Dispute - reasons in respect of an application by the plaintiff for summary judgment.

# [2021]JRC186

**ROYAL COURT**
**(Samedi)**

**7 July 2021**

**Before : Advocate Matthew John Thompson, Master of the Royal Court.**

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| **Between** | **Oleg Sheyko** | **Plaintiff** |
| **And** | **Consolidated Minerals Limited** | **Defendant** |

**Advocate W. A. F. Redgrave for the Plaintiff.**

**Advocate M. C. Seddon for the Defendant.**



**JUDGMENT**

**THE MASTER:**

**Introduction**

1. This judgment contains my written reasons in respect of an application by the plaintiff for summary judgment. These written reasons address the following issues which arose out of the written submissions filed by the parties and/or in argument: -

   (i) Whether the plaintiff should be permitted to amend its order of justice;

   (ii) The defendant's application for an adjournment;

(iii) The effect of certain admissions by the defendant in respect of the quantum of the plaintiff's claim;

(iv) The rate of interest; and

(v) The question of a stay.

**Background**

2. This judgment follows a series of judgments issued by me in relation to these proceedings. The general background to this dispute is summarised in my judgment dated 16th April 2020 Sheyko v Consolidated Minerals [2020] JRC 061 at paragraphs 2 and 3 as follows: -

> ***"2. The proceedings were commenced by an order of justice signed on 27th July 2018. There are related proceedings for injunctive relief but these are not relevant to this decision. The proceedings in brief concern allegations by the plaintiff that he was entitled to treat himself as dismissed as a result of various repudiatory breaches of contract by the defendant. The plaintiff was, until acceptance of the conduct alleged to amount to repudiatory breaches, the chief executive officer of the defendant. The order of justice at paragraph 19 sets out a series of allegations relied on as repudiatory conduct by the defendant. Other than to say those allegations are extensive, it is not necessary to set out the details of those allegations for the purposes of this judgment. As a consequence of the alleged repudiatory conduct, the plaintiff claims extensive damages by reference to the terms of his employment contract described as a service agreement.***
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> ***3. The plaintiff's allegations are all denied and contested for reasons set out in an answer and counterclaim dated 5th October 2018. A reply and answer to the counterclaim signed on 16th November 2018; and a rejoinder dated 7th December 2018 to the reply were also filed."***

3. On 13th January 2021, reported at Sheyko v Consolidated Minerals Limited [2021] JRC 006, I struck out the defendant's case on liability because I was satisfied that a fair trial could not take place on issues of liability including in respect of the defendant's counterclaim. This decision is under appeal and the appeal is due to be heard between 26th and 28th July 2021.

4. In respect of the quantum of the plaintiff's claim, although I struck out the plaintiff's case on liability, I reached the following conclusions in respect of quantum at paragraph 243 of my judgment as follows: -

> ***"243. However, I have not reached the same conclusion in respect of the claim for damages. The order I am therefore proposing to make, as a result of being satisfied that a trial on the issue of liability cannot take place fairly, is judgment for the plaintiff on liability with damages to be assessed. This is because I do not consider that the lack of documents from China prevents an assessment of what is due under the plaintiff's contract of employment. The quantification of the plaintiff's damages is therefore in dispute and can be determined by the Royal Court without the discovery that has not been provided."***

5. In the same judgment at paragraph at 244 I noted the defendant had denied that the sums claimed were due without specifying the reasons why. I therefore indicated that I wanted to be addressed on this topic in terms of what directions I should make when judgment was handed down.

6. Accordingly, on 13th January 2021, in respect of quantum I made the following orders at paragraphs 6, 9 and 10.

> ***"6. the issue of quantum remains extant between the parties and shall proceed to trial before the Inferior Number of the Royal Court ("the Quantum Trial");***
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> ***9. in respect of the Quantum Trial:-***
>
> ***a) the Defendant shall make and serve amendments to its Answer to set out all matters relied upon in respect of its denial in paragraph 109 of its Answer by close of business on 3rd February 2021;***
>
> ***b) the Plaintiff shall make and serve any consequential amendments to his pleadings arising from any amendments served by the Defendant pursuant to paragraph 9a) by close of business on 27th February 2021;***

***c) the Plaintiff's costs of any consequential amendments shall be paid by the Defendant on the standard basis;***

***10. the proceedings are then otherwise stayed until determination of the Defendant's appeal against the decision contained in this Act of Court…"***

7. In accordance with my directions the defendant filed its case on quantum. Paragraph 3 contained the following admissions:-

*"3. The Defendant admits the following claims:*

*(1) The Defendant admits, as alleged at paragraph 34(a) that, if the Plaintiff was wrongfully dismissed, he is entitled to the gross sum of US$12,410,958.90 subject to deduction of tax and national insurance pursuant to clause 9.1.*

*(2) The Defendant admits, as alleged at paragraphs 34(b), that if the Plaintiff was wrongfully dismissed, the Plaintiff is entitled to the sum of $905,666.67.*

*(3) The Defendant admits, in respect of paragraph 34(d), that if the Plaintiff was wrongfully dismissed, the Plaintiff is entitled to his reasonable legal costs in respect of his claim for payment under clause 3.4 only (but not otherwise)."*

