EASTERN CARIBBEAN SUPREME COURT TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE COMMERCIAL DIVISION

CLAIM NO. BVIHC (COM) 2013/0099 BETWEEN:

STEPHEN LESLIE PLANT

Claimant

and

PICKLE PROPERTIES LIMITED

Defendant

Appearances:

David Welford of Maples and Calder for the Claimant Andrew Willins of Appleby for the Defendant

2016: June 16; 17

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JUDGMENT

Claimant sued to recover from defendant, by way of contribution, one-half of monies claimant paid to settle liability of claimant and defendant to bank under joint and several limited guarantee, governed by English law, that secured a loan facility.

After bank sued claimant, claimant settled with bank, paying to resolve liability of himself and defendant - Judgment awarded defendant one-half of sums paid to bank based on equitable compensation and an agreement found tohave been made between claimant and defendant, and interest on all contribution sums, which was to be determined by coutt following submissions.

Held: Claimant awarded compound interest.

[1] LEONJ [Ag.]: The Claimant Stephen Plant **("Plant")** sued to recover from the Defendant Pickle Properties Limited **("Pickle"),** a BVI company, one-half of monies he paid to settlea liability of both of them undera joint and several limited guarantee **("Guarantee")** to Anglo Irish Asset Finance pie (later known as IBRC Asset Finance pie) **("Bank").**

[2] The Guarantee, given by Plant and Pickle in August 2007, was of a loan facility from the Bank fora company owned 50% for the benefit of the family of Steven PaulSharp and 50% for the benefit of Plant and his family.

[3] After the Properties were sold in early 2012, the Bank sought payment under the Guarantee from Plant and Pickle. Ultimately Plant paid a total of £625,000 to the Bank to resolve the Bank's claim against him on the Guarantee and both his liability and Pickle's liability under the Guarantee 1•

[4] Plant claimed and was awarded against Pickle, in a Judgment in this action dated 16 June 2016, one-half of the £693,580, namely £346,790, that hepaid to the Bank to settle the Bank's claim against him, and the liability of both of them to the Bank, under the Guarantee, plus interest on that sum.2

[5] The finding of liability in the Judgment was based on, first, the equitable right ofa guarantor to contribution froma co-guarantor3, and second, an express agreement, which this Court found existed[4], both of which the Court held provided Plant with a right to the contribution he claimed.

[6] This Court held in the Judgment that Plant is entitled to interest on the sums for which he is entiHed to be compensated by Pickle.s

[7] With respect to Pickle's liability to indemnify Plant pursuant to their agreement, this Court held that interest is impliedly covered by the intent *of* the agreement.6

1 Settlement Agreement between Bank and Plant dated 12 April 2013.

2 Judgment, paragraph 148.

3 Judgment, paragraphs 93 and 101-102. 'Judgment, paragraphs 107 -114.

5 Judgment, paragraphs 103 - 105 'Judgment, paragraph 114.

[8] In so holding, this Court referred to the Law of Guarantees (Sixth Edition)7 which reads, in part, as follows:

Interest 12-014

The surety can recover interest from his co-surety on the sum due for contribution: interest will run from the date on which the surety paid the creditor more than his due share. It is immaterial that the principal debt did not carry interest.

[9] This Court ordered that the interest should run to the date of the Judgment from the respective dates of payment by Plant to the Bank, namely on one-half of the sum of £500,000 (being 5 October 2012)[8] and on one-half of the sum of £125,000 (being 25 September 2013)[9], and to Clyde& Co, being one half of the sum of £68,579.09 (being 26 April 2013) [10].

[10] The order provided that if the parties could not resolve the interest rate or the calculations of interest, this Court would determine same. They could not resolve the interest rate. The issue was the subject oaf hearing on 16 June 2016 following the handing down of the Judgement

Submissions

[11] The parties' counsel filed written submissions on the interest issue in the Claimant's Submissions on Handing Down of Judgment dated 16 June 2016 and the Defendant's Skeleton Argument for Hearing on 1611! June 2016 and made oral submissions to the Court.

