

Case No: B2/2016/1923

Neutral Citation Number: [2018] EWCA Civ 87
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT
AT CENTRAL LONDON
District Judge Langley

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/02/2018

Before :

LORD JUSTICE KITCHIN
and
LORD JUSTICE HAMBLÉN

Between :

Lorna Carrasco
- and -
Rebecca Johnson

Appellant

Respondent

Stuart Hornett (instructed by MPR Solicitors LLP) for the Appellant
The Respondent, Ms Rebecca Johnson, appeared in person and was not represented

Hearing date : 24 January 2018

Judgment

LORD JUSTICE HAMBLÉN :

Introduction

1. This is an appeal against the award of statutory interest made by District Judge Langley in a judgment dated 20 April 2016.
2. The judge found that the Appellant was entitled to judgment for a total of £39,970.84, made up of a principal sum of £28,500, contractual interest of £6,000, and statutory interest of £5,470.84, awarded at the rate of 3% per annum.
3. The Appellant contends that the judge exercised her discretion wrongly when awarding statutory interest at the rate of only 3% per annum.

Factual background

4. The action concerned a claim by the Appellant to recover the balance of two unsecured loans made by her to the Respondent on 7 November 2008 and 18 December 2008, each of £20,000.
5. The judge found that both loans were made on the same terms, namely that they would be repaid in two months with interest of £3,000 and that, in the event of default, the loans would also attract £2,000 monthly interest. Shortly before trial the Appellant abandoned her claim for contractual default interest.
6. The Respondent did not repay either the principal or the contractual interest on time, but made only repayments in 2009, totalling £11,500. This left the principal sum of £28,500 and £6,000 interest outstanding. Proceedings were commenced in May 2010 and on 21 January 2011 the Appellant obtained an order for an interim payment for £28,500, which the Respondent did not comply with. A series of interim charging orders were then made against four properties owned by the Respondent, but no further payment was forthcoming.
7. Thereafter the proceedings were essentially dormant until the Appellant applied to restore the case in April 2014.
8. The Respondent raised various defences to the claim, namely that the agreements were unenforceable and the loans irrecoverable under s.40 of the Consumer Credit Act 1974 (“CCA”) because the Appellant was an unlicensed money lender within the meaning of s.41(1); that there was an unfair relationship between the parties within the meaning of s.140A of the CCA so that the obligations under the agreements should be varied or discharged under s.140B, and that if, which was disputed, the £3,000 contractual interest was agreed, it was void as a penalty. These defences were rejected by the judge.
9. A further defence raised was that the loans contravened s.93 of the CCA because the default rate was set at a higher level than the term rate. It was held in *McMullon v Secure the Bridge Limited* [2015] EWCA Civ 884 that any provision for default interest caught by s.93 of the CCA is wholly void; not just void as to any difference between the term and default rates. The claim to contractual interest of £2,000 per month was abandoned by the Appellant by letter dated 11 April 2016. This meant

that just before trial a claim for over £300,000 became one for £34,500 plus statutory interest.

The judgment

10. In arriving at her decision on interest the judge noted the following:
 - (1) The court has a discretion as to the rate to be awarded and the period on which it is payable.
 - (2) Bank lending rates are much lower now than they were in early 2009 when the loans were repayable.
 - (3) Interest is not awarded as compensation for damage done but for the claimant being kept out money that ought to have been paid.
 - (4) The loans were between private individuals. This was not a commercial loan and commercial loan rates were not appropriate.
 - (5) The Respondent was aware that the Appellant wished to buy out her sister's share in a property and that she needed the £40,000 loan to be repaid to enable her to do so.
 - (6) The present bank base lending rate was 0.5%. The judgment rate was 8%.
 - (7) Taking into account all the circumstances of both parties and the findings of fact made, the appropriate rate of interest was 3%.
11. The judge awarded 3% interest on £40,000 from 17 February 2009, on £38,500 from 15 August 2009 and on £28,500 from 6 October 2009.
12. The Bank of England base rates during the relevant periods were as follows:
 - (1) From 17 February to 4 March 2009: 1%.
 - (2) From 5 March 2009 to 4 August 2015: 0.5%.
 - (3) From 5 August 2015 to 20 April 2016: 0.25%.
13. For the majority of the relevant period the rate awarded represented 2.5% over base rate, but latterly 2.75% over base rate.

The grounds of appeal

14. The principal grounds of appeal are:
 - (1) An award of 3% did not reflect the findings of fact made by the judge as to the actual cost to the Appellant of being kept out of her money.
 - (2) The judge failed to take any or any proper account of the expert evidence before the court as to the borrowing rates in 2008.

- (3) Although the judge accepted that this was a case of private individuals rather than commercial parties he awarded a rate that was at or near the commercial rate.
 - (4) The judge failed to have regard to relevant matters in considering the overall fairness of the result.
 - (5) The judge failed to have any or sufficient regard to the fact that the Appellant obtained an order for interim payment in January 2011.
15. These grounds have been developed by Mr Hornett in his written and oral submissions on behalf of the Appellant. In particular, he has emphasised:
- (1) The expert evidence of Mr Palette as to the limited availability and high cost of loans for unsecured borrowers in late 2008 and as to credit card interest rates.
 - (2) The evidence as to the actual cost of borrowing to the Appellant, and, in particular, of a £25,000 8 year loan taken out by the Appellant with Abbey National in July 2015.
 - (3) The evidence of investment opportunities which the Appellant contended were lost as a result of the failure to repay the loan.
 - (4) The use of the loan by the Respondent to repay another loan, contrary to what she had told the Appellant, and consequent overall unfairness.