8. These admissions led to the plaintiff's summons seeking the following relief: -

*"1. Summary Judgment be entered in favour of the Plaintiff in respect of the following matters:*

*a) The sum of US$12,410,958.90 claimed at paragraph 1 of the prayer to the Order of Justice.*

*b) The sum of US$905,666.67 claimed at paragraph 2 of the prayer to the Order of Justice.*

*c) The payment by the Defendant of the Plaintiff's costs of and incidental to the above-named action and the proceedings under case heading 2018/193 on the indemnity basis in accordance with paragraph 3.4 of the Service Agreement to be taxed if not agreed.*

*2. The sum at paragraph 1(a) shall be paid gross of tax and national insurance. All appropriate deductions in accordance with paragraph 9.1 of the Service Agreement shall be made before any part of the aforementioned sum is paid to the Plaintiff by his Advocates or the Court (as the case may be) following determination of the Defendant's Appeal pursuant to paragraphs 8 and 9 below.*

*3. The Defendant shall within 14 days of the date of this Act make an interim payment of US$750,000 or such other sum as the Court deems appropriate on account of the Plaintiff's costs payable pursuant to paragraph 1(c) above.*

*4. The Defendant shall pay interest on the sums claimed above from 4 June 2018 to the date of this Act at such rate as the Court deems appropriate.*

*5. The Defendant shall pay judgment interest on the sums claimed above from the date of this Act until the date of payment in accordance with Royal Court Practice Direction 05/06.*

*6. The sum of U$10,000,000 held in Court pursuant to the Act of Court dated 3 October 2018 shall be paid to the Plaintiff's Advocates within 2 working days after the date of this Act in partial satisfaction of the sums due to the Plaintiff pursuant to this Act.*

*7. Save for the balance of the costs due pursuant to paragraph 1(c) above (which are to be taxed if not agreed), the balance of the sums due pursuant to this Act shall be paid to the Plaintiff's Advocates no later than 14 days after the date of this Act.*

*8. The Plaintiff's Advocates shall provide a written undertaking to the Defendant and to the Court to repay the sums paid pursuant to this Act, if and to the extent that the outcome of the Defendant's appeal against the Master's judgment of 13 January 2021 ("the Defendant's Appeal") necessitates such repayment.*

*9. Alternatively, all sums payable pursuant to this Act (save for the US$10,000,000 described at paragraph 6 above) shall be paid into an account of the Royal Court pending the determination of the Defendant's Appeal and/or further order of the Royal Court.*

*10. The Defendant shall pay the Plaintiff's costs of the present summons on the indemnity basis in accordance with paragraph 1(c) above.*

*11. Paragraph 10 of the Act of Court dated 13 January 2021 is hereby varied as set out herein.*

*12. Such further or other relief as the Court deems appropriate.*

*13. Liberty to apply."*

**The plaintiff's application to amend its order of justice**

9. Also, before me was a second summons issued by the plaintiff seeking to amend his order of justice. The amendment sought was as follows: -

*"2. The Plaintiff shall be permitted to amend paragraph 34(e) of his Order of Justice dated 27 July 2018 as follows:*

*"Interest ~~from the date of judgment on such sum or sums as may be awarded~~ pursuant to the Interest on Debts and Damages (Jersey) Law 1996, at such rate or rates and for such period or periods as the court deems appropriate""*

10. What led to this application was that, in the defendant's skeleton argument filed on 19th May 2021, the defendant argued that because the plaintiff's order of justice only sought post judgment interest, the part of the plaintiff's summons seeking pre-judgment interest should be dismissed as the claim for any pre-judgment interest had not been pleaded.

11. The plaintiff's order of justice pleaded the following at paragraph 34e): -

*"34. Accordingly, the Plaintiff is entitled to claim as a debt from the Plaintiff:*

*e) Interest from the date of judgment on such sum or sums as may be awarded pursuant the Interest on Debts and Damages (Jersey) Law 1996, at such rate or rates and for such period or periods as the court deems appropriate."*

12. The prayer to the order of justice simply sought interest.

13. The general power vested in the Court to award interest is contained in Article 2(1) of the Interest on Debts and Damages (Jersey) Law 1996 (the "Interest Law"). Article 2(1) of the Interest Law provides as follows: -

> ***"Subject to paragraph (4), in any proceedings, whenever instituted, 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 simple interest at such rate as it thinks fit on the whole or any part of the debt or damages in respect of which judgment is given, or payment is made before judgment, for the whole or any part of the period between the date on which the cause of action arose and –***
>
> ***(a) in the case of any sum paid before judgment, the date of the payment; and***
>
> ***(b) in the case of a sum for which judgment is given, the date of the judgment."***

14. It is clear that Article 2(1) gives the Court a very broad discretion in terms of what rate of interest it may award and for what period. In particular, interest can be awarded from the date upon which a cause of action arose. In Pell Frischmann v Bow Valley [2007] JRC 155A, to which both parties referred me, the issue for the Court was when interest was to start to run from and at what rate. At paragraph 6 Commissioner Page stated the following: -

