



Neutral Citation Number: [2020] EWCA Civ 1574

Case No: C1/2019/2976

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)
MRS JUSTICE COCKERILL DBE
[2019] EWHC 3291 (ADMIN)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 November 2020

Before :

LORD JUSTICE LEWISON
LADY JUSTICE ROSE
and
LORD JUSTICE STUART-SMITH

Between :

SSP HEALTH LIMITED

Appellant

- and -

**(1) THE NATIONAL HEALTH SERVICE LITIGATION
AUTHORITY (PRIMARY CARE APPEALS SERVICE)**

**(2) NATIONAL HEALTH SERVICE COMMISSIONING
BOARD**

(3) THE SECRETARY OF STATE FOR HEALTH

Respondents

David Lock QC and Simon Butler (instructed by **QualitySolicitors Acklam Bond**) for the
Appellant

Fenella Morris QC and Tom Cross (instructed by **Browne Jacobson LLP**) for the **Second
Respondent**

Hearing date: 12 November 2020

Approved Judgment

Lord Justice Stuart-Smith :

Introduction

1. The issue on this appeal is whether an adjudicator appointed to resolve a dispute under an NHS contract made a lawful decision not to award interest on sums that she considered due. Cockerill J held that she did, for the reasons set out in her judgment handed down on 8 November 2019: [2019] EWHC 3291 (Admin).
2. The Appellant, SSP Health Ltd [“SSP”] provided primary care services to Primary Care Trusts by taking over 22 failing GP practices and health centres. It did so pursuant to separate arrangements in materially identical terms that were “NHS contracts” within the meaning of s. 9 of the National Health Service Act 2006 [“the Act”]. One of the features of NHS contracts is that, whether or not the arrangements would otherwise be a contract in law, s. 9(5) of the Act provides that they must not be regarded for any purpose as giving rise to contractual rights or liabilities. S. 9(6) of the Act provides that, if disputes arise with respect to such an arrangement, the dispute may be referred to the Secretary of State for determination. The Secretary of State has devised and implemented an adjudication scheme whereby he has appointed the First Respondent [“the NHSLA”] to determine disputes that are referred to him. An authorised officer of the NHSLA will then conduct and determine the adjudication.
3. For present purposes it is sufficient to note that:
 - i) “A determination of a reference ... may contain such directions (including directions as to payment) as the [adjudicator] considers appropriate to resolve the matter in dispute”: s. 9(11) of the Act; and
 - ii) The adjudicator “may by the determination in relation to an NHS contract vary the terms of the arrangement or bring it to an end (but this does not affect the generality of the power of determination under subsection (6))”: s. 9(12) of the Act.
4. SSP alleged that it had been significantly underpaid under the various arrangements and referred the disputes across 20 of its NHS contracts for adjudication. The NHS Commissioning Board (“NHS England”) is the body that has assumed the responsibilities of the two Primary Care Trusts with whom the Appellant was initially in dispute. NHS England was therefore the other party to the dispute that SSP referred to the NHSLA. The Adjudicator awarded SSP £587,808 in aggregate but declined to award SSP interest on the sums awarded.
5. SSP issued Judicial Review proceedings. The NHSLA was the named Defendant. NHS England and the Secretary of State were joined as interested parties.
6. By her judgment, the Learned Judge held that the Adjudicator’s decision not to award interest was an exercise of discretion taken in circumstances where the Adjudicator considered that she had power to make an award.
7. The questions that fall to be decided on this appeal are:

- i) First, whether the Learned Judge was right to conclude that the Adjudicator was acting on the basis that she had power to make an award of interest but declined to do so in the circumstances; and
- ii) Second, whether the Learned Judge should have remitted the case to the adjudicator, either (a) on the grounds that the Adjudicator had (contrary to the conclusion of the Learned Judge) acted on the basis that she did not have power to make an award of interest or (b) on the grounds that, having a power, she should have made an award.

The Background to the Appeal

8. The arrangements pursuant to which SSP provided its primary care services commenced on 1 March 2013 and 1 April 2013 for the practices in Sefton and Liverpool respectively. SSP claimed that NHS England had failed to make interim payments for the period from 14 November 2013 to 13 February 2014 in the sum of £587,808. SSP's original application for dispute resolution did not mention interest. However, in a document entitled "Response on behalf of the Applicant" dated 2 May 2018 it included the following claim:

"97. The Applicant is entitled to interest on the global figure [of losses claimed] at the rate of 6% per annum.

