

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA

CLAIM NO: ANUHCV 1995/0390

BETWEEN:

ELAINE BRIDGES

-And-

PETER BRIDGES

AND

N.E.M. (WEST INDIES) INSURANCE LIMITED

Appearances:

Mr. Kendrickson Kentish for the Claimant

Ms. Racquel Silston for the Defendant

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2009: February 6

2009: February 13
.....

DECISION

1. **Harris J:** This is a matter concerning the application of discretionary statutory interest on agreed damages arising out of an insurance contract claim. The parties have agreed on damages in the sum of \$118,000.00 and come before this court to determine the issues in relation to the application of statutory interest as set out below.
2. By way of Statement of Claim filed on the 13th December 1995, the Claimants claimed inter alia, (i) a declaration that the insurance contract subsisted for the period 2nd April 1994 to 2nd April 1995; (ii) Performance of the said contract by the Defendant, or in the alternative, damages suffered by the Claimant by reason of the Defendant's breach of contract. (iii) Further, or in the alternative (a) damages and (b) aggravated damages; (iv) interest at such rate and for such period as the court deems just.
3. The Claimant's claim arose out of an alleged breach of a property insurance contract in respect of the Claimant's private dwelling house under which the defendant agreed to indemnify the Claimant in respect of certain contingencies including loss or damage to the said private dwelling house from fire, earthquake or volcanic eruption.

4. On 21st September 1994 the Claimants made a claim on its policy of insurance for loss and damage suffered as a result of fire to its insured premises which occurred on 21st July 1994. The claim was denied by the Defendant.¹
5. The Claimant alleges that on the 14th February 1994 the insured property was charged by way of security for a loan which they obtained from the Antigua and Barbuda Investment Bank (ABIB) and loss, if any, under the Policy of Insurance was payable to ABIB.²
6. The Defendants allege in their written submission before the court, and it is not denied, that at the date of the fire the Claimants were in arrears on their indebtedness to the Bank.
7. Further, the pleadings do not state the use to which the buildings were put. Two Stark facts are alleged, that is, **(i)** that at the time of the filing of the Statement of Claim in Dec. 13, 1995, the Plaintiffs were resident in the United States of America (see para 1 of the Statement of Claim) and **(ii)** the building was described as a dwelling house. (see pleadings generally.)

The issues arising in this matter are:

8. **(i)** Whether the court should exercise its discretion pursuant to S. 27 of the Eastern Caribbean Supreme Court Act Cap 143 and apply this interest to the agreed damages.
(ii) What is the appropriate rate of interest that the Defendant should be required to pay on the agreed damages
(iii) For what period between the date when the cause of action arose and the date of Judgment should this interest apply.

ISSUE "(i)"

9. The basis for the award of interest between the cause of action and Judgment is statutory - S. 27 of the Supreme Court Act Cap 143. The somewhat restrictive common law basis for the award of interest for this period is superseded and enlarged by statute.³ The application of S. 27 interest is discretionary and does not necessarily apply in every case.

¹ Introductory facts taken from the Defendants written submissions filed on December 19, 2008.

² See para 8 of the Statement of Claim.

³ See McGregor on Damages 15th edit para. 575 and The President of India v La Pintada etc [1985] AC 104 for the common Law application of interest.

10. Neither party seriously contends however, that interest is not applicable to the agreed damages in this case for the period between the cause of action arising and the settlement of the agreed damages. I do not propose to alter the parties' position and find that this is a fit and proper case to apply what is in fact discretionary interest, at a rate and for the period determined below.

ISSUE (ii)

11. The Defendants contends that the Claimant is not entitled to interest at the commercial rate on the ground that the Claimant has not established or even alleged in its pleadings that the property was a business asset and that they were deprived of a business asset.
12. Further, contends the defendant; the fact that the parties agreed damages must be factored in the calculation to the benefit of the Defendant. The Defendant suggested an annual rate of 3% - 5 %.
13. Further still, says the defendant if the court were minded to award a commercial rate of interest it should exercise its discretion in accordance with the principle as expounded by Forbes J. in Tate and Lyle Food and Distributor v G.L.C.¹ Forbes J put it thus: " *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.*" The Defendant submits that the instant case is not such a commercial case so as to attract a commercial interest rate as envisaged by Forbes J. I note however, that the authorities on the issue, including the *Tate & Lyle* case, make clear that the award of interest on damages is part of the attempt to achieve *restituto in integrum*. Forde J distinguished an award in personal injury cases which included General Damages in relation to what he referred to as including the intangibles such as *pain and suffering* and *loss of amenity*, from that of an award in commercial cases. He took the view that " *no suggestion could be made that one should envisage the plaintiff in a personal injury case of having to borrow money to take the place of the General Damages which he should have been paid.*" I accept and adopt this view. The instant case also, cannot be equated with a personal injury case where the consideration of intangibles play a part. The transaction that created the indebtedness of the claimants to ABIB² and the transaction that established the legal relations between the claimant's and defendant – the contract of insurance – are patently and sufficiently commercial transactions so as to attract the considerations applicable to the imposition of interest in commercial matters. In its written submissions on this matter, the Defendant suggests that the appropriate Commercial rate of interest (if applicable) would be the average base rate of interest charged by banks in this jurisdiction today on loans. The Defendant puts it in the range of 9.5% to 10% per annum. I will accept as more reasonable; a rate