> ***"6. It is trite law that the purpose of awarding interest is not to punish the paying party but to compensate the other party for having been kept out of his money since the date when it was due to him and that the starting date for an award of interest will, therefore, ordinarily be the date when the cause of action arose. A convenient statement of this and other principles relevant to the exercise of the court's discretion, as applied in the English Courts, is to be found in the judgment of Langley J. in Kuwait Airways Corp. & Anor. v. Kuwait Insurance Co. SAK & Ors. [2000] 1 AER 972, [2000] Lloyd's Rep IR 678 (being insurance case, some of the principles are couched in terms appropriate to that particular topic, but are also of more general relevance). The fifth principle listed by Langley J. was expressed as follows:-***
>
> ***"Where a claimant assured has been guilty of excessive delay, whether in making the original claim or in pursuing it, then the starting point (or on occasion the rate of interest) may be adjusted adversely to him. The rationale***

***for such an approach has sometimes been expressed as a form of sanction for the delay but can, I think, equally and more consistently with principle, be expressed in terms that in such a case it is wrong to view the claimant as kept out of deprived of the use of money payment of which he has delayed in seeking. A more striking illustration would be circumstances in which a claimant consciously and for his own reasons chose not to pursue a claim immediately and notified the potential defendant to that effect. It is not, I think, sensible to regard a party who positively chooses not to make a claim when first available to him as one who is deprived of or kept out of his money""***

15. I address later in this judgment the parties' submissions on the rate of interest which was also explored in Bow Valley. In terms of the actual decision, interest was awarded against the second and third defendants from the point when they first enjoyed the benefit of the sum awarded to the plaintiffs. In respect of the other defendants the court deferred the issue of what the starting date should be pending further argument between the parties if agreement could not be reached. To the extent that the defendant argued that the plaintiff could not have interest prior to the date of judgment, this approach was inconsistent with Bow Valley and with the rationale summarised by Commissioner Page set out above as to why interest is payable. However, Bow Valley is clear, and I am bound by the decision, that interest ordinarily accrues from the date a cause of action arises. In the present case the date on which the plaintiff's cause of action arose was not in dispute, if the claim was established.

16. In any event, as I consider the defendant must have appreciated, the pleaded claim for interest in paragraph 34e) of the order of justice is ambiguous because, while it refers to interest from the date of judgment, it also seeks interest *"at such a rate or rates and for such period or periods as the court deems appropriate"*. The prayer also leads to further ambiguity when read against paragraph 34e) in that the prayer simply sought interest. The prayer when read on its own is not ambiguous and does not contain any limitation on the claim for interest.

17. In my judgment, applying the rationale set out in Bow Valley, the defendant must have appreciated that the Court was never going to allow its discretion to be fettered on the basis of an ambiguous pleading.

18. Had the defendant been right in its approach, this would have procured an unfair result because the plaintiff's entitlement to interest would be governed by how long the proceedings took to conclude, rather than how long the plaintiff had been out of his money. There is no justification for such an approach. Such an approach also runs the risk of tactical game playing and delay because such delay, at least in high value cases, leads to a plaintiff losing significant sums.

19. Finally, there was no other reason to refuse the amendment. The proposed amendment was clear on its face and there was no other question arising or limitation argument that might preclude the amendment.

20. I therefore granted the amendment to the claim for interest.

**The application for an adjournment**

21. The defendant applied for an adjournment partly to be able to respond to the plaintiff's claim for interest if I was minded to allow the amendment and also in support of its submission that the plaintiff's application should be stayed pending any appeal. The defendant in the alternative argued, if I was minded to grant summary judgment, that enforcement of any judgment should be stayed. I will deal with this aspect of the defendant's submissions in the section dealing with the question of a stay.

22. In relation to adjourning the application to allow the defendant an opportunity to file evidence in respect of the plaintiff's claim for interest, I refused this application. What the plaintiff was seeking was clear and the plaintiff filed evidence in support of his claim justifying the rate sought at 3 per cent over base rate. The defendant had plenty of opportunity to file substantive evidence in response as an alternative to its primary case that the claim for interest was precluded by the plaintiff's order of justice. Advocate Seddon also made it clear that he was able to argue the principle of what approach I should take to interest, and the authorities relied upon by the plaintiff. Adjourning the claim for interest (on the assumption that some form of judgment was granted in favour of the plaintiff) was also unattractive because the application to adjourn was predicated upon an argument about the plaintiff's pleading, which was never going to prevail. Having allowed the amendment, there was also no compelling answer to Bow Valley and the principle that interest should start to run from the date the plaintiff's cause of action arose.

23. The defendant otherwise argued that I should stay matters because nothing had changed since the stay granted by paragraph 10 of the Act of Court of 13th January 2021. In my judgment, for the reasons set out in the next section of this judgment, certain matters had changed because of the contents of the defendant's case on quantum set out at paragraph 4 to which I now turn. I was not therefore prepared to stay matters because nothing had changed since the Act of Court of 13th January 2021.

