THE EASTERN CARIBBEAN SUPREME COURT
COMMONWEALTH OF DOMINICA

IN THE HIGH COURT OF JUSTICE

CLAIMS NO. DOMHCV2002/0340

BETWEEN:

THE BANK OF NOVA SCOTIA

Claimant

and

JOYCE ERIN RABESS
ANISON RABESS

Defendants

Before:

Master Fidela Corbin-Lincoln

On Written Submissions:

Ms. Joel Harris with Mrs. Noelize Knight Didier for the Claimant
Mr. Lennox Lawrence for the Defendants

2016: June, 29

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[1] Corbin Lincoln M : This matter is of some antiquity. The Bank of Nova Scotia ("the Bank") commenced a claim against Anison Rabess and Joyce Rabess, who are husband and wife, on 26th August 2002 to recover the sum of $346,012.42 due and owing on a loan.

[2] The statement of claim avers that the sum of $346,012.42 is "*the amount (inclusive of arrears of interest in the sum of $21,738.43) due and owing to the Claimant as at 23rd July 2002 on a loan made by the Claimant to the Defendant which sum the Defendant has failed to pay despite several demands for payment together with interest at the rate of 13.500% per annum in accordance with the Promissory Note dated the 31st day of August , 2001 till the date of Judgment and thereafter at a rate of 5% per annum.*"

[3] The claim form and statement of claim were served on Mr. and Mrs. Rabess on 2nd September 2012. On 22nd October 2002 the Bank filed a Request for Judgment in default of Acknowledgment of Service and requested that judgment be entered for the sum of $354,341.66 broken down as follows:

(1)	Amount claimed	$346,012.42
(2)	Court Fees on claim	$ 18.50
(3)	Legal Practitioner's fixed cost on issue	$ 2,000.00
(4)	Together with interest from the date of issue to today	$ 5,854.74
(5)	Court fees on entering judgment	$ 6.00
(6)	Service of Documents	$ 50.00
(7)	Legal Practitioner's fixed costs on entering judgment	$ 400.00

[4] On 22nd October 2002 a draft judgment in default was also lodged. The judgment in default, dated 24th September 2002, was filed on 29th September 2003.

[5] A chronology of events following the entry of judgment in default is as follows:

Date	Action
17th November 2004	Notice to Pay Off dated 14th September 2004 served on Joyce Rabess[1]
11th January 2006	Notice to Pay Off dated 21st November 2005 served on Joyce Rabess[2]
7th April 2014	Notice of Application filed by the Claimant for an order, *inter alia*, to settle Articles of Sale, estimate an upset price and fix a date for sale of land held by Certificate of Title registered in favour of Joyce Rabess in accordance with Section 78 of the Title by Registration

[1] Affidavit of Rennick John sworn on 19th November 2004 and filed on 25th November 2004.
[2] Affidavit of Rennick John sworn and filed on 18th January 2006

	Act Cap 56:50
6th May 2014	Application comes on for hearing and is adjourned to 26th May 2014 to allow for service on the defendants.
26th May 2014	Application comes up for hearing and is adjourned to 23rd June 2014 to allow for service on the defendants.
6th June 2014	Notice of Application served on the defendants.
23rd June 2014	Application comes up for hearing. The defendants are present and represented by Mr. Gildon Richards of counsel. Matter is adjourned to 29th September 2014.
14th July 2014	The application comes up for consideration. The claimant is present. The defendants are absent but are represented by G. Richards of counsel. Claimant is granted leave to file a further affidavit and application is adjourned to 29th September 2014
29th September 2014	Defendants and their counsel are absent. Claimant granted leave to file further affidavits. Matter is adjourned to 15th December 2014.
15th December 2014	Defendants and their counsel absent. Application adjourned to 9th March 2015.
9th March 2015	Defendants and their counsel absent. The matter is adjourned to 13th April 2015 to allow for service of the claimant's further affidavit exhibiting a new valuation on the defendants
13th April 2015	Defendants and their counsel absent. The matter is

	adjourned to 6th May 2015 to allow for service of the new valuation report on the defendants.
6th May 2015	Defendants and their counsel absent. Matter is adjourned to 23rd July 2015 to allow service of the new valuation report on the defendants.
25th June 2015	Defendants absent. Matter adjourned to 23rd July 2015 to allow for service of the valuation report on the defendants.
23rd July 2015	Defendants present. A letter is received from Lennox Lawrence of counsel who states that he represents the defendants and is seeking an adjournment because he is out of state. Matter is adjourned to 29th September 2015.
29th September 2015	Defendant present and represented by Mr. L. Lawrence. Counsel for the defendant stating there is no proof of service of the default judgment on the defendants. Matter is adjourned to 28th October 2015 and claimant ordered to file proof of service of judgment in default

Application filed by the Bank on 15th October 2015

[6] On 15th October 2015 the Bank served the default judgment on the legal practitioner for Mr. and Mrs. Rabess and filed an application to deem service of the default judgment on the legal practitioner as proper service on Mr. and Mrs. Rabess ("the service application").

