Neutral citation number: [2021] EWHC 2729 (Ch)

Case No: BL-2019-001003

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Thursday, 16 September 2021

BEFORE:

HIS HONOUR JUDGE HODGE QC
(Sitting as a Judge of the High Court)

BETWEEN:

AHUJA INVESTMENTS LIMITED

Claimant

- and -

(1) VICTORYGAME LIMITED
(2) SURJIT SINGH PANDHER

Defendants

MR DAVID HOLLAND QC and **MR EDWARD ROWNTREE** (instructed by **Cardium Law**) appeared on behalf of the Claimant

MR IAN CLARKE QC, **MR NICHOLAS TROMPETER QC** with him (instructed by **SBP Law**) appeared on behalf of the Defendants

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APPROVED JUDGMENT ON INTEREST

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(Official Shorthand Writers to the Court)

JUDGE HODGE QC:

1. This extemporary judgment addresses one of the matters which are consequential upon the formal handing-down of my reserved judgment, on Thursday 26 August 2021 under neutral citation number [2021] EWHC 2382 (Ch), following the attended trial, in the Rolls Building, over nine days between 2 and 14 July 2021, of this claim in damages for fraudulent misrepresentation and breach of contract and the defendants' counterclaim to recover the principal sum of £800,000, together with outstanding interest, under a loan agreement that had been entered into on 22 August 2018.

2. This claim and counterclaim arise out of the purchase by the claimant from the first defendant of a commercial investment property in Southall and a short-term, four-month loan of £800,000 that was made by the first defendant to the claimant in order to enable it to complete its purchase of the property.

3. The loan agreement provided for repayment of the principal in full on 21 December 2018. It also provided for the payment of interest at 3% per month, compounded monthly, to be paid in four equal instalments, each of £24,000, on 21 September, 21 October, 21 November and the redemption date of 21 December 2018. In default of repayment of the loan in full on the contractual redemption date, interest was to be payable thereafter on default at the rate of 12% per month, compounded monthly.

4. In my judgment, I dismissed the claim, and I will enter judgment on the counterclaim for the principal sum of £800,000, together with the unpaid last monthly instalment payment of £24,000 which had fallen due on 21 December 2018.

5. The first of the questions that arises at this hearing is whether any, and, if so, what, interest should be payable on the £800,000 and the £24,000 unpaid interest. On this issue, I have received detailed written submissions from counsel who appeared before me at the trial of the claim.

6. There are written submissions dated 8 September from Mr David Holland QC, leading Mr Edward Rowntree. There are two sets of submissions in response from Mr Ian Clarke QC and Mr Nicholas Trompeter QC, who appear for the defendants, both dated 13 September 2021. Finally, there are submissions in reply from Mr Holland and Mr Rowntree dated 14 September 2021.

7. Mr Clarke, who appears today without Mr Trompeter, and Mr Holland, who appears with Mr Rowntree, have both amplified their written submissions orally before me over the last 40 minutes or so, with Mr Holland advancing his submissions first, followed by Mr Clarke, and with a brief reply from Mr Holland.

8. The background to this issue is set out at paragraph [145] of my written judgment:

> "Despite the lengthy written closing submissions that were presented to the court, I was not addressed on the consequences if I were to find (as I have) that the default interest rate of 12% per month, compounded monthly, constitutes a penalty. Clearly, interest would not be recoverable at that rate under clause 4.1.1 of the loan agreement. But does interest continue to accrue at the previous rate of 3% per month, compounded monthly, under clause 4.1.2? This provides:
>
> > 'The Borrower will pay Interest on each Interest Payment Date. Interest shall accrue and be payable on the Loan at the Interest Rate.'
>
> By clause 1.3, the expression 'Interest Payment Dates' means 21 September 2019 [clearly a typographical error, with 2018 being intended], 21 October 2018, 21 November 2018 and 21 December 2018; and by clause 1.2 ‘the Interest Rate' means '3% per month (total sum of £24,000 per month)'. My provisional view, subject to any further submissions, is that, despite the reference to four fixed interest payment dates in the first sentence of clause 4.1.2, interest continues to accrue and be payable on the loan at 3% per month after the redemption date by virtue of the second sentence of clause 4.1.2; and such interest continues to be capitalised on a monthly basis under clause 4.2.1. This view is reinforced by the provisions of clause 10.1, which provides that:
>
> > 'Each of the provisions of this agreement is severable and distinct from the others and if at any time one or more of such provisions is or becomes invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions shall not be affected or impaired.'