...

99. The respondent is indebted to the Applicant in the sum of £587,808.

100. The Applicant is entitled to interest on this figure at the rate of 6% per annum.

Calculation

13 February 2014 to 2 May 2018 = 4 years and 79 days

= £35,268.48 per annum

= £96.62 per day

X 1539 days

= £148,698.18 in interest"

9. It is evident that SSP was claiming interest from the end of the period in respect of which it was claiming the interim payment of £587,808 to the date of its response document. There is no evidence before us of any reaction or response to this claim within the dispute resolution procedure either in the form of opposition from NHS England or of directions or other communication from the Adjudicator. The Court has been told and accepts that NHS England did not respond to the claim for interest.
10. The Adjudicator gave her decisions on 19 September 2018 awarding SSP its losses in the claimed aggregate sum of £587,808. She gave her reasons for refusing interest in

identical terms in the various decisions by which she awarded SSP its losses under its various NHS Contracts. Her reasons were:

“5.41 I note that in addition to the payment of Additional Payments, the Contractor is also claiming interest at the rate of 6% on the total sum of the Additional Payments across the 20 contracts, with the total interest claimed being £148,698.18. The Contractor had not provided a calculation or the sum for the interest claimed under this Contract.

5.42 I note that the Contractor had not submitted the basis for its entitlement to interest or the basis of the rate of interest charge.

5.43 I note that the Contract is silent in relation to entitlement to interest in the event of late payment of any sums due under the Contract. There is no contractual right for the Contractor to claim interest.

5.44 Clause 2.1 of the Contract states that “The Provider is a Health Service Body for the purposes of Section 9 of the Act. Accordingly, this is an NHS Contract.” I am not persuaded that this Contract is a contract at law and that interest is payable.

5.45 I do not determine that interest is payable as claimed by the Contractor.”

11. SSP issued Judicial Review proceedings challenging the Adjudicator’s refusal to make an award of interest. Ground 1 was that “the Adjudicator was wrong to conclude that she was not persuaded that the contracts were contracts at law.” Ground 2 was that “the Adjudicator was wrong to conclude that interest is not payable under the contracts.” Permission was given on that basis. Despite a later application to substitute amended Grounds (which was allowed in part), these remained the central issues before the Learned Judge. It is to be noted they were predicated on SSP’s understanding that the Adjudicator had held (in the passages set out above) that she had no jurisdiction to award interest.
12. The Learned Judge rightly gave short shrift to the suggestion that the arrangements were not NHS contracts within the meaning of s. 9 of the Act. That suggestion is no longer pursued: it is clear and accepted that they were.
13. Dealing with the substance of the Second Ground, the Judge recorded SSP’s case as being that the Adjudicator had made one primary error and two secondary errors. The primary error, on SSP’s case, was that the Adjudicator had wrongly concluded that she had no power to award interest because there was no provision for interest in the contract. The secondary errors were (a) a failure to apply the Late Payment of Commercial Debts (Interest) Act 1998 [“the 1998 Act”] and (b) failure to apply common law/equitable/restitutionary principles to produce an award of interest.
14. The NHSLA had served Summary Grounds for Contesting the Claim. At paragraph 4.2 it stated its position that each of the arrangements was an NHS Contract and that

the obligations arising under the arrangements were not legally enforceable in the civil courts, but are enforceable using the NHSLA's dispute resolution procedure. It then continued:

“What is in dispute is whether [the NHSLA] is entitled to award statutory (or other) interest on awards made in exercise of its jurisdiction under section 9(6) and (8) of the NHS Act 2006 to resolve disputes arising under NHS Contracts.”