Application Filed by Mr. and Mrs. Rabess on 3rd December 2015

[7] On 3rd December 2015 Mr. and Mrs. Rabess filed an application for an order that:

(a) The purported default judgment entered on 24th September 2002 be set aside; and

(b) All enforcement proceedings predicated on the purported default judgment be set aside and declared null and void.

Ex-Parte Application Filed by the Bank on 7th December 2015.

[8] On 7th December 2015 the Bank filed an application without notice for an order that the date of the default judgment be corrected to 24th September 2003 rather than 24th September 2002. The ground of the application was that by accidental slip the incorrect year was inserted in the default judgment.

[9] The application was heard by Thomas J on 8th December 2015. The learned judge ordered that the date of the default judgment be corrected to 24th September 2003 under the slip rule.

The Amended Application Filed by Mr. and Mrs Rabess on 31st December 2015

[10] On 14th December 2014, following the order of the learned judge correcting the date of the default judgment, Mr. and Mrs. Rabess were granted leave to file an amended application. On 31st December 2015 Mr. and Mrs. Rabess filed an amended application for an order that:

(1) The default judgment entered on 24th September 2002 to be set aside.

(2) The amended judgment obtained on 8th December 2015 by order of Thomas J be set aside.

(3) All enforcement proceedings predicated on purported default judgment be set aside and declared null and void.

(4) That the claimant pay to the defendant all sums obtained or realized in enforcing the purported default judgment from 2003 to date together with interest at the prevailing banker's rate.

[11] The Bank's service application was granted. The application arising for consideration is the amended application filed by Mr. and Mrs. Rabess on 31st December 2015.

The Approach to the Application

[12] The amended application filed by Mr. and Mrs. Rabess seeks various orders. The order in which I propose to address the application is as follows:

(1) Whether the order of Thomas J dated 8th December 2015 and made upon the Bank's ex parte application should be set aside and heard afresh.

(2) If the order of Thomas J is set aside and the Bank's application heard afresh – should the date of the default judgment be corrected under the slip rule?

(3) Whether the default judgment should be set aside.

(4) Whether all enforcement proceedings predicated on the default judgment should be set aside and declared null and void.

(5) Whether the claimant should pay to the defendant all sums obtained or realized in enforcing the purported default judgment from 2003 to date together with interest at the prevailing banker's rate.

ISSUE 1 – SHOULD THE EXPARTE ORDER OF THOMAS J BE SET ASIDE AND THE APPLICATION HEARD AFRESH?

[13] The application to correct the date on the default judgment was made and heard ex-parte after Mr. and Mrs. Rabess filed their application on 3rd December 2015 to set aside the default judgment.

[14] The Bank submits that Mr. and Mrs. Rabess' application, filed on 3rd December 2015, was not served until the afternoon of 8th December 2015 and thus they were not aware of the application at the time of filing the application to correct the default judgment. The Bank conceded that pursuant to Part 11.16 (1) of the Civil Procedure Rules 2000 ("CPR") a respondent to whom notice of an application was not given may apply for any order made on the application to be set aside or varied and for the application to be dealt with again.

[15] Having considered the application and CPR 11.16 (1) I would set aside the order of Thomas J and hear the Bank's application to correct the date of the default judgment afresh.

ISSUE 2 – SHOULD THE DATE OF THE DEFAULT JUDGMENT BE CORRECTED UNDER THE SLIP RULE?

[16] The grounds of the Bank's application to correct the date of the default judgment is that *"by accidental slip the judgment is dated as having been signed by the Registrar of the Court on the 24th September 2002 but this document was lodged along with the Request for Judgment which was filed in the matter on 22nd October 2002 and therefore could not have been signed by the Registrar in September 2002. The said judgment was filed on 29th September 2003."*

The Bank's Case

[17] The claimant's evidence in support of the application is that:

(1) On 22nd October 2002 the Request for Default Judgment was filed along with a draft judgment for the Registrar's signature.

(2) The signed judgment was not received back from the court office until late September 2003. Upon receipt it was filed at the court office at 12:20 pm on 29th September 2003.

(3) The judgment is however inadvertently dated the 24th September 2002 but it could not have been signed on 24th September 2002 since it was not lodged at the court office until 22nd October 2002.

(4) The clerical error was not brought to the Bank's attention until 27th November 2015 through the submissions filed by Mr. and Mrs. Rabess on that date.

