

Haribo Asia Pacific Pte Ltd v Aquarius Corp

[2021] SGHC 291

Case Number : Suit No 331 of 2018
Decision Date : 27 December 2021
Tribunal/Court : General Division of the High Court
Coram : Lee Seiu Kin J
Counsel Name(s) : Chou Sean Yu, Oh Sheng Loong Frank, Daniel Lee Wai Yong, and Eve Dana Ng Shi Ying (WongPartnership LLP) for the Plaintiff; Gregory Vijayendran SC, Kevin Tan, Devathas Satianathan, Low Weng Hong, and Ng Shu Wen (Rajah & Tann Singapore LLP) for the Defendant.
Parties : Haribo Asia Pacific Pte Ltd — Aquarius Corporation

Civil Procedure – Damages – Interest

27 December 2021

Lee Seiu Kin J:

The error to be corrected

1 Following the release of my decision in *Haribo Asia Pte Ltd v Aquarius Corporation* [2021] SGHC 278 (the “Judgment”), counsel for the Defendant wrote to the court, clarifying that an incorrect contractual interest rate had been applied in the Judgment in respect of the judgment debt I determined they were to pay the Plaintiff. At [12]–[13] of the Judgment, I wrote:

12 The Plaintiff pleads that the “**base** interest rate” prescribed by section 247 of the *Bürgerliches Gesetzbuch* (the “BGB”) – the German Civil Code – is 7.12% and that it is entitled from 1 July 2016 until the date of full payment. ...

13 The Defendant does not dispute that the Plaintiff is entitled to 8% over the rate of 7.12%. It contends, however, that the Plaintiff has no basis to claim interest from 1 July 2016. ...

[Emphasis added]

2 Thereafter, at [228] and [236]–[237] of the Judgment, I proceeded to apply the rate of 8% over 7.12%, *ie*, 15.12%, which I observed was a “rather high” rate of interest. The Defendant now highlights, and the Plaintiff confirms, that this was erroneous, and that the correct rate of interest which should have been applied was 7.12%, not 15.12%. The applicable **base** interest rate should have been -0.88%, not 7.12%. Thus, 8% over -0.88% is 7.12%, which is the rate which should have been used.

3 The Defendant suggests that this error stems from inconsistent usage, by the Plaintiff in its key documents, of the phrases “applicable base interest rate” and “applicable interest rate”. However, *my* incorrect usage of the figures in the Judgment in fact stems from the lack of clear distinction between these two phrases in the first place. At no point in the Plaintiff’s statement of claim, its written closing submissions, or its sole factual witness’s affidavit was the figure -0.88% stated, and if it had been, the character of the 7.12% figure would have been immediately apparent.

4 The Statement of Claim provided:

22. Pursuant to Clause 10 of the Delivery Terms and Conditions, the Plaintiff is entitled to claim default interest at the rate of 8% over the applicable base interest rate pursuant to Section 247 of the German Civil Code from the expiration of the time provided for payment until payment.

Particulars

- a. 7.12% per annum between 1 July 2016 and 31 December 2016
- b. 7.12% per annum between 1 January 2017 and 30 June 2017
- c. 7.12% per annum between 1 July 2017 and 31 December 2017
- d. 7.12% per annum between 1 January 2018 to date, up to 30 June 2018
- ...

AND the Plaintiff claims against the Defendant: ... (2) Interest at 8% over the base interest rate prescribed on a six-monthly basis under Section 247 of the German Civil Code (BGB) on EUR 1,526,224.76 until the date of full payment ...