15. Having defined what it considered to be the issue, the Summary Grounds then addressed the various grounds advanced by SSP in turn. The NHSLA submitted that (a) the 1998 Act was inapplicable; and (b) NHS contracts, not being legal contracts, were sui generis and did not provide for the awarding of interest. It stated that “for the above reasons, the Defendant considers it was entitled to find as it did that statutory interest was not payable.” It went on to submit that interest based on principles of restitution for unjust enrichment or wrongdoing had not been argued before the Adjudicator. It did not rely upon a lack of particularity in the formulation of the claim for interest as a reason for not making an award. The NHSLA did not concede the claim but set out its position as an impartial decision maker. Under the heading “Appropriate Remedy” it said at paragraph 5.2

“If the Court is persuaded by [SSP's] arguments the [NHSLA] considers that the appropriate remedy would be a declaration by the Court that the [NHSLA] has a power in general to award interest on damages and an order that the Defendant must decide whether interest should be awarded in respect of the 20 cases that are the subject of this appeal, and if so in what amount.”

16. The NHSLA did not appear and was not represented at the hearing below.
17. NHS England's position, as set out in its detailed Grounds of Resistance, was that SSP had not provided any calculation or sum explaining the basis for the amount it claimed; that the 1998 Act did not apply to the arrangements because they were NHS contracts; that the provisions as to interest in the Senior Courts Act 1981 and County Courts Act 1984 did not apply and did not provide a right to interest as the adjudicator was not a court; and that the same was true of awarding interest on equitable principles. It included the submission that the adjudicator “was entitled to award the amount she did [i.e. nil] as an “appropriate sum””. In subsequent submissions, NHS England has asserted that “it was emphatically not [its] case that the Adjudicator had no power to award interest at all.” As set out below, at [50] of her judgment the Learned Judge recorded that it was common ground as between SSP and NHS England that the Adjudicator had power to award interest. We accept that was the position at the hearing below: NHS England accepted that the Adjudicator had power to make an award of interest but rejected the legal foundations for such a power being put forward by SSP.
18. Dealing first with SSP's “primary error”, the Learned Judge held that it was based on a misreading of the Adjudicator's reasons:

“50. The first false premise is that the arbitrator’s conclusion on interest was one which rested on a decision that she had no power to award interest. That is not, in my judgment, a fair reading of the Adjudication. It was common ground as between the Claimant and the Interested Parties that the Adjudicator, in fact and in law, had power to award interest. While it may be said to appear from the Defendant’s submissions (written by solicitors for the Defendant and not by the Adjudicator) that the Defendant’s position is that it does not have power to order interest in relation to an NHS Contract, that was a position which was set out at a later stage in the documents in this Judicial Review. It does not appear to have been the view of the Adjudicator.

51. From her reasons which I have set out above, I conclude that she took the view that such interest was capable of being awarded even though she was dealing with an NHS Contract and not a contract at law. Her decision does not say, (as it would do if she considered that she had no such power), that the question did not arise because she had no power. What she did was to look at the submission made, which appears to have been a bold submission for six per cent interest with no calculation or basis underpinning it. She concluded she was not prepared to award interest in those circumstances.

52. That is an entirely appropriate exercise of her discretion. It involved no error of law or principle. It does not come within a country mile of being amenable to an unreasonableness challenge (none was ever posited). This approach is perfectly reflected in the reasoning of the Adjudicator which runs in essence thus:

- 1) The claim was a large claim (nearly £150,000) unsupported by either a calculation or a breakdown by contract.
- 2) No explanation was given of the basis for:
 - a) the alleged entitlement interest, or
 - b) the basis of the rate of the interest charge
- 3) The Adjudicator cannot fill the gap in this case by the obvious means of scrutinising the contract. Any claim for interest appears not to be contractual.
- 4) Given Clause 2.1 of the Contract, there is a question as to how interest would arise. (That is a question not answered by the submissions. The case now made for the basis of interest was not put to the Adjudicator).

5) Result: request to interest not granted. The Adjudicator does not say that she determines the interest could not arise under this arrangement.”

19. The Learned Judge then turned to the substance of the submissions on interest. She held that the 1998 Act could not provide the legal basis for a claim for interest because it only applied to contractual debts, which an obligation arising under an NHS contract was not. She then considered the possibility that interest might be awarded on some other basis. Having held that neither the Supreme Court Act nor the County Courts Act could apply, she continued, at [64]:

“... There would however be the possibility of interest to be awarded on an equitable basis if applicable. I conclude that interest could be awarded on this basis and indeed the contrary was not urged by either of the Interested Parties. However, I would note here that where one is outside the realm of contractual or statutory regimes which fix an interest rate, interest falls generally to be awarded on the basis of the principle that it is to compensate a party for being kept out of its money.”

