[2017] JMSC COMM 30

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2016CD00028

(NO 2: INTEREST ON JUDGMENT)

BETWEEN	**NATIONAL COMMERCIAL BANK STAFF ASSOCIATION (Bringing the claim in a representative capacity on behalf of all the members of the Association**	**CLAIMANT**
AND	**NATIONAL COMMERCAL BANK JAMAICA LIMITED**	**DEFENDANT**

IN OPEN COURT

Crafton Miller and Patricia Roberts-Brown instructed by Crafton Miller and Company for the claimants

Walter Scott QC and Anna Gracie instructed by Rattray Patterson Rattray for the defendant

September 11 and October 25, 2017

INTEREST ON JUDGMENT – WHETHER COMPOUND INTEREST OR SIMPLE INTEREST

SYKES J

INTEREST

[1] When the court delivered judgment on the issue of liability the court held that interest should be awarded at a commercial rate and the parties were invited to make further submissions on whether interest should be compounded or it should be simple interest ([2017] JMSC COMM 18).

[2] Written submissions were sent to the court and on September 11, 2017, in open court, the parties indicated that all that they wished to say were to be found in the written submissions and the accompanying cases. Counsel for the parties indicated the passages from the cases they wished to emphasise.

[3] The claimant has submitted that compound interest should be awarded and it also submits that Treasury Bill rate should be used as the basis of calculating the compound interest over a period of fifteen years beginning in 2002.

[4] It is now accepted that compound interest can be awarded in the Supreme Court (see **YP Seaton & Associates Company Limited v The National Housing Trust** [2013] JMCA 44 which approved of the House of Lords' decision of **Sempra Metals v Inland Revenue Commissioners and another** [1998] 1 AC 561). The **National Housing Trust** ('**NHT**') case went on to the Judicial Committee of the Privy Council. From the advice of the majority, delivered by Lord Mance, the Board has affirmed the correctness of **Sempra Metals** and applied its reasoning and conclusion to Jamaica ([2015] UKPC 43 **[31]**. This is what Lord Mance said at paragraph 31:

> *31 … Claims for loss of interest or interest incurred might in particular contexts be proved to be within the parties' contemplation under either limb [of Hadley v Baxendale].* ***It was thus open to a claimant to plead and prove an actual loss of interest caused by late payment of a debt, which might include an element of compound interest, and such a claim would be subject to the usual principles governing damages for breach of contract,***

> ***including remoteness and failure to mitigate. But the House underlined the need for pleading and proof.*** (emphasis added)

[5] Mr Miller in his written submissions cited this court's decision in **RBTT v YP Seaton (No 2)** [2014] JMSC Civ 139 in which it was decided that an award of compound interest is the default position in commercial disputes. This position now has to be abandoned in light of the Privy Council's decision in the **NHT** case. This court in **RBTT (No 2)** also held the claim for compound interest need not be pleaded and proved. The premise of this conclusion was that the House of Lords in **Sempra** had stated that simple interest was an artificial construct and compound interest was more realistic and a fact of commercial life. The following passages from **Sempra** are the ones on which this court based its reasoning in **RBTT (No 2)**.

[6] The issue arose in **Sempra** because the Revenue accepted that it received the payment prematurely. It also accepted that the tax payer was entitled to interest but the Revenue submitted that the interest should be simple interest.

[7] Lord Hope, in **Sempra**, said at **[33]**:

> *Simple interest is an artificial construct which has no relation to the way money is obtained or turned to account in the real world. It is an imperfect way of measuring the time value of what was received prematurely. Restitution requires that the entirety of the time value of the money that was paid prematurely be transferred back to Sempra by the revenue.*

[8] There is nothing in this passage or the rest of his Lordship's opinion that would lead anyone to think that the comment about simple interest was not one of general application as were the observations about compound interest. This is so because many of the commercial cases do not involve restitutionary claims. There is no reason to suppose that simple interest is artificial only in restitutionary claims but not in others. If simple interest is considered unrealistic in restitutionary claims why is it not unrealistic in commercial cases that do not involve restitution?

[9] Lord Nicholls said in **Sempra** at **[52]**:

> *We live in a world where interest payments for the use of money are calculated on a compound basis. Money is not available commercially on simple interest terms. This is the daily experience of everyone, whether borrowing money on overdrafts or credit cards or mortgages or shopping around for the best rates when depositing savings with banks or building societies. If the law is to achieve a fair and just outcome when assessing financial loss it must recognise and give effect to this reality.*

[10] This is as general statement as one could get on compound interest. This court reasoned that if this was the case why the insistence on the pleading of compound interest if compound interest was a fact of commercial life and reflected commercial reality? After all, shouldn't the reality be the norm? Be that as it may the Board has now held by necessary conclusion from its reasoning that such a view is wrong.

