Neutral Citation Number: [2021] EWHC 2112 (Ch)

Case No: BL-2019-001619

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Double-click to add Judgment date

Before :

CHARLES MORRISON

(sitting as a Deputy Judge of the High Court)

- -

Between :

(1) HITECH GRAND PRIX LIMITED **Claimant**

- and –

(1) ENAAM MOTOR SPORTS LIMITED **Defendant**
(2) MR ENAAM AHMED

- -
- -

Simon McLoughlin (instructed by **Leathes Prior** Solicitors) for the **Claimant**

Simon Hunter (instructed by **KD Law)** for the **Second Defendant**

Hearing date: 14th July 2021
- -

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.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10.30 am on [xxxx xx] July 2021.

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Charles Morrison (sitting as a Deputy Judge of the High Court):

Introduction

1. In this matter which came before me for a short trial, a Formula 3 Grand Prix racing team (the **Claimant**) is claiming unpaid racing fees in relation to one of its drivers (the **2nd Def**). In the world of Formula 3 racing, teams provide cars and mechanical expertise whilst some drivers it seems, pay for the pleasure of being able to race. Sometimes the drivers fund themselves, whilst others receive sponsorship.

2. Here the Claimant seeks to recover sums totalling £468,479.57 under the terms of two agreements entered into with the first defendant (**EMSL**) and the 2nd Def. Of that sum, £367,148.13 is claimed from EMSL, and £101,331.44 is claimed from EMSL and the 2nd Def jointly. Interest is also claimed.

3. Although EMSL says that the claim against it is overstated, and requires the Claimant to prove a number of its assertions, EMSL admits that it owes some money to the Claimant. EMSL was not represented at the trial before me and took no part.

4. The 2nd Def says that he owes nothing to the Claimant. His case is that the Claimant has already been paid everything that he owed. Sums which the Claimant has received and appropriated to EMSL's debts, had in fact been paid to settle his debts. The funds either in fact were, or at any rate should have been, appropriated to the payment of the 2nd Def's debts.

5. EMSL I should say, is a company owned and controlled by the 2nd Def's mother and his father, Mr Shami Ahmed (**Shami**). This company plays a role in the management of the 2nd Def and his racing career.

Evidence

6. I heard evidence in the Claimant's case from racing team principal, Mr Oliver Oakes. He is also a shareholder and director of the Claimant. I also heard from the Claimant's Finance Manager Mr Michael Sanwell.

7. At the outset of the trial I delivered a short judgment in which, on *Denton* grounds, I declined to grant the 2nd Def relief from sanction in respect of his attempt to serve three witness statements, in the words of his counsel, Mr Hunter, very late. As a consequence of that judgment, no witness evidence was led on behalf of the 2nd Def.

The Pleadings

8. The case is succinctly laid out in paragraphs 5 to 27 of the Particulars of Claim. A case is made that the 2nd Def entered into certain agreements with the Claimant under which he now owes the amounts that are the subject of this action. This is because the 2nd Def did enter races as part of the Claimant's team under a so-called "Season Agreement"; and because he did incur expenses, and a liability for crash damage repair costs.

9. It is common ground that:

9.1 the 2nd Def raced for Claimant in the 2018 Championship and in a further, freestanding race that was not part of the Championship, the 2018 Macau Grand Prix (the **Macau GP**);

9.2 the terms on which the Claimant permitted the 2nd Def to race for it in the Championship and at the Macau GP were contained in two agreements in similar terms, respectively "the **Season Agreement**" and "the **Macau Agreement**", entered into by both the 2nd Def and EMSL, the latter as Guarantor;

9.3 EMSL agreed to pay the Claimant a total of €750,000 (plus VAT, if applicable) for the 2nd Def to compete in a Hitech car in the Championship and €60,000 (plus VAT, if applicable) to compete in a Hitech car at the Macau GP;

9.4 EMSL agreed to be liable for the cost of damage caused to the Claimant's cars in the course of the 2nd Def's racing, and EMSL and the 2nd Def agreed to reimburse the Claimant for various travel and hotel accommodation expenses incurred by the Claimant on the 2nd Def's behalf.