Interest Pleading

[12] Pickle's first position was that the claim for interest was not pleaded as it should have been and that it was only on the afternoon of 15 June 2016 that the Plant finally confirmed his position in relation to interest.

[7] Andrews and Millett, The Law of Guarantees, 6th ed. **("Andrews and Millett")** 12-014.

[8] Plant Witness Statement 1, paragraph 65.

[9] Plant Witness Statement 1, paragraph 67.

[10] Clyde& Co- Billing History for Plant (Matter: Bank -1242210). Almost all payments were made on 26 April 2013, except for one made on 18 July 2012 and two made on 19 July 2013. Efficiency and simplicity dictates the use of 26 April 2013, and using that date is not materially unfair to either party.

[13] CPR 8.6(4) states that a claimant who is seeking interest must say so expressly in the claim form

and include in the claim form or statement of claim details of the basis of entitlement, rate and period for which it is claimed.

[14] The Amended Claim Form dated 30 May 2014 stated that Plant claimed "(3) Costs and interest." The

Amended Statement of Claim of the same date stated the same thing, that Plant claimed "31. Costs

and interest." The Re-Amended Defence did not address interest specifically but simply denied (in paragraph 30) that "the Claimant is entitle to the said or *any* relier.

[15] Plant's position was, first, that this Court has already determined an entitlement to interest in the Judgment (as referenced above). This Court agrees.

[16] The Judgment is clear that interest was ordered to be paid by Pickle to Plant ("[148] 2. Pickle shall pay to Plant interest at rate to be agreed between the parties, or determined by this Court following submission by the parties ...").

[17] While this Court is not functus, there was no properly founded application to reopen the trial on the

question of interest, nor does it appear that an application by Pickle in that regard could meet the applicable test.

[18] Plant's second position was that the question of interest in principle was the subject of argument and evidence at trial, citing his trial skeleton ("51. Mr. Plant is also entitled to interest on the contribution he seeks *from* Pickle ...") and closing submissions ("101. Mr. Plant also seeks interest on the contribution he seeks from Pickle pursuant to the inherent jurisdiction of the Curt and/or as part of his claim to an equitable contribution from Pickle on ...").11, and the expert Affidavit of Richard Millett QC regarding English

law, sworn 30 July 2014 and provided to Pickle in the exchange of experts' report (likely late 2014).

[19] Mr. Millett had identified interest as an issue and then opined on it:

11 While Plant also referred to the Pickle's Closing Submissions at trial, paragraph 88, that actually appears to deal witha denial ofa right to contribution of monies Plant paid to the Bank in respect of the Bank's interest claim.

(iv) Issue (iv): Does Mr. Plant have the right to claim interest from Pickle on any sums which Pickle is ordered to pay to Mr. Plant for the period when Mr. Plant made the payments to IBRTC and the date on which judgment is given against Pickle?

46. The answer to this question is yes. It is well established that a guarantor is entitled to recover interest form his co-guarantor on the amount that the guarantor is entitled to by way of contribution, and that interest will run from the date on which the surety paid the creditor more than his due share ...

[20] Pickle never objected at trial to Plant's submissions regarding interest or to this evidence, and to the extent there was any merit in its pleading point, it has waived the matter by its continued silence.

[21] In any event, even based only on the pleading, Pickle failed to take the objection which it might have been able to lake under CPR 8.6(4). What it could have done is move to strike the pleading that claimed interest, stated in its defence that Plant is not entitled to claim interest without having complied with the rule, or sought particulars of the interest claim.

[22] But in any event, the pleadings were overtaken first by Mr. Millett's evidence, then by Plant's trial skeleton.

[23] Pickle's post-trial reference back to the pleadings following what was contained in the evidence and submissions makes timely what was stated recently in the Australian judgment of His Honor Justice White in Vernerv Giannaros & Ors [2016] NSWSC 242 (4 March 2016):

[5] In *my* view, the contemporary role of pleadings has to be viewed in the context of contemporary case management techniques and pre-trial directions. In this Court, those pre-trial directions will almost invariably include; firstly,a direction for the preparation ofa trial bundle identifying the documents that are to be adduced in evidence in the course of the trial; secondly, the exchange well prior to trial of non expert witness statements so that non-expert witnesses will customarily give their evidence-in-chief only by the adoption of that written statement; thirdly, the exchange of expert reports well in advance of trial and a direction that those experts confer prior to trial; fourthly, the exchange of chronologies; and fifthly the exchange of written submissions.