[18] The Bank submits that CPR 42.10 gives the court a discretion to correct a clerical error at any time. The Bank cites relies, to several cases including Saint Christopher Club Ltd. v Saint Christopher Club Condominiums et al.[3]

Mr. and Mrs. Rabess' Case

[19] The submissions filed by Mr. and Mrs. Rabess do not address the issue of whether the default judgment can or should be corrected under the 'slip rule'. Rather, it is submitted that the default judgment should be set aside because, among other things,:

(1) The default judgment took effect from 24th September 2002 – the date it states it was made.

(2) The Bank relied on the default judgment as dated in several steps taken thereafter including the Notice to Pay Off and the Act of Seizure and thus all enforcement proceedings from 2002 were all premised on a default judgment dated 24th September 2002.

[3] SKBHCVAP2007/0004

(3) There is no provision in the CPR for granting a default judgment prior to filing of a request by the claimant. In the circumstance the default judgment dated 24th September 2002, having been granted prior to the Request dated 14th October 2002 is irregularly obtained, null and void.

Analysis

[20] CPR 42.10 states:

> Correction of errors in judgments or orders
>
> 42.10 (1) The court may at any time (without an appeal) correct a clerical mistake in a judgment or order, or an error arising in a judgment or order from any accidental slip or omission.
>
> (2) A party may apply for a correction without notice.

[21] In Saint Christopher Club Ltd. v Saint Christopher Club Condominiums et al [4] Rawlins J referring to CPR 42.10 – the "slip rule" and quoting from the Green Book 2005 stated:

> *" Only genuine slips or omissions in the working of the sealed judgment or order made by accident may be corrected by this rule; for example, the misdescription of a party or the incorrect insertion of a date; any substantive mistake (such as a mistake of law by the judge) may only be corrected by way of appeal under CPR Pt 52…The rule allows the court to amend the terms of a decision to give effect to its original intention but the rule does not enable the court to have second or additional thoughts…"*

[22] Rawlins J held that the court had the power to correct clerical errors or accidental slips or omissions but the power is limited to genuine slips.[5] He noted that:

[4] SKBHCVAP2007/0004

. "It is not always easy, however, to determine what constitutes an accidental slip or omission as the present matter shows. Thus the commentary on the slip rule contained in the White Book 2007 states as follows:

> "The so-called "slip rule" is one of the most widely known but misunderstood rules. The rule applies only to "an accidental slip or omission in a judgment or order". Essentially it is there to do no more than correct typographical errors (e.g. where the order says claimant when it means defendant; where it says 70 days instead of seven; where it says "January 2001" instead of "January 2002". Of course, such errors ought not to occur in important documents like a court order but they are regrettably common). ... the rule is limited to genuine slips and cannot be used to correct an error of substance nor in an attempt to get the court to add to its original order (e.g. to add a money judgment where none was sought, and none was given at the trial). ... The slip rule cannot be used to enable the court to have second thoughts or to add to its original order (see para.4.2.1 above). A judge does have the power to recall his order before it is issued but not afterwards. Once the order is drawn up, judicial mistakes have to be corrected by an appellate court. However, the court has an inherent jurisdiction to vary its own order to make the meaning and intention of the court clear and can use the slip rule to amend an order to give effect to the intention of the court."

[23] Having considered the Bank's evidence, including the dates the request for judgment in default, the draft judgment and the final signed judgment were filed, it is my view that the entry of the date of 2002 rather than 2003 was an accidental slip which can be corrected under CPR 42.10. I would therefore grant the Bank's application and correct the default judgment to read 24th September 2003.

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[5] ibid paragraph 24

ISSUE 3 – WHETHER THE DEFAULT JUDGMENT SHOULD BE SET ASIDE ?

[24] Mr. and Mrs. Rabess submit that the default judgment should be set aside on two grounds:

(1) The judgment is dated 24th September 2002 and the request for judgment in default was filed on 22nd October 2002. There is no provision in the CPR for granting a default judgment prior to filing of a request by the claimant. In the circumstance the default judgment dated 24th September 2002, having been granted prior to the Request dated 14th October 2002 is irregularly obtained, null and void.

(2) The default judgment was entered for a sum which includes interest and, further, the default judgment states that statutory interest is to be calculated on the interest component of the sum. This is a case of compound interest. The laws of Dominica do not permit an award of compound interest.

[25] In light of the correction of the default judgment to read 24th September 2003 the first ground for seeking to set aside the default judgment falls away.

[26] In relation to the second ground, Mr. and Mrs. Rabess submit, in summary, that :

(1) Compound interest is the capitalization of interest so that the interest itself yields interest.[6]

(2) In the instant case judgment was entered for the sum of $346,012.42 together with interest at the rate of 13.5% per annum from the 26th day of August 2002 till the date of judgment to the sum of $5,854.74 and thereafter at the rate of 5% per annum.

