[2014] JMSC Civ. 139

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. CL 1993/E 083

BETWEEN	**RBTT BANK JAMAICA LIMITED**	**CLAIMANT**
AND	**YP SEATON**	**FIRST DEFENDANT**
AND	**EARTHCRANE HAULAGE LIMITED**	**SECOND DEFENDANT**
AND	**YP SEATON & ASSOCIATES COMPANY LIMITED**	**THIRD DEFENDANT**

CONSOLIDATED WITH

CLAIM NO CL 1993/S 252

BETWEEN	**YP SEATON**	**CLAIMANT**
AND	**RBTT BANK JAMAICA LIMITED**	**DEFENDANT**

IN OPEN COURT

Denise Kitson QC, Trudy - Ann Dixon Firth instructed by Grant Stewart Phillips for RBTT Bank Jamaica Limited

Pamela Benka Coker QC and Anna Gracie instructed by Rattray Patterson Rattray for YP Seaton, EarthCrane Haulage Limited and YP Seaton & Associates Company Limited

July 7, 8, 16, 21 and September 24, 2014

CIVIL PROCEDIURE – POST-JUDGMENT APPLICATIONS – INTEREST ON JUDGMENT – STAY OF EXECUTION – FURTHER DISCLOSURE – WHETHER COSTS SHOULD BE ASSESSED ON STANDARD BASIS OR INDEMNITY BASIS – WHETHER INTEREST PAYABLE ON COSTS – PARTS 64 AND 65 OF THE CIVIL PROCEDURE RULES

SYKES J

[1] This is the final phase, in the Supreme Court, of litigation that arose out of events that took place, in 1990, when the Most Honourable Michael Manley was Prime Minister of Jamaica, President George H W Bush was President of the United States of American and the Right Honourable Sir John Major was Prime Minister of the United Kingdom.

[2] In this judgment Mr Seaton will be used as the generic reference to both himself and the companies other the bank because he appears to be the leading figure in those companies.

[3] This second judgment is concerned with post-judgment applications and submission relating to (a) whether there should be a stay of execution; (b) whether further disclosure should be ordered at this stage against RBTT; (c)

whether interest should be awarded on the sum to be paid by RBTT to Mr YP Seaton and if so, should that interest be simple or compound interest and (d) whether costs should be awarded on an indemnity basis against the bank. If respect of (d) there is the additional question of whether interest should be awarded on the costs.

[4] The judgment giving rise to these applications was delivered on March 17, 2014 (**JMSC Civ 34**). The facts will not be detailed here and will be repeated only where absolutely necessary for this judgment to be understood.

Whether there should be a stay of execution

[5] The starting point has to be the very, very strong ordinary rule which is that a successful claimant is entitled to secure the benefit of his judgment immediately unless there is some good reason to order otherwise.

[6] The bank has filed an appeal. It says that it has a real prospect of success on appeal for a number of reasons:

a. Mr Seaton did not ask for the return of the JA$15,254,583.69 and therefore that order should not have been made it not being a remedy sought by Mr Seaton. The claim made by the bank was for a declaration that what it did was lawful and there was no counterclaim for the money to be repaid and the failure to ask for this either remedy as a claim or counter claim is fatal which means that there can never be an order for the return of the money to Mr Seaton;

b. the ordering of an account in relation to accounts in question is erroneous because

i. Mr Seaton acknowledged that he had in fact got back some of the money with the accrued interest paid and so there was no loss to him;

ii. there is the risk of double recovery in that the JA$15,254,583.69 ordered to be returned were taken from the accounts at the bank and that part of the order which deal with the accounting remedy states that any amounts found to have been deducted should be repaid with interest may lead to the JA$15,254,583.69 being paid twice.

[7] The question here is whether the court on an application for a declaration, by the bank which has turned out to be the wrongdoer, that money was lawfully taken can order the wrongdoer to correct its wrong by returning the money even if the victim did not ask for the money to be returned in his pleaded case.

[8] Mangatal J, who delivered an earlier judgment in this case on a striking out application of portions of Mr Seaton's witness statement, decided that the declaration sought by the bank could not be transformed into a money claim against the bank. Her Ladyship held that since Mr Seaton had not asked for, by way of claim or counter claim, a specific order returning the money, Claim No 1993/E083 (**RBTT Bank Jamaica Limited v YP Seaton and others**), then those portions of the witness statement that spoke to return of the money ought to be removed from the witness statement.

[9] This court took a slightly different approach to the matter. This court took the view that since the bank had no lawful claim to take and to hold the money then it should be ordered to return the money to the lawful owner. In the view of this court, this was a consequential order on a declaration that it was not entitled to take the money.

[10] What is clear is that there are different views in the Supreme Court on this important point. There are now two decisions in the same case involving the same parties coming to different conclusions. This would suggest that RBTT has a reasonably good arguable case on the point. From this standpoint a stay should be granted pending resolution by the Court of Appeal. The stay is granted but only in respect of the payment of the JA$15,254,583.69.

Whether the bank should disclose further information to Mr Seaton

[11] The essence of Mr Seaton's anxiety is that at this stage he does not know whether RBTT Bank Jamaica Limited is or should continue to be a proper party to the claim. The reason for his concern is this: when the dispute began the name of the bank was Eagle Commercial Bank. That bank became Union Bank of Jamaica Limited. There was another name change to RBTT Bank (Jamaica) Limited. It appears that at some point the bank became known as RBC Royal Bank (Jamaica) Limited. Mrs Benka Coker QC submits that there is now talk of the bank becoming known as Sagicor Bank. Learned Queen's Counsel submitted that despite her repeated requests, the bank has not been forth coming with all necessary information that would enable her to say whether RBTT Bank Jamaica Limited should continue to be named as the proper party. Additionally, there is the question of Government of Jamaica indemnity applies to this claim and if so, what are the terms of that indemnity. Counsel submitted that there are important implications such as whether the bank before the court is properly named and described since this would have an impact on the enforceability of any order made by the court if it is the case that there is now no legal person known as RBTT Bank Jamaica Limited.

[12] Mrs Kitson QC's response was 'Let not your heart be troubled. Believe in the word of the undertaking given by the Government of Jamaica concerning these law suits.' The problem is that the content of the written undertaking is not known to either Mrs Benka Coker or her client. It is not known, for example, whether the undertaking given by the Government has any preconditions for that undertaking

to be activated. It is not known whether the undertaking is subject to a cap. Given these uncertainties, Mrs Benka Coker is submitting that disclosure should be made so that she is properly able to advise her client and decide on the appropriate course of action. As it presently stands, all that is available is the word of Mrs Kitson which itself is based on the words of FINSAC, a government company, which itself is giving its understanding or interpretation of an undertaking which is said to have been given over a decade ago. It must not be forgotten that it was the Government of Jamaica who took the point that it was not bound by an arbitration decision because the Government had acted unlawfully and ultra vires a statute. This tack was taken to avoid paying over the sums due under the arbitration ruling (**National Transport Co-operative Society Limited v The Attorney General of Jamaica** [2009] UKPC 48). Mrs Benka Coker, in light of this experience, is taking no chances and wants full disclosure of the undertaking and the various documents showing the terms of the transfer or sale of shares from the time the bank came into the hands of the government right through to the latest transfer. Counsel wishes to know whether there is anything in those sales or transfers that may have affected the undertaking given.

[13] The court is fully aware of the February 18, 2014 letter from RBC Royal Bank signed by Mrs Rose Davis Logan, Senior Corporate Counsel, which states that the 'recently announced sale of RBC Royal Bank (Jamaica) to the Sagicor Group will not have any negative impact on the undertaking provided by the Government concerning' the present suits. Respectfully, this is Mrs Davis Logan's honest assessment of the matter and the court unreservedly accepts her assessment but as we all know when it comes to the interpretation of a document, such as an indemnity, in the context where millions or possibly billions of dollars are at stake, there is no guaranteed smooth, uninterrupted path to enforcement.

[14] The court is also aware of a letter dated January 3, 2014 on the letter head of FINSAC Limited which was signed by the FINSAC general manager. It says that:

> *In keeping with the Share Sale Agreement between FINSAC Limited, RBTT Financial Holdings Limited and RBTT International Limited … and various related agreements governing the sale of … Union Bank of Jamaica Limited … FINSAC has indemnified the purchaser, on a full indemnity basis, for all loss suffered and costs incurred including all reasonable legal expenses by the purchaser after completion relating to prosecuting and defending any litigation instituted against UBJ where the cause of action of such litigation arose prior to the completion date.*

[15] The letter went on to refer to the YP Seaton litigation. It is not entirely clear from the letter whether this is a quotation from the indemnity or the letter writer's interpretation of the indemnity. This letter was written to auditors, presumably FINSAC's auditors. It may be that this was a response to a query from the auditor.