5 The Plaintiff’s written closing submissions then stated:

28 It is also undisputed that the applicable base interest rate pursuant to Section 247 of the BGB is 7.12% per annum:

Applicable Period	Applicable Interest Rate
1 Jan 2017 to 30 Jun 2017	8 + 7.12% per annum
1 Jul 2017 to 31 Dec 2017	7.12% per annum
1 Jan 2018 to 30 Jun 2018	7.12% per annum

[Part of table omitted]

6 The Plaintiff’s sole factual witness, Mr Nikolay Karpuzov, stated in his affidavit of evidence-in-chief:

49. Pursuant to Condition 10 of the Delivery Terms and Conditions, HAP is entitled to claim default interest at the rate of 8% over the applicable base interest rate pursuant to Section 247 of the German Civil Code from the expiration of the time provided for payment until payment:

Applicable Period	Applicable Interest Rate under Section 247 of the German Civil Code
1 Jul 2016 to 31 Dec 2016	7.12% per annum
1 Jan 2017 to 30 Jun 2017	7.12% per annum
1 Jul 2017 to 31 Dec 2017	7.12% per annum

[Part of table omitted]

7 On the face of these averments and submissions, it is not clear whether the figure 7.12% was meant to represent the *derived* figure (*ie*, base rate + 8%), or whether it referred to the base interest rate indicated in the German Civil Code without the additional 8%. The Defendant now highlights that it addressed the Plaintiff's error – particularly, the Plaintiff's written closing submissions – in its own written reply submissions. I have re-examined the materials, and I accept that the Defendant did so, but the point was confined to a mere footnote.

8 Having said the foregoing, I will not attribute any blame for the ultimate error. I will only note that roundabout ways of expressing simple positions are generally undesirable, especially in cases such as this, with written submissions running into two to three hundred pages per side. The applicable rate of interest was not a disputed issue, and references to the "base" and "applicable" rates were unnecessarily oblique. It could simply have been stated that the rate of interest being claimed was "8% over -0.88% (the base rate provided by the German Civil Code), *ie*, 7.12%". This would have avoided further, unnecessary ambiguity amongst a whole host of other contentious issues. I leave this point with the following admonishment: the role of counsel is to assist the court and this is best carried out by the use of plain and simple language that clarify rather than obfuscate the issues.

A consequential point raised by the Plaintiff

9 As stated at [2] above, I observed in the Judgment that the initially-applied interest rate of 15.12% was "rather high". On this basis, I ordered that the Plaintiff's contractual interest be terminated on the date of the Defence and Counterclaim, 30 August 2018, and thereafter, that they would only be entitled to the court-ordered rate of 5.33%, same as the Defendant.

10 At [236] of the Judgment, I said:

236 The Plaintiff had prayed for contractual interest to apply until the date of payment, but I think that it is just, on the facts of this case, to terminate the contractual interest at an earlier date for the following reasons. First, the contractual interest rate of 15.12% is rather high, and in the context of the present-day interest rate environment, it behoves this court to be cautious in making any such award. Second, I have found that the Defendant is entitled to a counterclaim that is of a similar order of magnitude to the Plaintiff's claim. After setting off the counterclaim, the sum for which the Defendant is indebted to the Plaintiff would be greatly diminished. In these circumstances, I am minded to exercise the discretion vested in me under s 12(1) of the Civil Law Act (Cap 43, 1999 Rev Ed) to order the Defendant to pay the contractual interest rate on the Plaintiff's claims up to 30 August 2018, the date of filing of the Defence and Counterclaim, with interest thereafter to run at 5.33%. I also order interest at 5.33% on the sum ordered under the Counterclaim to run from the same date, 30 August 2018.

11 In light of the error and the correction of the rate of interest down to 7.12%, the Plaintiff submits that there is basis for me to reconsider *not* terminating the applicable contractual interest on 30 August 2018. Having considered the submission, I agree that difference between the Plaintiff's contractual rate of 7.12% and the court-ordered rate of 5.33% is not as to engage the same considerations set out above. Indeed, apart from being almost *three* times the usual rate of 5.33%, 15.12% was, in my view, in and of itself bordering on usurious. The same cannot be said of 7.12% and the reason for not awarding the contractual rate no longer applies. I therefore change this

aspect of my orders.

