1, 3.2 and 3.3, creates an aggregate limit of £11 million which includes not just damages but also interest on damages, any uplift under CPR 36.17(4)(d), costs, interest on costs and any order to make a payment on account of costs.

4. The defendants submit that the parties cannot be taken to have intended that those ancillary obligations would be at large and uncapped. That would be surprising and inconsistent with the carefully chosen and broad words "in respect of". The cap applies to liability "in respect of" the relevant kinds of breach of warranty claim.

5. Equitix submits that the defendants' interpretation is wrong. It would deprive the court of its discretion enacted by section 51(1) and (3) of the Senior Courts Act 1981 to determine costs questions; and under section 35A to award interest on damages. Furthermore, the language used does not support that construction.

6. Equitix submits that the cap applies to damages only. A "claim" is defined as "any claim under this Agreement for breach of the Warranties" (paragraph 1.2 of Schedule 5). An ancillary order to pay interest or costs would not create a liability "in respect of" the claim itself but in respect of the litigation process to determine the claim. It would not be a liability in respect of a claim "under" the SSA.

7. The court should, Equitix submits, be slow, in the absence of very clear words, to infer an intention to abandon ancillary remedies otherwise open to the parties to a contract. Equitix's construction would not lead to absurdity or unfairness, as the defendants submit; the court would always be astute to use its powers to make ancillary orders that are fair in all the circumstances.

8. I do not accept Equitix's argument to the effect that the defendants' interpretation would mean the liability cap provisions constitute an impermissible ouster clause. It is open to the parties to provide for specific costs or other ancillary consequences of a breach of contract. Contractual interest rates are a good example and are commonplace.

9. To give another example, mortgage contracts frequently provide for indemnity costs in favour of the mortgagee in the event that it needs to enforce the terms of the mortgage. The court's discretion is, in such cases, not ousted. The court would normally exercise it in the manner contractually provided for by the parties.

10. However, I do accept that Equitix's construction is to be preferred and is right. The words "in respect of" are wide. But as Equitix points out, the limitation on liability applies "in respect of" a "claim *under this Agreement*" (my emphasis). I would not say that a claim for interest or costs is a claim made under the SSA itself; it is made pursuant to the court's jurisdiction to make ancillary orders when determining such claims.

11. I also agree with Equitix's point that the phrase "in respect of" is not as wide as a phrase such as "arising out of or in connection with". Still less is there any specific mention of interest or costs in the contractual provisions, as one would confidently expect if important litigation rights were being foregone.

Liabilities of Individual Defendants

12. It is agreed that liability for the £11 million awarded is to be apportioned in such a way that each of the nine defendants is liable only for the amount stated in the table found at Schedule 1 to the SSA. Those amounts will be reflected in my final order. They range from £6,609,337.82, the lion's share to be borne by Aqua Ventures, to £52,687.95, borne by each of the sixth, seventh and eighth defendants.

Interest on Damages

13. It is agreed that Equitix made a relevant Part 36 offer, by a letter dated 25 January 2021, that the offer was not accepted and that it was beaten at trial. With certain qualifications and exceptions, the defendants accept that the normal consequences should flow from successfully bettering the offer at trial.

First period: before taking account of the Part 36 offer

14. To calculate interest on damages, Equitix contends that the first relevant period starts on 5 August 2016, the date the SSA was concluded and its loss (based on the diminution in value calculation) crystallised; and ends on 15 February 2021, 21 days after the date of the Part 36 offer letter.

15. Equitix submits that it was from 5 August 2016 that it was deprived of the use of the money now awarded as damages. The defendants should not complain because they

knew what they were selling and the state of the plant and equipment; while Equitix had to uncover by degrees the full extent of its overpayment for Gaia.

16. The defendants accept that interest will generally run from the date of accrual of the cause of action, but point out that it does not invariably run from that date. They contend that the first period of interest should be awarded not from 5 August 2016 but from 30 October 2018, the date of the claim form.