[16] The court is not of the view that Mrs Benka Coker should be satisfied with the assurances of counsel regardless of how genuine they are for these reasons. First, neither Mrs Kitson nor Mrs Davis Logan has given any undertaking to the court that the judgment will be honoured regardless of the sum. This is not surprising. They do not represent FINSAC or indeed the Government of Jamaica and therefore are not authorized to give any undertaking in respect of these entities. Second, the precise terms of the undertaking are not generally known and counsel indeed has a responsibility to her client to do all that she can protect his interest and this includes having full knowledge of the terms and conditions (if any) of the undertaking. Third, the terms of sale of the various sales of shares of the bank may or may not have an impact on the undertaking and its effect. Fourth, it would be quite foolish for any attorney, to say nothing of Queen's Counsel, to embark on giving her client advice on an undertaking that she has not seen but only heard of. It is the view of this court that Mrs Benka Coker is

quite right to insist on the disclosure she has asked for because it would be unwise to rely on the interpretation or understanding of opposing counsel regardless of how impeccable the word or understanding of opposing counsel is. The court concludes that disclosure should be made of (a) all documents relevant to deciding whether RBTT should be the proper party to proceedings and (b) and the terms of the indemnity and such other documents that may assist in understanding the terms and conditions of the indemnity.

Whether compound interest should be awarded

[17] The House of Lords decided in **Sempra Metals v Inland Revenue Commissioners and another** [1998] 1 AC 561, that compound interest is a fact of commercial life and it reflects economic reality. Importantly, the House decided that irrespective of the position in equity, the common law now had the power to award compound interest. The Court of Appeal of Jamaica in **YP Seaton & Associates Company Limited v The National Housing Trust** [2013] JMCA 44 accepted the reasoning in **Sempra** and held in that case that the arbitrator had the power to award compound interest. There is nothing in the reasoning of McIntosh JA that suggested that her Ladyship's analysis was restricted to the particular facts of the case. Her Ladyship was making the point, following **Sempra**, that Jamaican law had followed the same path as that outlined in **Sempra**. McIntosh JA expressly relied 'on the general propositions relating to compound interest contained therein insofar as they are relevant to the issue in the instant case' (para 27). Her Ladyship noted that the reasoning in **Sempra** was not out of step with the Privy Council's decision in **Financial Institutions Services Ltd v Negril Holdings Ltd** (2004) 65 WIR 227. In that case, one of the issues was whether there was evidence that banks in Jamaica charged compound interest on overdraft facilities. Their Lordships reviewed the evidence (see paragraph 33 of advice) – which consisted of National Commercial Bank charged compound interest for near onto 30 years prior to the testimony in that case; Citibank had charged compound interest for about 24 years prior to the testimony in the case; the Bank of Nova Scotia charged compound interest for

106 years prior to the testimony; Mutual Security Bank had charged compound interest – and concluded that the evidence established that compound interest was the banking practice in Jamaica. Lord Walker, speaking on behalf of the Board, described the matter at paragraph 34 in this way

> *This evidence established, with striking unanimity, that interest on overdrafts with commercial banks was calculated on a daily basis and charged to the account on the last working day of the month. This produced the effect of compound interest, although not all the witnesses used that particular form of words to describe it. In only one case (the NCB) was it clearly established that this practice was, at the material time, covered by an express contractual term.*

[18] This finding is significant for a number of reasons. The customer in that case argued that while it did not expect to borrow funds free of interest cost, it was not the case that it should be exposed to paying what was in practical terms (though not called by that name) compound interest. The argument found favour with the trial judge and the Court of Appeal even in the face of seven witnesses testifying that the usual practice, in relation to overdraft facilities, was to calculate the balances daily and applied to the account monthly. In fact the evidence in that case showed that the practice was to charge the simple interest daily and if no payment was made then the interest accumulated during the month would be added back to sum owed and thus the new month would begin with this higher amount.

[19] The other thing about the **Negril** case is that the trial took place in 1992 with judgment being given in 1997 in relation to events that took place between 1984 and 1988, and the Court of Appeal's judgment was delivered on March 22, 2002. The events in the instant case took place in 1990/1991. It is extremely unlikely that the bank, in this present case, would be unaware of the practice within the

banking sector of charging compound and this court is prepared to find on a balance of probabilities that the bank did know that this was the practice. There is no evidence that this practice of charging compound interest on overdraft facilities has been abandoned. There is no evidence that the observation made by McIntosh JA, in **National Housing Trust**, regarding the charging of compound interest in the commercial world in Jamaica was erroneous.

[20] The ultimate point is that the cases of **Negril Holdings, Sempra** and **National Housing Trust** show that the applicability of compound interest to outstanding sums has been discussed in different contexts and while it is still early days in respect of the specific enumerated instances, it is fair to say that the tide has turned and that compound interest ought to be the interest awarded, at least in commercial disputes, unless there is some good reason not to do so.

[21] This court will follow the practice enumerated in **Negril Holdings**, in the absence of evidence that the practice has changed, namely, interest calculated during the month on daily basis and where no payment is made that accumulated interest is added at the last day of the month so that the starting balance on the first day of the next succeeding month is the total sum arising from the practice just outlined.

[22] In the previous judgment in this matter, the court had asked that an average rate of interest over the period be arrived so that calculations would be simplified and reduce the risk of error. Mr Seaton has produced material from the Bank of Jamaica for the period 1992 – 2014. The court accepts the average of 27.3% advanced by Mr Seaton. The court did not understand that the bank disagreed with this figure. Its contention was that no compound interest should be awarded.

[23] Mrs Kitson has raised a procedural objection to the award of compound interest. According to learned counsel, the **Sempra** case stated that the claimant must claim and prove his actual interest loss if he wishes to recover compound interest (Lord Hope at paragraph 17). This has not been done therefore there can be no

award of compound interest. This is all the more so, according to counsel, since Mr Seaton did not claim or counterclaim for the return of the money. Interest, if any, should therefore be awarded on a simple interest basis under the Law Reform (Miscellaneous Provisions) Act.

[24] There seems to be a problem here. On the one hand the Judicial Committee of the Privy Council has held that simple interest need not be pleaded while on the other hand the House of Lords is saying the compound interest which was said to reflect reality should be pleaded and proved. In other words, the Board held that the now-described unrealistic simple interest need not be pleaded but the House is saying that that which is the reality needs to be pleaded. In the matter of **Carlton Greer v Alstons Engineering Sales and Services Limited** (Appeal No. 61 of 2001) (delivered June 19, 2003), the Board had rejected the submission that interest must be specifically pleaded since it was important for the defendant to know the nature of the claim he is to meet. The Board expressly approved the decision of Hassalani J in ***DeSouza v Trinidad Transport Enterprises Ltd and Nanan (No 2)*** (1971) 18 WIR 150 where the trial judge held that interest was not a cause of action but only awarded if the claimant wins the case and therefore need not be pleaded. If this is so in relation to simple interest the question that arises is what is there in the nature of compound interest that would demand a different approach, particularly in the context where in Jamaica, it is well established that in commercial cases compound interest is now the order of the day?

[25] The other point to note is that in **Sempra** itself, Lord Hope accepted a number of propositions about simple interest vis a vis compound interest. His Lordship accepted that (a) simple interest was an artificial construct that did not accord with reality (para 33); (b) simple interest was an imperfect way of measuring the time value of money (para 33) and (c) computation of the time value of money on the ‘basis of simple interest will inevitably fall short of its true value.

[26] Regarding compound interest, Lord Hope observed that the main objection to its use was that there were many methods of computing it. It was this possibility of multiplicity of methods that led the Law Commission in England to suggest that if compound interest is to be awarded then there should be guidelines on when to award it.

[27] Lord Mance, in **Sempra**, identified the real anxiety regarding compound interest. It is this, (quoting from the Law Commissions 'Report on Pre-Judgment interest on Debts and Damages (Law Comm No 287) of 23 February 2004 at paragraph 2.42): 'Where interest is compound, interest increases in an exponential rather than a linear way, which can make the calculation appear frightening and unpredictable.' His Lordship took note of the fact that double digit inflation was still within the recent economic history of the United Kingdom and the 'experience in the Privy Council of appeals from the West Indies, where it is still prevalent, includes banking cases where claims have multiplied several times in size with compound interest' (para 222).

