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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO E 52 of 1985

IN THE MATTER OF NORCLIFFE LIMITED.

AND

IN THE MATTER OF THE COMPANIES ACT

Mrs. Jennifer Hobson-Hector for the Petitioner.

Mr. Alando Terrelonge for the Respondent.

Company – Debt due to it by person deemed trustee – Judgment Summons – Whether judgment debt attracts simple or compound interest – Date to which interest accrues at the rate ordered – Whether debt settled by payment to shareholder – Whether trustee may set off against debt dividends due to him as shareholder

21st December, 2006 & 4th January, 2007

BROOKS, J.

Recording the title of this claim was not the least of the challenges which it presented. The claim started life with one title and ended, in this Judgment Summons before me, with quite another. The genesis of the present summons is an order of Chester Orr, J. made on 31st July 1990. That order was made as a result of complaints by Mrs. Norma Butler about Mr. Radcliffe Butler's handling of the affairs of their family company Norcliffe Limited. The Butlers each held 50% of the shareholding in the company.

Orr J. made orders which required Mr. Butler to make certain payments. Those payments were to have attracted interest. The specific amounts to be paid were ascertained on 5th April 2000. Mr. Butler made no payments for a long time and the current judgment summons was issued in order to enforce payment. He has now raised queries as to the amounts payable by him, particularly in light of his shareholding in the company.

The issues raised by the judgment summons are as follows:

1. What were the sums initially payable by Mr. Butler;
2. Does the order authorize giving interest upon interest;
3. To what date should interest accrue at the rate ordered by Orr, J.
4. Should there be any reduction made in recognition of Mr. Butler's shareholding in the company;
5. Are the payments to be made to Mrs. Butler?
6. What sum is presently due and payable by Mr. Butler;

Background Facts

Up to the time that Orr, J. handed down judgment in this claim (which was initiated by petition pursuant to the Companies Act) it was intituled, "In the Matter of Norcliffe Limited AND In the Matter of the Companies Act". The title has gone through several permutations since then. Eventually the company's name was omitted from it altogether, and the heading referred

only to the Butlers. It seems that the change arose from the fact that Mrs. Butler's then Attorneys-at-Law, also acted for her in certain family proceedings before this court. Some of the documents in this claim therefore referred to her as the "Petitioner" and to Mr. Butler as the "Respondent". Through this process of evolution, the heading in this Judgment Summons reads:

"BETWEEN	NORMA BUTLER	CLAIMANT
AND	RADCLIFFE BUTLER	DEFENDANT"

At no point was there any order made by this court authorising any of these changes. The changes have however, apparently, assisted in shifting the focus of the petition as initially formulated, and ruled upon by Orr, J. I have therefore reverted to the original and correct heading format.

For an understanding of what follows, it is important to set out the relevant portion of the judgment of Orr, J.:

> "IT IS HEREBY DECLARED THAT:-
>
> (1) the Respondent is in breach of his fiduciary duties **to the Company;**
>
> (2) the Respondent is trustee **for the company** of all monies invested in Kong's Colour Lab Limited.
>
> IT IS HEREBY ORDERED:-
>
> (3) an account of what is due from the Respondent in respect of all monies, profits or gains, which would have been realised **by the Company** but for the wilful default and/or neglect by the Respondent and/or the breach of the fiduciary duty owed by the Respondent **to the Company**.

(4) payment by the Respondent **to the Company** of any such monies received by the Respondent and/or any sum found due upon the taking of such account with interest thereon at 16%.

(5) that the Respondent is personally liable for all debts that he has incurred in the **name of the Company** to further his personal interest and that he takes immediate steps to release and/or **indemnify the company** from any liability whatsoever therefore.

(6) that the Petitioner purchase the Respondent's shares in the company at a fair value.

(7) Costs to the Petitioner to be agreed or taxed. (Emphasis supplied)

The Court of Appeal upheld the judgment of Orr, J. Its decision is reported in *Radcliffe Butler v. Norma Butler* (1993) 30 JLR 348. That decision does not, strictly speaking, affect the issues to be here decided.

