Judgments

JSC BTA Bank v Ablyazov and others

Costs – Interest on costs – Rate of interest – Practice – Bank – Fraud – Knowingly assisting fraud – Claimant bank bringing claim against former chairman and other defendants alleging fraud and knowingly assisting fraud – Bank succeeding in claim and being awarded sum – Bank seeking interest on costs – Appropriate rate of interest – Date on which interest to run

[2013] EWHC 867 (Comm), 2010 Folio 706, 2009 Folio 1099, 2010 Folio 93, (Transcript)

QBD, COMMERCIAL COURT

TEARE J

26 MARCH, 19 APRIL 2013

19 APRIL 2013

S Smith QC, N Hood and T Akkouh for the Claimant

G Hayman for Mukhtar **Ablyazov**

H Norbury QC for Zhaksylyk Zharimbetov

J Chapman QC and S Atrill for Ildar Gayarevich Khazhaev

C Kinsky QC and P Griffiths for Usarel Investments Ltd

Hogan Lovells International LLP; Addleshaw Goddard LLP; Peters & Peters Solicitors LLP; Olswang LLP; Edwin Coe LLP

TEARE J:

[1] Following my judgment on liability (see [2013] EWHC 510 Comm) the court has had to deal with a number of ancillary matters, one of which concerns the interest claimed by the Bank on the sums in respect of which it has been awarded judgment. This is the court's ruling on the question of interest.

[2] The Bank seeks an order that interest be paid at the rate of 8% per annum on a compound basis with annual rests. This interest is claimed at common law. In the alternative simple interest is claimed at 8% per annum pursuant to s 35A of the Senior Courts Act 1981 ("SCA 1981").

[3] The Defendants dispute that interest at common law has been pleaded and say that it can only be awarded pursuant to s 35A of the SCA 1981.

INTEREST AT COMMON LAW

[4] Since the decision of the House of Lords in *Sempra Metals v IRC* [2007] UKHL 34, [2008] 1 AC 561, [2007] 4 All ER 657 it has been established that compound interest may be recovered as damages at common law. However, the House emphasised the need for such damages to be pleaded and proved.

[5] Thus Lord Hope said at para 17:

> ". . . the Claimant must claim and prove his actual interest losses if he wishes to recover compound interest . . . . The Claimant would have to show, if his claim is for ancillary interest, that his actual losses were more than he would recover by way of interest under the statute. In practice . . . where the Claimant does not have to borrow money to replace the debt, simple interest under section 35A of the Supreme Court Act 1981 is likely to be the more convenient remedy."

[6] Similarly Lord Nicholls at paras 94 – 97 said:

> "94 . . . it is always open to a Claimant to plead and prove his actual interest losses caused by late payment of debt.
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> 95 In the nature of things the proof required to establish a claimed interest loss will depend upon the nature of the loss and the circumstances of the case. The loss may be the cost of borrowing money. That cost may include an element of compound interest. Or the loss may be loss of an opportunity to invest the promised money. Here again, where the circumstances require, the investment loss may need to include a compound element if it is to be a fair measure of what the Plaintiff lost by the late payment. Or the loss flowing from the late payment may take some other form. Whatever form the loss takes the court will, here as elsewhere, draw from the proved or admitted facts such inferences as are appropriate. That is a matter for the trial judge. There are no special rules for the proof of facts in this area of the law.

96 But an unparticularised and unproved claim simply for 'damages' will not suffice. General damages are not recoverable. The common law does not *assume* that delay in payment of a debt will of itself cause damage. Loss must be proved. To that extent the decision in the *London, Chatham and Dover Railway* case remains extant. The decision in that case survives but is confined narrowly to claims of a similar nature to the simple claim for interest advanced in that case. Thus, that decision is to be understood as applying only to claims at common law for unparticularised and unproven interest losses as damages for breach of a contract to pay a debt and, which today comes to the same, claims for payment of a debt with interest. In the absence of agreement the restrictive exception to the general common law rules prevails in those cases.