[28] One of the more remarkable things about **Sempra** is that the majority steadfastly refused to presume that there was interest loss where payment is delayed despite accepting that such a view was unrealistic, generally and was even more unrealistic in times of high inflation and high interest rates (Lord Nicholls at para 97). Lord Nicholls even accepted that to require proof of loss in each case may seem unduly formalistic (para 97). It would be unduly formalistic because the simple interest method does not require the claimant to prove that he actually lost the interest computed on the simple interest method. What logic compels proof of actual loss of interest when dealing the compound interest? What the person is being compensated for is that the person who wrongfully withheld payment deprived the person owed of the opportunity to earn from the money wrongfully withheld. It is now settled in Jamaica, unless altered by contract or statute, that while compound interest may increase exponentially it is not unpredictable although it may be frightening. The Bank of Jamaica now has very reliable data on interest rates in the commercial sector and it has been the

source of interest rates in commercial case for near unto two decades. Thus the objections to having compound interest as the default position in Jamaica in commercial cases do not exist. There is not multiplicity of methods. There is no uncertainty in how it's calculated. There is no uncertainty regarding the prevailing rates at the material time.

[29] If Mrs Kitson is correct that the claim for compound interest must be pleaded and proved then there seems to be some incongruity here. If the House has accepted that simple interest is unrealistic; that it will always fall short of full compensation and does not reflect commercial reality, there would be the odd situation where such a defective method of computing interest need not be pleaded according the Privy Council but the more realistic method needed to be pleaded and proved. It would seem to this court that reason actually demands the conclusion that in commercial disputes, the claim for compound interest need not be pleaded because (a) it would only be awarded if the claim is successful and (b) it would be consistent with reality and therefore all defendants in commercial disputes should expect to pay compound interest if the claim against them is successful. The default position, at least in commercial disputes, that interest on money paid late or wrongfully taken or withheld will be compound interest. In addition there is the added advantage that in Jamaica the prevailing practice of the then existing commercial banks was examined before the courts. The Board did not hold that the practice was deficient. This would suggest that this method of computing compound interest should be the one used in commercial cases as the default method unless the parties, in their agreement, have specified some other method.

[30] The rationale for requiring that compound interest be pleaded has to be the multiplicity of methods available for its computation. That problem has been resolved to a significant extent in Jamaica by **Negril Holdings**. While it is true that compound interest can run up a debt very quickly and in no time become a huge number the fact is that compound interest is the way of the world. Those

who have borrowed from banks in Jamaica know this only too well. This court will go with the Privy Council's approach which is that a claim for interest need not be pleaded. The leading bank in Jamaica (Bank of Nova Scotia) has been charging compound interest for over 100 years.

[31] In this case, Mr Seaton has submitted, through his counsel, that the average interest rate over the period is 27.30%. Applying this rate of interest and compounding the interest in the manner suggested by **Negril Holdings Limited**, the calculation yields a sum of JA$5,622,084,739.33. By any measure this is a staggering sum.

[32] This shows the need for there to be a stay so that this issue can be fully addressed by the Court of Appeal. The question of when compound interest should be applied is a matter of great concern, particularly to those citizens who have been caught up in the financial sector crisis of the 1990s. Some of them have been paying back the debt for years with no end in sight. The sum they borrowed increased horrendously by way of compound interest. Despite the cries from citizens, the issue has not been addressed in any comprehensive way. One of the possible long term consequences of unbridled compound interest is that it stifles economic growth because it takes away the purchasing power from citizens thereby depressing consumer spending leading to economic stagnation with the only beneficiaries being financial institutions. Ultimately, it impoverishes the country and even financial institutions will be affected because there will come a time when they have fewer and fewer persons to lend which leads to either increased interest rates (to keep up returns) or loose lending policies to encourage borrowing, neither of which is any good.

[33] Mrs Kitson pressed the point of the language used in **Sempra** – pleaded and proved. Here, there was no plea from Mr Seaton therefore he should not get back his money even if the bank has been found to have taken it unlawfully. There are two points to note here. First, in **Sempra**, the amount claimed was in fact the interest. The primary sum had already been accounted for. In that

context, clearly the claimant had to plead the interest he sought. It may be said that this position is inconsistent with what was stated earlier about pleading or not pleading simple or compound interest on money not paid or wrongfully withheld. This is not so. In **Sempra**, the actual claim was for interest and so a reasonable argument could be made for specificity. However, when claiming interest on money generally, the pleader is not required to state a rate and in any event the Law Reform (Miscellaneous Provisions) Act confers a discretion on the trial court on the question of interest. It is all about practical justice and not dogmatic insistence on logical symmetry. Second, the court must confess that there is something distasteful about a wrong doer benefiting from his wrong doing. The wrong doer bank, here, did not let the sleeping dog of Mr Seaton's not filing a claim for the money taken lie. The bank came to court for an endorsement of its behaviour. It sought a declaration that the taking was lawful. This court could not grant the declaration sought and so it has to be contrary to justice for the wrong doer to remain in possession of money found to have been wrongfully taken and wrongfully withheld. It would seem that it would be equally odd that the wrong doer could have the benefit of money taken wrongfully over 20 years ago and pay on a simple interest basis (proposed by Mrs Kitson) which has been described, judicially, as unrealistic. Clearly, the bank was uneasy with its taking of the money. If it were so confident in its position it would simply have sat back and allowed Mr Seaton to make the running. Its unease prodded it to seek legal cover from the court in the form of a declaration.

Claim No CL 1994/E083

[34] This court concludes that compound interest is to be applied to the sum of money in this case because Mr Seaton could have had this money and utilised it to earn the interest to be applied in this case. The court concludes that this is a fair way of dealing with matter. It is not a matter of restitution or even disgorging gains made but simply paying back Mr Seaton with interest the money wrongfully taken and wrongfully withheld. This is the position in respect of the JA$15,254,583.69 in Claim No CL 1993/E-083.

Claim No CL 1993/S252

[35] In respect of Claim No CL 1993/S252 the court's position is now stated. With respect to the other accounts which were frozen. The court is not of the view, for the reasons given by Lord Hope, that simple interest would adequately compensate Mr Seaton for the loss of use of his accounts. The court holds that compound interest should be applied in the manner suggested by Mrs Benka Coker.

[36] On one view, the frozen sums were still accumulating interest although the precise rate of interest is not yet known. To that extent therefore, Mr Seaton was not out of pocket. It may also be the case that when the accounting is done, it may that the rate of interest found to be applicable may even exceed what was originally awarded at the time the bank calculated and added interest to the accounts during the time they were frozen.

[37] What Mr Seaton would have lost would be the difference between what he was awarded or should have been awarded on the accounts and the 27.3%. He was deprived of the opportunity, during the freezing period, to use his money in a way that was advantageous to himself and for that he should be compensated.

[38] This court concludes that the rate of interest applicable (compounded in the **Negril Holdings** manner) is the difference between the interest applied or that should have been applied

[39] In an attempt to give guidance and clarity to the Registrar who will be engaged in this process, the court states that the sequence should be:

a. determine what interest rate was in fact applied to the frozen accounts;

b. determine whether those rates at (a) were the correct rates which should have been applied;

c. if the rates in fact applied were the correct rates then the interest rate for the purposes of compounding should be the difference between the applied rate and the 27.3%;

d. if it turns out that the rate of interest applied was less than what should have been applied then the rate that should have been applied should then be applied in order to arrive at what the true starting balance at the beginning of the accounting period should be. There would have to be an adjustment in the figure to take account of the fact that some interest was applied albeit the incorrect sum. When the correct balance is arrived then the interest rate for the purposes of compounding would be the difference between the interest rate applied to get the correct balance and the 27.3%.

Whether costs should be awarded on an indemnity basis

[40] Mrs Benka Coker has been very strident in her submissions on this point that costs should be paid on an indemnity basis. She has spared no adjective to describe what she considers to be the reprehensible and indefensible conduct of the bank. These two adjectives are the milder ones used by Queen's Counsel. Counsel insists that costs on an indemnity basis must be awarded on this case. Having reviewed the submissions and the cases cited particularly the judgments of Jones J in **Norman Washington Manley Bowen v Shahine Robinson** Claim No 2007HCV03783 (unreported) (delivered October 8, 2010) and Brooks J in **Michael Distant and other v Nicroja Limited** Claim No 2010HCV 1276 (unreported) (delivered March 8, 2011), an important first question is whether in

Jamaica it is meaningful to speak in terms of assessing costs on an indemnity basis or standard basis.

