NCN: [2024] EWHC 2897 (Ch)

Case No: HC-2015-001224 & Ors

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

Rolls Building
Fetter Lane,
London, EC4A 1NL

Date: 1 August 2024

Before :

MR JUSTICE RICHARDS

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Between :

EVONIK UK HOLDINGS LIMITED and others **Claimants**

- and -

(1) COMMISSIONERS OF INLAND REVENUE **Defendants**
(2) COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

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Jonathan Bremner KC (instructed by **Joseph Hage Aaronson LLP)** for the **Claimants**
Frederick Wilmot-Smith, instructed by **the General Counsel and Solicitor for HM Revenue & Customs** for the **Defendants**

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Approved Judgment

This judgment was handed down remotely at 2pm on 1 August 2024 by circulation to the parties or their representatives by e-mail.

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MR JUSTICE RICHARDS:

1. This judgment must be read together with my judgment reported at [2024] EWHC 1671 (Ch) (the "June Judgment") in the same proceedings. I use the same defined terms as are used in the June Judgment unless the context requires otherwise. References to numbers in square brackets are to paragraphs of the June Judgment unless I specify otherwise.

2. With the consent of all affected parties, I determine the "apportionment question" summarised at [24] to [29] by reference to the written submissions of the parties.

3. HMRC advance two reasons why, in their submission, the £6.4 million should be allocated entirely to the principal component of Evonik's claim:

    i) When HMRC paid £6.4 million in 2016, Evonik had no liquidated right to any payment of interest. Accordingly, there was no liquidated claim for interest in 2016 against which the £6.4 million could be allocated.

    ii) Evonik is entitled only to an "adequate indemnity" vindicating EU law rights. If the £6.4 million was allocated to interest, it would obtain a much more than "adequate" indemnity since it would enjoy a benefit, in the nature of compound interest, from having had the use of £6.4 million in its business since 2016.

4. I am not persuaded by the argument set out in paragraph 3.i). Even if there was no liquidated sum due by way of interest in 2016, it is clear that, looking at matters now, Evonik is entitled to interest on the totality of its successful claim. Section 85(3)(b) of the Finance Act 2019 provides for simple interest to accrue on the "principal amount" until the date on which that "principal amount" is paid. Accordingly, whatever the position was in 2016, it is necessary to identify now when, if at all, any part of the "principal amount" was paid. Moreover, as noted at [1ii)], it is common ground that, to the extent that interest is capable of being awarded under s35A of the Senior Courts Act 1981 as applicable to various aspects of Evonik's claim, the court should exercise its discretion to award interest at base rate plus 2%. Deciding how much interest to award as at today's date therefore necessarily invites an examination of the apportionment question whether or not interest had crystallised into a liquidated sum in 2016. Now that interest is known to have accrued, it strikes me as conceptually entirely possible for some of the payment of £6.4 million to be treated as reducing interest that has accrued.

5. At a high level of generality it can be said that Evonik might have benefited from a "compounding" effect when it received £6.4 million of HMRC's money in 2016. For example, conceptually Evonik might have put the £6.4 million in a bank, earned interest on that sum and, rather than withdrawing the interest earned, left it in the bank account so that the interest itself earned interest. However, there is no guarantee that Evonik actually enjoyed any such compounding effect. It might, for example, have invested the £6.4 million in a failed business venture that earned no return.

6. Nor do I accept HMRC's proposition that any "compounding" effect that Evonik enjoyed from the receipt of £6.4 million in 2016 was somehow "excessive". As is now accepted, Evonik should never have had to pay ACT totalling £8.8 million in accounting periods prior to 1999. If it had not paid HMRC that ACT, it would have had the use of the sum in its business with the prospect of obtaining the "compounding"

effect that HMRC highlight. I accept, of course, that the law does not permit Evonik to claim compound interest for the period during which it has been out of its £8.8 million and limits the remedy to simple interest only. However, I do not accept that Evonik has somehow obtained an unprincipled windfall benefit simply because HMRC paid part of the sum due to it in 2016.

7. At [30] I expressed a preliminary view that I had not been greatly assisted by authorities on the allocation of payments due under a contract. That was because contracts reflect a common intention of the contracting parties whereas, in this case, there was no such common intention associated with the 2016 payment. HMRC made that payment simply because the High Court ordered it to do so.

8. However, I do see more force to Evonik's arguments based on fairness and common-sense. To adapt the example set out in paragraph 16 of Evonik's skeleton argument for the hearing on 17 June 2024, suppose that a defendant owes a claimant £100 but having steadfastly refused to pay the sum due, interest of £100 has accrued on a simple interest basis so that the total amount due is £200. Suppose that the defendant then pays £100. In that case, the claimant may benefit from the "compounding effect" to which HMRC refer. However, in my judgment it would make no sense to allocate the part payment of £100 to the principal amount of the debt. That would produce the anomalous result of excusing the defendant any further interest consequence from a continued refusal to pay the balance due since, in a simple interest environment, unpaid interest would not itself accrue interest.

9. It is no doubt with this kind of example in mind that courts have developed a rule of thumb to the effect that in similar cases, where simple interest alone is accruing on a sum, part payments should be allocated against interest before principal (see, for example *In Re Morley's Estate* [1937] Ch 491 and *Parr's Banking Company Ltd v Yates* (1898) 2 QB 460 at 466). That approach has not been confined to cases where a common intention can be presumed from the existence of the contractual relationship. In can be understood as preserving the utility of simple interest as a remedy for late payment of sums due.

10. In inviting the parties to make further written submissions, I asked them to consider whether they could reach an agreement to the effect that the £6.4 million is allocated partly to interest and partly to principal. Evidently, no such agreement has been reached. Moreover, HMRC chose to present an "all or nothing" argument to the effect that the £6.4 million should be allocated entirely to principal. Evonik, by contrast articulated a "fallback" position, if its primary argument, that the £6.4 million should be allocated entirely to interest, was unsuccessful.

11. For the reasons that I have given, I have not accepted HMRC's arguments. If HMRC had articulated a principled reason why the analysis summarised in paragraphs 8 and 9 above (which formed the core of Evonik's submissions at the hearing in June) should not be adopted, that might have supported a conclusion to the effect that at least some of the £6.4 million should be allocated to principal. However, as matters stand, HMRC have not provided a sufficiently good explanation of why the "rule of thumb" summarised in paragraph 9 above should not apply in this case. I do not accept the analysis that HMRC advance in paragraphs 18 to 20 of their skeleton argument because it does not deal with the anomaly identified in paragraph 8 above.

12. I will order that the £6.4 million should be allocated against the totality of interest as it had accrued at the time of the Summary Judgment Orders.

13. I had understood that the parties were also seeking to agree the final amount of Evonik's FID Claim (see [26]). I have not been notified of any such agreement, nor have the parties articulated any competing positions in this regard. I am prepared to defer the sealing of an order for a further short period (given the confidentiality issue that was explored in the June hearing). However, unless either side puts forward a compelling reason to the contrary, I consider that the debate on this issue should now come to an end. I would invite the parties to agree an order that gives effect to my judgment above together with such additional amendments to the quantum of the FID Claim as they are able to agree and submit that order for sealing no later than 8 August 2024 (reflecting the extension of time that I allowed in response to the draft of this judgment that was circulated before it was handed down in final form).