97 The common law's unwillingness to presume interest losses where payment is delayed is, I readily accept, unrealistic. This is especially so at times when inflation abounds and prevailing rates of interest are high. To require proof of loss in each case may seem unduly formalistic. The common law can bear this reproach. If a party chooses not to prove his interest losses the remedy provided by the law is to be found in the statutory provisions."

[7] The Defendants submitted that the Bank had not pleaded or proved its actual interest losses.

[8] Before considering the pleadings it is necessary to reflect upon the nature of the Bank's claims. In the Granton action the Bank claimed, as against Mr **Ablyazov** and Mr Zharimbetov, that it had paid away vast sums, about $1.4 billion, as a result of fraud. Paying away such sums meant that the Bank was unable to use those sums in whatever way it would otherwise have done. Such use might have been providing the sums to bona fide borrowers or using the sums as part of the Bank's capital reserves. In the Drey action the Bank claimed, as against Mr **Ablyazov** and Mr Zharimbetov, that it had paid away sums of about $400 million as a result of fraud. Again, paying away such sums meant that the Bank was unable to use those sums in whatever way it would otherwise have done. In the Chrysopa action the Bank claimed, as against Mr **Ablyazov**, Mr Khazhaev and Usarel, that it had paid away $120m as a result of fraud. Once again, paying away such sums meant that the Bank was unable to use those sums in whatever way it would otherwise have done. Thus, if the Bank intended to allege and prove that, in addition to the loss of those sums which it had paid away, it had suffered additional losses by reason of the loss of use of that money one would expect to see pleaded the use which would otherwise have been made of that money and the losses thereby sustained by reason of not having had the use of that money. If the Bank's case was that but for the fraud the money paid away in the three actions would not have been borrowed by the Bank so that interest paid by the Bank on its own loans had been thrown away one would expect to see pleaded the interest which the Bank had paid.

THE PLEADING IN THE GRANTON ACTION

[9] The Bank pleaded at para 86 of its Statement of Case that it had suffered loss and damage in that the unlawful loans ought never to have been made and that sums had been paid pursuant to the misappropriations scheme. The prayer claimed interest on all sums due at the rate of 8% (compound with quarterly breaks) or simple interest pursuant to s 35A of the SCA 1981 and/or the equitable jurisdiction of the court and/or s 44A of the Administration of Justice Act 1970.

THE PLEADING IN THE DREY ACTION

[10] The Bank pleaded at para 118 of its Statement of Case that it had suffered loss and damage in that it had paid out sums under the Compensation Agreements and the Sale and Purchase Agreements. At para 120 the Bank claimed interest at the rate of 8% pursuant to the equitable jurisdiction of the court and/or s 35A of the SCA 1981 and/or s 44A of the Administration of Justice Act 1970.

THE PLEADING IN THE CHRYSOPA ACTION

[11] The Bank pleaded at para 68 of its Statement of Case that it had suffered loss and damage in that it had paid out US$120m under the loan agreement and that no part of the sums or interest thereon had been paid by Chrysopa or any other entity to the Bank. At para 70 the Bank claimed compound, alternatively, simple, interest at the rate of 8% pursuant to the equitable jurisdiction of the court and/or s 35A of the SCA 1981 and/or s 44A of the Administration of Justice Act 1970.

[12] It is to be observed that in none of the actions is there any allegation of the use to which the monies paid away as a result of the Defendants' fraud would have been put had there been no fraud. There is no allegation of losses the Bank had suffered in addition to having paid away the principal sums. Thus the Bank, in my judgment, has not alleged “its actual interest losses”. It may be that the monies paid away would have been lent to bona fide borrowers but that has not been alleged. It may be that the sums would have been used to augment the Bank's capital base and so reduced the extent of the Bank's own borrowings but whether that was done and if so what savings would have been made (and therefore lost) has not been alleged. It may be that but for the fraud the monies would not have been borrowed by the Bank in the first place and so the interest it paid has been thrown away but that has not been alleged.

