Neutral Citation Number: [2020] EWHC 1908 (Ch)

Case No:PT-2019-MAN-000020

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
TRUSTS AND PROBATE LIST

Date:17 July 2020

Before:

His Honour Judge Halliwell sitting as a Judge of the High Court

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Between:

LIV Bridging Finance Limited

Claimant

- and –

EAD Solicitors LLP (in administration)

Defendant

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Mr Martin Hutchings QC (instructed by **Gunner Cooke LLP**) for the **Claimant**
Mr Scott Allen (instructed by **DAC Beachcroft LLP**) for the **Defendant**

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APPROVED JUDGMENT (2)

I direct that, pursuant to CPR PD 39A Para 6.1, no official shorthand shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

HHJ Halliwell:

(1) Introduction

1. This is my judgment in relation to the issue of interest and all consequential matters, following my main judgment ("the Main Judgment") handed down on 18th June 2020. Following the Main Judgment, the parties have each delivered written submissions.

2. In this judgment, I shall use the same nomenclature as the Main Judgment.

(2) Interest

3. LIV is entitled to equitable interest. To achieve *restitutio in integrum*, this should be based on the cost of borrowing and it is common ground that interest

should thus be calculated at 1% above the base rate from the dates upon which, in breach of trust, the trust monies were first paid away.

4. However, there remains an issue whether LIV should be awarded simple or compound interest.

5. In his written submissions, Mr Allen maintains that LIV should be limited to simple interest on the basis that the claim is not based on fraud and it is not contended that EAD has made profits from its breaches of trust. He relies upon the observation of Lord Brown-Wilkinson, in *Westdeutsche Bank v Islington LBC [1996] 2 WLR 802* at *825,* that "in the absence of fraud courts of equity have never awarded compound interest except against a trustee or other person owing fiduciary duties who is accountable for profits made from his position."

6. In his written submissions, Mr Hutchings QC submits that it is now appropriate for the courts to take a wider view. In doing so, he refers to the observations of Lord Mance in *Sempra Metals v Inland Revenue [2008] 1 AC 561 (Para 239)*, that "…in claims against fiduciaries, the court may in its discretion award interest on a simple or compound basis, as it concludes the circumstances require". In any event, Mr Hutchings relies on my own conclusion, in Paragraph 13 of the Main Judgment, that Mr Gorman is "likely to have colluded" in Mr Ware's frauds and that EAD has failed to account as a fiduciary.

7. Notwithstanding Mr Hutchings's submissions, I shall limit the award to simple interest. LIV's claim and its pleaded causes of action were not founded on fraud. It also forms no part of its case that EAD is liable to account for profits. LIV does not maintain that EAD retained or otherwise profited from the money and its case is certainly not advanced on that basis. These are the classic circumstances for a claim for compound interest in Equity. Lord Mance's observations in *Sempra Metals* suggest the courts might have a wider discretion to award compound interest than previously thought. However, in my view, it remains necessary for LIV to show it has a case for compound interest on grounds similar or closely analogous to the historic principles identified by Lord Brown-Wilkinson. It has not done so.

8. LIV is thus entitled to simple interest only. It is agreed that this amounts to the sum of £12,838.01, to the date of judgment, 18th June 2020.

(3) Costs

9. LIV seeks the costs of its application for summary judgment. Under the general rule in *CPR 44.2(2)(a),* it submits that it is entitled to its costs as the successful party and there is no case for an issue based order since it has succeeded on all the substantive issues.

10. Mr Allen submits that it would be excessively simplistic to characterise LIV as the successful party and calls for more nuanced approach. He points out that LIV has only succeeded in its application for summary judgment in respect of two out of the four loans encompassed in the application. When quantified, he submits that, as at 23rd April 2020, the claim was valued at £893,704.34 and with accumulated interest to 18th June 2020 at a daily rate of £425.14, LIV's full claim was for £917,512.18. He thus submits that, having achieved no more than 28.6% of the claim, LIV can hardly be described as the successful party.

11. Alternatively, Mr Allen submits that I should adopt an issue based approach under *CPR 44.2(4)(b)*. If not, I should at least take into consideration, under *CPR 44.2(5)(b)* and *(c),* LIV's conduct in raising or pursuing allegations or issues on which it did not succeed. In this respect, he relies, in particular, on LIV's claim for lost contractual interest.

12. When addressing the manner in which LIV's case has been pursued, Mr Allen submitted that the application for summary judgment was vacated and re-listed twice prior to the hearing before me owing to inadequate time estimates, on LIV's behalf, at the time the application was successively listed for hearing. He also submitted that a substantial amount of the material filed in support of the application was irrelevant or inadmissible.