10. In addition therefore to EMSL's liability under the Season Agreement and Macau Agreement (the Agreements), the Claimant raised invoices for costs it incurred as a result of damage sustained to its car in the course of the 2nd Def's driving; and also for expenses incurred by the Claimant on the 2nd Def's behalf and recharged to him.

11. It was agreed before me that the following sums had been due and owing to the Claimant but subject to the case made by the 2nd Def that insofar as a claim was made against him, the relevant costs had been defrayed and could not be the subject of any judgment as a result of this trial.

a)	Championship Fees	€750,000
b)	Macau Fees	€60,000
c)	Crash damage	£58,221.25
d)	Expenses:	£101,331.44

12. Thus, the sums payable in GBP, allowing for an agreed formula for conversion, under the Agreements totalled £838,641.96, plus VAT. On the Claimant's case the sum of £513,141.26 has been paid. One of these payments, £150,000, was made by a Dr Poupel (the **Poupel Payment**). It is that Poupel Payment that featured at the centre of the trial before me. Despite repeated claims for payment over the course of the 2018 Championship season (and afterwards), no further sums have been paid.

13. On 3.9.19 the Claimant issued these proceedings, claiming £468,479.57, plus interest.

14. By their Defence dated 28.10.19 EMSL and the 2nd Def denied that any sum was due from the 2nd Def, because the payments made by his father and/or Dr Poupel had been appropriated by the Claimants against the 2nd Def's liability under the Agreements. EMSL did not admit any specified amount as being due to the Claimant.

The Agreements

15. By article 9.1 of each the Agreements, EMSL agreed to pay the fees payable for the 2nd Def's 'seat' in the Claimant's car: €750,000.00 to race in the Championship and €60,000.00 to race at the Macau GP, plus (in each case) VAT if applicable.

16. In relation to expenses, articles 10.1 and 10.5 of the Agreements provided as follows:

> "*10.1 Neither the Guarantor nor the Driver is entitled to recover any expenses other than those set out in this Agreement or otherwise preapproved in writing by Hitech GP …*
>
> *10.5 Where the driver is responsible for his own expenses associated with his participation in the [Championship] [Race] [as applicable] and any such costs have been incurred by Hitech GP, the Driver shall pay these costs to Hitech GP within 30 (thirty) days of receipt of invoice*"

17. By article 3.2 of each the Agreements, EMSL agreed to "procure that the Driver complies with each of its obligations set out in [the relevant] Agreement".

18. In relation to crash damage, article 12.1 of the Season Agreement (and the Macau Agreement was the same, save for Insurance thresholds) provided as follows:

> "*12.1 The Guarantor will be liable for and will promptly settle at Hitech GP's demand, all damages to the Car howsoever caused, for first accident, up to the uninsured amount of GBP 6,000 (six thousand Pounds) plus VAT, increasing to GBP 7,500 (seven thousand, five hundred Pounds) for every accident thereafter as per the insurance policy that Hitech GP undertakes to take out*"

19. The Agreements provided that if EMSL failed to pay any sums due under the relevant agreement, interest would be payable at 4% per annum above the base rate of Barclays Bank plc from time to time

20. Thus in the trial before me, the Claimant asked for judgment against EMSL in the following sums, together with interest, totalling £468,479.57:

a)	Balance of Season Fees	£244,727.14
b)	Macau Fees	£64,199.74
c)	Crash Damage	£58,221.25
d)	Expenses	£101,331.44

21. The only sum claimed from the 2nd Def is the expenses of £101,331.44, with the addition of interest which the Claimant seeks under the Late Payment of Commercial Debts (Interest) Act 1998 (the **LPCD Act**)

22. Whatever was the position of the Defendants on the pleadings, the case run by the 2nd Def before me was straightforward: the Poupel Payment settled any claim that could be brought against him. It either was or should have been appropriated to the settlement of that debt.

