Case No: SC-2020-BTP-000327

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Royal Courts of Justice
London, WC2A 2LL

Date: 10/07/2020

Before :

SENIOR COSTS JUDGE GORDON-SAKER

- -

Between :

THOMAS JOSEPH MARBROW	**Claimant**
- and -	
SHARPES GARDEN SERVICES LIMITED	**Defendant**

- -
- -

Miss Michelle Walton (instructed by **Barratts Solicitors**) for the **Claimant**
Mr Simon Gibbs (of **Gibbs Wyatt Stone**) for the **Defendant**

Hearing date: 7th July 2020 (by Microsoft Teams)
This judgment was handed down remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 4 pm on Friday 10th July 2020

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Approved Judgment

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

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SENIOR COSTS JUDGE GORDON-SAKER

SENIOR COSTS JUDGE GORDON-SAKER :

1. This judgment:

   i) sets out the reasons for my decisions that the caps on recoverable costs provided by sub-paragraphs 7.2(a) and (b) of Practice Direction 3E of the Civil Procedure Rules 1998 exclude value added tax;

   ii) sets out my decision on the Claimant's claim at item 481 of his bill for £2484.48 in respect of interest paid under a disbursement funding loan; and

   iii) sets out my decision on the Defendant's contention that the Claimant's entitlement to interest should run from 3 months after the date of the order for costs.

2. The Claimant is entitled to the costs of his claim for damages for personal injuries arising from an accident at work on 4th July 2016. He was engaged in trimming a hedge with a petrol driven hedge cutter. For reasons which remained in dispute between the parties, the hedge cutter came into contact with the Claimant's left hand, causing him significant injuries. The Claimant instructed Barratts Solicitors of Nottingham under a conditional fee agreement to bring a claim against the Defendant, his employer. Proceedings were issued in the Queen's Bench Division. Liability was disputed and remained in dispute until the claim settled in December 2019, shortly before trial. The terms of settlement provided that the Defendant should pay the Claimant's costs of the action on the standard basis.

3. The detailed assessment of those costs was heard on 7th July 2020 by video and, save for the issues reserved to this judgment and the summary assessment of the costs of the detailed assessment proceedings, was concluded on that day. I am grateful to Miss Walton, on behalf of the Claimant, and Mr Gibbs, on behalf of the Defendant, for their efficiency in dealing with not only a paper bill, but also an electronic bill, with the original solicitors' files lodged in support of the bill in hard copy adumbrated by an electronic bundle of key documents.

Whether the caps on recoverable costs provided by sub-paragraphs 7.2(a) and (b) of Practice Direction 3E of the Civil Procedure Rules 1998 exclude value added tax

4. Paragraph 7.2 of Practice Direction 3E provides:

> Save in exceptional circumstances—
>
> (a) the recoverable costs of initially completing Precedent H shall not exceed the higher of £1,000 or 1% of the total of the incurred costs (as agreed or allowed on assessment) and the budgeted costs (agreed or approved); and
>
> (b) all other recoverable costs of the budgeting and costs management process shall not exceed 2% of the total of the incurred costs (as agreed or allowed on assessment) and the budgeted (agreed or approved) costs.

5. The present case was subject to a costs management order. The Claimant's budget was approved at a costs and case management conference and the Defendant's budget was agreed. It is not contended by the Claimant that there any exceptional circumstances such as to enable him to escape the caps.

6. The Defendant contends that the caps of £1,000 or 1% in sub-paragraph 7.2(a) and 2% in sub-paragraph 2(b) must be inclusive of value added tax because it is not expressly stated to be otherwise. Neither Miss Walton nor Mr Gibbs was able to point me to any decision directly on the point apart from my own decision in *BP v Cardiff & Vale University Local Health Board* [2015] EWHC B13.