Pursuant to Orr, J's mandate, the Deputy Registrar made the enquiries and concluded thus:

> "The finding of this enquiry is that there are monies, profits of gains which would have been realized **by the Company**, but for the wilful default and/or neglect by the respondent and/or the breach of the fiduciary (sic) owed by the respondent **to the company**. The respondent should pay interest for the loans advanced to Norcliffe Limited as well as the rental amounts paid **to the company**.
>
> The amounts of monies outstanding are:
>
> (a) interest on the sum of $100,000.00 @ 16% from the 2nd day of February 1982
>
> (b) interest on the sum of $200,000.00 @16% from June 1988
>
> (c) rental amounts in the sum of $70,500.00 plus interest @ 16% from January 1983..." (Emphasis supplied)

I have provided the emphasis to demonstrate that the order was made mainly for the benefit of the Company and not for Mrs. Butler.

The report was approved by Donald McIntosh, J. on May 15, 2003.

The present Judgment Summons was filed on January 3, 2005. Up to that date Mr. Butler had made no payments in respect of the judgment. He was said to have then owed in excess of $7.0m. On January 7, 2005, Mrs. N. McIntosh, J. made an interim order in respect of this summons. By the order, Mr. Butler was, on his offer, ordered to pay $25,000.00 per month, and, in partial settlement of the judgment debt, to transfer a parcel of real property to Mrs. Butler. That order and transfer provide an unfortunate complication. I shall seek to deal with that complication later. It is sufficient to observe at this stage that the property was valued at $5.0m and, it is now agreed that the transfer to Mrs. Butler has been completed.

I shall now address each of the questions raised in my introduction of this matter.

What were the sums initially payable by Mr. Butler?

The sums involved here, were those identified by the Deputy Registrar, that is, $100,000.00, $200,000.00 and $70,500.00 respectively.

Does the order authorize giving interest upon interest?

Orr J. did not make any reference to compound interest in his order. I raised this issue with the attorneys-at-law for the parties. They informed me that the matter had already been argued before the Master. There is now no contest between them that Mr. Butler should pay compound interest.

Wallersteiner v Moir [1975] 1 Q.B. 373 is authority for the proposition that a court of Equity will order compound interest in appropriate circumstances. Whether, however, compound interest may be inferred when the court's order is silent on the point, seems doubtful. Denning M.R. at p. 388A of *Wallersteiner* said:

> "Equity now prevails in all courts: and equity was in the habit of awarding interest when it was considered equitable to do so. In some cases it awarded simple interest. In others compound interest, i.e., with yearly rests."

The learned authors of *Bullen and Leake and Jacob's Precedents of Pleadings* (13th Ed.) explain the principle this way:

> "The practice at common law has been to give simple interest only, and indeed s.35A of the 1981 Act specifically so enacts. Only the Courts of Equity, as *Wallersteiner v Moir* ...has illustrated, will award compound interest, but this appears to be limited to ensuring that a person in a fiduciary position does not make a profit from his own wrongdoing, as in O'Sullivan v. Management Agency Ltd. [1985] Q.B. 428..."

Both quotations, in my view, make it clear that, the court will decide, whether the circumstances of the case demand an award of compound interest. In all the cases cited by counsel there was a specific order for such an award. A further argument against drawing an inference in favour of compound interest is that section 3 of the Law Reform (Miscellaneous Provisions) Act specifically states, that the power given to the court by the section to award interest, does not authorize the giving of interest upon

interest. I note that there is no order by the learned Master concerning the matter, but I shall not disturb the agreement between the parties.

To what date should interest accrue at the rate ordered by Orr, J.?

The parties both presented calculations which assumed that interest would have continued to accrue on the debt at 16% per annum until payment. Mrs. Hobson-Hector, appearing for Mrs. Butler, sought to justify that position on the basis that "while the Respondent has failed to make any payment, the Claimant's loss continued to accrue and that proper compensation should be for interest to be calculated up to payment". Mr. Terrelonge, appearing for Mr. Butler, disagreed. During his submissions Mr. Terrelonge stated that it was "trite law" that pre-judgment interest is to be calculated to the date of judgment and not to the date of payment.

I do not agree with Mrs. Hobson-Hector's submission. Section 51(1) of the Judicature (Supreme Court) Act provides for interest on judgments handed down in the Supreme Court:

> "(1) Every judgment debt shall in the Supreme Court carry interest at the rate of six *per centum* per annum or such other rate per annum...from the time of entering up the judgment, until the same shall be satisfied..."