23. As to interest, the argument before me centred on whether the LPCD Act applied or whether, on such sums as I might find are due to be paid, interest should be awarded at the usual, likely to be lower, court rate. The 2nd Def says that the LPCD Act does not apply to the sums claimed by the Claimant because the Agreements are not agreements for the provision of goods or services within the meaning of the LPCD Act.

Legal Framework

24. It was a singular feature of the proceedings before me that throughout, and I am indebted to them for it, Counsel exercised the utmost good sense in seeking to narrow the issues that required a decision from the court. Consistent with that approach, there was no controversy as to the law relating to the central issue of appropriation. It is well set out in *Chitty on Contracts* (33rd edn.), vol. 1, [21-061] to [21-066]. When making a payment, a debtor is entitled to appropriate the payment to a particular debt. If the debtor does so, the creditor must apply it as directed; but if the debtor makes no appropriation, the creditor is then entitled to do so.

25. The appropriation by the debtor must be properly communicated to the creditor. The creditor must be in a position to know that his right of appropriation as creditor cannot arise: see *Leeson v. Leeson* [1936] 2 KB 156. The communication to the creditor of the debtor's requirement for appropriation can be express or it might in the appropriate

circumstances, be implied. As Males LJ observed in *Khandanpour v Chambers* [2019] EWCA Civ 570 at [25],

> "A debtor's intention to appropriate a payment to a particular debt may be inferred from the circumstances known to both parties".

26. The learned judge was there drawing upon the position set out by Lush J in *Parker v Guinness* [1910] 27 TLR 129:

> "But if the inference to be drawn from the circumstances is that the payment was in fact appropriated by the debtor at the time of payment, the fact that he made no express statement at the time is immaterial. Now an appropriation by the debtor may be inferred from a variety of circumstances. Each case must, in my opinion, be considered on its own peculiar facts."

27. Expressing his view on the test set out by Lush J, Males LJ went on to say at [27], that,

> "What matters is that in the light of all the circumstances, and viewing the matter objectively, there should be no doubt about the debtor's intention".

28. There was equally no disagreement before me that where the debtor has not exercised his right to appropriate, the creditor may do so "up to the very last moment"; or until something happens which makes it inequitable for him to do so. As will be seen, the 2nd Def did make submissions to me on this latter principle.

The evidence

29. In their witness statements, both Mr Oakes and Mr Sanwell explain so far as they were concerned, neither Dr Poupel nor Shami, nor the 2nd Def himself, advised them (or the Claimant) to apply the Poupel Payment towards any particular liability under the Season Agreement. Mr Oakes' evidence at paragraphs 26 and 27 of his statement is that no one communicated an appropriation to him and that it "*would be unusual (unheard of in my experience) for a sponsor to come on board to pay those expenses. I have never come across an 'expenses' sponsor* ".

30. Mr Oakes told me that he was responsible for drivers and races. He was involved in accounts and new about invoices. He also approved the audit of the accounts. Mr Sanwell would ask him to approve certain questions but if a payment simply came in then it would be put on the driver's account. Mr Oakes believed he was copied in on everything including contracts and invoices and so he was "up to speed on all of it day to day". The 2nd Def's father, mother, as well as Dr Poupel, would all often ring him so for that reason he was up to speed.

31. Mr Oakes told the court that he runs four teams with 12 drivers. "If someone sends a payment to be allocated differently, they would be accompanying such a payment with a clear instruction as to how that payment should be allocated."

32. In June 2018, Mr Oakes had not recharged for the expenses and no payment had yet been received from Dr Poupel. He invoiced the expenses in the October but they should already have been paid by then. Mr Oakes explained how prior to that point he had

been instructed by Shami to "keep them on file". His evidence was that the Claimant would normally invoice within 30 days but had been asked not to invoice as Shami had said "sponsors were coming – but they did not and I was becoming frustrated as I had these two expenses to clear."