(3) An examination of the claim form confirms that the sum of $346,012.42 was the sum claimed inclusive of the arrears of interest in the sum of $21,738.43.

[6] Paget's Law of banking, 13th ed page 235

(4) The principal sum of $346,012.42 therefore includes capitalized interest of $21,738.43. Accordingly the 13.5% that runs on the award till the date of judgment and thereafter at the rate of 5% per annum from the date of judgment includes interest on the capitalised sum (i.e interest on the capitalized interest of $21,738.43) at the said rate of 13.5% from filing to judgment and thereafter.

(5) This is a classic example of compound interest as the initial interest portion is contained in the principal award and the interest awarded on that capitalized interest at 13.5% and thereafter at 5%.

(6) By virtue of the compound interest factor the judgment itself is excessive as the judgment should have been for the principal sum of $321,273.99 only. On the authority of AID Bank v Mavis Williams [7] the default judgment is irregular and defective.

(7) The judgment cannot simply be varied it must be set aside. The claimant cites the cases of Anlaby v Praetorius [8] and Anthony Eugene v Jn Pierre [9]

[27] The Bank submits, in summary, that:

(1) While the sum of $346,012.42 contains both principle and interest owed to the claimant as at the date of issue of the claim, *"one can by mere mathematical calculation decipher that the interest amount of $5,854.74 (accrued from the date of issue to the date of judgment) was not derived by applying the 13.5% interest rate to both principal and interest outstanding but instead to the principal outstanding only. Thereafter, by virtue of the words "and thereafter" the interest rate of 5% per annum following judgment would replace the 13.5% and would therefore operate in the same way (i.e would be applied only to the principal outstanding and not to the principal and interest."*

[7]

[8] 1888 2 QB 764

[9] SLUHCV2004/0097

(2) In light of the fact that the interest rate of 13.5 % is applied only to the principal due and not the principal plus interest, the application of the statutory interest of 5% does not amount to a charge of 5% per annum on the principal amount outstanding plus interest accrued to the date of judgment

(3) Even if the judgment stated that the statutory interest was to be applied to the principal amount plus interest accrued to the date of judgment this would not amount to a charge of compound interest and would not be excessive since by virtue of section 7 of the Judgments Act Cap 4:70 interest of 5% may be applied to the entire judgment figure, even inclusive of interest. Such an award of statutory interest does not amount to an award of compound interest.

(4) The Certificate of Result of Appeal in Antoine Raffoul v The Bank of Nova Scotia shows that the Court of Appeal awarded statutory interest of 5% to the total sum of damages which included interest calculated at 6% from 13th November 2007 for a period of three years.

Analysis

[28] The essence of the challenge to the default judgment by Mr. and Mrs. Rabess is that judgment has been entered for an excessive amount because:

1. The default judgment was entered for a sum which includes interest; and

2. The default judgment states that statutory interest is to be calculated on the interest component of the sum which amounts to compound interest. Compound interest is contrary to the law of Dominica and judgment should have been for the principal sum of $321,273.99 only.

Should Judgment Have been Entered for a Sum Which Includes Interest?

What is Interest?

[29] Interest has been defined as *"the return or compensation for the use or retention by one person of a sum of money belonging to or owed to another"*[10] Interest is recoverable (a) at common law (b) in equity and (c) by statute.[11]

Interest at common law

[30] Historically interest is payable at common law[12] (a) where there is an express agreement to pay interest; (b) where an agreement to pay interest can be implied from the course of dealing between the parties or from the nature of the transaction or custom or usage of the trade or profession concerned; and (c) in certain cases by way of damages for breach of contract.

[31] It is therefore trite law that interest is recoverable at common law where there is an express agreement to pay interest.

[32] The Bank's statement of claim avers that the claim for interest of 13.5 % on the loan made to Mr. and Mrs. Rabess is pursuant to the terms of a promissory note. The Bank's claim for 13.5% interest is therefore based on an express agreement.

[33] I therefore find that the Bank was entitled to recover the agreed interest of 13.5% per annum on the loan.

[10] Halsbury's Laws of England 4th Ed, Vol. 32 para. 106

[11] Sempra Metals v Commissioner of Inland Revenue [2007] 4 All ER 657

[12] Halsbury's Laws of England 4th ed. , vol 32, para 106

For Which Period Should Contractual Interest be calculated?

[34] The statement of claim avers that interest of 13.5% is being claimed until the date of judgment.