[6] Those processes leave very little opportunity for surprise or ambush at trial and, it is *my* view, that pleadings today can be approached in that context and therefore in a rather more robust manner, than was historically the case; confident in the knowledge

that other systems of pre-trial case management will exist and be implemented to aid in defining the issues and appraising the parties to the proceedings of the case that has to be met.

[7] In my view, itfollows that provided a pleading fulfils its basic functions ofidentifying the issues, disclosing an arguable cause of action or defence, as the case may be, and appraising the parties of the case that has to be met, the Court ought properly be reluctant to allow the time andresources of the parties and the limited resources of the Court to be spent extensively debating the application of technical pleadings rules that evolved in and derive from a very different case management environment.

[8] Most pleadings in complex cases, and this is a complex case, can be criticised from the perspective of technical pleading rules that evolved in a very different case management environment. In *my* view, the advent of contemporary case management techniques and the pre-trial directions, to which I have referred, should result in the Court adopting an approach to pleading disputes to the effect that only where the criticisms of a pleading significantly impact upon the proper preparation of the case and its presentation at trial should those criticisms be seriously entertained.

Rate of Interest

[24] Plant submitted that in equity the Court has a discretion as to the rate of interest, the purpose of interest in a case such as this in which a guarantor sought contribution from a co-guarantor being to compensate the claimant for the loss of the use of the sums paid by him which should have been paid by the defendant, and to reflect the improper benefit to the defendant of his failure to pay.12

[25] Pickle's submissions were to like effect, citing Andrews and Millett as follows:

... the person to be indemnified should be put in the same positon as if the man who had contracted to indemnify him had in fact done what he had contracted to, that is, paid the money at the proper time.

[26] Under the contractual basis for interest, as set out in the Judgment, the focus would be limited to Plant's Joss only.

12 McGregor on Damages, 19'h ed., paragraph 18-10; Andrews and Millett, paragraph 12-001 and 12-014.

[27] Pickle went on to submit Plant needed to prove his loss, which he did not do, such as by providing evidence of the use to which he would *have* put the money, his banks, and the annualised rate of return with those banks. For completeness, it should be noted that Pickle led no evidence on interest either, including not on the uses to which he put or did not put the monies on which this Court has ordered interest is payable.

[28] The Court declined an invitation by counsel for Plant to receive additional evidence on the interest issue such as Plant's interest costs or other damages he may have suffered by being out of pocket on the sums for the relevant periods, or in the case of the equitable claim, also Pickle's benefit from having the sums.

[29] Plant submitted that it is within the Court's equitable jurisdicfon to determine an appropriate rate in the absence of evidence. This Court agrees, and also is of the view that it should establish the contractual rate using what evidence and submissions it has available.

[30] By not leading evidence of his loss, Plant has forgone the opportunity of establishing that he suffered any particular compensable loss beyond the basic interest loss anyone would suffer from not having the use of money during the applicable periods. Also he has forgone the opportunity of establishing the Pickle made a greater profit from its use of the monies during those periods.

[31] Plant asked for 8% compounded annually.

[32] Plant did not provide any basis for the rate (leaving aside compounding for the moment), beyond his counsel saying that he was instructed by Plant that 8% reflected his loss. While that *may* be the case, as this Court stated during the hearing, something more to support it would have been required, and that basis on introducing a rate provided Pickle with no opportunity to challenge it

[33] Pickle submitted that the appropriate measure of interest would be "the rate of return which would have been available to Sterling lime deposits with UK banks" and that it isa matter of public record that between 2012 and 2016 the monthly average of UK resident financial institutions' interest rates, payable to private companies, ranged between 0.73% and 0.57% (as set out in an extract from the Bank of England's statistical data page that was provided to the Court).

[34] Plant submitted in support of a higher rate that he is an individual and likely had a higher cost of borrowing (although the Court notes that there is no evidence that he borrowed during the relevant period); that secured lending rates are not relevant; and that the relationship between the parties was a commercial one.