[41] Before answering the question posed, it is important to speak briefly about parts 64 and 65 which speak to costs. Part 64 deals with entitlement to costs along with other general principles while part 65 deals with quantification of costs. Part 64 establishes the fundamental loser pays principle (rule 64.6 (1)). However, rule 64.6 (2) permits the court to order the winner to pay costs. When the court is deciding who should pay costs the court must have regard to a number of factors listed in rule 65.6 (4). These include the conduct of the parties before and during the proceedings; whether there has been success on all or some of the issues; whether there were payments into court or offers to settle; whether a party behaved reasonably in terms of how he or she pursued an allegation or issue and the manner in which the allegation, issue or the case was pursued; whether the successful claimant exaggerated his claim in whole or in part and whether the claimant gave reasonable notice of intention to issue a claim.

[42] Under the CPR, the loser pays principle is not inflexible. It is the general rule but there can be departures. The reason stated by Lord Woolf MR in *Phonographic Performance Ltd v AEI Rediffusion Music Ltd* [1999] 2 All ER 299 at 313-314:

> *[t]he most significant change of emphasis of the new rules is to require courts to be more ready to make separate orders which reflect the outcome of different issues. In doing this the new rules are reflecting a change of practice which has already started. It is now clear that too robust an application of the "follow the event principle" encourages litigants to increase the costs of litigation, since it discourages litigants from being selective as to the points they take. If you recover*

all your costs as long as you win, you are encouraged to leave no stone unturned in your effort to do so.

[43] The passage needs no comment or analysis. After the part 64 examination is completed, the next stage is quantification. Neither parts 64 or 65 use the words standard basis or indemnity basis of assessment of costs. These labels are a carryover from the previous costs regime that existed in Jamaica. The labels are retained in England and Wales and actually used in the English CPR. Although the labels do not appear in the Jamaican CPR, they are used in Jamaica by both bench and bar before and since the introduction of the CPR.

[44] All costs, regardless of the basis of assessment, are indemnifying in the sense that the receiving party gets back his or her costs. Costs are not intended to be a windfall or to make a profit. Costs are not intended to be punitive and are not a bonus for the receiving party. The rationale for costs was explained by Dyson J in **R v Lord Chancellor Ex p Child Poverty Action Group** [1998] 2 All ER 755, 764. His Lordship stated that the basic rule of costs following the event is designed to ensure 'that the assets of the successful party are not depleted by reason of having to go to court to meet a claim by an unsuccessful party.' What is also clear is that regardless of the basis of assessment, the receiving party cannot receive more than his actual costs as between himself and his attorney.

[45] What is the practical difference between indemnity costs and costs on a standard basis? When costs are assessed on a standard basis, then it is for the receiving party to make the case that any costs he is asking for are reasonable in amount and reasonably incurred. On an indemnity basis assessment, it is for the paying part to make the case that costs claimed are not reasonable in amount and not reasonably incurred. The other practical difference is that on the actual taxation in standard assessment the benefit of the doubt will go to the paying party whereas in an indemnity assessment, the benefit of the doubt will go to the receiving party. From this explanation it is easy to see why it has been said that in an indemnity basis assessment, the receiving party is more likely to get back

more of his costs. In both cases, the costs must have been reasonable to incur and reasonable in amount because both are constrained by the fundamental principle that regardless of the basis of assessment the receiving party cannot get back more than his or her real costs.

[46] What, then, leads a court to make either a standard or an indemnity assessment? It is this court's view that the case of (**Mayor and Burgesses of the London Borough of Southwark v IBM UK Ltd** [2011] EWHC 653 captures the principle quite well. Akenhead J held the following at paragraphs 3 and 4:

> ***[3]*** *The principles to be applied are derived from CPR Pt 44.4 which provides that the court will assess costs on a standard or indemnity basis and Pt 44.3 which provides that the court, in deciding what order to make about the costs, should have regard to the conduct of the parties (both before and during the proceedings), success, any admissible offer to settle, whether it was reasonable for a party to raise or pursue particular claims and the manner in which the party has pursued its case or particular allegations or issues.*
>
> ***[4]*** *The following are unexceptionable propositions:*
>
> *(a) an award of costs on an indemnity basis is not intended to be penal and regard must be had to what in the circumstances is fair and reasonable: Reid Minty v Taylor [2002] 1 WLR 2800, paragraph 20.*

(b) indemnity costs are not limited to cases in which the court wishes to express disapproval of the way in which litigation has been conducted. An order for indemnity costs can be made even when the conduct could not properly be regarded as lacking in moral probity or deserving of moral condemnation: Reid Minty, paragraph 28.

(c) the court's discretion is wide and generous but there must be some conduct or some circumstance which takes the case out of the norm: Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hammer Aspden & Johnson (A Firm) [2002] Cr App Rep 67, paragraphs 12, 19 & 32

(d) the conduct must be unreasonable to a high degree. 'Unreasonable' in this context does not mean merely wrong or misguided in hindsight: Kiam v MGN Ltd (No 2) [2002] 1 WLR 2810, para 12.

(e) the pursuit of a weak claim will not usually, on its own, justify an order for indemnity costs, but the pursuit of a hopeless claim, or a claim which the party pursuing it should have realised was hopeless, may well lead to such an order: '[T]o maintain a claim that you know, or ought to know, is doomed to fail on the facts and on the law, is conduct that is so unreasonable as to justify an order for indemnity costs': Wates Construction Ltd v HGP Greentree Allchurch Evans Ltd [2006] BLR 45, paragraph 27 and Noorani v Calver [2009] EWHC 592 (QB), paragraph 9.

(f) there is no injustice to a claimant in denying it the benefit of an assessment on a proportionate basis when the claimant showed no interest in proportionality in casting its claim disproportionately widely and requiring the Defendant to meet such a claim: Digicel (St Lucia) Ltd v Cable & Wireless plc [2010] 5 Costs LR 709, paragraph 68.

(g) if one party has made a real effort to find a reasonable solution to the proceedings and the other party has resisted that sensible approach, then the latter puts himself at risk that the order for costs may be on an indemnity basis: Reid Minty, paragraph 37.

(h) rejection of a reasonable offer to settle will not of itself automatically result in an order for indemnity costs but where the successful party has behaved reasonably and the losing party has behaved unreasonably the rejection of an offer may result in such an order: Noorani, paragraph 12.

(i) rejection of 2 reasonable offers can of itself justify an order for indemnity costs: Franks v Sinclair (Costs) [2006] EWHC 3656.

[47] This approach is not new. In 2006, Tomlinson J, in the ill advised pursuit of the Bank of England in the **Three Rivers** litigation, held in **The Three Rivers**

District Council v The Governor and Company of the Bank of England (No 6) [2006] 5 Costs LR 714, paragraph 25:

> *(1) The court should have regard to all the circumstances of the case and the discretion to award indemnity costs is extremely wide.*
>
> *(2) The critical requirement before an indemnity order can be made in the successful defendant's favour is that there must be some conduct or some circumstance which takes the case out of the norm.*
>
> *(3) Insofar as the conduct of the unsuccessful claimant is relied on as a ground for ordering indemnity costs, the test is not conduct attracting moral condemnation, which is an a fortiori ground, but rather unreasonableness.*
>
> *(4) The court can and should have regard to the conduct of an unsuccessful claimant during the proceedings, both before and during the trial, as well as whether it was reasonable for the claimant to raise and pursue particular allegations and the manner in which the claimant pursued its case and its allegations.*
>
> *(5) Where a claim is speculative, weak, opportunistic or thin, a claimant who chooses to pursue it is taking a high risk and can expect to pay indemnity costs if it fails.*
>
> *(6)A fortiori, where the claim includes allegations of dishonesty, let alone allegations of conduct meriting an award to the claimant of *732 exemplary damages, and*

those allegations are pursued aggressively inter alia by hostile cross examination.

(7) Where the unsuccessful allegations are the subject of extensive publicity, especially where it has been courted by the unsuccessful claimant, that is a further ground.