**The effect of certain admissions by the defendant in respect of the quantum of the plaintiff's claim**

24. In the defendant's case on quantum, the defendant admitted that, if the plaintiff was wrongfully dismissed, he was entitled to the gross sum of US$12,410,958.90 subject to deduction of any tax and national insurance payable and the further sum of US$905,666.67. In respect this latter sum, it emerged during argument this was also subject to the question of what tax might be payable on this sum. These amounts were the sums for which the plaintiff sought summary judgment because judgment had been entered on liability.

25. The conclusion I reached was that, whatever the outcome of the appeal against my decision of 13th January 2021, the defendant admitted that certain sums were due, if the plaintiff was wrongfully dismissed. This admission applies whether the defendant's appeal is successful or not. If the appeal is successful, but the defendant does not prevail at a later trial, then by its case on quantum the defendant has admitted certain significant sums are due. The same analysis applies if the appeal is unsuccessful because judgment on liability has already been entered. This analysis led to the conclusion that a trial on the question of whether the sums claimed by the plaintiff in paragraphs 34a) and b) of his order of justice were due was not necessary because the amount of these sums was not disputed.

26. I therefore concluded that I was able to make an order that no trial was required in respect of these issues and that the admitted sums will be due to the plaintiff, either because the defendant's appeal is unsuccessful and the current judgment on liability is upheld or because the defendant's arguments on liability do not prevail at any trial following a successful appeal.

27. Although a trial on quantum is necessary in respect of the plaintiff's claim for a bonus (subject to any other arguments that may be raised in the future, to which the plaintiff has reserved its position) it is not necessary to expand such a trial to deal with sums admitted to be due if the defendant is found to be liable to the plaintiff. I should add that at present, if the appeal is successful, there will be one trial dealing with liability issues and the bonus question. If the appeal fails, the only remaining issue is the claim for a bonus.

28. In reaching this conclusion I must clarify that the question of making an order that a trial on the amounts claimed in paragraphs 34a) and 34b) of the order of justice is not required is a separate question from whether enforcement of any such sums should be permitted at this stage. The fact that there is a question about whether enforcement should occur does not prevent me from declaring what is in dispute between the parties (and what is not) and whether or not a trial on

sums admitted to be due is required. My approach falls squarely within the case management responsibilities vested in me.

29. For completeness, the power to make an order declaring that a trial was not required on the amounts admitted to be due either exists in Rule 7 of the Royal Court Rules 2004, as amended, which permits me to give summary judgment on any particular issue (see Rule 7/1(1)) or alternatively under Rule 6/19(4) which allows me to make an order on any admissions without waiting for the determination of any other questions between the parties.

**The rate of interest**

30. In relation to the plaintiff's claim for interest, having ruled that the plaintiff was entitled to declarations setting out what was due if the plaintiff was found to have been wrongfully dismissed, the next logical question to consider was what interest rate should apply in relation to such admitted sums. This was because if, as I had concluded, I was entitled to rule on what sums were due to the plaintiff either if the current judgment on liability was upheld or following any trial, I was equally entitled to rule what interest should be payable on such sums.

31. The claims for interest cover two periods: -

    (i) from the date of the cause of action arose until judgment; and

    (ii) from the date of judgment until payment.

32. In respect of the latter category the plaintiff did not seek to argue that the rate of interest applicable should be different from the rate set out in Practice Direction RC05/06 (i.e. 2 per cent over base). Therefore, if the judgment on liability dated 13th January 2021 is upheld, the plaintiff is entitled to judgment debt interest at 2 per cent over base until payment on the sums I have declared are due and admitted as being due. This interest rate applies from the date of the declarations. If the appeal is successful but the defendant does not prevail at trial, interest is due from the date of the Court's judgment following such a trial.

33. The argument therefore focused on pre-judgment interest and the rate of interest for pre-judgment interest.

34. The plaintiff argued that a rate of 3 percent over base should apply for the period from 4th June 2018 to the date of the present court hearing.

35. In terms of the Court's ability to order interest the plaintiff noted there was limited authority in Jersey. The plaintiff observed that in Bow Valley the Royal Court approved a pre-judgment interest rate of base rate plus 1 per cent which reflected the general practice in England and Wales at that time. However, the Bow Valley case was decided in 2007 prior to the 2008 financial crash when the base rate was 5.75 per cent. After 2008 the base rate has been at significantly lower levels than previous rates. When the plaintiff's claim was issued the base rate was 0.5 per cent; it has since decreased to 0.1 percent.

36. The historically low levels of interest since 2008, in particular since issue of the present proceedings, led the plaintiff to submit that a figure of 1 per cent over base was no longer appropriate.

37. In support of this position the plaintiff relied on various authorities where the courts in England and Wales had taken into account the changes to base rates since the 2008 crash when considering the appropriate rate to apply and invited the Royal Court to do the same.

