



[2015] JMSC Civ 63

**IN THE SUPREME COURT OF JUDICATURE**

**THE CIVIL DIVISION**

**CLAIM NO. 2011 HCV 03331**

<b>BETWEEN</b>	<b>CASILDA SILVEST</b>	<b>FIRST CLAIMANT</b>
<b>AND</b>	<b>LEON WHITFIELD SAMUELS</b>	<b>SECOND CLAIMANT</b>
<b>AND</b>	<b>RUPERT ELLIS</b>	<b>FIRST DEFENDANT</b>
<b>AND</b>	<b>DEVON THOMAS</b>	<b>SECOND DEFENDANT</b>

**IN OPEN COURT**

Miss Gillian Burgess instructed by Messrs. Paris & Co. for the Claimants.

Heard: 3<sup>rd</sup> October 2013 & 15<sup>th</sup> April 2015.

**Breach of Contract – Claimants seek damages and interest – Whether interest should be awarded at the prevailing bank rate – Discretionary and Realistic award of interest – Judge should be provided with evidence to assess and ascertain an appropriate rate – Statistics from reputable agencies – Claim for an award of interest at the prevailing bank rate granted.**

**CAMPBELL J.**

**Background**

- [1] On the 3<sup>rd</sup> October 2013, I reserved judgment on the question whether the Claimant should be paid interest at the prevailing commercial bank rate from the 29<sup>th</sup> October 2006 to the date of judgment, the 3<sup>rd</sup> October 2013. I will now address the issue.
- [2] The Claimants entered into an agreement with the Defendant to sell and purchase a parcel of land known as Lot # 3 Haughton Court in the parish of

Hanover and being part of the land comprised in Volume 1142 Folio 665 for the purchase price of Two Million Dollars (\$2,000,000.00).

- [3] On the 28<sup>th</sup> April 2006, the First Claimant paid two sums amounting to One Million Seven Hundred Thousand Dollars (\$1,700,000.00) to Miss Marcel Bent, the then Attorney-at-Law for the Defendants. The agreed time for completion for the sale was One Hundred and Eighty days (180 days) from the date of execution. The sale agreement was subject to the Defendants obtaining sub-division approval from the Hanover Parish Council.
- [4] By letter dated the 12<sup>th</sup> February 2008 the Claimants' then Attorney-at-Law, Mr. Bryan Clarke wrote to the Defendants' Attorney-at-Laws, Messrs. Frater Ennis & Gordon, giving a Notice, making time of the essence to complete the sale by 31<sup>st</sup> March 2008. Another Notice dated 4<sup>th</sup> December 2009 was sent, extending the time for compliance to the 5<sup>th</sup> January 2010. The Defendants were still non-compliant. The Claimants have elected to treat the contract as being repudiated by the Defendants.

### **The Application**

- [5] The Claimants by way of a Re-Issue Notice of Application for Motion for Default Judgment filed on the 26<sup>th</sup> June 2013, sought the following orders, inter alia;

*“1. Damages for breach of the undated agreement for sale made in writing between the parties hereto in respect of the purchase from the Defendants by the Claimants of all that parcel of land part of Haughton Court in the Parish of Hanover being the Lot #3 on the proposed sub-division plan of part of the lands comprised in certificate of title registered in Volume 1142 Folio 956 of the Register Book of Titles and containing by estimation quarter of an acre more or less and now contained in volume 1419 Folio 956 of the Register Book of Titles.*

*2. A declaration that by reason of the repudiation of the said agreement by the Defendants the Claimants are relieved of all liability for the further performance of their obligations there-under.*

*3. Repayment to the Claimants of the deposit of \$200,000.00 and further payment of \$1,500,000.00 in the aggregate sum*

of \$1,700,000.00 paid there-under **with interest at the prevailing bank rate from the 29<sup>th</sup> October 2006.**

4. A declaration that the Claimants are entitled to a lien on the parcel of land registered in certificate of title in Volume 1419 Folio 956 of the Register Book of Titles for their deposit and further payment and any damages and costs awarded in this claim.” **[Emphasis added].**

[6] On the 3<sup>rd</sup> October 2013, the Claimants having proved personal service on both Defendants, neither of whom appeared nor were represented, the court was moved to make the following orders:

1. “Judgment to be entered in default in the sum of One Million Seven Hundred Thousand Dollars (\$1,700,000.00);

2. Interest on judgment sum at the rate of 3% from the 29<sup>th</sup> October 2006 to the date of payment;

3. Costs to be agreed or taxed.”

[7] The Claimants’ written submission asserted that in matters where the court is asked to grant interest at the prevailing bank rates, the rationale for the award must be *restitutio in integrum* and the rate awarded would be the rate at which the Plaintiff could have borrowed the money. The judge must be provided with evidence to enable him to make a realistic award. (See; **British Caribbean Insurance Company Limited v Delbert Perrier** (1996) 33 JLR 119). In that case, the contents of statistical digests published by the Bank of Jamaica were used to determine the appropriate rate of interest.