20. The Learned Judge then set out a summary of principles that are generally applicable when a Court is considering a claim for interest to compensate a claimant for being kept out of its money, as provided by this Court in *Carasco v Johnson* [2018] EWCA Civ 87 at [17]:

“The guidance to be derived from these cases includes the following:

(1) Interest is awarded to compensate claimant’s 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 claimant’s 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 claimant’s the general presumption will be that the appropriate rate of interest is the investment rate.

(5) Many claimant's 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."

21. In summary, therefore, the Learned Judge held that (a) the Adjudicator had the power to award interest on normal principles, (b) the Adjudicator had exercised that power, and (c) the Adjudicator's decision not to award interest in the circumstances of the dispute she was called upon to resolve should be upheld.

The Appeal

22. SSP now advances three grounds of appeal:

- i) Ground 1 is that the Learned Judge erred in deciding that the words of the adjudication meant that the Adjudicator made the Adjudication decision on the basis that she knew she had a power to award interest: the Learned Judge should have held that the Adjudicator made her decision on the basis that she had no such power;
- ii) Ground 2 is that the Learned Judge was wrong to conclude that the Adjudicator had made a lawful discretionary decision not to award interest: the Learned Judge should have held that the Adjudicator had made no such decision because (a) the Adjudication contained no such decision, (b) no reasons were given for such a decision;
- iii) Ground 3 is that the Learned Judge erred in refusing to grant a declaration confirming that the Adjudicator was entitled to reconsider the question of interest on the damages found due and owing over a period of 5 years because, on the basis that (as the Learned Judge found) there was a power to award interest, that was the agreed position between SSP and the NHSLA.

23. The NHSLA and the Secretary of State have taken no active part in this appeal. NHS England opposes the appeal and supports the reasoning of the Learned Judge below.

Discussion

24. I agree with the Learned Judge that the Adjudicator had the power to award interest. I also agree that the 1998 Act is not directly applicable, because an NHS contract is not a contract at law, and that the provisions of the Senior Courts Act and the County Courts Act are inapplicable because the adjudicator is not a court. I do not agree that it is open to an Adjudicator acting under the NHS Dispute Resolution Scheme to resort directly to principles of equitable compensation as the Adjudicator is limited to the powers that have been confirmed upon her or him and does not have inherent jurisdiction to dispense equity or grant equitable remedies. The source of the power, in my judgment is to be found in s. 9(11) of the Act read in conjunction with s. 9(12). By s. 9(11) the Adjudicator is empowered to give such directions as she thinks appropriate to resolve the matter in dispute; and this power is to be exercised in the context of her wide-ranging power to vary the agreement.

25. Whatever the pre-existing practice, I can see no justification for a blanket policy or decision not to include an award of interest as a constituent part of the appropriate resolution of a dispute where a party has been kept out of sums of money to which it was rightfully entitled. Put another way, if a party to a dispute has been kept out of their money, it is prima facie appropriate that the resolution of that dispute should include provision to reflect and compensate the party for that fact. There may of course be reasons why that may not apply in a given case; but that should be for the decision of the adjudicator on the facts of the particular case. I would hold that the general powers available to the Adjudicator under ss. 9(11) and 9(12) confer a power to award interest where it is appropriate to do so. When considering whether or not such an award is appropriate it is open to the Adjudicator to take into account the considerations that would apply and weigh with a decision maker if the arrangement were a contract at law and the Adjudicator were a court. To that extent the 1998 Act and general equitable principles may be relevant by analogy; but, ultimately, the decision as to what is appropriate is a matter for the Adjudicator to decide on the facts of a given case taking all relevant matters into account.
26. Having reached this conclusion, the next question is whether the Adjudicator acted on the basis that she had a power to award interest. The reasons given by the Adjudicator for not making an award of interest are opaque. Paragraph 5.41 asserts a failure to provide a calculation or the sum for interest claimed under the individual contract being determined. This suggests acceptance by the Adjudicator that she had a power to award interest but that the absence of a calculation or a sum specified for the individual contract provided a reason supporting not making an award. Paragraph 5.42 asserts that SSP has not submitted the basis for its entitlement, which suggests that the power to make an award has not been established. Paragraph 5.43 (a) refers to the silence of the arrangements in relation to “entitlement” to interest in the event of late payment and (b) states that there is no contractual right for the Contractor to claim interest, both of which suggest an absence of entitlement and that the power to make an award of interest has not been established. Paragraph 5.44 rejects the submission that the arrangement is a contract at law. Had her conclusion been to the contrary, the fact of it being a contract at law would give rise to an entitlement to interest under the 1998 Act. Thus, of the four reasons given, the first is consistent with the existence of a power to award interest while the latter three suggest the opposite.
27. While it may in some limited circumstances be acceptable for a Court to take into account further reasons for a decision that are provided at a later date, that typically occurs in the circumstances of a challenge to the rationality of previously stated reasons, which is not this case. In the present case I do not derive assistance about the Adjudicator’s reasons from the terms of the NHSLA’s Summary Grounds for Contesting the Claim. First, the Summary Grounds do not state that they are providing further reasons or clarifying the existing ones; nor do they purport to do so. Second, as with the Adjudicator’s stated reasons, there is no clear statement that she considered that she either had or did not have the power to make an award of damages; nor, for that matter, is there a clear statement that the NHSLA considers that it does or does not have such a power. As I have summarised at [14] above, the Summary Grounds concentrated on the grounds being advanced by SSP as the basis of a power to award interest and contested them. That said, the reasons advanced by the Summary Grounds for contesting them, which were said to entitle the Adjudicator