> However, if Ahuja wishes to contend otherwise, since this issue was not expressly addressed at trial, and in view of the sums involved, it seems to me that it should be open to it to present submissions to the contrary."

9. The contractual interest said by the first defendant to be due under clause 4 of the loan agreement to today's date is in the order of some £1.35 million. There is therefore a lot riding on this issue, although Mr Holland accepts that, if his arguments are correct, then the court would nevertheless have the power to award statutory interest on the unpaid loan.

10. Mr Holland has taken me through various provisions of both the loan agreement, and of the contemporaneous facility letter, which it is, I think, common ground that I am entitled to look at as part of the admissible background when construing the loan agreement itself.

11. Mr Holland's position is that my provisional view that the contractual provisions are such that interest continues to accrue at 3% on a monthly basis after the redemption date, and is to be capitalised monthly on an ongoing basis, does not represent the proper construction of the relevant provisions. He submits that there is simply no provision, apart from clause 4.1.1 (which has now been declared to be unenforceable as a penalty), for the accrual of interest after the redemption date. Clause 4.1.2, read in conjunction with the definition of 'Interest Payment Dates' in clause 1.3, specifically provides for only four interest payment dates up to the redemption date and for no others. There is nothing in clause 4.1.2 which deems interest to continue to accrue at the rate of 3% per month after the redemption date. The default position provided for in the loan agreement is clause 4.1.1. Should sums not be repaid on the redemption date, then interest is payable at 12% per month. That provision has been declared unenforceable as a penalty. Further, there is nothing in either the offer letter or the face of the document itself which would afford the court any opportunity to correct the wording of the loan agreement so as to make provision for ongoing interest, whether by construction or by rectification.

12. Mr Holland invited me to undertake a two-stage process. I should first consider what the contract means, ignoring the fact that clause 4.1.1 has been found to be an unenforceable penalty. I should then consider the consequences of the finding that that clause is an unenforceable penalty, having regard to my prior decision as to the meaning

of the contract. He submits that the parties actually intended that there should be two interest regimes, one applying in advance of any default and the other applying after default.

13. The court has held the default interest provision to be unenforceable as a penalty. The consequence is that the contract contains no provision for interest after default. There is no injustice in leaving the first defendant, which has been found to have been too grasping and too greedy, to its statutory entitlement to interest, freed from any contractual right.

14. Mr Holland submits that the 3% interest rate provision, payable during the currency of the loan, was never intended to be payable in the event of default. The default interest rate is itself unenforceable as a penalty.

15. Clause 10 contains a standard provision in relation to the severability of provisions but the court cannot properly conclude that, merely because clause 4.1.1 is unenforceable as a penalty, clause 4.1.2 has any continuing application. That is because the effect of the clear words of clause 4.1.2 is said to limit pre-default interest to the four express interest payment dates and no others. Clause 10 merely preserves other provisions of the loan agreement if one of them is held to be unenforceable, but it does not permit the court to refashion the contract in a way never intended by the parties. The court cannot make a new bargain for the parties which they themselves never chose to make.

16. Mr Holland's submission is that there is simply no express provision for interest to be paid after default, and the first defendant is therefore left with its rights to interest under statute. Mr Holland puts the matter this way: if clause 4.1.1 had not been struck down as penal, then interest would have been payable under that clause and not under clause 4.1.2, as the first defendant now claims. Since clause 4.1.1 has been declared to be an unenforceable penalty, Mr Holland submits that there can be no warrant for stretching the wording of clause 4.1.2 to cover a situation which the parties never intended it to cover. In summary, there is said to be no surviving provision for contractual interest payable after the past redemption date on 21 December 2018. The court is therefore left only with the power to award statutory interest.

17. Mr Clarke emphasises that all that the court has concluded is that the first sentence of clause 4.1.1 of the loan agreement, when read in conjunction with clause 4.2, is a penalty in so far as it purported to oblige the claimant to pay interest at 12% per month, compounded monthly, on any amount remaining outstanding after the redemption date. In consequence, that part of the loan agreement is unenforceable. However, that still leaves clause 10.1. By reason thereof, the court was right to take the provisional view that the remaining provisions of the loan agreement entitle the first defendant to receive continuing interest at the rate of 3% per month, compounded monthly, on the amount of £824,000 which was outstanding at the redemption date.