Undoubtedly, the court has the power to order that interest should continue to accrue on judgment debts, at a rate higher than the statutory rate. It frequently does so, especially in cases of commercial transactions. This is

however specifically stated. Similarly, when the court intends that interest is to cease accruing at a particular rate as at the date of judgment, it specifically so states. It is true that the latter situation usually occurs when that rate is lower than the rate on judgment debts.

What therefore applies when the judgment is silent on the point? In my view, there is no basis for a judgment creditor to say, after such a judgment has been delivered and perfected, that interest should accrue at a rate other than that prescribed by Parliament, by virtue of section 51(1) mentioned above. In *Central Soya of Jamaica Ltd. v Junior Freeman* (1985) 22 J.L.R. 152, Rowe, P. dealt extensively with the discretion which a judge had in treating with interest. What is clear from that oft-quoted judgment is that the issue of the granting, or not, of interest is a discretion which the trial judge exercises.

In the 2003 edition of *Civil Procedure* (*The White Book*) the learned authors at paragraph 7.0.18 say as follows:

> "The date to which interest is awarded is ordinarily the date of the judgment or sooner payment. The judgment debt itself carries interest at the prescribed rate...by ss. 17 and 18 of the Judgment Act 1838 and the Act contains provisions enabling this interest to be recovered. But if, as is usually the case in claims for debt or damages, the rights of the parties merge in the judgment, any contractual right to higher interest ceases (*Re Sneyd, ex p. Fewings* [1883] 25 Ch. D. 338)."

There is nothing in either the judgment of Orr, J. or the Deputy Registrar's report which stipulates that interest should continue to run at

16% per annum after the date of the judgment. In those circumstances therefore, I find that that rate ceased at 31st July 1990, and the statutory rate on judgment debts commenced thereafter.

Should there be any reduction be made in recognition of Mr. Butler's shareholding in the company, and;

Are the payments to be made to Mrs. Butler?

These questions may be conveniently considered together as they represent the two sides of the same issue; should the company's interests be ignored in resolving this matter. The report of the Deputy Registrar, mentioned above, indicates that the company ceased operation in 1985. It is also common ground that the company's only asset was a property at No. 32 Upper Melwood Avenue, and that it has since been sold. Does that justify a payment to Mrs. Butler? Does it justify Mr. Butler withholding half of the debt on the basis that he is 50% shareholder of the defunct company?

Mrs. Hobson-Hector submitted that since Orr, J. made an order with respect to the purchase of the shares by Mrs. Butler, then "it should be interpreted that it was anticipated that the payment should be made to Norma Butler." Further, Mrs. Hobson-Hector submitted that the heading on the Deputy Registrar's said report (naming only Mr. and Mrs. Butler as parties to the action), indicated that the debt was due to Mrs. Butler.

I find the submission strained and in contradiction of the fact that all the other matters dealt with in the judgment referred to the Company. I have already stressed that the order made by Orr, J. spoke to a liability owed to the company. The company is the named recipient for the payments. In addition, as was earlier pointed out, the change in the title of the claim was not authorised by the court. The order authorising Mrs. Butler's purchase of Mr. Butler's shares did not, in any way, transfer his liability from the company, to Mrs. Butler. In my view, that aspect of the order was made in an attempt to prevent future litigation. Even if the shares have since been purchased, the debt would still be due to the company and not to Mrs. Butler personally.

If I am correct in finding that the payment is not due to Mrs. Butler, since she is not the company, but only one of its shareholders, I must, to be consistent, hold that Mr. Butler cannot seek to reduce his liability to the company due to the fact that he is a shareholder thereof. As in the case of Mrs. Butler, the status of the company is to be considered. The company is a legal entity having its own identity, separate from Mr. Butler. It is owed money. If it can collect that debt, then it is up to it, through its directors, to decide how to manage the sums involved. Does it have debts? Are there any reporting requirements which it must satisfy? Are there tax

considerations for any declaration of dividends to shareholders which it would be inclined to make? These issues are just a few of which the company must consider, in its individual identity, which is separate from that of its shareholders.

There is another aspect to the matter of capacity. Mr. Butler owes the company money, as a person deemed a trustee. He cannot properly set off, as against that debt, money which he hopes to receive from the company in his capacity as a shareholder. Not only does the difference in capacity preclude the set-off, but he cannot say, for the reasons explained in the last paragraph, how much of the sums will or may come to him as a shareholder.