[35] Counsel for the parties agreed that post-judgment interest in this jurisdiction is 5% although neither submitted that it is in any *way* determinative of interest before judgment, and it was noted by Pickle that the rate is fixed asa matter of policy but does not necessarily reflect at any point in time actual commercial interest rates,1 3 There is no statutory provision in this jurisdiction for pre-judgment interest.14

[36] This Court finds, having regard to the foregoing, that it is just and equitable in the circumstances of this case for interest to be at 3.5%.

Compound Interest

[37] Plant sought compound interest on the basis that simple interest does not fully compensate for the

loss caused toa person by being kept out of money nor does it reflect the benefit to the wrongdoer of having had the use of it.

[38] While traditionally in equitable compensation, compound interest *may* be awarded, two cases from

this jurisdiction were cited by Pickle that involved trustee or defaulting fiduciaries only being required to pay simple interest1s

[39] However, each case will tum on its facts and the Court's view, in the exercise of its discretion, of what it equitable compensation in the particular circumstances.

13 Claymore Services ltd v Nautilus Properties Ltd [2007] EWHC 805 (ITC), paragraph 68; Reed Executive piev Reed Business Information Ltd [2004] EWCA Civ 887; [2004]4 All E.R. 943 (CA).

14 Unlike Section 35A of the Supreme Court Act 1981in England and Wales.

15 Malitskyv Adamovsky, BVIHC(COM) 2-12/0051, 1 October 2014, and Appleby Corporate Services (BV/) limited v Citco BVIHC(COM) 2011/0156, 20 January 2014, paragraphs 119 - 120, both judgments of the Honourable Justice

[40] In damage awards, historically in the English common law there has been a reluctance to compensate a claimant for the loss of use of money by awarding compound interest. It has never been a principled approach to compensation. We carry a lot of baggage from days of old and in the case of interest, there has been endless baggage around the morality of interest. In damages cases, interest should be just about compensation.16

[41] In Man Nutzfahrzeuge AG and others v Freightliner Ltd and others [2005] EWHC 2347 (Comm) **("Freightliner"),** paragraph 321, Lord Justice Moore-Bick observed that "an award of simple interest does not fully compensate the injured party for the loss caused by being kept out of his money nor does it adequately reflect the benefit to the wrongdoer of having had the use of **it."**

[42] The judgment of the Supreme Court of Canada in Bank of America Canada v. Mutual Trust Co., 2002 SCC 43 **("Bank of America")** is compelling. The Court pointed out that although both simple interest and compound interest measure the time value of the initial sum of money, the principal, compound interest reflects the time-value component tointerest payments while simple interest does not. Simple interest makes an artificial distinction between money owed as principal and money owed as interest while compound interest treats a dollar as a dollar and is therefore a more precise measure of the value of possessing money for a period of time. The Court explained as follows:

(4) Interest as Compensation

36 In The Law of Interest in Canada (1992), at pp. 127-28, M.A. Waldron explained that the initial theory underpinning an award of judgment interest was that the defendant's

conduct was such that he or she deserved additional punishment. The modern theory is that judgment interest is more appropriately used to compensate rather than punish. At pp. 127-28, she wrote:

Compensation is one of the chief aims of the law of damages, but a plaintiff who is successful in his action and is awarded a sum for damages assessed perhaps

16 Another example of "baggage from days ofold" existed around service of court documents. The UK Supreme Court tackled that baggage from days of old and set it aside In Abela v Baadarani [2013] UKSC 44, [2013] 4 All ER 119, [2013] 1 WLR 2043, pointing out that service of court process in today's world is to **be** viewed differently than It once **was. Lord Sumption wrote, "Litigation between residents of different states is a routine incident of modern** commercial life." [p. 2062, line HJ In addressing service out of the jurisdiction he noted that "[t]he decision is**generally a pragmatic one in the interests of the efficient conduct of litigation in an appropriate forum". Service is** to give a defendant "notice of the commencement of proceedings which [Is] necessary to enable the defendant to **decide whether and how to respond in his own interest"; and see in this jurisdiction: Storca lntertrans Corp v Minco** Enterprises limited, BVIHC(COM) 2015/0096, Judgment, 3 September 2015.

years before but now payable in less valuable dollars finds it quite obvious that he has been shortchanged. Equally obviously, payment of interest on his damage award from some relevant date is one way of redressing this problem.