[35] In Re Sneyd, ex parte Fewings [13] Fry LJ stated :

> "When there is a covenant for the payment of a principal sum, and a judgment has been obtained upon the covenant for that sum, it is plain that the covenant is merged in the judgment, and, if there is a covenant to pay interest which is merely incidental to the covenant to pay the principal debt, that covenant also is merged in a judgment on the covenant to pay the principal debt. Of course a covenant to pay interest may be so expressed as not to merge in a judgment for the principal."

[36] The agreement for payment of the principal sum and interest merges into the judgment. Until the entry of judgment the terms of the agreement subsist. The Bank is therefore entitled to interest at the agreed rate of 13.5% until the date of judgment.

[37] A perusal of the default judgment shows that the judgment entered did not calculate interest to the date of judgment but rather to an earlier date. In other words, it appears to me that judgment was entered for an amount *less* than the Bank was entitled. This error does not appear to have wholly attributable to the Bank. I say this because:

1. The Request for Judgment in default is dated 14th October 2002 and was filed on 22nd October 2002. It states that in addition to the sum of $346,012.42 the sum of $5,854.74 is being claimed as interest "*from date of issue to today's date*". It is not clear whether *"today's date"* refers to 14th October 2002 or 22nd October 2002. The Request could only calculate interest up to the date the request was filed. I do note that the daily rate at which interest was accruing was not stated in the Request.

[13] 1883) 25 Ch D 338

2. The court office did not enter judgment until September 2003 – several months later. The court office entered judgment for the amount of interest stated in the Request i.e interest from the filing of the claim to the date of the request or the date of the filing of the request rather than for interest up to the date of entry of judgment.

[38] I therefore find that the Bank was entitled to recover interest at a rate of 13.5% as agreed. Mr. and Mrs. Rabess have not provided any legal or other basis for setting aside the default judgment on the ground that judgment was entered for a sum which includes interest.

Should statutory Interest Run on the "Interest Component" of the Judgment?

[39] Mr. and Mrs. Rabess assert that the default judgment is excessive because it states that statutory interest is to run on the "interest component" of the judgment which amounts to compound interest.

[40] A good starting point is the actual words of the judgment in default. The judgment states:

> " No acknowledgment of service having been filed by the defendants herein
>
> IT IS THIS DAY ADJUDGED that the defendants do pay to the Claimant the sum of $346,012.42 together with interest at the rate of 13.500% per annum from the 26th day of August 2002 till the date of judgment to the sum of $5,854.74 and thereafter at the rate of 5% per annum.

[41] I am unable to agree with counsel for Bank that it is clear on the face of the default judgment that statutory interest is only to be calculated on the principal - which is not even clearly identified. The wording of the judgment is unnecessarily complicated and unclear. This much was accepted by counsel for each party.

[42] My understanding of the default judgment is that statutory interest of 5% is to be calculated on the sum of $351,867.16 i.e the sum of $346,012.42 *(being principal and interest up to 23rd July 2002)* plus $5,854.74 *(being interest calculated from 26th August 2002 to the date of judgment).*

[43] Counsel for Mr. and Mrs. Rabess submits that permitting statutory interest to run on the interest calculated up to the date of judgment amounts to compound interest. Counsel submits that statutory interest of 5% should only be calculated on the principal and cites the cases of Dominica AID Bank v Mavis Williams[14] and the consolidated appeals in SAG Motors Co. Ltd v Royal Bank of Canada[15] and Desmond Carlisle v Royal Bank of Canada. [16]

[44] Counsel for the claimant submits that Section 7 of the Judgments Act Cap 4:70 ("the Act") permits interest at a rate of 5% ("statutory interest") to be calculated on the judgment debt. Counsel submits that the "judgment debt" includes the principal sum awarded ***and*** interest awarded up to the date of judgment.

The Judgment Act

[45] Section 7 of the Act states:

> *" Every judgment debt shall carry interest at the rate of five percent a year from the time of the entering up of the judgment…until the judgment is satisfied, and the interest may be recovered in the same manner as the amount of the judgment*

[46] By virtue of the Act every "judgment debt" carries interest at a rate of 5% from the time of entry of judgment. Does the term "judgment debt" mean all sums awarded by the court – including pre-judgment interest or does it just include the principle debt or damages awarded?

[14] DOMHCVAP2005/0020
[15] DOMHCVAP2010/0011
[16] DOMHCVAP2010/0012

[47] An examination of the cases relied upon by the parties has not provided me with a clear answer on how the courts have interpreted and applied the phrase "judgment debt".