If authority is needed for my view, I would cite an excerpt from the judgment of Carey, J.A. in *Radcliffe Butler v. Norma Butler* (*supra*) at p. 354 C, where that learned judge said:

> There is one remaining point on this aspect of the appeal with which I must deal. Mr. Scharschmidt, Q.C. submitted that a distinction must be drawn between matters which affect the company and matters which affect a member as a member. No one disputes that statement: section 196(1) (a) expressly so states. Having regard to the allegations made in paragraph 11 and paragraph 12 of the petition, it is difficult to appreciate how these allegations could do otherwise but affect the wife as the oppressed other member of the company. In this regard, the example given in Pennington's Company Law (3rd edition) p. 577 is where a member of a company has been treated harshly in some other capacity, for example if he has been dismissed from his directorship or employment under the company: see *In re Westbourne Galleries* [1973] A.C. 360..."

It is also stated in *Bullen and Leake and Jacobs's Precedents of Pleadings* (*supra*) at p. 1417 that:

> In general, the cross-claim must involve the plaintiff and the defendant acting in their same capacities as for the claim...If the plaintiff claims as an executor or trustee, his personal debts to the defendant cannot be set off (*Rees v Watts* (1855) 11 Ex 410) and, if he claims against the defendant personally, the defendant cannot set off claims he may have *qua* executor or trustee against the plaintiff (*Phillips v Howell* [1901] 2 Ch. 773).

In applying that principle to the present case, it will be observed that Mr. Butler owes the company in the capacity of a trustee. His entitlement to receive a payment from the company is as a shareholder thereof. These are two different capacities. As in the case of *Phillips v Howell,* even if a set off were permissible, the amount due from the company is unknown at this time, and it is beyond the scope of this claim to ascertain that figure.

If the judgment debt is due by Mr. Butler to the company, and Mrs. Butler is not entitled to receive it, or any part of it, *qua* judgment debt, what is to be made of the payments made to Mrs. Butler pursuant to the interim order on this Judgment Summons? Similarly, what of the transfer of the real property to Mrs. Butler toward settlement of the judgment debt? It is an unfortunate complication. At best, it would seem that Mrs. Butler should account to the company for the payments, and the value of the property. That would seem to be the just result. The transfer was made as a result of an order of this court. It was however made with the consent of Mr. and Mrs. Butler. I shall in the circumstances, but not without some diffidence, include that value in the calculation of the sum due by Mr. Butler.

What sum is presently due and payable by Mr. Butler?

The method used by the parties for calculating the sums due, differed. If one applies the principle that payments when made against a debt, is applied firstly against interest and thereafter, principal, then Mrs. Hobson-Hector's method used in calculating the debt would be correct. That is the method to be used in determining the figure payable. It is to be noted that during the period under review, there were changes to the rate of interest accruing on judgment debts. This was by way of Ministerial Order.

Interest on the sums due, @ 16% p.a. from 2/2/1982 to 31/7/1990.

Relevant Date	**Principal/Interest Accrued/ (Payment made)**	**Total with Interest accrued thereon**
February 2, 1982	$100,000.00	$100,000.00
January 1, 1983	14,641.10	114,641.10
January 1, 1983	70,500.00	185,141.10
January 1, 1984	29,622.58	214,763.68
January 1, 1985	34,362.19	249,125.87
January 1, 1986	39,860.14	288,986.01
January 1, 1987	46,237.76	335,223.77
January 1, 1988	53,635.80	388,859.57
June 1, 1988	25,909.77	414,769.34
June 1, 1988	200,000.00	614,769.34
June 1, 1989	98,363.09	713,132.43
June 1, 1990	114,101.19	827,233.62
July 31, 1990	21,757.38	848,991.00

Interest on the sums due, @ 6% p.a. from 31/7/1990 to 30/6/1999

July 31, 1991	50,939.46	899,930.46
July 31, 1992	53,995.83	953,926.29
July 31, 1993	57,235.58	1,011,161.87

July	31, 1994	60,669.71	1,071,831.58
July	31, 1995	64,309.89	1,136,141.47
July	31, 1996	68,168.49	1,204,309.96
July	31, 1997	72,258.60	1,276,568.56
July	31, 1998	76,594.11	1,353,162.67
June	30, 1999	74,294.19	1,427,456.86

Interest on the sums due, @ 12% p.a. from 30/6/1999 to 30/6/2006 and payments made in respect of the debt.