38. The current Commercial Court Guide 10th Edition 2017 states: -

> ***"Historically the Commercial Court generally awarded interest at base rate plus one percent unless that was shown to be unfair to one party or the other or to be otherwise inappropriate. There is now no longer a presumption that base rate plus one percent is the appropriate measure of a commercial rate of interest."***

39. The most helpful authority on what rate of interest to set to which I was referred was the decision of Challinor v Juliet Bellis & Co [2013] EWCH 620 (Ch). Paragraphs 31 to 34 of that decision states as follows: -

> ***"31. As to (l), it seems to me that the Court's overall approach in the authorities cited to me is to distinguish between (a) cases relating to money lost in or in relation to the conduct of a business where the general assumption would be that money lost or detained would have to be replaced by money borrowed to maintain that business and (b) cases where any award***

***is an accretion to the funds of the claimant, rather than replacement of monies which the claimant had previously had and put to use.***

***32. In cases of type (a), the Court seeks to identify an appropriate interest rate, adopting a broad brush to establish a rate approximating to the cost that a claimant in that line of business or activity would have incurred in borrowing money to replace the money lost or detained. In cases of type (b), of which the paradigm may be personal injury cases, the Court seeks to identify an appropriate rate to represent a minimum return to put the claimant in the position he or she would have been if the money had been placed on deposit at the date of the event that gave rise to the claim.***

***33. This case does not really fit easily into either category. It seems to me an example of a third type of case, which is where the claimant is not running a business that depends upon credit, and where the loss of the money is likely to deprive the claimant of other opportunities, but where any ordinary presumption of the need for credit is weak or non-existent.***

***34. In cases of this third type, in my view, neither a minimum investment basis nor a proxy borrowing cost basis, is really a logical proxy. Thus, it is unlikely that any of the Claimants in this case, being sophisticated investors, would have left money on bank deposit at such low rates of return; but it is also unlikely that any of them would have borrowed at (say) 5 percent over base rate to make further investments: even someone with an unusual appetite for geared investment would be likely to be put off. Further, neither reflects the larger reality that in this case the Claimants' real loss is the opportunity denied for further investment: and that is not measurable."***

40. The plaintiff's argument was that he fell within that third category. He had not had to borrow money because he had not received what he argued was due to him from the defendant. Nor would he have merely placed the money on bank deposit, given the low rates of return available. He therefore sought a rate higher than a deposit rate but lower than any cost of borrowing or return he might have achieved.

41. His argument was supported by his sixth affidavit where he deposed that he was a highly experienced investor (see paragraph 22). His affidavit exhibited a breakdown of his personal investment portfolio until April 2021 showing that he had received significant returns. The same affidavit as well as the sixth affidavit of Phillip Brown, a solicitor employed by Baker & Partners advocates for the plaintiff, indicated that the current rate for borrowing funds was between 4 and 6 per cent.

42. Returning to Challinor, there were over 20 claimants in that case. This led the High Court to set out how to assess such an interest rate for a multitude of claimants leading to the following observations at paragraphs 37 and 38:-

> ***"37. That brings me to issue (2) in paragraph 30 above: what rate would be fair across the board. Again, a broad brush is required: in assessing any special rate the Court disclaims the task of determining what each claimant's financial position is and at what rate that claimant could have borrowed money. It seeks to assess a reasonably representative or proxy rate which can without apparent injustice be applied across the class of claimants. 38. The fashioning and calculation of a representative or proxy rate is more art than science, and it is more in the nature of "one size fits all" than "made to measure". It is an exercise of discretion rather than of settled rules. The Court must do its best to fashion a proxy which suits the nature of the case and the claimants as a whole, though it does not and cannot reflect the individual financial position of each claimant."***

43. This led to the court fixing a proxy rate for all the claimants.

44. However, in my judgment the observations made by the judge also apply to setting a rate for an individual such as the plaintiff. The court in Challinor therefore continued at paragraphs 39 to 41 as follows: -

> ***"39. To my mind, three special features need to be taken into account in fixing a proxy interest rate for the Claimants as a whole: first, these were speculative off-market investments (albeit that the Albemarle schemes had a good track record) such as to interest and be available only to sophisticated investors. Secondly, I infer from the fact that there was no evidence provided that any had been forced to borrow (although there was some suggestion made by Counsel on his feet and late in the day that Mrs Challinor had had to take out a mortgage), that many and perhaps most of the Claimants invested out of disposable funds. Thirdly, the period in question was one of historically low rates for both savers and borrowers, but with savers typically being offered very little return above base rate and borrowers (especially in the case of unsecured borrowing being required to pay considerably in excess of base rate).***
>
> ***40. I would expect rates lower than unsecured lending rates to have been available to borrowers where (a) there is evidence that the (presumed) borrowers plainly had surplus available assets (whether in the form of credit***

***balances or other investments) other than their homes to offer as security, and/or (b) the nature of the activity that has given rise to the loss is such as would not ordinarily be undertaken by persons without such surplus assets available to provide as comfort during the currency of investment, and (c) the borrowing would not be to fund trading activities but to enable and fund a geared investment strategy.***

***41. In this case, in my view, although the Claimants are for the most part individuals, they should be taken to be sophisticated investors, borrowing (if at all) to fund a geared investment strategy of a fairly speculative nature, able to borrow and in good standing, and owning other realisable investments which might provide comfort but which would not be likely to be acceptable as security."***

45. The court therefore concluded the following at paragraph 42 as follows: -

***"42. In such circumstances, as it seems to me, a fair proxy rate would be one slightly higher than that available to borrowers offering real property with a substantial LTV ratio, but lower than unsecured lending in the ordinary course. It should, however, approximately, reflect the more general reality that the borrowing costs might have been offset or even exceeded by investment gain. Further, and like the old Commercial Court standard rate, it should be blended (and in the present circumstances slightly reduced) to take into account the likelihood that at least some of the Claimants would never in fact have had to borrow at all. As to that last point, it is relevant to bear in mind that the old standard commercial rate was a pragmatic blend: see Colin Baker v Black Sea and Baltic General Insurance Co Ltd [1996] LRLR 353 , where Otton LJ explained (at 365)."***

46. The court then awarded the plaintiffs 3 per cent above base rate, which is the rate now claimed by the plaintiff in the present proceedings.

