Dispute Resolution

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RECOVERING EXCHANGE RATE LOSSES IN A POST-BREXIT ECONOMY

Many of our clients are working hard to manage the impact of fluctuating currency rates on their business. This has become a particular challenge in the wake of the UK's decision to leave the EU in June 2016. Two recent, and apparently conflicting, decisions in the English High Court mean that the position remains unclear whether it is possible for non-UK litigants to recover currency exchange losses on legal fees paid in pounds sterling. However, some lessons can be drawn from the judgments and until a higher court resolves the conflict, our view is that it is still worth claiming for currency exchange losses.

The judgments

The first decision[1] was handed down in November 2016. The claimant, a German company (Elkamet), had brought a successful action in the English Patents Court against a French company (Saint Gobain) and was entitled to a summary assessment of its costs. Elkamet had to exchange euros into pounds sterling to pay its legal bills and the currency fluctuations, especially after June 2016, had negatively affected its costs. As the costs order at the conclusion of proceedings was to be made in pounds sterling, Elkamet sought an order to be compensated for losses suffered as a result of movements in the exchange rate.

The court accepted Elkamet's claim. With no previous authority to rely on, the decision was made on a point of principle. The court agreed that the point of an order for costs is to put the receiving party back into the position it would have been in if it had not had to pay the costs to which the costs order related.

The court routinely uses its power to award interest on costs to compensate the successful party in a claim.

1 *Elkamet Kunststofftechnik GmbH v Saint-Gobain Glass France S.A.* [2016] EWHC 3421 (Pat)

It held that as a matter of logic, it ought to have power if it decides to make an order in pounds sterling to compensate for exchange rate loss. For the past 40 years, courts have been allowed to make orders for damages expressed in foreign currencies. However, if a non-UK company has to exchange its local currency into pounds to pay the costs of litigation and is subsequently successful in the claim, it should in principle be entitled to compensation for additional expenditure linked to exchange rate losses.

When making its award of costs, the court also took into account the fact that exchange rates might also move in Elkamet's favour and was cautious to round down the full amount claimed to reflect this in its award.

The second decision[2] came in February 2017. In this case, the claimant (MacInnes) failed in its claim against the defendant (Gross) and there was no dispute that MacInnes was therefore obliged to pay Gross' costs. However, Gross asked for costs on an indemnity basis, whilst MacInnes maintained that costs should be assessed on the standard basis. Gross also sought to recover additional sums to reflect losses caused by exchange rate fluctuations when making payments to its English lawyers, relying on the decision in Elkamet.

The court rejected Gross' argument on exchange rate losses. One reason for this was that unlike in Elkamet, the court was not given specific figures and supporting evidence to consider. The court was also uneasy with the idea that an award of costs should be treated like a claim for damages: an order for costs will almost never allow the payee to recover the actual costs that have been incurred.

Further, the court did not accept, as it had in Elkamet, that there was a "powerful analogy" between an order for exchange rate losses and the far more commonplace order for interest on costs. This was because interest is predictable, and can be calculated by reference to a certain identified interest rate, whereas the fluctuation of currency rates is uncertain and the paying party cannot adequately calculate its additional risk. The court was reluctant to make an open-ended order to allow compensation where the extent of the loss is completely unknown.

HFW perspective

Given the uncertainty left by these contrasting decisions, the impact for non-UK parties to English litigation is unclear and will remain so unless a claim for exchange rate losses on a costs award progresses up to the Court of Appeal. In the meantime, there can be nothing to lose in including a claim for exchange rate losses in any costs claimed following a successful litigation claim. There may also be scope to add exchange rate losses as a head of damages when issuing a claim in the English courts.

Claimants considering a claim for exchange rate losses should bear in mind the following key questions:

1. Has the loss been particularised with exact figures and evidence of the loss?

The court is unlikely to look favourably on an 'open-ended' application without exact figures for losses incurred.

2. Have or could the parties agree upon payment of a judgment amount in another currency?

If payment can be made in an alternative currency it would likely mean the court would be unwilling to award currency exchange losses.

3. Which currencies are involved?

To date, judicial authority only covers conversions from euros to pounds sterling. However, arguably it could apply to other currencies.

4. How much has the currency rate changed and is it likely to change further before the date of payment of the judgment amount?

The court is likely to differentiate between normal daily fluctuations in the currency rate and significant changes as a result of a specific political event.

5. Were any factors in the parties' control and/or was the risk of loss mitigated?

If the parties chose to incur the fees in pounds sterling rather than euros for example, the court may well be less likely to award currency exchange costs. Any steps taken to mitigate exchange rate losses, for example through insurance, currency swaps or hedging, will be taken into account by the court when quantifying the amount of a costs award in respect of exchange rate losses.

2 *MacInnes v Gross* [2017] EWHC 127 (QB).

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