7. Mr Gibbs described that decision as "brave" because I had imported words into the rule which were not there, presumably, in each sub-paragraph: "excluding value added tax". He preferred the approach taken by His Honour Judge Hacon *in Response Clothing Limited v The Edinburgh Woollen Mill Limited* [2020] EWHC 721 (IPEC). There the court was concerned with the interpretation of rule 45.31(1) of the Civil Procedure Rules which provides that, in certain proceedings in the Intellectual Property Enterprise Court, the court will not order a party to pay total costs "of more than … £50,000 on the final determination of a claim in relation to liability". The issue was whether that sum included or excluded value added tax. It would appear that a factor in the learned judge's decision was that the "total costs" capped by r.45.31(1) did not fall within the definition of "scale costs" provided by r.45.30(4). That r.45.31(5) provided that "VAT may be recovered in addition to the amount of the scale costs" but made no provision for value added tax on "total costs", "coupled with the unambiguous wording of rule 45.31[(1)](a)" suggested that the £50,000 cap on total costs did not exclude value added tax.

8. My decision in *BP* was not intended to be brave nor did I intend to import any words into the rule, because, quite simply, it was not necessary for me to do so. This is clearly not a case where there is an obvious drafting error and equally clearly it does not fall to me to exercise the court's exceptional jurisdiction to put right any such error, as described in *Inco Europe Limited v First Choice Distribution* [2000] 1 WLR 586.

9. Miss Walton submitted that value added tax does not fall within the definition of "costs" in r.44.1(1) and so, by that route, does not fall within the caps. I think that the difficulty with that argument is that if the value added tax paid by the claimant to his solicitors is not costs, how can it be recoverable? The definition provided by r.44.1(1) is clearly not intended to be exclusive, for it begins: *"costs" includes*.

10. To my mind the caps provided by paragraph 7.2 cannot include value added tax because they are expressed as percentages of figures which do not include value added tax. All of the figures set out in a budget exclude value added tax – as Precedent H makes clear. 2% of £100,000 excluding value added tax, would be £2,000 excluding value added tax.

11. Mr Gibbs sought to place greater emphasis on the figure of £1,000 in sub-paragraph 7.2(a). But it seems to me that the same reasoning must apply. If the percentages are exclusive of value added tax so must the £1,000 be exclusive of value added tax. Otherwise the sub-paragraph would read "shall not exceed the higher of £1,000

including value added tax or 1% excluding value added tax of the total of the incurred costs … and the budgeted costs". That would require stating expressly.

12. This reasoning may or may not be inconsistent with my conclusion in *BP* that additional liabilities are included in the cap even though they are excluded from the budget. The authors of *Cook on Costs* (at para 15.21) have described my decision on that point as "challenging". However whether or not that conclusion was correct does not arise in this case.

13. I obtain some support for my view, not only from the reasoning in *Cook*, but also more directly from *Friston on Costs* (3rd edition) at paragraph 12.133:

> While there is no authority on the point, it is likely that the percentage limits are exclusive of VAT. This is because Precedent H is designed in such a way as to discourage VAT being recorded therein, so it would seem odd if the costs were payable on a VAT-inclusive basis. Moreover, if it were not a VAT-exclusive limit, then a VAT-registered litigant would have the advantage over a non-VAT registered litigant – and that would be a curious state of affairs.

14. If I am wrong in this analysis then I am thrown back to my reasoning in *BP*. My decision in that case was based on the approach taken by the Civil Procedure Rule Committee to the cap on the costs of provisional assessment. Initially r.47.15(5) provided that the court would not award more than £1,500 in respect of the costs of provisional assessment. When disputes arose as to whether that included value added tax the committee clarified its intention that the figure was net by an amendment in the same year as the introduction of the rule.

The recoverability of interest paid under a disbursement funding loan

15. The Claimant claims, as an item of costs, the interest that he is liable to pay under a loan agreement with his solicitors in relation to the funding of disbursements. The agreed interest rate was 5%.

16. In *Hunt v RM Douglas (Roofing) Ltd* [1987] 11 WLUK 221 the claimant sought to recover on the taxation of his costs the interest that he had incurred under an overdraft to fund the disbursements required for his claim. The Court of Appeal held that funding costs had never been included in the categories of expense recoverable as costs and to include them would constitute an unwarranted extension.