[11] In the **NHT** case the Board reasoned that the arbitrator in that case (and this was before the new Arbitration Act in Jamaica came into force but that does not affect the reasoning because we are here dealing with the unamended Law Reform (Miscellaneous Provisions Act) and not the new Arbitration Act), by analogy with the courts, was not free to award compound interest as a matter of a general discretionary power to award interest. Lord Mance in **NHT** held at **[29]**:

> *On this basis, the question is whether arbitrators have any such general discretion, or whether their power is (absent contrary agreement) limited to awarding simple interest. Chandris v Isbrandtsen-Moller is the English Court of Appeal authority for the proposition that an arbitrator's discretionary power to award interest is modelled on the court's statutory power, which was in England at the time of that case, and in Jamaica still is, limited to awarding simple interest on any debt or damages found due: see for Jamaica section 3 of the Law Reform (Miscellaneous Provisions) Act 1955. The contrary statement by Lord Denning in Tehno-Impex (at p 666) cited by the Court of Appeal was actually dissenting on this point. The majority held that an arbitrator has no discretionary power to award compound interest. Further, as the law stood at that date, in the light of the House of Lords decision in London, Chatham and Dover Railway Co v South Eastern Railway Co [1893] AC 429, the majority also held that neither courts nor arbitrators could award*

> *interest as damages for non-payment of a debt. Lord Denning's dissenting view of the arbitral discretion was further expressly disapproved, and the decision in Chandris was expressly upheld, by the House of Lords in President of India v La Pintada Co Nav SA [1985] AC 104, 116F-119C, in the judgment of Lord Brandon with which all other members of the House of Lords agreed.*

[12] His Lordship was drawing an analogy between the court's power to award interest under the Law Reform (Miscellaneous Provisions) Act section 3 and that of the arbitrator. Lord Mance was stating that the arbitrator's power was modelled on the court's power and in Jamaica the general discretionary power of the court is limited, by statute, to simple interest on any damages or debt found to be due to the claimant. In other words, the court has no power to award compound interest as a matter of course exercising its general power to award interest. The default position is simple interest. The point was reinforced by Lord Mance at **[32]**:

> *Chandris v Isbrandtsen-Moller and the majority decision in Tehno-Impex therefore are and remain good authority for the proposition that arbitrators have no general discretion to award compound interest, and should proceed by analogy with the courts' limited power, contained in the present case in section 3 of The Law Reform (Miscellaneous Provisions) Act 1955, to award simple interest on sums awarded due. The law as regards arbitrators has been changed in England and Wales by the Arbitration Act 1996, but there has been no equivalent legislation in Jamaica.*

[13] An important thing to note about Lord Mance's examination of **Sempra Metals** in the **NHT** case is that it appears that the fact that the former was claim for interest ***as*** the principal sum and the latter was a claim for interest ***on*** the principal sum made no difference regarding the requirement of pleading and proving compound interest.

Application to case

[14] Mr Scott QC submitted that in this particular case the claim for compound interest was neither pleaded nor proved and thus the court has no basis for awarding compound interest. That is correct. The Association did not plead compound interest and so that is the end of the matter on compound interest.

[15] However, this does not mean that the Association is not entitled to interest at a commercial rate since that was pleaded. This entitlement is based on the Jamaican Court of Appeal's decision which will now be dealt with.

[16] The Association is entitled to commercial interest based on the case of **British Caribbean Insurance Company Limited v Delbert Perrier** 33 JLR 119. According to Carey JA at pages 125 I to 126A:

> *The question which is posed is on what basis should a judge award interest in a commercial case. I do not think it can be doubted that where a person has been found to have failed to pay money which he should have, it is only right that he should pay interest to cover the period the money has been withheld.*

[17] His Lordship concluded at page 127 C – D:

> *…it is desirable that a claim for interest should be included in the prayer, then that would remind the parties that evidence can be adduced at the trial. In summary the position stands thus:*
>
> *(a) awards should include an order for the defendant to pay interest;*
>
> *(b) the rate should be that on which the plaintiff would have had to borrow money in place of the money wrongfully withheld by the defendant; and*
>
> *(c) the plaintiff is entitled to adduce evidence as to the rate at which such money could be borrowed.*

[18] The other two members of the court did not offer a contrary view of the matter.

[19] Having resolved that simple interest at a commercial rate is applicable to this case, the remaining question is the rate of interest. The Association says that the treasury bill rate is the one to be applied. The reasons advanced for this selection are threefold: First, it is recognised in the financial market as a fairly accurate measure of the cost of investing funds in the market. Second, the market for treasury bills is said to be 'more absorptive for cash' because they are regularly issued and there is no limit on

the amount any single person can purchase. This stands in sharp contrast to Local Registered Stock which has not been issued regularly since 2010.