18. Mr Clarke points to the fact that, disregarding the first sentence, which is unenforceable, the remainder of clause 4.1.1 provides that 'Interest shall accrue and be payable on the Loan at the Interest Rate', and that 'Interest on the Loan shall accrue on a daily basis and be calculated from the Redemption Date'. Mr Clarke says that 'Interest' is undefined in the loan agreement but the expression 'Interest Rate' is a defined term and means '3% per month (total sum of £24,000 per month)'. Mr Clarke submits that that applies to clause 4.1.1.

19. Mr Holland submits that, read in the context of the unenforceable first sentence, 'Interest' in clause 4.1.1 and 'the Interest Rate' must be a reference to the default rate of 12%. Mr Holland may well be right as to that but, if so, it reinforces Mr Clarke's point that this loan agreement is not particularly well drafted because one has to read a defined term of 'Interest Rate' as not meaning the defined rate of 3% where it appears in the second sentence of clause 4.1.1. However, it is quite clear that in clause 4.1.2, 'the Interest Rate' must be 3% per month.

20. Mr Clarke submits that the second sentence of clause 4.1.2, reading 'Interest shall accrue and be payable on the Loan at the Interest Rate', is not subject to any temporal limitation and is capable of applying equally after, as well as before, the redemption date. Mr Clarke also points to the capitalisation provision in clause 4.2.1.

21. Mr Clarke further submits that the proper construction and interpretation of these provisions is elucidated by the facility letter which was entered into contemporaneously

with, and as part and parcel of, the loan agreement transaction. Clauses 3 to 6 of the facility letter read as follows:

> '3 The Borrower shall provide to the lender's Solicitors in advance four (4) post-dated cheques (each for the sum of £24,000) for the interest payable each month.
>
> 4 Interest will be charged on the balance of the Loan outstanding from time to time at a rate of 3% per month.
>
> 5 Interest sum of £24,000 (per month) will be paid on the 21st day of each month commencing on 21st day of September 2018.
>
> 6 In the event that any month's interest is not paid on the due date, default interest at the rate of 12% per month will become payable. This shall be without prejudice to our other rights under the terms of this Facility Letter and the Legal Charge.'

22. Mr Clarke places particular emphasis upon the last sentence of paragraph 6 of the facility letter. The phrase 'without prejudice to our other rights' is said to make it clear that interest will continue to be charged on the balance of the loan outstanding at the rate of 3% per month, independently of the default interest at the rate of 12% per month.

23. Mr Clarke submits that, when read together, and in context, it is quite clear that the parties to the facility letter and the loan agreement (in the circumstances which have come to pass) intended that interest at 3% per month compounded would continue to accrue with the (unenforceable) default rate of 12% in the circumstances provided for (albeit without prejudice to the right to interest at 3% per month). The defendants adopt the analysis in my judgment at paragraph [145]. The terms and structure of the interest provisions within the loan (which Mr Singh claims always to have been in a position to repay) are such that interest accrues at 3% with an uplift on default (which, being unenforceable) simply leaves the underlying agreed non-default rate of interest extant.

24. In his oral submissions, Mr Clarke accepted that the court cannot rewrite the language of the loan agreement if it is clear and unambiguous; but he submits that Mr Holland's construction is contrary to all commercial common sense. The entitlement to interest persists after default on a clear reading of the language of the loan agreement. A commercial loan should clearly carry a commercial rate of interest. There is a bedrock interest provision of 3% per month, with a high watermark of 12% in the event of default.

That default rate is clearly without prejudice to the underlying entitlement to a minimum of 3% per calendar month. That is made clear by paragraph 6 of the facility letter, which is echoed in the terms of clause 10.1 of the loan agreement. That clause, by using the term 'provisions' rather than 'clause, as is used elsewhere in the loan agreement, is deliberately chosen to exhibit a degree of granularity below the level of a clause.

25. Mr Clarke points to the fact that the loan agreement is not a particularly well-drafted document. I had pointed to the fact that there is an error in the year in the first of the interest payment dates in clause 1.3. Mr Clarke pointed to the fact that clause 1.1 contains another clear error where the term of the loan is said to be for a period of 'three months' in words but with '4 months' inserted in figures within the parenthesis, with the four months clearly being the correct duration of the loan. Mr Clarke also points to the fact that the loan agreement contains a number of duplicative provisions to the same effect. He instanced the provisions of clause 3.1 and clause 6.1. I would also refer to the duplication in clauses 4.1.1 and 4.1.2 of the sentence, 'Interest shall accrue and be payable on the Loan at the Interest Rate.'