17. Mr Gibbs relied on the decision of the Court of Appeal in *F&C Alternative Investments v Barthelemy* [2012] EWCA Civ 843 where (at paragraph 98.3) Davis LJ apparently approved the submission by leading counsel for the appellants that "costs of funding litigation by way of bridging loans are not ordinarily recoverable in themselves as costs of litigation".

18. Miss Walton relied on the decision of the Court of Appeal in *Secretary of State for Energy v Jones* [2014] EWCA Civ 363. However that case was concerned with the rate of interest that could be allowed on costs from a date earlier than judgment where, as here, the claimants had incurred a liability to pay interest to their solicitors

in respect of the funding of disbursements. The court upheld the decision to allow interest on pre-judgment disbursements at 4% above base rate. The argument on appeal was that the rate should have been calculated by reference to the circumstances of the claimants' solicitors, rather than of the claimants. The solicitors, it was said, could have borrowed at a much lower rate.

19. In my judgment it is clear following *Hunt* that interest incurred under a disbursement funding loan cannot be recoverable as costs. Item 481 in the bill must therefore be disallowed.

20. However r.44.2(6)(g) does allow the court to order the payment of interest on costs from a date before judgment. Mr Gibbs submitted that a costs judge does not have power to award pre-judgment interest on costs. However in my experience parties often ask costs judges to award interest from a date different to the date of judgment. Indeed in this case the Defendant seeks an order that the Claimant should be entitled to interest on his costs from 3 months after the date of the costs order. I can see no reason why a costs judge should have power to award interest from a date after judgment, under r.44.2(6)(g) but not from a date earlier than judgment, under the same rule.

Whether the Claimant's entitlement to interest should run from 3 months after the date of the order for costs

21. The Defendant submits that interest should run from three months after the order for costs and relies on the decision of Leggatt J. (as he then was) in *Involnert Management Inc v Aprilgrange Limited & Ors* [2015] EWHC 2834 (Comm) at paragraph 24:

> it seems to me that a reasonable objective benchmark to take is the period prescribed by the rules of court for commencing detailed assessment proceedings. Pursuant to CPR 47.7, where an order is made for payment of costs which are to be the subject of a detailed assessment if not agreed, the time by which detailed assessment proceedings must be commenced (unless otherwise agreed or ordered) is three months after the date of the costs order. In order to commence such proceedings, the receiving party must serve on the paying party a bill of costs giving particulars of the costs claimed. It is then for the paying party to decide which items in the bill of costs it wishes to dispute. Postponing the date from which Judgments Act interest begins to run by three months will therefore generally serve to ensure that the party liable for costs has received the information needed to make a realistic assessment of the amount of its liability before it begins to incur interest at the rate applicable to judgment debts for failing to pay that amount.

22. The Claimant maintains its entitlement to interest at the Judgment Act rate of 8% from the date of the costs order.

23. Section 17 of the Judgments Act 1838 provides:

> (1) Every judgment debt shall carry interest at the rate of 8 pounds per centum per annum from such time as shall be prescribed by rules of court . . . until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment.
>
> (2) Rules of court may provide for the court to disallow all or part of any interest otherwise payable under subsection (1).

24. Rule 40.8 of the Civil Procedure Rules 1998 provides:

> (1) Where interest is payable on a judgment pursuant to section 17 of the Judgments Act 1838 or section 74 of the County Courts Act 1984, the interest shall begin to run from the date that judgment is given unless -
>
> (a) a rule in another Part or a practice direction makes different provision; or
>
> (b) the court orders otherwise.
>
> (2) The court may order that interest shall begin to run from a date before the date that judgment is given.

25. Rule 44.2 provides (in part):

> (6) The orders which the court may make under this rule include an order that a party must pay -
>
> ….
>
> (g) interest on costs from or until a certain date, including a date before judgment.

26. The entitlement to interest on costs under section 17 of the 1838 Act is automatic. Generally the court will not order it expressly. Interest is therefore payable on costs at 8 per cent from the date of judgment (*Hunt v R.M.Douglas (Roofing) Ltd* [1990] 1 AC 398) without an order to that effect unless the court makes a different order under either CPR 40.8 or CPR 44.2(6)(g).