17. They submit that it would be wrong to regard Equitix's loss as crystallising from 5 August 2016 when their initial pleaded case relied on either loss of operating profit from the Greenergy contract or on a diminution in value approach producing the figure £7,441,064, the total amount Equitix then said was expended on buying the shares in Gaia. Further, Equitix should not be allowed to claim interest from before the date of the claim when its accounts for the period booked no loss.

18. I do not think it would be just to accept the defendants' submissions on this issue and I see no reason for departing from the general rule that interest runs from the date the cause of action accrues. I accept the contention of Equitix that it parted with its money on 5 August 2016 and that it did so in ignorance of the falsity of the relevant warranties. It is therefore right to regard it as having been kept out of its money since then.

19. As explained in my main judgment, a hypothetical open market purchaser aware of the true position would only have parted with £1 million and therefore kept hold of the £13.45 million by which Equitix overpaid. I do not see why Equitix should not be treated as having been kept out of £13.45 million (albeit capped at £11 million) from 5 August 2016.

20. The defendants, using similar reasoning, suggest that the principal amount on which interest should be awarded should be confined to £7,441,064 until 28 May 2020, for until that date Equitix was content, on its pleaded case, to limit the diminution in value basis for the claim to that amount, as an alternative to its unquantified (and unsound) claim for damages based on lost operating profit.

21. I reject that contention. I attribute little importance to the state of the pleaded quantum claim at different times during the evolution of the litigation. It is not unusual for the presentation of the claim to evolve as the claim proceeds, especially In a complicated case such as this. The parties are continuously updating their knowledge of the documents, of witness evidence, of the assessment of the experts and of the product of legal research and a consequent need to refine the pleadings.

22. I will therefore award interest on the damages of £11 million from 5 August 2016 down to 15 February 2021. The parties are now agreed that the rate of interest should be 2 per cent per annum over base rate. To be clear, the base rate applicable will be the Bank of England base rate from time to time during the relevant period.

Second period: after taking account of the Part 36 offer

23. The second relevant period for the purpose of interest on damages starts, according to Equitix, from 16 February 2021 (the 22nd day after the Part 36 offer) and should run to the date of payment. The defendants, however, argue that the enhanced rate of interest

(consequent on the Part 36 offer having been beaten) should run only from 22 March 2021.

24. They say that it was not until 22 March 2021 when Ms Hill's second report was served, that they were able to make an informed assessment of the offer. Further, interest at an enhanced rate should be awarded only on the £5,471,093.60 Equitix offered to accept in full and final settlement of the claim and counterclaim: it would be unjust to award interest on an amount more than twice what Equitix was willing to accept.

25. I reject the defendants' contentions. As to the first, parties frequently face the pressure of a Part 36 offer without all pieces of the jigsaw in place. Much of the purpose of Part 36 would be lost if it were otherwise; the costs which the regime was intended to prevent being incurred, would have to be incurred before the normal consequences of the offer could flow. A well judged Part 36 offer is often based on inspired and educated guesswork, which the other party must also display when deciding whether to accept it.

26. As to the second contention, it is another ordinary consequence of the Part 36 regime that enhanced rate interest is payable on the amount actually recovered, not on the amount the other party would have settled for. Part of the incentive to settle is the "upping the ante" consideration that a recipient of the offer may pay dearly for not accepting it, if it is beaten at trial.

27. It remains to consider the appropriate rate during the second period. It must not exceed 10 per cent over base rate (CPR 36.17(4)(a)). Equitix submits the rate should be 10 per cent, apparently including base rate. The defendants stress that 10 per cent over base is not a default rate; the rate should be 4 per cent over a base rate of 0.1 per cent.

28. The defendants point to the short period between the offer and the judgment; and to the fact that the information available to them was incomplete until 22 March 2021. Procedural disputes were still ongoing and the expert evidence (including some defence expert evidence) was not all served by then.