The relevant principles

16. In relation to the exercise of the court's discretion we have been referred to the commentary to CPR Part 7 in the White Book at 7.0.14-16. We have also been referred to and/or have considered various cases, including *Tate & Lyle Food and Distribution Ltd v Greater London Council* [1982] 1 WLR 149 (Forbes J); *Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd* (Steyn J); *Jaura v Ahmed* [2002] EWCA Civ 210 (Rix J); *Claymore Services* [2007] EWHC 805 TCC (Jackson J); *Fiona Trust and Holding Corporation* [2011] EWHC 664 Comm (Andrew Smith J); *Attrill v Dresdner Kleinwort* [2012] EWHC 1468 QB (Owen J); *Sycamore Bidco Ltd v Breslin* [2013] EWHC 174 Ch (Mann J); *Challinor v Julietter Bellis & Co* [2013] EWHC 620 Ch (Hildyard J) and *Reinhard v Ondra* [2015] EWHC 2493 Ch (Warren J).
17. The guidance to be derived from these cases includes the following:
- (1) Interest is awarded to compensate claimants for being kept out of money which ought to have been paid to them rather than as compensation for damage done or to deprive defendants of profit they may have made from the use of the money.
 - (2) This is a question to be approached broadly. The court will consider the position of persons with the claimants' general attributes, but will not have regard to claimants' particular attributes or any special position in which they may have been.

- (3) In relation to commercial claimants the general presumption will be that they would have borrowed less and so the court will have regard to the rate at which persons with the general attributes of the claimant could have borrowed. This is likely to be a percentage over base rate and may be higher for small businesses than for first class borrowers.
 - (4) In relation to personal injury claimants the general presumption will be that the appropriate rate of interest is the investment rate.
 - (5) Many claimants will not fall clearly into a category of those who would have borrowed or those who would have put money on deposit and a fair rate for them may often fall somewhere between those two rates.
18. *Challinor* and *Reinhard* are examples of cases which were held to fall within that mid-category, justifying a blending between rates, and in both cases interest was awarded at 3% over base rate.

The exercise of the judge's discretion

19. As the Appellant accepts, the court has a broad discretion in awarding interest.
20. In exercising that discretion, the judge had regard to the general principle that interest is awarded to compensate claimants for being kept out of money which ought to have been paid to them rather than as compensation for damage done.
21. In considering how the Appellant should be compensated the judge had regard to the fact that the loans were between private individuals rather than commercial parties.
22. In my judgment, this was a case in which the judge would have been entitled to treat the claimant as falling somewhere between the borrowing and investment category of claimant. The rate awarded may have been lower than the borrowing rate for an individual over the relevant period but it was well above the deposit rate.
23. The rate of 2.5/2.75% over base rate is broadly comparable to other awards to mid-category claimants during this period, such as in *Challinor* and *Reinhard*.
24. The judge would also have been entitled to reduce the interest rate to take into account the delay in the prosecution of the proceedings from 2011 to 2014.
25. In all the circumstances, I do not consider the award of 3% interest to involve an error in approach or to be outside the wide boundaries of the legitimate exercise of the court's discretion.
26. Dealing with each of the specific grounds of appeal, as elaborated in argument:
 - (1) The actual cost of borrowing - the court is concerned with the general attributes of a claimant, not what the particular claimant actually did or otherwise would have done or, in this case, the claimed actual cost of borrowing.
 - (2) The expert evidence – this addressed the cost of long term unsecured borrowing or bridging finance at the time of the loans in 2008. This was

relevant to various of the defences raised but not to the appropriate interest rate to be awarded over the period 2009 to 2016. The relevant starting point for those purposes is the Bank of England base rate over that period.

- (3) The commercial rate - although borrowing rates for individuals may be higher than for businesses, that is one of the reasons why, having regard to general attributes, it is often unrealistic to approach the issue on the basis that the money would all have been replaced by money borrowed. A blended rate may well result in rates comparable to the commercial rate, given the much lower deposit rate.
 - (4) Overall fairness – interest is awarded to compensate the claimant for being kept out of money rather than for damage done, such as alleged lost investment opportunities, or to punish or to call the defendant to account for his use of the money. The merits of the underlying case are not relevant to the award of interest, but delay in the prosecution of that case may well be.
 - (5) The order for interim payment – this does not attract interest at the judgment rate and that rate is accordingly not relevant to the order made. The fact that it does not do so made it all the more important for the Appellant to pursue the proceedings with expedition, which she did not do.
27. The Appellant’s arguments in this case highlight the importance of the principle that the court does not inquire into the detailed financial position of the claimant, but looks only at general or class attributes. To examine properly, for example, the claimant’s financial position throughout the relevant period; the borrowing carried out by her, when and on what terms; whether and how she needed so to borrow; the uses to which she might otherwise have put the money and the financial consequences of so doing; the extent to which any of these matters were known or in the reasonable contemplation of the Respondent etc. would have required a mini or indeed major trial, consumed significant time and expense and may well not have resulted in definitive answers. The broad approach which the court adopts is fair, practical and proportionate.

Conclusion

28. For all these reasons, in my judgment no error of law in the approach of the judge has been demonstrated and the conclusion which she reached as to the appropriate rate of interest to be awarded fell well within the generous ambit of her discretion. I would accordingly dismiss the appeal.

LORD JUSTICE KITCHIN:

29. I agree.