[13] Mr Smith submitted that the pleadings, whilst not perhaps perfect, nevertheless were sufficient to entitle the Bank to claim interest as damages. I am unable to accept that submission. There has been, no doubt for very good reason, no attempt to plead as damages the Bank's actual interest losses over and above the paying away of the principal sums. There has merely been a claim for damages. But that, as was clearly stated by Lord Nicholls in *Sempra Metals,* is insufficient for the purpose of claiming actual interest losses.

[14] Mr Smith submitted that it must have been clear to all parties that interest was being claimed as damages because the experts on Kazakh law considered whether interest was payable in Kazakh law. There is some force in this. However, it does not necessarily follow from the experts' discussion of interest in Kazakh law that all parties appreciated that interest was being claimed as damages. The Kazakh law position can also be relevant to the exercise of the court's discretion pursuant to s 35A of the SCA 1981; see *Maher v Groupama Grand Est* [2009] EWCA Civ 1191, [2010] 2 All ER 455 at para 40, [2010] 2 All ER (Comm) 843. But in any event one looks in vain in the pleadings for any particulars of the Bank's “actual interest losses”.

[15] Mr Smith submitted that it was inevitable, given the gap in the Bank's capital reserves admitted by Mr Zharimbetov, that the large sums of money paid away would have to have been funded. This is no doubt true but what interest rate was paid, and with what rests for compound interest, is unstated on the pleadings. The Bank's actual losses, in terms of funding costs thrown away, are not stated.

[16] Mr Smith submitted that the further report of Mr von Gleich (as to whom see para 72 of my judgment on the Bank's claim) was evidence of the Bank's actual interest losses. I do not think that it can be said that the further report of Mr von Gleich was adduced for the purposes of giving particulars of the Bank's “actual interest losses”. The genesis of the report was the need for evidence of borrowing rates in Kazakhstan in circumstances where the Bank was claiming an interest rate at a rate much higher than is usually awarded. One can, perhaps, draw general conclusions from the report as to the rates of interest paid or likely to have been paid by the Bank to borrow money during the relevant period but they would not be specifically related to the borrowings required to finance the sums paid away in the Granton, Drey and Chrysopa actions. I do not consider that Mr Von Gleich's report can be regarded as taking the place of the pleading of “actual interest losses” which the House of Lords said is required.

[17] Mr Smith observed that no Defendant had complained that he had been prejudiced by the absence of a specific plea. This provoked each Defendant to say that in the absence of a specific plea it was premature to consider the question of prejudice. Although perhaps formalistic this response seemed to me right in prin-

ciple. Until it is said what actual losses are alleged to have been sustained it is not practicable to consider the question whether adequate evidence is available to enable the resulting issue or issues to be resolved.

[18] To require actual interest losses to be specifically pleaded might be regarded by the Bank as unrealistic and unduly formalistic. But Lord Nicholls expressly accepted this “reproach” to the common law and said that in the absence of a specific plea of actual interest losses the remedy lay in the statutory provisions for interest. This is clear guidance for trial judges which I must follow.

[19] I have therefore concluded that there has been no plea of actual interest losses. It follows that the Bank can only claim simple interest pursuant to s 35A of the SCA 1981.

INTEREST IN THE GRANTON AND DREY ACTIONS PURSUANT TO S 35A

[20] There is no dispute that simple interest should be awarded at the rate of interest at which borrowers with the general attributes of the Bank could have borrowed money over the relevant period. The Bank has taken “Kazakh banks” as the appropriate class of borrower. The Defendants have suggested that this is too narrow and that the appropriate class should be “banks” or “financial institutions”. Whilst Kazakh banks obviously have some attributes in common with other banks or financial institutions they also have some characteristics which Western banks do not; see para 19 of my judgment on the Bank's claims. I consider that the appropriate class is Kazakh banks.