[48] Dominica AID Bank was a case concerning damages for wrongful dismissal. In dealing with the issue of interest, Barrow J.A, who delivered the judgment of the Court stated:[17]

> "Interest: The judge's award of interest on damages at the rate of 11% per annum compounded, running from the date of dismissal until the date of payment, is simply wrong. Apart from statute, in the absence of express agreement our courts do not award interest on debt or damages and they do not award compound interest except in the case of trustees profiting from a breach of trust. Counsel for the respondent properly conceded in their written submissions that the law of Dominica does not support an award of compound interest on damages."
>
> The statute which regulates the award of interest on damages is the Judgments Act, which provides in section 7 "Every judgment debt shall carry interest at the rate of 5% a year from the time of entering up of the judgment ..." Counsel for the respondent, again properly, conceded that post-judgment interest was limited by statute to the rate of 5%. However counsel submitted that the court had power to award pre-judgment interest, from the date of dismissal to the date of judgment, based on the provision in section 35A of the English Supreme Court Act 1981, which is applied to Dominica by section 11 of the Eastern Caribbean Supreme Court Act.
>
> … I therefore accept the argument on behalf of the respondent that the English legislation that permits the awarding of pre-judgment interest is capable of being imported, by the application of section 11 of the Eastern Caribbean Supreme Court Act, into the laws of the Commonwealth of Dominica. But that can only be done where no special provision is contained in local law. Counsel for the respondent did not offer any basis upon which this court should treat the Judgment Act, which deals specifically with the matter of awarding interest in judgments, as not being a "special provision".
>
> It seems to me Mr. Astaphan is correct; the Judgment Act was special legislation passed to confer jurisdiction to award interest on damages for the period after judgment. It could not have been because of a slip or inadvertence that it conferred no jurisdiction on the court to award interest for the period between the arising of the cause of action and judgment. I would, therefore, refuse the claim for

[17] DOMHCVAP2005/0020 at paragraphs 60 -61 and 64-65

interest.

[49] While the Court noted that the laws of Dominica do not support an award of compound interest on damages and that the court does not *award* compound interest except in the case of trustees profiting from a breach of trust , I do not find that this decision directly addresses the issue currently before the court. The Court was dealing with a situation where the learned trial judge exercised a presumed *discretionary power* to award interest at a rate of 11% not only up to the date of judgment (pre judgment interest) *but to payment* and thus covered a period ***post judgment***. The Court held that in that jurisdiction the court was not empowered to ***award pre-judgment*** interest. With respect to ***post judgment interest*** the Court affirmed that the Act was the appropriate legislation and that the rate permitted by statute was 5%. The issue of whether interest under the Act is calculated only on the principal debt or damages or both the principal debt or damages and any pre-judgment interest *(which could arise by virtue of a contract as distinct from a discretionary award by the court)* does not appear to have arisen.

[50] Counsel for both parties sought to rely on Certificates of Result of Appeal to support their respective positions. Counsel for the Bank submitted the Certificate of Result of Appeal in Antoine Raffoul v The Bank of Nova Scotia [18] where the Court of Appeal stated "*It is further ordered that the respondent pay to the Appellant damages of $450,000 together with interest at the rate of 6% per annum from 13th November 2007 for three years and interest at the statutory rate on the total amount of damages from the date of judgment that is from 21st of June, 2013 until payment*." Counsel submits that the wording of the Certificate indicates that the Court of Appeal awarded statutory interest on "the total amount of damages" and that included the damages and the pre-judgment interest. In the absence of any details of the facts and the issues arising on the appeal, I am unable to rely on this as an authority. Counsel for the claimant conceded that it not clear that the issue was raised or addressed by the court.

[51] Counsel for Mr. and Mrs. Rabess submitted that the issue under consideration was considered by the Court of Appeal in the consolidated appeals of SAG Motors Co. Ltd. v

[18] DOMHCVAP2013/0016

Royal Bank of Canada[19] and Desmond Carlisle v Royal Bank of Canada[20] but states that a written judgment was not delivered. Counsel submitted and relied on the Certificate of Result of Appeal. Part of the Certificate states:

> " In respect to Civil Appeal 11 of 2010 the judgment of the Hon. Justice Brian Cottle dated 28th June 2010 is hereby varied to read: Judgment for the Respondent for the Principle sum of $241,917.42 with interest thereon at the rate of 5% per annum from the 30th day of July, 1999 until satisfaction plus accrued interest up to 31st January, 1999, in the sum of $30,992.51 plus interest on the principle sum from 1st February, 1999 to July, 1999 at the rate of 5% per annum and solicitor's cost of $1,500 plus disbursement of $43.50"

[52] I have serious reservations about relying on a Certificate of Result of Appeal which does not provide relevant background facts, clearly identity the issues on appeal or provide the reasoning of the Court. In the absence of such information to put the matters stated in the Certificate of Appeal in context I am unable to derive any legal principles which would guide me in resolving the issue currently before the court.