47. The approach of the English High Court in the various first instance decisions I was referred to including Challinor were reviewed by the English Court of Appeal in Carrasco v Johnson, 2018 EWCA Civ 87 which contained a concise summary at paragraph 17 as follows: -

***"17. The guidance to be derived from these cases includes the following: (1) Interest is awarded to compensate claimants for being kept out of money which ought to have been paid to them rather than as compensation for***

***damage done or to deprive defendants of profit they may have made from the use of the money. (2) This is a question to be approached broadly. The court will consider the position of persons with the claimants' general attributes, but will not have regard to claimants' particular attributes or any special position in which they may have been. (3) In relation to commercial claimants the general presumption will be that they would have borrowed less and so the court will have regard to the rate at which persons with the general attributes of the claimant could have borrowed. This is likely to be a percentage over base rate and may be higher for small businesses than for first class borrowers. (4) In relation to personal injury claimants the general presumption will be that the appropriate rate of interest is the investment rate. (5) Many claimants will not fall clearly into a category of those who would have borrowed or those who would have put money on deposit and a fair rate for them may often fall somewhere between those two rates."***

48. This is the approach I have applied in this case. I also cannot see any reason why this approach should not be adopted and applied in this jurisdiction. Therefore, where a defendant's breach has caused a plaintiff to borrow money to have access to funds lost or wrongfully detained for that plaintiff's business, the rate of interest awarded is likely to be the borrowing rate. In personal injury and similar claims on the other hand the rate is likely to be a rate reflecting the funds having been placed on deposit from the date the cause of action accrued, or damage was suffered, if later. For financially sophisticated individuals who are wrongfully kept out of money due to them, the applicable rate is a figure somewhere between the cost of borrowing and money being on deposit. I stress however this approach will very much be the exception and for most individuals a fair rate will be the deposit rate for claims involving an addition to a plaintiff's assets.

49. Advocate Seddon argued that there was not enough evidence for me to be satisfied that the plaintiff was a sophisticated investor. I disagree. The plaintiff's description of his portfolio attached to his sixth affidavit is far removed from placing funds on deposit and far removed from the sort of investments the average individual might make. To award interest at 1 per cent over base would not provide fair compensation to the plaintiff. The nature of the investments held and the levels of return he has achieved (which he does not seek to claim) are clearly significant. Such returns require a certain degree of risk to be taken and an appreciation of the risks of losses that can occur applying an investment strategy of the kind the plaintiff adopted. It is only individuals in such a category who have sufficient surplus funds to be invested and who can demonstrate a track record of making more complex investments who should be entitled to recover a higher rate of interest than monies on deposit. The plaintiff falls within this category. I also do not need to go further and be satisfied what returns the plaintiff would have achieved, had he received the funds admitted to be due. It is enough for him to satisfy me, as his affidavit does, that he is within the category of a sophisticated investor and so should receive more than a rate of

interest reflecting monies held on deposit. The plaintiff, by an award of interest at the rate of 3 per cent, is also not receiving any windfall or return based on speculation or a high-risk strategy which would not be appropriate or justifiable. The rate he seeks is also less than available rates set out in the evidence before me in terms of applicable borrowing rates.

50. Accordingly, for all these reasons, I declared that the plaintiff in respect of any sums found to be due to him is entitled to interest at the rate of 3 per cent over base from the date his cause of action accrued until the date of my declaration. Thereafter he is entitled to interest at the court rate of 2 per cent over base until payment.

**The question of a stay**

51. The defendant, in its skeleton argument at paragraph 44.6, rejected the suggestion that its appeal against my decision striking out its answer and counterclaim would not be rendered nugatory if the defendant was required to pay over the sums I have declared to be due to the plaintiff directly. Furthermore, the defendant argued that any such payment, whether to the plaintiff or to Baker and Partners for the plaintiff or by way of a payment into Court, would be contrary to the overriding objective (Rule 1/6 of the Royal Court Rules 2004) and, in particular, the requirements at sub-rule (2) for the Court to deal with a case in a manner which saves expense, is proportionate to the amount of money involved and allocates to it an appropriate share — but no more than an appropriate share — of the Court's limited resources. This was because, if the appeal was successful, the defendant would have to seek to recover any monies I had ordered to be transferred. The context of this was the relief sought by the plaintiff, which sought at its highest the transfer of the sum of US$10 million plus accrued interest already paid into court, plus an additional sum representing the remaining balance of the defendant's admitted case on quantum again plus interest. To undo any such orders would involve the defendant incurring significant costs and expense as well as the risk of not being able to recover sums paid over.