June	30, 2000	171,294.82	1,598,751.68
June	30, 2001	191,850.20	1,790,601.88
June	30, 2002	214,872.23	2,005,474.11
June	30, 2003	240,656.89	2,246,131.00
June	30, 2004	269,535.72	2,515,666.72
December	31, 2004	152,180.61	2,667,847.33
December	31, 2004	(120,000.00)	2,547,847.33
March	31, 2005	75,388.36	2,623,235.69
March	31, 2005	(75,000.00)	2,548,235.69
May	31, 2005	51,104.34	2,599,340.03
May	31, 2005	(75,000.00)	2,524,340.03
July	31, 2005	50,625.12	2,574,965.15
July	31, 2005	(25,000.00)	2,549,965.15
August	31, 2005	25,988.69	2,575,953.84
August	31, 2005	(25,000.00)	2,550,953.84
November	30, 2005	76,318.95	2,627,272.79
November	30, 2005	(75,000.00)	2,552,272.79
December	31, 2005	26,012.20	2,578,284.99
December	31, 2005	(25,000.00)	2,553,284.99
January	31, 2006	26,022.52	2,579,307.51
January	31, 2006	(25,000.00)	2,554,307.51
February	28, 2006	23,513.63	2,577,821.14
February	28, 2006	(25,000.00)	2,552,821.14
March	31, 2006	26,017.79	2,578,838.93
March	31, 2006	(25,000.00)	2,553,838.93
April	30, 2006	25,188.55	2,579,027.48
April	30, 2006	(25,000.00)	2,554,027.48
May	31, 2006	26,030.09	2,580,057.57
May	31, 2006	(25,000.00)	2,555,057.57
June	30, 2006	25,200.57	2,580,258.14

June	30, 2006	(25,000.00)	2,555,258.14

Interest on the sums due, @ 6% p.a. from 30/6/1999 to 31/7/2006.

July	31, 2006	13,021.32	2,568,279.46

Based on that calculation Mr. Butler would have owed $2,568,279.46 as at 31st July, 2006. There is however the matter of the transfer of the real property to Mrs. Butler. It would seem that the value of the property should be deducted from the debt, as at the date of transfer. Indeed Mrs. Hobson-Hector in making her calculations did deduct the sum of $5.0m to reflect that transfer. The result is that, based on my approach to the question of interest, Mr. Butler has overpaid. Just how, if at all, the sum is to be recovered, and from whom, I shall not venture to say. Mr. Butler will have to seek assistance from his legal advisors, concerning that aspect.

Conclusion

An improper shift in the focus as to Mr. Butler's liability in this matter, brought about in part by the change of the title in some of the documentation filed in court, has caused some unfortunate results. Although Orr, J. made it clear that Mr. Butler was a trustee for Norcliffe Limited and owed monies to it as a result of breaches which he had committed, the parties have eventually, and wrongly, proceeded as if the debt was owed to Mrs. Butler. Mrs. Butler, as a shareholder is not entitled to collect the debt

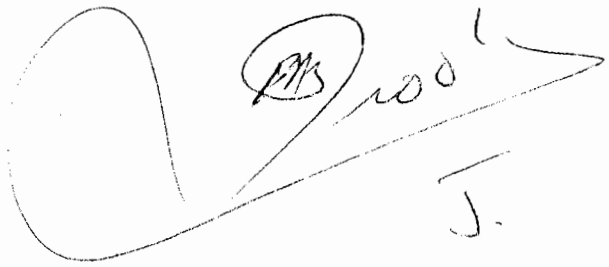
due to the company. Having done so, she may well be required to account to Norcliffe for the sums collected.

Mr. Butler held two capacities in respect of Norcliffe Limited. He was a trustee to, and a shareholder of, the company. Because of the difference in capacity, he would not have been entitled to set off against the debt, any sums which he expected to come to him from the company as a shareholder thereof. As it has emerged, he has paid more than the amount due by the judgment and so the issue does not have a practical application.

The overpayment has resulted from my finding that, the judgment being silent as to the date at which interest at 16% p.a. ceased to run, that rate ceased as at the date of judgment and thereafter the statutory rate applied.

I therefore find that Mr. Butler does not now owe any sum in respect of the judgment and the Judgment Summons is hereby dismissed.

I shall however still award costs to Mrs. Butler, the petitioner, as Mr. Butler's default is what necessitated the judgment summons. In light of the volume of work involved I shall fix those costs at $25,000.00.



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