¹ [1981] 3 AL ER 716 at 722 d-j.

² See para 5 and para 6 above for identity of and relevance of ABIB.

calculated on the basis of an average over a period, rather than an instance in time. For this reason I except the Defendants commercial interest rates¹ for what they are, over that which is suggested by the claimant.

14. The Claimant submits, following **Alston Engineering Sales and Service Ltd. (2003) UKPC (PC)**, that the claimant was wrongfully deprived of a business asset and that the interest rate should reflect this reality. Further, that where a party has borrowed money to operate a business they are entitled to interest on their damages at the commercial rate at which they have had to borrow the said funds.
15. There is no sufficient pleading, evidence, agreed facts or any other basis upon which I am able to infer that the Claimant either used the dwelling house as a 'commercial asset', or borrowed money for that commercial purpose in the way contemplated in the **Alston Engineering** case. That is; I am unable to conclude that the claimants derived income from the subject premises.²
16. The sale of the claimant's house I would have thought – forced or otherwise - would have tended to extinguish or reduce the Claimant's debt and interest liability and thereby soften its claim for discretionary interest at an appreciated commercial rate. There is no evidence that the Claimants did borrow monies to purchase/rebuild a house for the purpose of establishing or to continue a commercial enterprise either before or after the fire . On the basis that they did so borrow the money and subject to the usual considerations, they would certainly have incurred loss (interest) to which they would likely have been entitled to recover at the commercial rate.
17. This is not the end however, of the determination of whether a commercial interest rate applies. Having regard to the content of paragraph 13 above, and in all the the circumstances of this case; *"...the first question is to look to see whether the plaintiff would have money available to him which he now, by breach of contract, has not."* ³ The simple answer to that question is yes, \$118, 000.00. Had the Defendant performed his end of the bargain the Claimant's would have had their money at least by the time of the filing of the writ, December 2nd, 1995 or very shortly thereafter..
18. The commercial rate of interest can alternatively to the **Alstons** situation⁴, be invoked in the following manner; Devlin J, in awarding interest in the case of **Kemp v Tolland** [1956] 2 Lloyds Rep 581 (691) – a case of a failure to pay the price of goods sold and delivered - said that he awarded interest *"on the simple Commercial basis that if the money had*

¹ Even these rates are somewhat inadequate for the reasons provided below. See para 24.

² This does not necessarily mean that commercial considerations do not attend the whole of the circumstances surrounding the relationship between the premises, ABIB, the Claimants and the Defendants. See para 13 above.

³ See para 576 McGregor on Damages 15th edit.

⁴ See para 13 and Forbes J in the **Tate & Lyle** case at pp 722 f-j.

been paid at the appropriate Commercial time, the other side would have had the use of it." This situation appears to accord with that of the instant case.

19. From the date of an insurance claim from fire damage to payment out, involves an involved process which includes – forensic examination/survey, of the insured property, discussions and negotiations, among other things. Some time will pass before settlement of the claim even in an uncontested claim. I find that non payment-out by the Insurance Company at anytime up to and including December 1995 not to be unreasonable.

20. The Defendant's contention that the Claimant was responsible for much of the delay in pursuing this matter so therefore should not benefit from either a high interest rate or an interest rate applied over the entire period is not an entirely valid contention in the circumstances. Simply, the Defendant deprived the Claimant of monies that were rightfully that of the Claimants. More importantly in my view, the Defendant had the benefit of this retained sum from inception. It is common knowledge and a notorious fact I would think and the court takes judicial notice of that fact that insurance companies invest monies held by them at commercial rates that by and large exceed that available to the public through mainstream financial institutions. I conclude that the defendant would have received greater returns and benefit generally than the value of the commercial rates of interest prevailing in the market place over the period for which it suggests the use by the court of the average annual rates of 9.5% - 10%. The Defendant would have suffered no or little loss during the period from December 1995 to the date of settlement while in possession of the disputed monies. Indeed the defendant is more likely to have benefited from a net gain. This accumulated financial benefit which would have more than likely accrued to the Defendant offsets any detriment that delay might in other circumstances have afflicted upon a Defendant. If the claimants had the \$118,000.00 in, for instance, an interest bearing account, certificate of deposit, Mutual¹ funds, allowing principal and interest to accumulate, the gains would be substantial. The claimants did not receive the money in 1995/6 and have lost the benefit of that money and interest accumulated over that period. Some of this loss can be regained as it were, by the award of interest at the appropriate commercial interest rate that reflects that commercial reality. I note however that In any event I am unable on the material before me to make a definitive finding against the claimants on the cause of the delay in prosecuting this matter to its conclusion.