[20] The court understands the Association to be saying that the manner in which treasury bills are issued and bought are closer to a free market than Local Registered Stock because there is no barrier to participation in the market and no limitation on how much can be purchased by any individual. It is the purest form of supply and demand and so the price of the money, that is the interest, arrived at by pure economics is the one to be used.

[21] The bank, on the other hand, says that the applicable rate should be from the weighted loan rates applied by commercial banks published by the Bank of Jamaica in its annual statistical digest. What Mr Scott QC submitted on behalf of the bank is by no means unusual since that is the method that has been used for many years to determine the rate of interest applicable to commercial cases. In **British Caribbean** Carey JA stated at page 127B.

> *This leads me to venture the rate which a judge should award in what may be described as commercial cases. It seems to me clear that the rate awarded must be a realistic rate if the award is to serve its purpose. The judge, in my view, should be provided with evidence to enable him to make that realistic award. In the case just cited [Motor & General Insurance Co Ltd v Gobin], evidence was in fact led by the plaintiff but I can see no objection to documentary material being properly placed before the judge to enable him to ascertain and assess an appropriate rate of interest.*

[22] This dictum led to the practice of placing before the court material from the Bank of Jamaica without calling oral evidence.

[23] The court must refer to one other passage from **British Caribbean**. It is found at page 126E-F where Carey JA said:

> *If restitution in integrum is the rationale for the award of interest, then the rate at which a plaintiff can borrow money must be the rate set by the judge in his award. In civil cases, the object of the entire*

process is to restore the aggrieved party, the plaintiff to the position he occupied before the wrong.

[24] The compound verb 'can borrow' is important. It does not say can 'can invest.' The treasury bill rate selected by the Association is what a person with the money to do so can earn if he invests in such a market but the law looks at the interest rate from the perspective of borrowing not lending. For this reason, the court does not accept the treasury bill rate.

[25] The court agrees with Mr Scott that the Bank of Jamaica statistical digest can be used to derive an interest rate. Mr Scott suggested that the rate should be 15.15%. The problem here is that Mr Scott has relied on table for the period to January 2017 to March 2017. It is not immediately clear why this period was selected and the written submissions on this selection were not very illuminating. The court sees no legitimate reason for limiting the period from which to derive an interest to January 2017 to March 2017 unless it can be said that that period was a representative sample of interest rate for the fifteen-year period that the Association's members have been out of pocket and that interest should be for the whole period. That argument has not been made.

[26] The court is of the view that the simple interest at commercial rate should apply for the period October 1, 2002 to the date of payment.

Summary

[27] The court's decisions are:

(1) compound interest is not applicable to this case because it was neither pleaded nor proved;

(2) simple interest is to be applied at a commercial rate. The average rate for each year for the period October 1, 2002 to October 25, 2017;

(3) the rate is to be applied from October 1, 2002 to the date of payment;

(4) the parties are to agree the figure to which the interest is to be applied not later than November 17, 2017, failing which the parties are to submit written arguments on the correct figure not later than November 30, 2017. There will be no oral submissions on this aspect of the matter. All calculations where there is disagreement must be clear shown.

(5) in determining the figure to which the interest is to be applied the parties are to take account of the following:

(a) the formula is the starting point and that must be applied and the figure arrived at is the minimum principal sum for the purpose of this case:

(b) there was an agreement that monthly employees are to receive one month's salary under the scheme;

(c) if there are other eligible employees then they are to benefit from the scheme;

(d) should the application of the formula result in individual eligible employees not being able to receive their full entitlements then the principal sum must be increased so that each eligible employee, whether monthly paid or paid otherwise, receives his or her full payment had the payments been made in 2002;

(e) the interest is to be applied to the total sum that represents what each eligible employee is entitled to receive.

(6) The cut-off date on which the principal sum ceases to attract interest at the commercial rate is the date of payment of the total sum payable after all the calculations are done;

(7) The bank is ordered to make available to the Association all relevant information so that all eligible employees can be properly identified and the correct calculations made so that those who are entitled to receive one month's salary or any other amount can receive their lawful entitlements.

(8) In the event that some employees have died or are no longer employed to the bank then in such cases, the sum to which these persons would have been entitled to had the bank paid out their entitlements under the scheme is to be held on trust by the Association for the estate, or beneficiaries under the estate or will of the deceased and to in respect of those who would have receive money had they not left the employment the Association is to hold the money on trust for these persons.

(9) Under paragraph 8 the entitlement of the persons identified ceases at death or termination of employment whether by death, dismissal, resignation or retirement or any other lawful means of termination of employment.

(10) Costs to be costs in the claim.

(11) Liberty to apply.

[28] Counsel are to prepare an order to give effect to the considerations identified.