[8] Counsel also relied on the Court of Appeal decision of **Peter William (Snr.) et al v United General Insurance Company Limited** SCSA No. 82 of 1997 (Delivered, November 30, 1998) where the Court of Appeal used a rough average of the rate of interest over the relevant period in arriving at their decision. It was asserted that from the supporting report of the Bank of Jamaica, the average rate of interest on loans awarded by commercial banks over the period June 2007 to June 2013 is 20.4% per annum.

[9] Therefore using the rate of 20.4% per annum, the sum of \$1,700,000.00 would accumulate \$346,800.00 in interest per annum and would have a daily rate of \$950.00. Applying that formula to the outstanding monies, for a total of \$2,402,850.00.

- [10] Based on the calculations, counsel submitted that the judgment should be for the Claimants in the sum of \$1,700,000.00 with the interest of \$2,402,850.00 from October 29, 2006 to October 3, 2013, the date of judgment, and thereafter at a rate of 6% per annum.

## Discussion

- [11] The gravamen of the Claimants' application, is that they have been kept out of funds, because of the conduct of the Defendants who have wrongfully retained their money. The Claimants have claimed liquidated damages of \$1,700,000.00, the amount they deposited, but complain that in order for them to be placed in the position they were in prior to entry into this contract, they should be paid interest at the prevailing bank rate.

- [12] The **Law Reform (Miscellaneous Provisions) Act, 1955** empowers the court to grant an award of interest. Section 3 of the Act provides;

*“in any proceedings tried in any Court of Record for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or part of the period between the date when the cause of action arose and the date of the judgment...”*

- [13] The section provides for, the grant of interest “*in any proceedings tried*”. In the matter before the court there was an entry of judgment in default of appearance. The entry of default judgment, is deemed to be, “*any proceedings tried*”, for the purposes of Section 3 of the **Law Reform (Miscellaneous Provisions) Act**. In the case of **Long Yong (Pte) Ltd v Forbes Manufacturing & Market Ltd.** (1986) 40 WIR 229, where a challenge was raised to the judgment claimed, because it included a sum for interest and there was no such claim in the writ. The court held that, where judgment is entered in default of appearance by the defendant for a liquidated sum under the Rules of the Supreme Court, Order 13, Procedure (Section 70 of the **Judicature (Civil Procedure Code) Law**), no amount in respect of interest can be included in the judgment unless a claim for interest has been specifically pleaded.

- [14] Rowe JA, in **Long Yong (Pte) Ltd v Forbes Manufacturing & Market Ltd.**, said at page 230h;

*“Section 3 of the **Law Reform (Miscellaneous Provisions) Act 1955** enables a court to order interest at its discretion in a large number of cases... It has been held in England that where it has been intended to rely, on a statutory provision, similar to section 3, a claim for interest need not be pleaded. **And it was clear that when section 3 above speaks of “proceedings tried”, that term was wide enough to include the entry of final in default of appearance or pleadings.**” (See also; **Gardner Steel Ltd. v Sheffield Bros (Profiles) Ltd.** [1978] 3 All ER 399). [Emphasis added].*

- [15] The Court of Appeal upheld the submission of counsel for the Defendant, that under the **Civil Procedure Code (CPC) Law**, no amount in respect of interest can be included in the judgment unless a claim for interest has been specifically pleaded. The then **CPC**, provided inter alia;

*“Where the writ of summons is endorsed with a claim for a liquidated demand, whether specially or otherwise...the plaintiff may...enter final judgment for any sum not exceeding the sum endorsed on the writ, together with interest at the rate specified (if any), or (if no rate be specified) at the rate of six (6) per centum per annum, to the date of the judgment and costs.”*

- [16] Rowe JA, sustained the submission on two grounds, at page 231d. He said;