(8) The following circumstances take a case out of the norm and justify an order for indemnity costs, particularly when taken in combination with the fact that a defendant has discontinued only at a very late stage in proceedings:

> *(a) where the claimant advances and aggressively pursues serious and wide ranging allegations of dishonesty or impropriety over an extended period of time;*
>
> *(b) where the claimant advances and aggressively pursues such allegations, despite the lack of any foundation in the documentary evidence for those allegations, and maintains the allegations, without apology, to the bitter end;*
>
> *(c) where the claimant actively seeks to court publicity for its serious allegations both before and during the trial in the international, national and local media;*
>
> *(d) where the claimant, by its conduct, turns a case into an unprecedented factual enquiry by the pursuit of an unjustified case;*

(e) where the claimant pursues a claim which is, to put it most charitably, thin and, in some respects, far-fetched;

(f) where the claimant pursues a claim which is irreconcilable with the contemporaneous documents;

(g) where a claimant commences and pursues large-scale and expensive litigation in circumstances calculated to exert commercial pressure on a defendant, and during the course of the trial of the action, the claimant resorts to advancing a constantly changing case in order to justify the allegations which it has made, only then to suffer a resounding defeat.

[48] What was said by Tomlinson J at paragraph 8 of the extract cited is not exhaustive but a strong indication of what the courts, in England and Wales, would look for in deciding whether costs should be awarded on an indemnity basis. This court is fully aware that the CPR on costs in England and Wales has changed since 2013. The court is also aware that the relevant rules in England and Wales at the time of the **Three Rivers** and **The Mayor and Burgesses** cases were different from the Jamaican rules but the underlying themes apply to Jamaica, namely, costs must be reasonable in amount and reasonably incurred and that conduct or circumstances which takes the case may attract indemnity costs.

[49] Langley J in **Amoco (UK) Exploration Company v British American Offshore Limited** [2002] BLR 135 (Official transcript) (delivered November 22, 2001) summed up the matter accurately when he said at paragraphs 2 and 3:

> *2. The fact of success, however resounding, is not sufficient of itself to justify an award of costs to be assessed on an indemnity basis. The general rule is that costs are to be awarded on a standard basis. The factors to be considered by the courts in deciding what orders to make as to costs are stated in CPR rule 44.3 . The discretion is of course ultimately to be exercised so as to deal with the case justly and authority indicates that it is not helpful to seek to define the circumstances in which indemnity costs may be appropriate.*

> *3. The difference in approach between assessments on the standard and the indemnity bases was stated, following the wording of CPR 44.4, by Lord Woolf in Petrotrade v Texaco an unreported decision of the Court of Appeal dated 23 May 2000. The relevant paragraphs of the judgment are numbered 62 to 63. In summary, costs unreasonably incurred or unreasonable in amount cannot be recovered on either basis. On a standard basis any doubts as to whether costs were reasonably incurred or are reasonable and proportionate in amount are resolved in favour of the paying party, in this case Amoco. On an indemnity basis such doubts are to be resolved in favour of the receiving party, in this case BAO, and there is no express reference to the need for the costs to be "proportionate" in amount. But it is important to keep in mind both the basic principle that costs,*

even awarded on an indemnity basis, do not amount to a full recovery of costs unless all the costs have been reasonably incurred and are reasonable in amount and that there has to be some added factor to justify departure from the general rule. If such a factor is to be found it is most likely to be found in some conduct of the paying party which the court considers merits sufficient criticism beyond that which might ordinarily apply in the case of a party which has fought and lost such as to make it appropriate to order assessment of costs on the indemnity basis.

[50] Are these criteria from all the cases cited relevant and of assistance in Jamaica? The answer is yes. Rule 65.17 (1) states that where the court has a discretion as to the amount of costs then the sum allowed must be reasonable and fair to both the parties. Rule 65.17 (3) states that when deciding what is reasonable the courts must have regard to a number of things including the importance of the matter to the parties; the time reasonably spent on the matter; whether the matter or cause or the particular item was appropriate for senior attorney at law or an attorney at law of specialised knowledge; the novelty, weight and complexity of the matter; proportionality and reasonableness both in terms of whether the costs should been incurred at all and if incurred whether the amount is appropriate are matters to be considered. If, for example, the matter is a simple debt collection that the debtor acknowledged owing but has not paid and thus court action is necessary in order to have a judgment which can be enforced, would it be appropriate to retain a silk of twenty years who has specialised knowledge of debtor/creditor law? To take another example, if there is a collision and there is only a broken arm with no complication arising from the injury would it be appropriate to retain a senior attorney with specialised knowledge of personal injury claims? The answers would be that in neither case would retention of counsel of the calibre in the examples given and his or her fees be regarded as reasonable and proportionate and in all probability lower

costs would be recovered. All this is implied by rule 1.1 which espouses the principle of dealing with cases justly having regard to the amount of money involved, the importance of the case, the complexity of the issues and financial position of each party. The concepts of proportionality and reasonableness, although those expressions are not used in parts 64 and 65, permeate the entire CPR including the assessment of costs.

[51] The court now returns to **Bowen** and **Distant**. In making the costs order in **Bowen**, Jones J declined to use the word 'indemnity.' The order simply said that costs were to be paid in accordance with Civil Procedure Rules (CPR) rule 64.6 (1) and taxed in accordance with rule 65.3. Brooks J analysed Jones J's judgment and concluded that in Jamaica the quantification process 'cannot be said to be aimed at achieving the payment of costs, on a strict "indemnity basis", as the term is used in England and Wales' and therefore an 'order for costs stipulating that costs should be paid "on an indemnity basis", is therefore, … inappropriate for our jurisdiction' (page 9). This court respectfully disagrees. There is nothing in rule 65.17 that is inconsistent with costs being assessed on either standard or indemnity basis.

[52] While it is true that the Jamaican rules do not use the words indemnity, proportionality and reasonableness 2013 [1] that is not a sufficient reason to conclude that costs orders on an indemnity basis are excluded from the Jamaican rules. The reason is this. If the court concludes that some of the costs were unreasonably incurred and unreasonable in amount is this also not saying that costs incurred were disproportionate? If the losing party, for instance,

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[1] 44.5(1)The court is to have regard to all the circumstances in deciding whether costs were –(a) if it is assessing costs on the standard basis –(i) proportionately and reasonably incurred; or (ii) were proportionate and reasonable in amount, or (b) if it is assessing costs on the indemnity basis – (i) unreasonably incurred; or (ii) unreasonable in amount.

This was the wording before the amendments of 2013.

conducted his case in the manner that would have given rise to indemnity costs in England and Wales, why shouldn't the courts in Jamaica not be able to do the same? Why should the receiving party receive less merely because the rules in Jamaica do not use the word indemnity when the very factors to be considered which could give rise to indemnity costs are to be found in the rules? It seems to this court that the purpose of rule 65.17 (1) and (3) is to direct the courts to consider how the litigation was conducted and if the court finds that the litigation was conducted in manner that was so highly unreasonable so as to fall outside of the normal conduct of litigation then there has to be some practical consequence. What would be the point of asking the court to consider the factors stated were it not intended that a finding that the conduct of the case was highly unreasonable should result in indemnity costs? It could hardly be the case that the new regime which has as one of its purposes, the reduction of unnecessary costs by proper case management should be powerless to permit the receiving party to recover closer to his or her actual costs in the face of highly unreasonable conduct from his opponent. If it were otherwise, it would encourage litigants to be a profligate with time and resources as they can be sure in the knowledge that costs orders will be benign.

[53] This court therefore concludes that the Jamaican CPR even without using the words 'indemnity basis' and 'standard basis' has in fact incorporated both principles in the assessment of costs. It is therefore not necessary for a party to specifically apply for costs to be assessed on an indemnity basis. The structure of parts 64 and 65 in fact directs the taxation to be done in a manner that incorporates the possibility of costs being assessed on an indemnity basis. Having said this, the application to the trial court for costs to be assessed on an indemnity basis still serves a useful purpose which is this: if the order is made by the trial court, then the Registrar, who does all taxation in the Supreme Court trial, is spared the problem of lawyers contending before him or her, whether indemnity costs should be applied to the assessment. The trial court is always better placed than the costs assessment judge to decide whether the costs

should be assessed on a standard basis or indemnity basis. It is for all these reasons this court, disagreeing with Brooks J's decision in **Distant**, thinks that an order for indemnity costs is not appropriate for Jamaica.