[53] Counsel for the Bank, quite admirably, brought the High Court decision of The Bank of Nova Scotia v Joslyne Jerome et al [21] to the court's attention notwithstanding that it does not support the Bank's position. In that case the learned trial judge was faced with the same issue which is now before this court. The court referred to the SAG Motors Co. Ltd case, noted there was no written judgment available but appeared to have considered the Certificate of Result of Appeal and, based on that authority, held that the Act did not permit interest to run on the pre-judgment interest awarded. I do not propose to rely on the Certificate of Result of Appeal in SAG Motors

[54] In the absence of any clear precedent in this jurisdiction on this issue, I return the words of the Act to interpret the meaning of "judgment debt."

[19] DOMHCVAP2010/0011
[20] DOMHCVAP2010/0012
[21] DOMHCV2014/0040

Meaning of "Judgment Debt"

[55] Sir Vincent Floissac C.J in Charles Savarin v John Williams (1995) 51 W.I.R. 75 at 78-79. C.J. stated:

> "In order to resolve the fundamental issue of this appeal, I start with the basic principle that the interpretation of every word or phrase of a statutory provision is derived from the legislative intention in regard to the meaning which that word or phrase should bear. That legislative intention is an inference drawn from the primary meaning of the word or phrase with such modifications to that meaning as may be necessary to make it concordant with the statutory context. In this regard, the statutory context comprises every other word or phrase used in the statute, all implications therefrom and all relevant surrounding circumstances which may properly be regarded as indications of the legislative intention.

[56] The Act does not define the phrase "judgment debt". Specifically, the Act does not state whether the phrase "judgment debt" includes:

(1) Both the principal sum i.e the debt or damages awarded and any pre-judgment interest awarded ; or

(2) Only the principal sum i.e the debt or damages awarded as submiited by counsel for the defendants.

[57] Section 2 of the Act states:

> "judgment" includes an order for the payment of money or costs or any other order having the operation of a judgment

[58] The Act does not define "debt" but the natural and ordinary meaning of the word is something, typically money, that is owed or due.[22]

[59] It appears to me that the natural and ordinary meaning of the word "judgment debt" is a sum which is payable by virtue of an order of the court.

[60] It is often the case that the court will provide a breakdown of the various heads under which debt or damages are awarded and separately identify any interest and costs. All these various parts of an award are all payable by the unsuccessful party by virtue of the order of the court and consequently, in my view, they all form the "judgment debt". All these various sums made payable by the judgment, including any pre-judgment interest, become part of and merge into a total single sum awarded. Since any pre- judgment interest *(in this case payable by virtue of a contract)* as with the other component parts of the judgment merges into a single debt it cannot in my view be treated separately for the purposes of calculating statutory interest.

[61] The merger of the right to interest into the judgment for principal sum and interest has long been recognised. [23] In Re Sneyd, ex parte Fewings [24] Lindley L.J acknowledged that the merger of the debt and the agreement to pay interest into the judgment and the calculation of statutory interest on the merged judgment sum does amount to compound interest. He stated:[25]

> "Now it may be technical, but it is well settled, that, if there is a debt secured by a covenant, and judgment is recovered on the covenant, the debt on the covenant, merges in the judgment debt. In point of law the £2200 is no longer payable under the covenant, it is payable under the judgment; the covenant to pay interest is gone, and the judgment debt bears interest only at 4 per cent.[26] It is said that the effect of this will be to vary the contract between the parties. I think it may vary the contract, but it must be borne in mind that the creditor who obtains a judgment for principal and interest gets compound interest; his judgment

[22] Oxford Online Dictionary
[23] Re Sneyd, ex parte Fewings (1883) 25 Ch D 338; London Borough of Ealing v El Isaac and another [1980] 2 All ER 548 where the court held that there were restrictions on the operation of the doctrine of merger.
[24] 1883) 25 Ch D 338
[25] ibid pages 353-354
[26] i.e the interest payable by the relevant UK Statute

> carries interest at 4 per cent. upon the arrears of interest, as well as upon the principal.

[62] It is the statute rather than the exercise of a discretionary power that makes interest at a rate of 5% payable on every "judgment debt". It may very well be, as stated by Lindley L.J, that since the "judgment debt" includes an element of pre-judgment contractual interest - interest is in fact being calculated on interest. However, until such time as the legislature sees it fit to modify the law, the words in the statute must be given their ordinary and natural meaning.

[63] I therefore find no basis for setting aside the judgment in default on the basis that the judgment was been entered for an excessive amount because it orders that statutory interest be calculated on a sum which includes pre-judgment contractual interest.

ISSUE 4 - WHETHER ALL ENFORCEMENT PROCEEDINGS PREDICATED ON THE DEFAULT JUDGMENT SHOULD BE SET ASIDE AND DECLARED NULL AND VOID.