52. In addition, if monies were paid to the plaintiff and/or to Baker and Partners as the plaintiff's agent, the defendant argued that such payments also gave rise to an income tax liability because under Article 62D(1) of The Income Tax (Jersey) Law 1961 (the "Income Tax Law"), tax is chargeable in respect of any payment made by or on behalf of an employer to an employee in consequence of the termination of that employee's employment. This is regardless of whether the payment arises from a contractual or statutory entitlement, an order by a court or tribunal, or as a voluntary covenant.

53. The obligation to pay was one that applied to an employer who was obliged by Article 41B of the Income Tax Law to deduct tax at the appropriate rate from any sums payable to an employee

including any payments under Article 62D. This obligation applied to the defendant as a Jersey company. The amount of tax to be deducted was also in dispute. The defendant argued that it was 22 per cent; the plaintiff argued that the rate was 3 per cent. The defendant did not know therefore what tax it had to deduct and account for to the Comptroller of Income Tax in Jersey.

54. Further difficulties arose according to the defendant concerning how interest was to be treated if a payment was made to the plaintiff, to Baker and Partners or into court. What rate of interest would apply and how was this to be returned to the defendant if the appeal was successful?

55. The plaintiff in response argued that what was meant by an appeal being rendered nugatory was a *"state of affairs in which the appeal would be rendered of no or very little purpose."* (see In the Matter of Saisie Judiciaire of the Realisable Property of Robert Tantular [2019] JRC 222).

56. The plaintiff further argued that he had both undertaken to return funds and had provided an affidavit which had not been challenged explaining the strength of his connections to this jurisdiction and why there was no risk of him not honouring the undertaking or promise he was offering. To give comfort to the court, if the monies were paid over to him, the plaintiff offered during the hearing to keep the funds within Jersey. As a second alternative, the plaintiff argued that Baker and Partners would provide an undertaking to return the monies. The practical effect of giving such an undertaking is that any monies paid out of court or ordered to be paid by the defendant would be held in Baker and Partners' client account.

57. The final position argued for by the plaintiff was that if neither a payment to the plaintiff nor a payment to Baker and Partners' client account were acceptable to the Court, an additional sum should be paid into court over and above the sum of US$10 million already paid into court as security.

58. It is right to record that the undertakings offered were qualified to the extent that the plaintiff and/or Baker and Partners would return the funds if ordered to do so. This obviously preserved an opportunity for to the plaintiff to argue, even if the appeal was unsuccessful, that funds should not necessarily be returned.

59. In respect of tax an opinion was produced by the plaintiff from the accountancy firm Rawlinson & Hunter which suggested that a charge to tax would arise if monies were paid over either to the plaintiff or Baker and Partners but would not arise if monies were paid into court. The opinion concluded that a rate of tax payable of 3 per cent was reasonable, albeit the rate had not yet been agreed with the Comptroller of Income Tax. Rawlinson & Hunter also noted that they would

need to contact Revenue Jersey to request an ITIS rate for the plaintiff, and explained that if they did not obtain this then the defendant would be obliged to deduct income tax at a rate of 22 per cent.

60. In relation to interest this would simply accrue and so any accrued interest could be calculated based on whatever steps or sum the Royal Court ordered should occur for funds to be returned.

61. The starting point for my decision on whether to grant a stay, is the applicable legal principles. I was referred to the Tantular matter by both parties above and paragraphs 7 and 8 which state as follows: -

> ***"7. Advocate Belhomme submits that the test to be applied is that which was formulated by this court in Veka AG v TA Picot (CI) Limited [1999] JLR 306 at page 309. At paragraph 19 of the First Respondent's contentions he sets out the relevant passage from that authority which is in the following terms: "Where there is an appeal by an unsuccessful party, the usual approach to be adopted in the Courts of Jersey is to make whatever orders, including an order staying proceedings under the judgment appealed from, as will prevent the appeal, if successful, from being nugatory unless the Court is of the view that the appeal is not bona fide, has no realistic chance of success or there are other exceptional circumstances."***
>
> ***8. We understand the word "nugatory" in this passage to mean a state of affairs in which the appeal would be rendered of no or very little purpose. With that clarification we agree that this is the test which we must apply. We are satisfied that this test has been applied consistently in Jersey since the decision in Veka as the later cases identified in paragraph 20 of the First Respondent's contentions demonstrate. Advocate Hanson does not disagree."***

62. The Court of Appeal also considered what approach to take in relation to stays pending appeal in Crociani v Crociani [2017] JCA 162 where the Court of Appeal stated the following at paragraphs 30 to 32: -

> ***"30. It seems to me that a good starting point is that enunciated by Balcombe LJ (sitting as a single judge of the Court of Appeal in England and Wales) in Bhinji v Chatwani (29 January 1993) where he stated:***

***"The principle to be applied in cases of this kind is laid down by a series of cases, largely in the late 19th/early 20th century, which can be summarised in the phrase that 'a person who has a judgment is not lightly to be deprived of the fruits of that judgment' and therefore in granting a stay one starts with the assumption that, where someone has a judgment ….. this court should not stop the Plaintiffs from exercising the necessary court procedures in order to have the benefit of that judgment even though an appeal is pending. But as Lord Justice Staughton said, quite recently, the practice of the court has moved on, and I believe that he is right when saying that one approaches this really as a matter of common sense and balance of advantage…."***