13. In my judgment, LIV is the successful party within the meaning of *CPR 44.2(a)* and is thus *prima facie* entitled to its costs. Whilst it is true that it has ultimately recovered significantly less than the maximum value of its application, its application encompassed alternative claims for an interim payment on account of compensation or, more generally, an account of the amounts due. With good reason, Mr Hutchings QC submits that, had LIV succeeded on the alternative claims, it would have achieved a less favourable outcome than ultimately achieved. In substance, LIV has succeeded in establishing liability in respect of

two out of four loans and, in doing so, obtained judgment for the full amount advanced under these loans. It has failed to establish its claim in respect of the other loans but this is essentially attributable to issues of causation, loss and the quantum of its claim rather than breaches of duty; in particular, it arises from the failure of LIV's claim for contractual interest – an item effectively conceded during the course of the hearing itself – and the overall value of LIV's receipts taken into consideration when quantifying its losses.

14. Conversely, I am advised that, whilst EAD has made no offer to compromise the application, LIV has made a *Calderbank* offer in which it offered to compromise the application on terms providing for EAD to consent to judgment on all four loans with damages to be assessed subject to an interim payment of £250,000. It cannot be said that LIV has obviously achieved a better outcome than the offer, not least because it was seeking, in the offer, to obtain the costs of the whole action subject to an interim payment of £150,000. However, it is close to the outcome ultimately achieved.

15. However, I am satisfied that the issues in relation to contractual interest and the accounting issues in respect of the amounts received by LIV in respect of the First and Fourth Loans related to discrete aspects of the case which will have increased the costs of and incidental to the application, albeit to a moderate extent only. Moreover, in my judgment, LIV's claim to contractual interest was misconceived from the outset. Having regard to *CPR 44.2(4)(b)* and, more generally, *44.2(4)(a)* and *44.2(5)(b)*, I am satisfied that I should disallow 12.5% of LIV's costs based on my assessment of the amount of time that is likely to have been expended on these aspects of the case in the preparatory work on documentation and at the hearing before me.

16. I am also satisfied – again having regard to *CPR 44.2(5)(c)* – that, in an appropriate case, it is open to the Court to make an order disallowing the successful party's costs or indeed requiring the successful party to pay the unsuccessful party's costs owing to matters such as inadequate time estimates for hearings and the preparation of witness statements. This is particularly so where, as a result of such matters, the unsuccessful party un-necessarily incurs costs. However, where a proportion of the successful party's costs are disallowed, it will remain necessary for the Court to consider whether they were

reasonably incurred at the assessment stage under *CPR 44.3*. Unless the issue is carefully addressed, there is thus a measure of risk that a successful party will be penalised twice owing to the same considerations.

17. Mr Allen is correct in his observations that prior to the hearing before me, it was repeatedly necessary to vacate and re-list the hearing of the application owing to the provision of inadequate time estimates on the part of LIV's solicitors and, more significantly, that substantial parts of the material on which LIV relied in support of the application were irrelevant or inadmissible. This includes the repeated use of witness statements as a vehicle for submissions rather than the delivery of factual evidence and the incorporation of evidence which was not material to the relevant issues. EAD will have been put to un-necessary expense in dealing with these matters. Whilst it has not provided particulars, I shall draw inferences from the information available to me and, to reflect this issue, I shall disallow a modest proportion of LIV's costs, namely 5%, on the basis that it will remain open to EAD to take the point, on assessment, that by reason of the matters on which Mr Allen relies, LIV's own costs have not been reasonably incurred or are unreasonable in amount. Proportionality will also remain in issue. For the sake of completeness, I should emphasise that LIV's case before me on 18th-19th May was well prepared and presented. It was also focused and measured and cannot be subject to reasonable criticism.

18. I shall thus make an order providing for EAD to pay 82.5% of LIV's costs of the Application for summary judgment, such costs to be assessed on the standard basis under CPR 44.3. In advance of assessment, I shall not make a specific order for the payment of interest on costs.

19. I am invited to make an order requiring EAD to pay a reasonable sum on account of LIV's costs under *CPR 44.2(8)*. I must to do so unless there is good reason to the contrary. I can see no such reason here. However, in the current circumstances, I shall provide for the interim payment to made within 28 days of this judgment. LIV has filed a statement of costs amounting to some £108,544.

20. Mr Hutchings QC invites me to direct an interim payment of 60%, amounting to some £65,126. In his written submissions, Mr Allen described LIV's

aggregate costs of £108,544 for the Application as a "staggering sum". He submitted that EAD's costs for the Application amounted to no more than £46,064.45 which was – he submitted – itself too high owing to the manner in which the Application has been conducted. This is no more than a cross reference. However, when applying the principle of proportionality, it is more than conceivable that LIV's costs, or certain items of its costs, will be considered higher than could reasonably be expected.

21. I shall make an order providing for EAD to make an interim payment of £50,000 on account of LIV's costs. Having apportioned LIV's aggregate costs to reflect its allowed percentage, 82.5% (£89,549), this is some 56%, or thereabouts, of the amount LIV seeks in respect of its recoverable costs. In my judgment, this is a reasonable amount for EAD to be required to pay under *CPR 44.2(8).*