33. When pressed in cross examination as to whether the Poupel Payment which had been received under the reference Enaam, must necessarily have been in respect of the 2nd Def's expenses liability because that is the only sole liability he had, Mr Oakes replied with an unequivocal no. His evidence was that when someone made a payment like this it is relating to the 2nd Def and his racing agreements.

34. Mr Oakes was taken to an email of 3 December 2018 which included three tables of figures. He was asked repeatedly to agree that the tables taken together, revealed that the Poupel Payment had in fact been appropriated by the Claimant and for that reason a negative amount of £230,000 was shown in the first table. The first table he agreed was a mixed account of crash damage for EMSL's account and expenses which were to be settled by the 2nd Def. No mention was made of the previous invoices for expenses which so far as Mr Hunter was concerned confirmed that they had already been settled.

35. Mr Oakes would accept none of this. The previous expenses invoices remained outstanding. The fact that the Poupel Payment appeared in the first table did not mean that it had been appropriated: quite the reverse. It was a payment on account. The Claimant had been "holding back" and had not remitted invoices because that is what the 2nd Def's father had asked him to do. But now, in December, the financial position needed to be cleared.

36. The court then heard evidence from the financial manager Mr Sanwell. In cross examination he was also asked about the 3 December email and the three boxes of figures. He confirmed that it was him who had prepared the email and the boxes. The Claimant, he said, used the SAGE accounting system. All of the costs relating to the 2nd Def went into the one account in the system: no distinction was drawn between the liabilities of the 2nd Def and those of EMSL.

37. As to the Poupel Payment he noted the reference to Enaam, but saw it simply as a payment towards his season fees. At the time he said

> "we had been chasing Shami and Enaam for the lion's share of the debt which was the Season Agreement costs – we took the payment as being his costs of which the lion's share was the Season Agreement. At no point did anyone say it was just for his expenses. It was just for his account."

38. When pressed again about what was in truth revealed by the three boxes with the 3 December email, Mr Sanwell remained resolute to his position that the Poupel Payment was not being shown as being allocated against any particular fee.

> "The two payments at the top of the box had not yet been allocated. They had not been deducted from liabilities. The table shows outstanding amounts. The crash damage amounts are still there as outstanding – if they had been cleared they would have line through."

39. When asked about the negative balance, Mr Sanwell again replied that this was as a result of an allocation by him of the Poupel Payment. Asked why the earlier expenses had not been shown, Mr Sanwell explained that they had already been invoiced – they had not been cleared. It was not that they had been paid.

39.1 When re-examined, Mr Sanwell explained how a desire to avoid a liability for VAT had played a part in the holding back of invoices. If the 2nd Def's father, Shami, had succeeded in identifying a sponsor who could settle a racing liability with the Claimant without having to pay VAT then so far as all were concerned, so much the better. It made little difference to the Claimant but if it meant that the costs were paid then Mr Sanwell was content. It was for this reason that invoices were not generated until the last minute.

40. Mr Sanwell also explained that as regards the boxes in the 3 December email, invoices would be cleared off the table when an allocation of a payment was made. The top box contained the open items. Once an invoice was paid or a payment allocated, it was no longer outstanding and would no longer appear on the download and not on any outstanding list. Thus the invoices were unallocated and so too was the payment of £150,000.

Discussion

41. I will deal first with the claim against the 2nd Def. Mr Hunter says that in the event, the evidence is clear: there was in fact no appropriation by the Claimant of the Poupel Payment. But he asks, should there have been? In seeking to persuade me to answer this question in the affirmative, Mr Hunter invited my attention to what had happened between June and November of 2018, when the Poupel Payment was made. By then, the Claimants had invoiced the Expenses. This in his view was a highly relevant part of context. Whilst there had been communications between Shami and the Claimant, there had been nothing passing between the Claimant and Dr Poupel. The reference which Dr Poupel applied to his remittance is that it was for the 2nd Def. It says it in black and white and it was sufficiently clear who it was for and what liability it was discharging. It was the invoiced expenses of the 2nd Def that needed to be cleared and that it what this payment was doing. Mr Hunter urged this interpretation of events upon me despite conceding that the position could have been put beyond peradventure in a covering email; and that this line of argument was the only string he had to his bow. There is no other fact or circumstance to which I can apply the Lush J formula.

