GOWLING WLG

BREXIT BITES AS COMPENSATION AWARDED FOR EXCHANGE RATE LOSS ON PAYMENT OF LEGAL COSTS

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In deciding what was a novel point, the High Court has compensated a German company for exchange rate loss on payment in pounds sterling of its solicitors' costs incurred in English patent proceedings, particularly following the significant fall in the value of the pound after the 23 June 2016 referendum.

In Elkamet Kunststofftechnik GmbH v Saint-Gobain Glass France S.A, the successful German claimant was awarded 93 percent of its costs of the proceedings. While summarily assessing those costs on the indemnity basis, the issue arose as to whether the claimant should be compensated for the decline in the exchange rate between the pound and the euro since the proceedings were launched, and particularly since the decision in the EU referendum.

The exchange rate had fallen from £1 to €1.39 to £1 to €1.14 during the period over which the claimant had had to pay its solicitors' invoices, so the cost in euros of paying the solicitors at the time was much more than the euro value now of the pounds sterling sums sought.

The claimant had calculated that the substantial adverse move in the exchange rate would cause it to suffer €29,602 or £25,193 in exchange rate losses, if it was simply awarded the pounds sterling value of what it had paid its solicitors (and then had to repatriate that back to Germany). The question was whether the claimant should be compensated for that loss?

Costs are awarded to a successful party to litigation to put it back, in principle, more or less to the same position it would have been in if it had not had to expend those costs. The courts have regularly exercised the power to award interest on such costs to

compensate the successful party for being kept out of its money. There was no authority on the point in relation to exchange rate losses, but the claimant argued that this reasoning should apply equally to additional costs incurred by reason of the adverse movement in exchange rate.

The defendant declined the invitation to accept that the payment of costs be made in euros, despite the fact that it was a French company. It argued that as the litigation was progressing in this jurisdiction, a costs order should be expressed in sterling regardless of the source of funds from which payment was made, and that as exchange rates can go up and down, satellite litigation over levels of exchange rates should be discouraged.

The High Court determined that the claimant should be compensated: the court considered that as it had the power to make an order for damages expressed in a foreign currency, it also, in principle, had the power to order that costs be expressed in a foreign currency. It should therefore follow as a matter of logic that the court also had the power, if it made an award in pounds sterling, to compensate for any exchange rate loss.

There was a powerful analogy between an award of interest on costs and an award of exchange rate losses on costs. If the court could award interest on costs to compensate a party for being kept out of its money, there seemed no reason why, if it had to exchange its local currency into pounds sterling to pay its legal costs as the litigation went along, it should not be similarly compensated for any additional losses by reason of exchange rate movements.

The court should, however, be cautious in quantifying the exchange rate loss as it did not know what the exchange rate would be at the date of final payment - it could have gone up again. It awarded the claimant an additional payment of £20,000.

Comment

Parties on the paying end of orders for costs in favour of non-UK based parties may, on the basis of this judgment, see applications for compensation for recent exchange rate loss and should make appropriate provision for it.

The more interesting issue is: courts award interest on the principal sums claimed, again to compensate the successful party for being kept out of its money. Will we soon be seeing exchange rate losses claimed as a standard head of loss (i.e. just like interest) in any proceedings with a non-UK based claimant? That might sound a big step, but the principle is just the same …

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