***31. In Winchester Cigarette Machinery Limited v Payne and Another Ralph Gibson LJ fully quoted that statement and agreed with the approach which was, as he said:***

***"… mainly that one starts with the assumption that a successful Plaintiff is not to be prevented from enforcing his judgment even though an appeal is pending. … I do not disagree with the formulation "balancing of advantage", provided that, in holding that balance, full and proper weight is given to those starting principles, that there must be good reason to deprive a successful Plaintiff of the right to enforce his judgment and that the mere existence of an arguable ground of appeal is not by itself such a reason."***

***32. It seems to me that each of these expressions reflects the position adopted in this jurisdiction and that, absent – as here – the rendering of an appeal nugatory or the mere reliance on an arguable ground of appeal, the obligant must show "good reason" (Winchester) "common sense and balance of advantage" (Bhinji) or "exceptional circumstances" (Trilogy)."***

63. I found this passage helpful in deciding what decision to take. Otherwise I was facing rival arguments about whether or not a payment of some kind made the defendant's appeal pointless.

64. The starting point I adopted is that a person who has the benefit of a judgment should not be deprived of the fruits of that judgment lightly. Ultimately what the rival submissions of the parties required me to do was to evaluate whether there were good reasons or some balance of advantage or some exceptional circumstances that meant that the plaintiff should not have the benefit of sums representing the quantification of his judgment.

65. The decision I reached firstly was that it was not appropriate to pay the sums over to the plaintiff. While I have no reason to doubt the assurances he gave and the factual matters in support of

those assurances which were not challenged, if the plaintiff were to choose not to abide by his assurances then the defendant runs the risk of facing serious disadvantages in having to recover any sums the court order the plaintiff to repay. This risk was illustrated by the fact that during the hearing the plaintiff offered not to remove funds from Jersey. The very fact, however, that he had to make such an offer illustrated the potential difficulty the defendant might face if any funds paid over were removed from Jersey and held elsewhere. The defendant would have to find out where those funds were and to take steps to recover them if the plaintiff chose not to cooperate. In expressing this risk, I am not concluding that the plaintiff would choose not to cooperate; rather my concern is the difficulties the defendant would face should the plaintiff choose not to cooperate.

66. Such difficulties do not arise if funds were held in the client account of Baker and Partners. However, the difficulty that does arise then (and also arises if a payment was made to the plaintiff) is that a charge to tax arises. At present the rate of tax payable is not agreed. The plaintiff argues 3 per cent. The defendant says as matters stand unless the Comptroller of Income Tax agrees otherwise, the applicable rate of deduction is 22 per cent. On the sums I have declared to be due, this is a significant figure. The defendant understandably did not want to find itself in a position where it was in breach of obligations it owed to the Jersey Income Tax authorities.

67. Nor was it clear to me how funds might be recovered from the Comptroller if monies were paid to the plaintiff or to Baker and Partners and then the Court ordered the return of those funds. Would the tax be repaid? What steps would the defendant have to take to recover such tax if the Comptroller would not return voluntarily tax paid over that was no longer due?

68. It appeared from the rival submissions that a charge to tax would not however arise if monies were paid into court. However, as the position was not certain, when I gave my decision, I ordered a payment into court so long as the Comptroller confirmed that a payment into court would not give rise to a charge under Article 62D. Subsequent to my decision and before giving these reasons, the Comptroller provided such a confirmation.

69. The amount I ordered to be paid into court was the difference between sums already in court plus accrued interest and the amounts that I declared to be due to the plaintiff, plus accrued interest at the rates that I had also declared were appropriate.

70. I did not consider that the question of returning interest was a problem in respect of a payment into court. Monies currently in court were accruing interest at the rate secured by the Court. The additional payment I ordered would accrue interest at the same rate and, if funds were to be

returned, the accrued interest on sums to be returned would also be returned to the defendant. Unlike the difficulties I have described in respect of a payment to the plaintiff or the difficulties on tax, I concluded that the question of a payment of interest, should sums be ordered to be returned to the defendant, was not a sufficient basis to deprive the plaintiff of the benefit of the judgment it currently enjoys.

71. Finally, to be clear I ordered that, if the appeal was successful, the funds paid into court pursuant to this decision would have to be returned unless the Royal Court ordered otherwise. In other words, if the appeal was successful, unless the plaintiff could persuade the Royal Court that monies paid into court pursuant to this decision should remain in court, they had to be returned. I made this order because the plaintiff was reserving his position as to whether funds should be returned as depending on an order by the Royal Court at a later date. While the plaintiff is always entitled to ask the Royal Court not to return funds, I did not consider it appropriate for the payment into court to remain in Court should the defendant's appeal prove successful. The view I reached therefore was that there had to be some other reason which justified the funds remaining in court.

72. For these reasons I therefore ordered a payment into court but refused the plaintiff's application for a payment to the plaintiff or alternatively to Baker and Partners notwithstanding the undertakings offered.

**Authorities**

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