42. In sum, Mr Hunter placed central reliance upon the reference which was applied to the Poupel Payment *ENAAM AHME*. This was the argument developed at paragraph 16 of his skeleton.

43. As I have already indicated, Mr Hunter accepted that the Claimant had not appropriated the Poupel Payment by the time of the emails in December. They did so later. In a second line of argument, Mr Hunter submitted that the Claimant ought not to be treated to have done so, as that would be inequitable. The grounds for this inequity were not developed at any length, if at all by Mr Hunter. No case was made of a change of

position, or some such principle that might lead the court to the view that an appropriation at the stage it took place, would be unjust.

44. I have to say that on the evidence I have read and heard, I am driven to these conclusions:-

44.1 The Claimant did not appropriate the Poupel Payment to the settlement of any debt on any date earlier than on its evidence it did.

44.2 The Claimant was not expressly informed that the Poupel Payment was to be allocated only or first to the settlement of the 2nd Def's liabilities.

44.3 In all the circumstances, there was no reasonable basis for the Claimant to infer that the Poupel Payment was to be appropriated to the settlement of the debts of the 2nd Def. The reference applied to the Poupel Payment was of itself insufficient to discharge the burden on the 2nd Def to make it plain to the Claimant the appropriation that was required. On the evidence, the Claimant had no idea whatsoever that the Poupel Payment was intended to cover the 2nd Def's debts. There was in my judgment nothing in the factual matrix as it was developed before me in this trial, as would reasonably lead to any such belief. The £140,000 payment made earlier by Shami, carried a very similar reference. No case was made that this payment ought to have been appropriated to the 2nd Def's debt. It was treated no differently by the Claimant. Indeed it was Common ground that payment of £140,000 was a sum discharging EMSL's liability for season fees under the Season Agreement.

44.4 I find no grounds for holding that the appropriation by the Claimant of the Poupel Payment to the settlement of the debts of EMSL, was wrongful or inequitable on any basis. I see no grounds on which the court could interfere with this treatment of the payment.

45. The Claimant was thus entitled to appropriate the £150,000 payment to the partial discharge of the outstanding 'seat' fees payable by EMSL under the Season Agreement and did so.

46. Turning to the claims made against EMSL, and looking first at the claim for unpaid season fees, having now decided the appropriation issue, it is clear that judgment must be entered for the balance claimed. There was as I understand it no other defence made to the claim, certainly none was ventilated before me. I am satisfied that the claim has been properly particularised and evidenced.

47. It is a similar position in respect of the Macau fees of £64,199.74. I am told that a CPR PD 16 para 9.1 point was taken on the pleadings in regard to the way in which the claim based on a foreign currency was described. I agree with the Claimant that it is difficult to see any prejudice to EMSL who appears to have been very well aware of the amounts claimed and how they were calculated.

48. Turning next to the crash damage, I am satisfied with the evidence of Mr Oakes and Mr Sanwell, which taken together, provide full details of the damage and the costs incurred. It explains how the claim was limited to the extent of the relevant insurance premium

where the damage costs were in fact in excess of that value. I also accept that no real defence has been put up to the crash damage claim.

49. The Claimant accepts that under article 12.1 of the Macau Agreement, EMSL is liable for only the first 10,000 plus VAT of the costs of the first accident at Macau, not the 15,000 plus VAT invoiced under invoice 445 – both amounts in Euros. EMSL's liability under that invoice is thus limited to £8,927.77, calculated at the rate of exchange then applied, to which must be added VAT, providing a total £10,713.32.