29. Equitix counters that the short period between offer and trial is already catered for by "the fact that the period over which interest is to be paid at the uplifted rate is that same short period".

30. However, the enhanced rate continues during the period between trial and judgment, up to the date of this supplemental judgment and beyond until payment. I am satisfied that 10 per cent is too high, having regard to the guidance in *OMV Petrom SA v Glencore International AG* [2017] EWCA Civ 195; [2017] 1 WLR 3465.

31. Applying the guidance in that authority, I would not say the defendants took obviously bad points or behaved unreasonably in deciding, despite the offer, to pursue their defence; nor that refusing to negotiate did anything worse to Equitix than obliging it fight the case in court.

32. Weighing the various factors in the balance and finding nothing particular untoward in the way the case was conducted, I will opt for a figure towards the lower to middle part of the spectrum and award interest on the damages of £11 million from 16 February 2021 onwards at the rate of 5 per cent over the current base rate, i.e. 5.1 per cent.

Uplift: Additional Amount

33. The parties are agreed that there should be an award of an additional amount of £75,000 pursuant to CPR rule 36.17(4)(d).

Costs and Interest on Costs

34. There is no dispute that, subject to special orders in consequence of the Part 36 offer, it is appropriate to make the normal order that costs follow the event. I will therefore order the defendants to pay Equitix's costs of the action on the standard basis in respect of the period down to and including 15 February 2021.

First period: before taking account of the Part 36 offer

35. In respect of the period from 5 August 2016 to 15 February 2021, by parity of reasoning with my decision above on the rate of interest on damages, I award interest on costs at the same rate, 2 per cent over base rate from time to time during that period.

Second period: after taking account of the Part 36 offer

36. In line with my reasoning above, I award Equitix its costs on the indemnity basis from 16 February 2021 onwards.

37. Again applying the same reasoning as explained above, I will award interest on those costs (from 16 February 2021 onwards) at the rate of 5 per cent over the current base rate, i.e. at 5.1 per cent.

Payment of Account of Costs

38. Equitix seeks a payment on account of its costs of £1.25 million. The defendants do not demur. I will make that order and direct that the payment must be made by 4pm on 16 November 2021.

Permission to Appeal

39. The defendants seek permission to appeal on four grounds. They assert that each ground has a real rather than fanciful prospect of success. Permission is opposed by Equitix, on the basis that none of the grounds crosses that threshold.

40. The first ground is misconstruction of paragraph 15.1 of Schedule 5 to the SSA. I grant permission to appeal on that ground. It raises an issue of construction and as such of law.

41. I do not accept the submission that it is academic because of the court's findings to the effect that Equitix and Gaia did not act unreasonably. If I had held that paragraph 15.1 imposed a standard higher than that of the common law doctrine of mitigation of loss, those findings could have been different and more favourable to the defendants.

42. The second ground on which permission is sought is that the court should have given credit for two amounts, the sum of £2 million placed in escrow and the sum of £7,594,960, both of which were elements of deferred consideration which, the defendants say, will now not be earned through Gaia's performance.

43. Those sums, say the defendants, "had not and now never would be paid, in circumstances where the contractual regime governing the deferral of the consideration was precisely concerned with factors that would (and on the Judge's findings did) cause diminution in value, including production of steam lower than the Agreed Heat Demand".

44. I find that line of reasoning difficult to follow, as indicated at [369] in my main judgment. While I accept that assessing damages on a wrong basis is an error that the Court of Appeal would be willing to correct, I do not think the contention that I did so has a real prospect of success; especially since the defendants' expert did not seek to include the two sums in the valuation calculation.

45. The third and fourth grounds are challenges to findings of fact, as the defendants acknowledge. A finding of fact is not unassailable on appeal, but (as Equitix reminds me) "an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified" (*Henderson v Foxworth Investments Ltd* [2014] 1 WLR 2600, per Lord Reed JSC (as he then was) at [67].