26. The bedrock of Mr Clarke's submission is that the second sentence of clause 4.1.2 contains no express temporal limitation on the accrual of interest, and that the contract works perfectly well without either importing or implying any such temporal limitation.

27. In his submissions in reply, Mr Holland submitted that Mr Clarke's submissions are simply wrong on the correct construction of both the loan agreement and the facility letter. The parties are said clearly to have intended there to be two separate regimes for interest, one applying up to the redemption date at a rate of 3% per month, with payment by way of four post-dated cheques on identified interest payment dates, and a separate regime of default interest at the rate of 12% per month on any sum not repaid on the redemption date. Since the default interest rate has been declared to be an unenforceable penalty, it cannot be right -- rather, it is unreal and unrealistic -- to read the remainder of clause 4.1.1 of the loan agreement, or clause 4.1.2, in the way Mr Clarke submits. The remainder of clause 4.1.1 clearly refers only to the default interest rate payable after redemption. The effect of declaring the default interest to be an unenforceable penalty renders unenforceable the entirety of clause 4.1.1 of the loan agreement. That leaves simply clause 4.1.2, which can only apply up to the redemption date. There cannot be

two simultaneous, and parallel, interest rate regimes. Clause 4.1.1 applies only after default. Similarly, clause 4.1.2 applies only up to default. Mr Clarke's proposed construction is not a sensible commercial construction.

28. Those are the submissions. I accept entirely, as Mr Clarke accepts, that one cannot rewrite or refashion the agreement that the parties have chosen to make. However, I prefer Mr Clarke's submissions. It seems to me clear that, once the court has declared the first sentence of clause 4.1.1 to be an unenforceable penalty, disentitling the first defendant to recover interest at the default rate of 12% per month, compounded monthly, then the natural and commercial reading of the contract is that interest continues to be payable at the primary rate of 3% per month in accordance with the second sentence of clause 4.1.2, which provides that interest shall accrue and be payable on the loan at the interest rate, and to be compounded in accordance with the provisions of clause 4.2.

29. If one asks what the parties intended, the clear intention of the parties was that interest would be payable at 3% per month until the redemption date and at 12% per month thereafter in the event of default. But if one had gone on to ask the further question: "And what if the 12% default rate is held to be unenforceable for any reason?", in the light of paragraph 6 of the facility letter, and clause 10.1 of the loan agreement, I have no doubt that both parties would have said that, in that event, interest continues to be payable at the original rate of 3% per month, compounded monthly in accordance with clause 4.2.1. As Mr Clarke says, this was a commercial loan intended to bear interest at a rate agreed by the parties as a commercial rate appropriate to a short-term loan. It cannot have been intended by the parties that, if the default rate were unenforceable for any reason, the contractual entitlement to interest at the original rate would cease to apply.

30. In my judgment, as I said when setting out my provisional view at paragraph [145] of my substantive judgment, the wording of the second sentence of clause 4.1.2 is capable of continuing application after the redemption date because it is subject to no temporal limitation; and to import any such temporal limitation would, in my judgment, be contrary to commercial common sense.

31. I am satisfied that I am not refashioning or rewriting the loan agreement or making a new bargain for the parties. I am simply giving effect to what they themselves have agreed in the circumstances that one of the provisions they have agreed has been found to be unenforceable as a penalty.

32. For those reasons, I accept Mr Clarke's submissions for the defendants and will hold that interest continues to be payable at the rate of 3% per month after 21 December 2018, compounding monthly. It follows that the draft order should contain provision in paragraph 3(b) for there to be judgment on the counterclaim, in addition to the £824,000, for contractual interest thereon under clause 4 of the loan agreement to today's date in the sum of £1,351,257.13.

33. Had I not reached that conclusion, then I might well have concluded that it was appropriate for the court to exercise its statutory power to award interest under section 35A of the Senior Courts Act, or alternatively section 57 of the Bills of Exchange Act, at a rate of 3% per month, equivalent to 36% per year, on the basis that that had been the rate which the parties themselves had agreed as being the rate appropriate to a short-term commercial loan when it was not repaid on the due date. But, in the event, it is unnecessary for me to adopt that alternative route. There would, of course, have been no power to compound interest on an award of interest pursuant to the statutory provisions.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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