Consequential changes to the Judgment

12 Using the correct interest rate of 7.12%, and with the change stated in the paragraph above in mind, I set out the amendments to the following paragraphs of the Judgment:

9 The parties tendered their written closing and reply submissions on 13 August and 3 September 2021 respectively. No further oral replies were heard. Having considered these submissions and the evidence put before me, I allow the Plaintiff's claim for the principal sum of €1,526,224.76 **and its claim for contractual interest** in full. I allow the counterclaim in part, and order that the Plaintiff pay the Defendant ~~€~~1,969,018,000 with judgment interest of 5.33% from the date of the Defence and Counterclaim, 30 August 2018. I also find that the requirements for set off have been satisfied, and I will explain how the set off is to be applied from [236] to [240] below.

...

12 The Plaintiff pleads that the "base interest rate" prescribed by section 247 of the *Bürgerliches Gesetzbuch* (the "BGB") – the German Civil Code – is **-0.88%** and that it is entitled from 1 July 2016 until the date of full payment. Applying this rate and starting date, as at 13 August 2021 – the date on which closing submissions were filed – the Plaintiff calculates that it is entitled to €519,074.76 in interest.

13 The Defendant does not dispute that the Plaintiff is entitled to 8% over the rate of **-0.88% (ie, 7.12%)**. It contends, however, that the Plaintiff has no basis to claim interest from 1 July 2016. In support of this, the Defendant highlights that interest is only payable "from the expiration of the time provided for payment" (see [11] above). The earliest invoice on which the Plaintiff's claim is based is dated 1 November 2016, and the invoice states that payment is to be made by the "3rd working day of [the] next month". That is, 5 December 2016 – the 3rd and 4th of December being non-working days.

...

228 As such, I find that the Plaintiff is entitled to **7.12%** interest on each of their invoices, starting from the day after the amount fell due on that particular invoice. The following table sets this out: ...

...

236 [This paragraph is deleted]

237 For the foregoing reasons, I allow the Plaintiff's claim for the principal sum of €1,526,224.76 and its claim for contractual interest of **7.12%** for the following sums from the following dates: (a) €1,390,464.86 with interest payable from 4 February 2017 until the date of **this judgment, 2 December 2021**; and (b) €135,759.90 with interest payable from 4 March 2017, also until the date of **this judgment**. In respect of (a), there are **1762** days between 4 February 2017 and **2 December 2021 (this takes into account the Leap Day in 2020)**, both dates inclusive. As such, interest amounts to **€477,917.63**. For (b), there are **1734** days and interest payable amounts to **€45,920.62**. **Thus, in total, as of the date of this judgment, the Plaintiff is awarded the sum of €2,050,063.01. I will denote this sum (P₁).**

238 [This paragraph is deleted]

...

240 With sums (P_1) and (D) in mind, I turn then to the issue of set off involving a complication concerning currency exchange rates. The starting point is that I order that the parties determine the applicable exchange rate and set off their respective judgment debts on the date of this judgment. That is, (D) should be converted to Euro based on the exchange rate on 2 December 2021 and deducted from (P_1). As such, as of this date, the Defendant would only owe the Plaintiff ($P_1 - D$), a sum in Euro, which I will denote (P_2). Thereafter, the Plaintiff would be entitled to **7.12%** interest **only** on (P_2) – as opposed to (P_1) – from the day after this judgment, 3 December 2021, to the date of full payment.

...

255 It is for these reasons that I held (at [240]) that the parties set off their claims on the date of this judgment, and consequently, that the Plaintiff is entitled to receive **7.12%** interest **only** on (P_2) from the day after this judgment.

[Amendments emphasised]

13 For the avoidance of doubt, my amended orders as set out above shall take effect from 2 December 2021, the date of the Judgment. As I explained at [240]–[253] of the Judgment, there are issues of set off and currency conversion arising in this matter, and there is a principled basis on which I decided to order the necessary conversion and set off to be effected on that date. This subsequent correction of the precise sums which form the subject of my orders does not justify a departure from the basis on which I made that decision.

14 With these clarifications, the parties may proceed to effect the set off of their respective judgment debts using the relevant exchange rate on 2 December 2021, and the Plaintiff may then proceed to enforce payment of the balance owing thereafter.