to find that interest was not payable, go to entitlement rather than the particular facts of the present case and any deficiency in the formulation of SSP's claim for interest. While I would accept that the Summary Grounds reflect the Adjudicator's reasons as stated in her decisions, they do not advance the position beyond those stated reasons.

28. Accordingly, in my judgment, the Summary Grounds should be seen as stating the NHSLA's position in the Judicial Review proceedings rather than as amplification or restatement of the Adjudicator's stated reasons. As with the stated reasons, what is said in the Summary Grounds suggests that the effective reason for declining to award interest should be that the existence of a power to do so has not been established. More particularly, by identifying the issue as it did in paragraph 4.2 and proposing the remedy in the terms it adopted in paragraph 5.2, the NHSLA defined its position in the Judicial Review proceedings as being that it did not accept that there was a general power to award interest.
29. I therefore return to the terms of the Adjudicator's decision. I have come to the clear conclusion that the Adjudicator acted on the basis that she did not have a power to award interest: that is the natural meaning and implication of paragraphs 5.42-5.44, each of which goes to the existence of a power to award interest. Ms Morris QC submitted that, if the Adjudicator had considered that she had no power to award interest, she could have said so more clearly. I agree; but that applies equally to the Adjudicator's failure to state that she considered that she *did* have a power. The failure to state the position clearly in either direction contributes to the opaque nature of the reasons as a whole. If, however, the Adjudicator was acting on the basis that she had a power to award interest, SSP's failure to identify the basis of that power, the absence of express provision for interest in the contractual arrangements, and the fact that the NHS contracts were not contracts at law do not, either singly or cumulatively, provide a reason for the Adjudicator not to exercise the acknowledged power. In other words, if the Adjudicator believed she had a power to award interest, paragraphs 5.42-5.44 are irrelevant.
30. That being my conclusion, I would remit the case to the Adjudicator to exercise her power to decide whether an award of interest is appropriate in this case. I see no reason why the dispute should not be remitted to the same Adjudicator.
31. As I have indicated above, it is plain that SSP's claim for interest was expressed as a claim on the aggregate sum awarded and that the period for which interest was awarded was the period from the end of the period in respect of which the Adjudicator has held that interim payments should have been made to the date of the Response document that articulated the claim. This Court does not have the information to determine whether that is an appropriate approach for SSP to have taken or whether there are features of any of the individual arrangements that might require further calibration or refinement of SSP's approach. Equally, this Court is not in a position to express any informed view on the rate of interest claimed by SSP. I therefore express no view on these matters, which are for the Adjudicator to determine after seeking any further information or explanation that she feels necessary to enable her to make an appropriate decision.
32. For these reasons I would allow the appeal.

Lady Justice Rose

33. I agree.

Lord Justice Lewison

34. I also agree.