[21] The Bank adduced evidence from Mr von Gleich as to the rate at which Kazakh banks could borrow money. On the basis of that evidence Mr Smith submitted that relevant rate was 8%. Mr Hayman submitted that the relevant figure for the period 2006 to 2012 was about 7.3%. I agree with Mr Hayman. The average rate of interest paid by the Bank and its peer group for the period 2006 until 2012 (see table 2 of Mr Von Gleich's report) was just under 7.3%. I consider that interest should be awarded at 7.3% rather than 8%.

[22] The Bank claimed interest from the date on which its cause of action accrued. The Defendants submitted that interest should only be awarded from the date of judgment. This was on the basis that *Maher v Groupama Grand Est* supported the proposition that the court, when exercising its discretion under s 35A, could take account of the treatment of interest according to the *lex causae* and that, on the basis of the evidence of Professor Maggs (as to whom see para 69 of my judgment on the Bank's claims), interest in Kazakh law (the *lex causae*) ran from the date of judgment.

[23] The opinion of Professor Maggs was not accepted by Mr Vataev (as to whom see para 68 of my judgment on the Bank's claims) who gave evidence to the effect that interest will accrue in Kazakh law from the date on which the Defendant caused damage but will only become payable once the court gives judgment.

[24] The dispute between the experts appears to concern the meaning and effect of art 353 of the Civil Code which provides:

> “1. For the unlawful use of another's monetary assets as the result of non-performance of a monetary obligation or of delay of repayment, or their unfounded receipt or economizing, penalty-interest is subject to payment. The rate of penalty-interest shall be determined by the official rate of refinancing of the National Bank of the Republic of Kazakhstan on the day of the performance of the monetary obligation or the corresponding part of it. In case of recovery of a debt by judicial proceedings a court may satisfy a claim of a creditor, proceeding from the official rate of refinancing of the National Bank of the Republic of Kazakhstan on the day of filing the suit or on the day of making a decision. These rules shall be applied unless another rate of penalty-interest has been established by a statute or the contract.

2. Penalty-interest for the use of another's money shall be recovered until the day of payment of this money to the obligee, unless legislation or an contract has established another procedure for calculating the amount of the penalty-interest.

3. If the losses caused to an obligee by the unlawful use of his money exceeds the sum of penalty-interest due to him on the basis of Paragraph 1 of the present Article, he shall have the right to demand from the obligor compensation for losses in the part exceeding this sum."

[25] Each expert has sought to extract from this article indications or inferences which support his opinion. I have considered what each expert has said. I have concluded as follows. Sub-clause 1 provides for interest to be payable. There is then provision for the rate of interest. Nothing is said concerning the date from which interest is paid. Sub-clause 2 provides for the date until which interest is payable. Sub-clause 3 provides that losses in excess of interest may be demanded. Thus there does not appear to be any provision expressly dealing with the date from which interest is payable. In those circumstances a purposive construction (which the experts agreed was a permissible approach to the construction of the Civil Code, see para 69 of my judgment on liability) suggests that interest should be payable, as Mr Vataev said, from the date on which the Defendant caused damage. I therefore accept Mr Vataev's opinion.

[26] But if, contrary to my view, Professor Maggs is correct on this point I would still, in the exercise of my discretion, have awarded interest from the date on which the cause of action accrued. This court awards simple interest as some, albeit imperfect, compensation for the Claimant being deprived of the use of his money. To award it only from the date of judgment would, in a case such as the present where the causes of action date from 2006-8 and judgment is given in 2013, substantially deprive the Bank of that compensation. That would not in my judgment be justified merely because Kazakh law does not recognize the loss involved to a judgment creditor in being kept out of its money from the date on which its cause of action accrued. Interest under s 35A is essentially a procedural remedy (see *Maher v Groupama Grand Est* at para 37) and I consider that it is appropriate, when this court is awarding its own procedural remedy, to have regard to economic reality. Interest should be awarded from the date on which the cause of action accrued.