*“Firstly, a defendant would not know how much to pay to satisfy a claim for liquidated demand which did not specifically claim interest, if he was liable to pay interest at an unspecified rate, hidden within the breast of the plaintiff. Secondly the interest under the **Law Reform (Miscellaneous Provision) Act 1955** is in nature of unliquidated damages and can only be determined through the intervention of a judicial officer.”*

- [17] For interest to be awarded on a specified sum, it must be specifically pleaded pursuant to **Part 8.7(3) of the Civil Procedure Rules (CPR)**. The rate of interest must be noted in the Claim Form or Particulars of Claim. The Claimants sought in their Claim Form, at paragraph 9; *“payment of the aggregate sum of \$1,700,000.00 paid thereunder with interest at the prevailing bank rate from the 29<sup>th</sup> October 2006.”* In the case of a default judgment, it is clear from the

provisions of the **CPR**, that no amount of interest can be included in the judgment unless a claim for interest has been specifically pleaded. However, **Part 12.8(2) of the CPR** entitles the Claimant to interest on a specified sum even if the rate of interest is not specified. Subsection **12.8(2)(a) of the CPR** provides for a statutory rate of interest to be added to a specified sum of money. As it relates to subsection **12.8(2)(b) of the CPR**, this rate is not fixed pursuant to the **Judicature (Supreme Court) Act, 1880**, evidence must therefore be provided on which the court can make an appropriate assessment of the interest to be awarded in the circumstances before the court.

- [18] The court has a discretionary power to award interest. Several cases, highlight that coupled with the discretionary nature of awarding interest, a successful party is not entitled to an award of interest as of right, but such an award will be dependent on the circumstances of the particular case. In **General Tyre and Rubber Company v Firestone Tyre and Rubber Company Limited (1975) 2 All E.R. 173** at page 188, Lord Wilberforce noted;

*“where a wrong-doer has failed to pay money which he should have paid, justice in principle, requires that he should pay interest over the period for which he has withheld the money. But other considerations may enter into it. In a commercial setting it would be proper to take account of the manner in which and the time at which persons acting honestly and reasonably would pay. Correspondingly account ought to be taken of any unreasonable or delaying or obstructive conduct of the debtor...”*

- [19] The aim of awarding interest is not to punish the Defendants. Forbes J, in the case of **Tate & Lyle Food & Distribution Ltd v Greater London Council & Anor [1981] 3 All E.R. 716** at page 722, is apposite. He said;

*“... I do not think the modern law is that interest is awarded against the defendant as a punitive measure for having kept the plaintiff out of his money. I think the principle now recognized is that it is all part of the attempt to achieve restitutio in integrum. One looks, therefore, not at the profit which the defendant wrongly made out of the money he withheld (this would indeed involve a scrutiny of the defendant’s financial position) but at the cost to the plaintiff of being deprived of the money which he should have had. I feel satisfied that in commercial cases the interest is*

*intended to reflect the rate at which the plaintiff would have had to borrow the money to supply the place of that which was withheld. I am also satisfied that one should not look at any special position in which the plaintiff may have been; one should disregard, for instance, the fact that a particular plaintiff, because of his personal situation, could only borrow money at a very high rate or, on the other hand, was able to borrow at specially favourable rates. **The correct thing to do is to take the rate at which the plaintiffs in general could borrow money.***” [Emphasis added].

[20] The applicable rate may be determined by adducing oral or documentary evidence. The rate so determined would naturally contemplate the vagaries of the money market, as it applies to the plaintiffs generally. In **British Caribbean Insurance Company Limited v Delbert Perrier**, at page 354, Carey J.A, laid down the following important guidelines. He said;

*“this leads me to venture the rate which a judge should award in what may be described as commercial cases. It seems to me clear that the rate awarded must be a realistic rate if the award is to serve its purpose. The judge, in my view, should be provided with evidence to enable him to make that realistic award. In the case just cited, evidence was in fact led by the plaintiff, but I can see no objection to documentary material being properly placed before the judge. Statistics produced by reputable agencies could be referred to the judges to enable him to ascertain and assess an appropriate rate.”*

## **Conclusion**

[21] I accept the submission of the Claimants’ Attorney-at-Law. The Court has been provided with evidence which has assisted in making a realistic award. The statistics presented before the court were reports from the Bank of Jamaica. The court in exercising its discretion, grants an award of interest of the sum of \$2,402,850.00 from 29<sup>th</sup> October 2006 to 3<sup>rd</sup> October 2013 and thereafter at a rate of 6% per annum.