46. The third ground concerns the court's treatment of Equitix's and Gaia's accounts and the finding that they were not a reliable guide to the value a hypothetical purchaser with knowledge of the true position would have placed on Gaia's shares. The defendants criticise that finding as unsupported by evidence, adequate findings of fact or sufficient reasoning.

47. Equitix submits that it was plainly open to the court to reject the accounts deployed by the defendants as a reliable guide; the defendant's expert, Mr MacGregor, did not attach much importance to them, any more than did Ms Hill, the expert instructed by Equitix. They were first relied on during the trial rather than being deployed any earlier.

48. The evidential value of the accounts was a matter for the experts and the court to assess, in the light of questions asked about them, particularly of Mr Cashin, Ms Hill and Mr MacGregor, and their answers. They did not seem to me to elevate the amount a hypothetical purchaser would have been willing to pay for Gaia's shares rather earlier in the history, on 5 August 2016. I will refuse permission to appeal on the third ground.

49. The fourth and final ground also involves a finding of fact, as the defendants accept. It needs reordering to understand it properly. It is said that the court:

> "failed to differentiate between diminution in value arising from the breaches of warranty of which the Claimant had actual knowledge … from [sic] diminution in value arising from the breaches of warranty of which the Claimant did not have actual knowledge."

50. The breaches of which Equitix is said to have had actual knowledge are:

> "that the Plant could not meet the AHD because of (a) fluctuating Greenergy demand and (b) the Interterminals issue, such that it required the installation of (i) control valves (ii) kerosene boilers and (iii) a steam accumulator in order to address those issues".

51. The judge, it is said:

> "did not take into account in arriving at his award the proposition (accepted in terms by the Claimant's forensic accountant) that diminution in value can only be caused by a breach of warranty if, first, the price paid assumed that the warranty was true."

52. Equitix submits that this ground is hopeless, as it is:

> "premised on the suggestion that the Court made findings that the Claimant had actual knowledge of certain of the breaches of warranty alleged, in circumstances in which the Court actually found the opposite".

53. I agree that this ground does not have a real prospect of success. Knowledge that the plant had not historically been meeting the AHD is not the same as knowledge that the plant's condition was such that it was incapable of being used for the purpose for which it was then being used. The defendants impermissibly elide the two. I refuse permission to appeal on the fourth ground.

54. I will extend time for appealing to the Court of Appeal and for applying for permission to appeal on the three grounds for which I have refused permission. The appellants' notice must be filed by 4pm on 16 November 2021.

Stay of Execution Pending Appeal

55. The defendants seek a stay of execution pending appeal on the ground that Equitix is "balance sheet insolvent" and would be unable to restore to the defendants monies recovered from them, should the Court of Appeal correct the court's decision and reverse the defendants' liability in damages and for interest and costs.

56. Equitix opposes a stay on the grounds that it has been kept out of its money for over five years and is likely to face serious difficulties of enforcement, particularly in relation to Aqua Ventures, which is liable for about 66.2 per cent of the total of £11 million and is located in the Fujairah Free Zone in the United Arab Emirates.

57. It offers, through its solicitors, an undertaking to hold in their client account any monies recovered, pending the outcome of any appeal. Alternatively, Equitix submits that a stay should only be granted on terms that the defendants' respective shares of the total judgment sum, or a substantial proportion of those shares, should be paid by each individual defendant into court.

58. I have been referred by the parties to the usual authorities. I am conscious that a stay is the exception rather than the rule. I have taken into account the rival arguments and I do think I need to undertake a balancing exercise and decide where the least risk of irremediable harm lies. In my judgment, the right balance is as follows.

59. I will not order a stay but I will accept the undertaking of Equitix's solicitors to hold any monies recovered from them in their client account, to the court's order, pending the outcome of any appeal, or until further order of the Court of Appeal. The undertaking will lapse in the event that an appellant's notice is not filed by the deadline.