INTEREST IN THE CHRYSOPA ACTION PURSUANT TO S 35A

[27] There is a point peculiar to this action arising from the fact that the Bank has been awarded recovery of the shares in the White Sea companies. In my judgment on liability I concluded that Usarel and Mr Khazhaev were liable to compensate the Bank to the extent that the value of the shares did not exceed US$120m plus interest. Those Defendants have submitted that until the shares have been valued there will be no judgment against them and therefore no cause to award interest.

[28] My conclusion in the liability action was premised upon the need to avoid double recovery by the Bank. I consider that the proper, fair and realistic analysis is that the Bank succeeded on its claim for damages against both Defendants but that, in order to prevent double recovery, the court decided to make no order that any particular sum be paid to the Bank in respect of its claim for damages until such time as the shares had been valued. On that basis there is cause to award interest, albeit not yet payable, so that the parties may know the full extent of the Bank's claim in damages and the interest to which it is entitled in respect of that claim. I have therefore not accepted the Defendants' submission.

[29] As to the rate of interest Mr Chapman on behalf of Mr Khazhaev submitted that since the Chrysopa loan was in US dollars it is appropriate to consider the rate at which Kazakh banks could borrow US dollars. But there was, he said, no evidence of such rate and therefore the court should order the conventional rate of US LIBOR plus 1%. (Mr Kinsky on behalf of Usarel made a similar submission but based upon the appropriate class of borrower being "banks" rather than "Kazakh banks" which for the reason already given I must reject). Mr Smith said in response to Mr Chapman's submission that the table in App 2(a) to Mr Von Gleich's

report showed the US dollar rate payable by the Bank, namely about 8%. The table suggests that the rate of interest payable in respect of US dollars was not (usually) very much different from about 8%, so not very much different from the rate of 7.3% which reflects the cost of borrowing to the Bank's peer group. In these circumstances I remain of the view that interest should be awarded at 7.3%.

[30] For the reasons already given interest should run from the date on which the cause of action accrued.

SHOULD INTEREST BE INCLUDED IN THE COMPARISON EXERCISE IN THE CHRYSOPA ACTION TO AVOID DOUBLE RECOVERY?

[31] Finally, it is necessary to consider a related question, namely, whether I was correct in my judgment in the Chrysopa action to say that the Bank's claim for damages against Usarel and Mr Khazhaev could only succeed to the extent that the value of the shares in the White Sea companies did not exceed US$120m *plus interest.* I had added those words at the request of the Bank after having considered whether it was right to add them. However, since I had heard no argument on that question and no order had yet been sealed I said that I would reconsider the matter in the light of such submissions as the Defendants wished to make. Counsel for Mr Khazhaev and Usarel submitted that the words *plus interest* ought not to have been added because the Bank's claim to damages was limited to US$120m.

[32] The Defendants' submission has great force if one restricts the comparison to that between the value of the shares and the sums claimed by the Bank as damages. However, if, as is the case, the Bank is entitled to interest on its damages pursuant to s 35A of the SCA 1981 the question is whether the comparison should properly be between the value of the shares and the total recovery to which the Bank is entitled on its claim for damages, which includes interest. I consider that such a comparison should be made because the purpose of the comparison is to see whether by recovering the shares the Bank has recovered an amount at least equal to that to which it is otherwise entitled in respect of its damages claim, which entitlement includes interest. If the value of the shares is at least equal to that entitlement then, to avoid double recovery, no further monetary sum should be payable. But if it is not then, to ensure that the Bank is properly compensated, the amount of the shortfall should be payable. If interest is excluded from the comparison and, for example, the value of the shares is $120m then the Bank will have recovered less than that to which it would have been entitled on its damages claim. I therefore consider that the words *plus interest* were correctly added.

[33] I have some, though not every, confidence that the parties can agree an order to reflect this ruling.

Judgment accordingly.