21. So what discretionary interest rate does the court apply. This court finds much logic in the learning in the UK White Book 2000 volume 1. Where an issue arises as to the appropriate S. 27 interest rate to apply to a particular type of action including the judgment debt/agreed damages *"...it is within the discretion of the court to award interest at the judgment Act rate, and there is nothing exceptional about using such*

¹ Forbes J in the *Tate & Lyle* case suggests that even these type of interest bearing vehicles tend to be on the lower scale and more applicable to judgment awards in matters such as personal injury cases.

rate as an exercise of discretion. When a court is considering the appropriate rate of interest for a period from the date of the cause of action to the date of the judgment, the rate payable on judgment debts is a convenient starting point" (see 7.0.15, Civil PROCEDURE, Vol. 1 2000.) The white book is here referring to our equivalent of interest pursuant to the Judgment Act which is 5% per annum, applicable on a judgment sum from the date of judgment to satisfaction, as an appropriate starting point. I adopt this reasoning and consider 5% as the lower end of the scale in this case and do so even if I were not to consider this matter as being wholly commercial. I accept that on the highest end of the scale, a recent transaction of a wholly commercial character, will attract the prevailing annual interest rate, suggested by the claimant as 13.5 %. This matter is not a wholly commercial matter¹ as in the **Alstons** matter for instance, and certainly not on equal footing with a personal injury matter.

22. Further, I consider the fact that it takes at least two parties to settle a matter and in that process, much may have been factored into the decision to settle and in the calculation of the final settlement figure by both parties that are not disclosed on the face of the pleadings and submissions. This could have included a calculation of anticipated interest rates pursuant to S. 27 of the Supreme Court Act or the non application of S. 27 discretionary statutory interest.
23. Whereas the court may take judicial notice of prevailing commercial interest rates, I think it asking much, that the court have knowledge of commercial interest rates going back the 13 years since this matter was filed.
24. The Claimant has simply sought to have the prevailing bank lending interest rate of 13.5% apply without any consideration for the previous 12 years during which they were kept out of their money or indeed, any other consideration.² The Defendant on the other hand has submitted a range of commercial interest rates between 9.5% to 10% to be applied in the event the court was to find that a commercial rate applied.
25. In all the circumstances I do find that the nature of the matter is such that in an attempt to achieve *Restituto in integrum* a commercial interest rate applies³ and the court awards an interest rate pursuant to S. 27 of the Supreme Court Act. The court awards this interest at 9.5% per annum on the agreed damages sum of \$118,000.00 as reflecting all the relevant parameters of this case.

ISSUE (iii)

26. I have pointed out above that (i) Up to and including December 1995 was a reasonable period to allow for the Defendant to have performed its end of the Bargain and pay out the monies to the Claimant. This date - the expiration of December 1995 -

¹ See para 15 above for definition.

² See para 20 for one such consideration.

³ See para 18 above.

is the appropriate starting point for the running of the period over which the 9.5% interest rate shall apply; (ii) the Defendant, during the entire period from the expiration of December 1995 to the date of settlement, had the use and benefit of the monies it unlawfully retained and deprived the Claimant off. This benefit in my view was sufficient for the most part to offset the present interest Order and the detriment (if any) to the defendants, resulting from that portion (if any) of the delay attributable to the claimant in prosecuting this matter to a conclusion.

ORDER

It is hereby ordered as followed

- i) That discretionary interest pursuant to S. 27 of the Supreme Court Act applies to the agreed damages of \$118,000.00.
- ii) That the said interest rate pursuant to S. 27 of the Supreme Court Act be fixed at 9.5% per annum from Jan 1996 the date of settlement of the agreed damages.
- iii) That the Interest rate of 5.0% per annum pursuant to the Judgment Act be applied to the said agreed damages of \$118,000.00 from the date of the settlement of the agreed damages until full satisfaction.
- iv) Success in this matter being evenly balanced; there is no order as to costs.

DAVID C. HARRIS
Judge