[54] The court has gone through this at some length to make another point which is that it is not accurate to say, as Mrs Kitson has suggested, that the circumstances in which a court may award costs on an indemnity basis are limited to those cases which are akin to an abuse of process or conduct deserving of moral censure. It was also submitted that pre-CPR cases established that indemnity basis costs are rarely awarded and are only granted when there is evidence that the litigant does something or conducts the case in manner deserving of moral condemnation. This court does not share Chadwick J's view that **Marie Claire Album SA v Hartstone Hosiery Ltd 2.** [1993] F.S.R. 692 that a departure from the standard basis is so rare that something close to an abuse of process is required. This is out of step with rule 64.6 (4) and rule 65.17 of the Jamaican CPR.

[55] This court, in agreement with Coulson J **Noorani v Calver** [2009] EWHC 592, concludes that if 'indemnity costs are sought, the court must decide whether there is something in the conduct of the action, or the circumstances of the case in question, which takes it out of the norm in a way which justifies an order for indemnity costs' (Coulson J, para 9). It is hoped that if the principles extracted above are bourne in mind as well as the judgments of Brooks and Jones JJ, then there will no longer be the need to cite innumerable cases on this subject (as happened here) and definitely no cases from the pre-CPR era.

Claim No CL 1993/E083

[56] Mr Seaton does not have to establish that the bank's conduct amounted to an abuse of process before getting an indemnity costs order. Neither does he have to establish any conduct deserving of moral censure. Therefore, Mrs Benka Coker is correct in her view that the court's failure to find that the bank's conduct

amounted to an abuse of process does not preclude an order for indemnity costs against the bank. However, as noted above there must still be something in the conduct of the paying party or the circumstances of the case that takes it out of the standard basis approach. The court now considers whether an indemnity basis assessment order should be made.

[57] Part of the evidence in the main judgment was that JCTC brought two suits against the bank. According to Mr Senior, the bank settled these cases to the tune of some JA$32m. JCTC also sued Prolacto in one of those suits (CL 1991/J244). Prolacto had filed a full defence and by all appearances was ready to defend the claim.

[58] There was evidence from Mr Senior that when the bank settled the cases with JCTC it used money from its capital account. This meant that the bank had a depleted capital base. Mr Senior more than suggested that the bank took money from Mr Seaton's account to fill this hole. From Mr Senior's evidence, the court did not get the impression that the bank concerned itself too much with the significant question of whether it was lawful to take money from Mr Seaton's account. This is not to say that it was not discussed but the court did not form the view that the bank was overly detained by this question. The main motivation seems to have been to get back the money to repair the impaired capital base and the main question, after that, where was the best source for recovery. The bank then looked through its records and took the money from Mr Seaton's accounts.

[59] Mrs Benka Coker highlighted the fact that this present litigation no longer has Prolacto and JCTC, the parties to the original sale contracts who would have been best placed to say what was agreed. This made the case for the bank more precarious because the bank was asking the court to say (a) what the terms of the sale agreement between Prolacto and JCTC were and (b) what those terms meant. To attempt to do this two decades after the event without the original contracting parties was always problematic. When this is coupled with the fact

that important documents were not available the risk of failure was enhanced. Finally, according to Mrs Benka Coker, the banks sole witness could not speak to all the details of the transactions between JCTC and the bank. The bank's case was far out on the limb of success.

[60] The court recalls that during the trial Mr Seaton was accused of recent fabrication. At one point Mr Seaton was told that he knew that when he took money from the account he had no lawful or legitimate basis for the taking of the money. It was not that he was mistaken or perhaps misunderstood his remit in relation to the account.

[61] If what has been said about the bank's case was bad enough, the bank's prospect of success nosedived sharply after a hearing before Beckford J. The bank had filed a witness statement from Mr Senior that contained conclusions based on documents that were not in the agreed bundles and neither were the documents available. To put it bluntly, the bank could not produce the documents or information on which Mr Senior rested conclusions which were vital for the bank's case. The bank's case was substantially impaired by the order of Beckford J which was to the effect that unless the bank could produce the documents on which Mr Senior based his conclusions (in this witness statement) then he could not give the opinion evidence he had in his witness statement. Beckford J struck out large parts of Mr Senior's witness statement because it offended the hearsay rule. The problem was that Mr Senior's witness statement did not identify the documents on which he based his calculation which were being used by the bank to ground part of the claim against Mr Seaton. As it turned out, except for the formal admission by the bank in the pleading that it took the JA$15,254,583.69, the figures on which the exchange rate was based were not produced. Mr Senior said that the figures were provided by persons other than himself. Thus there were no documents and no witness who could properly prove the figures relied on by the bank. Beckford J specifically noted in her judgment that the documents Mr Senior was relying on were not those in the agreed bundles so he was barred from giving testimony that was based on the

missing documents unless they were produced. This aspect of the case was referred to at paragraphs 159 – 165 of the judgment on liability. The consequence was that the bank's case moved up the scale failure from risky to very high risk. As Tomlinson J observed, to pursue a thin claim is high risk and such a claimant can expect to pay indemnity costs if it fails. The bank has failed. Add to this the fact that the bank even went as far as saying that at the time the moneys were taken by Mr Seaton he knew full well that he had no legal or factual basis for using the money from the account. This was more than a veiled suggestion that Mr Seaton was a crook. The suggestion was not that he was mistaken or made errors in his calculation it was a naked suggestion of well – theft. To accuse someone of taking that which he knows for sure that he has no legal right to take with the intention to keeping it permanently is really an accusation of serious criminality. It is one thing to be called mistaken but another thing to be called a liar (allegation of recent fabrication) and a thief (taking property knowing you have no lawful right with intention of keeping it permanently).

[62] Despite the ruling of Beckford J, Mr Senior was led down a path to say things which could not be established by the agreed bundles before the court. When Mr Senior was asked to demonstrate his conclusion, he frankly admitted that the information he used to prepare his letter of June 30, 1991 was provided to him by others and he had not even seen the relevant documents. In a sense, he was doing the very thing Beckford J's order had forbidden, namely, not to testify about things based on documents or information which were not produced to the court (paragraphs 212 – 217, 229 of the judgment on liability).

[63] Even in respect of some documents placed before the court, Mr Senior could not speak definitively about them because he was not privy to circumstances leading up to their creation. He was giving, at best, an explanation based on his experience as a banker but he was always reluctant to speak to the actual details

of the contracts because, as he said, he was not in the bank at the time and he did not have first-hand knowledge of the types of discussions that went on.

[64] So shaky had the bank's case become that during the trial there was even a suggestion that Mr Salmon, a senior manager and manager of a flag ship branch, was not acting as an officer of the bank but in his personal capacity. In other words, Mr Salmon's actions and decisions were not to be attributed to the bank.

[65] If the bank really undertook this litigation as a means of covering itself because it was seeking to plug the hole in its capital base then that is a strong reason for imposing assessment on an indemnity basis. This conduct would suggest that the bank did not have a genuine belief in the rightness of its conduct and the litigation was brought primarily to seek legal cover.

[66] Is this sufficient to take the court out of the ordinary course of things so that an indemnity costs order should be made? This court concludes, in light of the authorities cited, that indemnity costs are appropriate. The bank had difficult a case from the outset which became high risk because for a very long time the bank could not find a witness to testify. The case became very high risk when the witness it found stated clearly that he could not speak to the details of the contract but could only use his experience as banker to explain the documents as best he could. The bank's case declined even further when the order of Beckford J eviscerated a significant part of the bank's case. The bank's case eventually fell over the cliff when Mr Senior said the exchange rate the bank was relying on to prove its case were imputed rates which may or may not be true because the documentation to support the letters he wrote were not seen by him but were given to him by persons which the evidence in the case did not identify. The court concludes that costs in Claim No CL 1993/E083 should be assessed on an indemnity basis.

Claim No CL 1993/S252

[67] In this claim Mr Seaton sought an accounting from the bank. There is no doubt that the relationship between the parties is within the categories in respect of which the remedy of account can be granted. The problem here is this: the bank says that accounts frozen were thawed and the money, with interest, returned to Mr Seaton. That Mr Seaton was entitled to interest on his accounts is not in dispute. The bank says that it has paid Mr Seaton all that he was entitled to receive. The bank has not proved what the interest rate was at the material time of freezing the accounts. Neither has the bank proved that the interest rate at the time was properly applied to the accounts. All that the bank could prove was that interest was awarded on the accounts but, respectfully, that does not prove that the interest in fact applied was the correct interest that ought to have been applied.