50. As I have held that the 2nd Def is liable to the Claimant for the expenses claim, so EMSL must have a liability for a like sum pursuant to article 3.2 of the Agreements which provided that EMSL, as guarantor, would procure that the 2nd Def would perform his obligations under the agreement. One of those obligations (article 10) was that the 2nd Def would pay to the Claimant, expenses due, within 30 days of the relevant invoice.

Interest

51. The Claimant argues that its right to claim interest from EMSL under clause 9.4 of the Season Agreement and 9.2 of the Macau Agreement arises, on the true construction of the Agreements, in relation to "*any sums due on the due date*" under the Agreements.

52. The Claimant accepts that it has no contractual right to interest as against the 2nd Def. The Claimant therefore says the LPCD Act applies. This is because the Claimant contracted to carry out a service or services for a consideration that is a money consideration within the meaning of s.2(2) and s.2(3) of the LPCD Act. The services are described in article 2.1 of each of the Agreements, and include the provision of a car, team and technical staff, a simulator and an engineer.

53. Mr Hunter on the other hand asks me to look at the Agreements as a whole. In essence he submits that the Agreements do not amount to a contract to provide or carry out a service. The LPCD Act he says, and for support he points me to s.2, applies to any,

> "contract for the supply of goods and services where the purchaser and the supplier are each acting in the course of a business";

and when I look at the types of contract to which the LPCD Act applies, the only potentially relevant one is s.2(3)(c): "agreeing to carry out a service." The argument runs that the essence of such a contract is that one party pays another party to carry out some service for the purchaser; as much is clear from the definitions of those two terms in s 16.

54. So far as Mr Hunter is concerned, under the Agreements EMSL and the 2nd Def are paying for the 2nd to drive. Yes they are purchasers, but the Claimant is not supplying a service: it is the 2nd Def who is driving. It is the 2nd Def providing a service to the Claimant by doing that driving.

55. I regret to say that if I were to find for Mr Hunter on this point such would be an artificial and strained conclusion. The plain fact of the arrangement was that a service was being supplied to the 2nd Def. That is what he was paying for. He was able to pursue his

passion for racing fast cars, and perhaps even develop a career out of it, because of the services supplied by the Claimant.

56. The LPCD Act applies to a contract for the supply of goods or services and in my judgment the services provided by the Claimant under the Agreements fell square within the meaning of "agreeing to carry out a service" in s.2(3)(c). I have arrived at this view taking full account of the Recitals to the Season Agreement which suggests that EMSL and the 2nd Def are themselves supplying the services of the 2nd Def as a driver, because, it might said, the Claimant is desirous of participating as a team in motor racing championship (*viz*, Recital B). I also recognise that at article 3 of the Agreements, the 2nd Def himself took on obligations to the Claimant, in terms that he would, by way of example, keep himself fit, compete to the best of his ability and make himself available to the Claimant for tests and races. On the evidence I have heard however, it was the 2nd Def who wanted to drive for the Claimant's team; the Claimant agreed that he could, if he purchased the services that they would provide as a motor racing team. That was the essential character of the Agreements and the complexion I place upon them.

57. For these reasons, I am prepared to hold that the Claimant is entitled to interest on the sum due to it from the 2nd Def, such interest to be calculated applying the provisions of the LPCD Act.

Conclusions

58. In light of my findings, to which I would add that I am not troubled by any argument that might have been raised by EMSL in regard to the rate of conversion of amounts claimed in British Pounds having been charged in that currency I was told for EMSL's convenience, I am prepared to enter judgment for the Claimant as against EMSL for:

58.1 the claim in respect of the balance of the season fees, £244,727.14;

58.2 the outstanding Macau fees of £64,199.74; and

58.3 the crash damage claim being £52,864.58

59. As against the 2nd Def and EMSL jointly, there will be judgment in the amount claimed of £101,331.44

60. I will hear counsel on the form of the order and any other consequential matters although it is to be hoped that an agreed draft can be submitted to the court.