27. In *Simcoe v Jacuzzi UK Group PLC* [2012] EWCA Civ 137 Lord Neuberger, then Master of the Rolls, said:

> 47. We were referred to *Fattal v Walbrook Trustees (Jersey) Ltd* [2009] EWHC 1674 (Ch), [2009] 4 Costs LR 591, paras 25-30, in which Christopher Clarke J held, in summary terms, that the effect of CPR 40.8 was that (a) the general rule is that interest on costs runs from the *incipitur* date, (b) a departure from that general rule is justified if it is 'what justice requires'; (c) the notion that a departure can only be justified in 'exceptional' cases is an unhelpful guide; (d) the primary purpose of an award of interest is 'to compensate the recipient

> for [having] been precluded from obtaining a return on [his] money'; (e) '[s]ince the payment of solicitors' costs involves the payment of money which could otherwise have been profitably employed, the overwhelming likelihood is that justice requires some recompense in the form of interest'.
>
> 48. I agree with all those observations, but would add two precautionary comments on his observations. First, I would discourage too detailed an approach into the facts of the particular case in hand for the purpose of determining the date from which interest should run. As Lord Ackner's speech in *Hunt* [1990] 1 AC 398 implies, when making such a determination, the court should take a broad view of the position. Prolonged argument, let alone detailed evidence, on the issue must be avoided. There will often be no perfect date, and the decision inevitably will, indeed should, be broad brush. Further, if interest was to run from different dates on different components of the costs, it would, in many cases, lead to arguments which would do the legal system no credit. The second observation is that I would not necessarily agree with the suggestion, at [2009] 4 Costs LR 591, para 30, that it may be inappropriate to award interest on costs where the case is being funded by a third party entirely voluntarily or otherwise free of any cost. I would have thought that, following the logic of reason (v) in para 11 above (and see para 46 above), if interest on costs is payable from the *incipitur* date, the party to whom it is paid may have to account for it to the third party, and, if that is correct, there would seem to me to be a powerful argument for saying that the third party should get interest on costs in the normal way.

28. Accordingly the court should depart from the *incipitur* rule only where that is what justice requires in the particular case and should avoid awarding interest from different dates on different components of costs.

29. In this case Mr Gibbs did not rely on any particular feature to justify a departure from the general rule. He relied merely on the passage from the judgment in *Involnert* quoted above. However that was a commercial case in which the court had ordered the payment of interest at 2% over base rate from when the costs were incurred (ie pre-judgment interest) until the date 3 months after the date of the costs order when interest would become due at 8%.

30. As far as I am aware, most if not all of the cases in which the court has awarded Judgment Act interest only from a date after judgment have been commercial cases, in which orders for pre-judgment interest on costs at commercial rates are often made.

31. As he did not identify any particular feature in this case, Mr Gibbs' argument, in effect, is that the default position should be that interest should run only from the date on which notice of commencement of detailed assessment is or should have been served. However that is not the default position and no reason has been shown to depart from the general rule.

What order(s) should be made in relation to interest?

32. Given my decision that the Claimant should be entitled to interest at the rate of 8% from the date of judgment, is there any particular reason to award interest on part of the costs before judgment?

33. *Jones* was a rather different case to the present: a group action in which the disbursements came to a total in excess of £787,500. The present case is a straightforward personal injury claim. No evidence of the Claimant's means has been produced but for present purposes I am happy to accept, on my reading of the papers, that it is unlikely that the Claimant would have had the means to fund disbursements other than by a loan. That is almost certainly the case for the vast majority of claimants in personal injury actions. Yet the *incipitur* rule remains the default position and parliament did not choose, when enacting the Legal Aid, Sentencing and Punishment of Offenders Act 2013, to make specific provision for the funding of disbursements whether by enabling the recovery of funding costs or by creating a default entitlement to pre-judgment interest.

34. In my view, justice does not require a departure from the general rule in this case and the Claimant should be entitled only to interest from the date of the costs order. The higher rate of interest under the Judgment Act should go some way to compensating the Claimant for the interest that he is liable to pay for funding the disbursements.