[68] It was in this context that the bank resisted Mr Seaton's claim. Interestingly, the bank has now placed before court interest rates which it says should be applied to the accounts. It is relying on data collected by the Bank of Jamaica. The bank is not saying that these rates now being placed before the court were the contractually agreed rates with Mr Seaton. The court is being asked to accept these rates as the best Mr Seaton could have received at the time and apply them to the accounts. In other words, whatever the contractually agreed rates were, these rates now produced from the Bank of Jamaica statistics for the relevant period are the best that Mr Seaton could have possibly received. The bank has not spelt out the argument in this detail but this is really the ultimate logic of the submissions.

[69] An interesting question is why didn't the bank take this approach long ago? Why wait until judgment to put forward what is an eminently sensible solution? All that Mr Seaton was asking for was an account and in the absence of clear evidence of what the parties contractually agreed the interest would have been, the figures from the Bank of Jamaica could have provided the basis for a solution. Instead,

the bank dug in its heels and insisted that the correct interest was paid when it was not able to say what that rate was.

[70] The bank's response to the eminently reasonable claim by Mr Seaton was unfortunate. It is the view of this court that the stance of the bank led to unnecessary and prolonged litigation in respect of the frozen bank accounts when all that was required was a bit of common sense and the spirit to reach an amicable solution.

[71] The bank, in its written submissions, has stated that Mr Seaton has asked for accounting in respect of interest credited or which should have been credited to the said accounts. If this was how the bank understood the claim, it would have been eminently more sensible to sit down with Mr Seaton at time when the records were more likely to be available, and do the mathematics to either prove to Mr Seaton that he has already received the proper interest or seek to arrive at some other solution.

[72] It may be said that the claims arose before the CPR when litigation was much more contentious. However, the CPR has been force since 2002. The CPR encourages parties to further the overriding objective to settle matters quickly and fairly.

[73] The bank chose to resist the case without being able to say what was the true interest rate and that it was properly applied. Additionally, the bank did not at the time and has not during the case produced full and complete records of Mr Seaton's accounts in order to allay fears of improper calculation and application of interest during the relevant period. In light of all this it was not easy to see how the bank could have avoided the accounting remedy. Had there been a genuine desire on the part of the bank to settle this aspect of the case that could have been done as soon as the accounts were released or as soon as Mr Seaton filed suit. If the bank had difficulty with its records and could not say what the true rate of interest should have been the data now produced by the bank could have

been secured and used as basis to reach an agreement. Instead the bank chose belligerence. This court concludes that the conduct of the bank was unreasonable to such a high degree that costs should be assessed on an indemnity basis in claim not CL 1993/S252.

[74] Mrs Benka Coker has asked for certificate for costs for more than three counsel. Despite the voluminous nature of the evidence and the length of time from filing suit to judgment the court is not convinced that certificate for costs should be granted for more than two counsel.

Interest on costs and whether the interest should run from a time before judgment

[75] It is common ground that the court can award interest on damages. The CPR permits the court under rule 64.6 (5) (h) to award interest on costs 'from or until a certain date, including a date before judgment.' Even with this additional power given to the court the general rule is that interest on costs runs from the date they were ordered (**Hunt v RM Douglas (Roofing) Ltd** [1990] 1 AC 398). The practical effect of **Hunt** was that interest on costs runs from the date of the order or judgment for costs even if costs were in fact incurred and paid years or months before the order. The reasoning and outcome provided ample ammunition for the virulent critics of the decision.

[76] The crucial question is why was this power to state a date from which interest was payable given to the court? The case of **Hunt** provides the clue. In that case the House was being asked to decide whether the incipitur rule (interest should commence on the date judgment for costs was given) or allocutur rule (interest applied from the date of taxation) should be applied. The House came down in favour of the incipitur rule. The House acknowledged that a satisfactory result cannot be achieved in every case but the balance of justice favoured the incipitur rule. The decision was made in 1988.

[77] It was in this state of the law that the CPR was introduced and conferred the discretion on the judge to grant interest from a time before judgment. As can be seen, no criteria are stated in the rule. The new power implicitly confirms the incipitur rule while giving the discretion to depart from it.

[78] Christopher Clarke J explained in **Fattal** at paragraph 27:

> *The ability of the High Court to depart from the incipitur rule was conferred in order that the court could take account of the fact that money would often be expended before any judgment. Conversely, where money has not been expended, for example where the bulk of the costs have been paid at a date long after the relevant judgment, justice requires that the date for the commencement of the interest is postponed beyond the date of that judgment.*

[79] The learned judge applied the dictum of Lindsay J in **Haji-Ioannou v Frangos** [2005] EWHC 279 which was to the effect that the rule did not require that it should be applied only in exceptional circumstances.

[80] This court agrees with this approach because costs are an expense which when incurred leaves the person out of pocket until he has been reimbursed. Christopher Clarke J stated at paragraph 30:

> *Since the payment of solicitors' costs involves the payment of money which could otherwise have been profitably employed, the overwhelming likelihood is that justice requires some recompense to be made in the form of interest. If the receiving party has financed the costs from his own money or from money that he has borrowed at interest, the case for his receiving interest on his costs, at least from*

> *some date, is likely to be overwhelming. The position might be different if the finance had been advanced entirely voluntarily, interest free, from a sympathetic relative or institution, as Akenhead J contemplated in Fosse Motor Engineers Ltd v Conde Nast and National Magazine Distributors Ltd [2008] EWHC 2527 QB , or conceivably from a lender which mistakenly failed to call for interest. In some cases it may be necessary to examine the underlying financial arrangements.*

[81] This passage is consistent with preventing the receiving party from getting windfall or profit.

[82] Mrs Kitson has submitted that there was 'no deliberate, continuous or flagrant breach of court orders by RBTT' and so there should not be any award of interest on costs from any date before judgment. Learned counsel relies on the judgment of McDonald-Bishop J in **Branch Development Ltd T/A Iberostar Rose Hall Beach Hotel v The Bank of Nova Scotia Jamaica Ltd** [2014] JMSC Civ 40 at paragraph 16. Her Ladyship was not laying down a general rule but simply observing that the conduct of a party may be factor when considering whether interest should be awarded on costs.

[83] The point is this: whenever a party expends money on litigation in which he or she prevails then that money spent could have been used more profitably by the paying party. But for the litigation, the money would not have been consumed in this way and so it is only proper that the money which has been spent should be replaced and with interest because success means that the losing party had no basis for his or her case. It is not about punishing the losing party but recognising that the winning party should be compensated, by interest, for what has turned out to be an uncalled for expenditure of money. This points to yet another reason why cases should be pursued expeditiously and not be allowed to meander through the court system. Delay in completion raises the costs of litigation

unnecessarily with the added risk of being exposed to an indemnity assessment of costs which may quite likely attract interest.

[84] Christopher Clarke J in **Fattal and Fattal v Walbrook Trustees (Jersey) Ltd**][2009] 4 Costs LR 591 observed that under the English statute and CPR there was no stated precondition for the award of interest on costs from a date before judgment. In the case of **Powell v Herefordshire Health Authority** [2003] CP Rep 26, Kay LJ noted that under rule 44.3 (6) (g) (identical to rule 64.6 (5) (h) in the Jamaican CPR), the taxing officer has 'a discretion which enabled him to look at the dates when the costs had been incurred, and to come to a conclusion in relation to the payments of interest that fitted the justice of the circumstances of the particular case' (paragraph 13).

[85] This court will be guided by Christopher Clarke J in **Fattal** where it was said at paragraphs 25 and 26:

> *25 The combined effect of the Act and the Rules is that save where a rule or Practice Direction otherwise provides, interest will run from the date the judgment is given unless the court orders otherwise. There is nothing in the statute as amended or in the Rules, which indicates that a different order is only to be made in exceptional circumstances. No doubt there must be a good reason to make such an order, but the court must not, in my judgment, need to be able to label the circumstances as exceptional. The Rules expressly indicate that the court may order interest to begin from the date before judgment and the circumstances in which it is likely to do so include cases where substantial sums have been paid in costs before the judgment is given – a not exceptional occurrence.*
>
> *26 The most important criterion is that any order should*

reflect what justice requires. The primary purpose of an award of interest on a debt, damages or costs is to compensate the recipient for the fact that he has been precluded from obtaining a return on the money which he has had to expend on costs and has thus been out of pocket …

[86] The same learned judge rejected the taxing Master's view that awarding interest from a date other than the date of judgment would be exceptional (paragraph 28) and instead held that 'the circumstances in which in practice the just order is that no interest shall accrue on the costs from any date are likely to be highly exceptional' (paragraph 29).