The overwhelming opinion today of Law Reform Commissions and the academic community is that [page617] interest on a claim prior to judgment is properly part of the compensatory process. [Citations omitted.]

37 After acknowledging that historically compound interest was not available at common law, Waddams [S.M. Waddams, The Law of Damages (3rd ed. 1997)]. at p. 437, concludes that an award of compound interest should be available to courts so as to allow them to award full compensation to a plaintiff.

[T]here seems in principle no reason why compound interest should not be awarded. Had prompt recompense been made at the date of the wrong the plaintiff would have had a capital sum to invest; the plaintiff would have received interest on it at regular intervals and would have invested those sums also. By the same token the defendant will have had the benefit of compound interest.

38 Although not historically available, compound interest is well suited to compensate a plaintiff for the interval between when damages initially arise and when they are finally paid.

[43] Other important principles set out in the Supreme Court of Canada judgment are the following:

a. There has long existed an equitable jurisdiction to award compound interest [para. 41-42];

b. The equitable jurisdiction to award compound interest *'has traditionally been exercised in cases of, inter a/ia, wrongful retention* of *funds'* [para. 52];

c. There is a right at common law to award compound interest [para. 43];

d. Compound interest provides a more accurate model of the time value of money [para. 24]; and

e. Compound interest is the norm in the commercial systems of the western world [para. 24].

[44] The Court also noted (at paragraphs 43 - 44) the point made above regarding old baggage, stating that recent developments in the common law have moved towards a recognition that compound interest is an 'economic reality" which is not "usurious" or "involve prohibitively complex calculations".

[45] Counsel for Pickle referred to the 2007 Court of Appeal judgment in Dominica Agricultural and Industrial Development Bank v. Mavis Williams (No 2), 2005/20, an appeal from Dominica in an employment case. Justice of Appeal Barrow stated (at paragraph 60) that 'in the absence of express agreement our courts do not award interest on debt or damages and they do not award compound interest except in the case of trustees profiting from a breach of trust. Counsel for the respondent properly conceded in their written submissions that the law of Dominica does not support an award of compound interest on damages." Cited in support were Jefford v Gee [1970] 1 All ER 1202 at 1205(9) and Westdeutsche v Islington BC [1996] 2 ALL ER 961.

[46] This Court takes the reference to "trustees profiting from a breach of trust" as an abbreviated reference to equitable compensation being able to include compound interest, as discussed above.

[47] Given the concession of counsel that "the law of Dominica does not support an award of compound interest on damages", it appears that the issue was not fully canvassed, and in any event, the judgment in that regard, dealing with the law of Dominica it appears, would be *obiter*.

[48] In this jurisdiction, in which international and other commercial cases are a significant factor, compensation should and can take account of the commercial realities recognized in Freightliner and Bank of America. It is important that this jurisdiction do so, particular in commercial cases of which this was one.

[49] Accordingly, this Court concludes that it is just and equitable in relation to equitable compensation, and correct under the agreement between them, as found by this Court, that the interest payable by Pickle to Plant should be compound interest.

ORDERS

[50] accordingly, for the reasons set out above in this Judgment, this Court orders as follows:

I. The interest that Pickle shall pay to Plant, as ordered in the Judgment, on the three components of the sum of £346,790 to the date of the Judgment from the respective dates of payment by Plant to the Bank of the sum of£500,000, being 5 October 2012, and the sum of £125,000, being 25 September 2013, and to Clyde & Co of the sum of £68,579.09, being 26 April 2013 shall be interest at the rate of 3.5% per annum, compounded annually on the anniversary date of the payment by Plant of each of the three sums.

2. The costs of the hearing on interest issues and of the handing down of this Interest Judgment shall form part of the costs of the Claim awarded pursuant to the Judgment.

Justice Barry Leon

Commercial Court Judge

17 June 2016