[87] In summary then, the principles on which interest will be awarded on costs are these:

a. the basic rule is the incipitur rule;

b. the court now has power to depart from this rule under rule 64.6 (5) (h);

c. the purpose of awarding interest on cost is to ensure that the litigant who incurs costs and prevails at trial should receive some recompense because the litigation deprived him or her of the opportunity to use the money in ways beneficial to himself or herself;

d. interest should only be awarded in respect of sums actually expended by the litigant, that is to say, if the litigant has received a bill of costs from his legal advisers but has not actually paid then there should be no interest because a bill

of costs only indicates potential liability but until actual payment the litigant is not out of pocket;

e. if the costs are paid after judgment ordering costs then interest should not be paid for the period between judgment and the date of payment.

[88] These principles revolve around the key idea that costs are for recompense for money spent and not a vehicle for profiteering.

[89] The court concludes that interest should be paid by the bank on costs in both claims. In respect of any costs actually paid by the receiving party to his legal advisers whether before or after the judgment ordering costs interest should be paid at 6% per annum from the date of actual payment to date of payment by paying party to receiving party. The Registrar must have regard to all the applicable rules of parts 64 and 65 of the CPR.

[90] Mr Seaton asked for some costs to be paid on account. The court is of the view that 50% of the assessed costs, if not agreed, and interest on the 50% should be paid.

Disposition of the post-judgment applications

[91] A stay is granted in respect of the payment of JA$15,254,583.69. There should be disclosure, taxation of costs on an indemnity basis and interest should be awarded on the costs. Fifty percent of assessed or agreed costs and interest on that amount should be paid. Counsel are to submit a draft order to reflect this decision. Any draft order submitted should pay particular attention to paragraph 38 and capture the essence of that paragraph.

Costs on the post-judgment application

[92] Finally, on these post-judgment applications there is the question of costs. Mrs Benka Coker has submitted that costs should be in favour of Mr Seaton on an

indemnity basis with interest. The submission was that in the normal course of things Mr Seaton would have been entitled to receive the benefit of his judgment immediately. The successful application for a stay, it was said, should not mean that since Mr Seaton failed in his resistance to it should result in costs against him because the application is asking that he be deprived, even if temporarily, of something that a court has declared he has a lawful right to get. Mr Seaton should not be deprived of his costs for trying to secure what the court has now said is and was always his.

[93] It was also submitted, by Mrs Benka Coker, that Mr Seaton has been successful in (a) application for compound interest; (b) interest on costs; (c) disclosure of information and (d) part payment of costs he should also get interest on costs. It should be noted that he was also not successful in his application for part payment of judgment in **Claim No CL 1993/E083**.

[94] Mrs Dixon Frith, for the bank, contended that regarding the application for stay of execution the costs order should be that either (a) no order as to costs or (b) costs in the claim. Counsel also resisted the application for these costs or any part of them to be assessed on an indemnity basis.

[95] Mrs Dixon Frith informed the court that the application for the proper party to be named in the claim was filed in August 2014 along with the relevant disclosures and so there is no need to make the disclosure order. Counsel also submitted that costs should not be awarded on the disclosure application and if awarded it should not be on an indemnity basis because there was nothing in how the bank acted that would warrant indemnity assessment of costs. Mrs Dixon Frith also submitted that leading counsel, Mrs Kitson QC, had told the court that the application would be made at the appropriate time when all information was to hand. Counsel also said that there were confidentiality agreements that inhibited full disclosure to the court.

[96] The context here is that Mrs Benka Coker, from February of this year, had raised the issues of the indemnity and whether the present named bank was the proper litigant. Indeed, Mrs Benka Coker wrote to counsel for the bank, in this litigation, on the issue. The letter was prompted because there were reports in the press that the bank was being sold to a company known as Sagicor. Mrs Dixon Frith said that the reports in the press were premature.

[97] The fact of the matter is the sale was now a matter out in the public domain. As I indicated to counsel in light of the matter being reported in the press there would be hardly any point in denying it. What could have been done without breaching any confidence in light of the press revelation was this:

a. a clear statement to say that the sale was either pending or ongoing or it was completed;

b. there were matters that had to be completed before the sale could be said to be legally completed;

c. as soon as that has been done then an application to change the name of the litigant bank would be made.

[98] The bank could have said the above clearly and unambiguously without breaching any further confidence since the press had already revealed the sale. It is also known that the bank operates across several jurisdictions in the Caribbean and may well have had to deal with the bank regulators in each jurisdiction. Had this position been taken then there would have been no need for Mr Seaton to make the application for disclosure. Indeed even after the application was filed the bank could have simply adopted this position rather than argue against it.

[99] It will be recalled that there was a letter from Mr Seaton's counsel to the bank's counsel, dated February 12, 2014, raising concerns about reports in the press

that the bank, then known as RBC Royal Bank (Jamaica) Limited (RBC) was taken over by Sagicor Life Jamaica (Sagicor). The letter stated that RBC appeared to be the successor to RBTT Bank Jamaica Limited (RBTT). The letter also said that from information gleaned from the press, Sagicor was buying RBC free of debt because the bad debt had been sold to an undisclosed purchaser. The letter specifically stated that arising from the enquiries of counsel and others for Mr Seaton it was not clear who owned RBTT or had taken over RBTT's rights and obligations. The letter specifically asked (a) whether RBTT had changed its name to RBC; (b) whether RBC was the proper party to the litigation; (c) whether RBC's financial statements for the year ended October 2013 which spoke to contingent liabilities included the present litigation; (d) whether RBTT, RBC or Sagicor had made any provision for this claim litigated and (e) who is the proper litigant in light of RBTT sale to RBC and RBC's proposed sale to Sagicor? The letter ended with a warning that should the response not be sufficient then Mr Seaton would have no choice but to seek interim protective measures which may include preventing the transfer of the bank's assets which should be available to meet any judgment obtained in his favour.

[100] Inferentially, the bank's litigation attorneys wrote to the bank itself and asked it the questions posed by Mrs Benka Coker. The court says inferentially because by letter dated February 18, 2014, the bank's attorneys wrote to Mr Seaton's attorneys and enclosed the response from the bank's in-house counsel, Mrs Rose Davis Logan. That letter has been referred to above. The letter noted the sale of the bank from Union Bank of Jamaica to RBTT to RBC to Sagicor. The letter also noted that the sale to Sagicor 'will not have a negative impact on the undertaking provided by the Government concerning the captioned lawsuits [the present claims].' Mrs Rose Davis Logan's letter referred to 'a redacted version of letter dated January 3, 2014 from FINSAC to [the bank's] external auditors.' This January 3 letter was also referred to earlier. The comments made there need not be repeated here.

[101] As can be seen the issue of who is the proper bank to be named in this litigation was not settled at the time of the exchange of letters. Even up to the end of the submission on these post-judgment applications there was no clear and unambiguous statement stating clearly, the proper party is or will soon be A or B.

[102] The need for clarity on who is the proper part to litigation is not academic. The court needs to be satisfied that the proper party is before the court. What if contempt proceedings were brought against RBTT, would the court be told that RBTT no longer exists? What if there was an order directing the bank to do a specific act or refrain from doing a specified act, which institution could be held accountable? Would it be RBTT, RBC or Sagicor? The very judgment of this court in the previous judgment refers to RBTT. Should it have been RBTT, RBC or Sagicor?

[103] The court has decided that costs will not be assessed on an indemnity basis because the conduct of the bank on this aspect of the claim could not be said to be such that it was outside the norm.

[104] The court will make a percentage based costs order rather than an issue based order. The percentage based order is more likely to produce a fairer result for the reasons given in **English v Emery Reimbold & Strick Ltd; DJ & C Withers (Farms) Ltd v Ambic Equipment Ltd; Verrechia (trading as Freightmaster Commercials) v Commissioner of Police of the Metropolis** [2002] 3 All ER 385 and **Budgen v Andrew Gardner Partnership** [2002] EWCA Civ 1125. To award costs on an issue basis would add further costs, unnecessarily, to the assessment process with not real benefit. A percentage based order eases the burden of the costs officer and the parties. Issue based orders would require the costs officer to master the intricate details of an issue then make an determination of the costs in relation to that issue.

[105] The court is of the view that the bank should pay 75% of the Mr Seaton's costs on these post-judgment applications. Also, in respect of costs already paid by Mr Seaton on these post judgment applications, there should be interest at the rate of 6% until payment. The other costs incurred but not paid also attract 6% from this date until payment. These costs are to be taxed if not agreed. Counsel should prepare an order to reflect the decision on the costs awarded on the post judgment application.