[64] Mr. and Mrs. Rabess also seek an order setting aside all enforcement proceedings taken upon the judgment in default on the ground that the default judgment was not personally served on the defendants.

[65] In Anison Rabess and Joyce Rabess v National Bank of Dominica[27] Mitchell JA held:

> " If a default judgment is to be capable of being enforced it must be personally served on the defendants: CPR 42.6 applies. There being no evidence that the default judgment in this case had been served on the defendants, it was not capable of being enforced by an order for the sale of property. "

[66] In the course of the judgment Mitchell JA reasoned as followed:

[27] DOMHCVAP2011/0030

"Mr. and Mrs. Rabess also complain against the enforcement of the default judgment that it was never served on them. They say they found out about its existence after making inquiries at the court office. Such an inquiry by a defendant does not substitute in law for the service of a judgment or order as required by the rules. It is a long established principle of civil procedure that a final judgment or order may not be enforced unless it is served personally on the party against whom it is sought to be enforced. This principle finds modern reflection in CPR 42.6. This provides that, unless the court otherwise directs, the court office is to serve every judgment or order on the parties to the claim. In this context, "unless the court otherwise directs" does not confer a discretion as to whether or not to serve the judgment on the unsuccessful party. The provision gives the court a discretion, which is frequently exercised, of ordering one of the legal practitioners instead of the court office to serve the judgment or order. The court office does not have the resources in every case to seek out the parties and to serve them personally. The provision in CPR 42.2 that a party who is notified of the terms of an order by telephone, etc., is to be bound by the terms of the order whether or not it is served has relevance to contempt and other similar proceedings. This does not provide an alternative to the requirement for service in CPR 42.6. "[28] (emphasis mine)…

The Bank has not denied that the default judgment was never served on Mr. and Mrs. Rabess, far less has it provided the court with proof of service. In the circumstances, I would consider that omission to be an admission that the judgment was not in fact served. All proceedings consequent to the entering of the judgment would then be defective, null and void and of no effect. " [29]

[67] The Bank submits that :

[28] paragraph 7
[29] paragraph 12

(1) The application for an order for sale was brought under the Title by Registration Act Cap 56:50 ("the Act") and does not constitute enforcement of the judgment since:

(a) CPR 45 sets out various methods of enforcing a judgment;

(b) Money Judgments may be enforced, inert alia, by an order for seizure and sale of goods under CPR 46;

(c) CPR 46 defines "writ of execution" as including an order for sale of land.;

(d) Proceedings under Part V of the Act are not referred to in the Act or the CPR as a method of enforcement.

(2) Enforcement of judgments, as against properties brought under the Act are specifically dealt with in Part VI of the Act which sets out the procedure for a judgment creditor to apply for an order for sale of land. Consequently, pursuant to CPR 2.2 (3),[30] CPR 46 has no application since the procedure set out in Part VI of the Act applies.

(3) The statements by Mitchell J.A in Rabess and Rabess are obiter and consequently this court is not bound by it.

[68] It appears to me that the facts in the case of Rabess and Rabess are almost identical to this case. The Bank in that case, like in this case, among other things, filed an application for an order for sale of land following the entry of judgment in default. There was no evidence in that case that the default judgment was served personally on the appellants.

[30] "These Rules do not apply to the following …(e) any other proceedings in the Supreme Court instituted under any enactment, in so far as Rules made under that enactment regulate those proceedings."

The Court held that in the absence of service all proceedings taken upon the default judgment were null and void.

[69] I am unable to agree with counsel for the Bank that the statements by Mitchell J.A are obiter. I am bound to follow the decision. It is not in dispute that there is no evidence of service of the default judgment on Mr. and Mrs Rabess. Service was only deemed to have been effected on them on 15th October 2015 by an order of the court dated 22nd February 2016.

[70] I therefore order that all proceedings taken consequent to the entering of the judgment on 24th September 2003 are null and void and of no effect.

ISSUE 5 - WHETHER THE CLAIMANT SHOULD PAY TO THE DEFENDANT ALL SUMS OBTAINED OR REALIZED IN ENFORCING THE PURPORTED DEFAULT JUDGMENT FROM 2003 TO DATE TOGETHER WITH INTEREST AT THE PREVAILING BANKER'S RATE.

[71] Mr. and Mrs. Rabess seek an order that the Bank should pay them all sums obtained or realized in enforcing the judgment in default. However, there is no evidence before the court that the Bank has realized any sums at all in in efforts to enforce the judgment. In the circumstance I find there is no basis upon which to make this order.

Conclusion

[72] In summary it is hereby ordered as follows:

1. The order of Thomas J dated 8th December 2015 is set aside.

2. Upon a fresh hearing of the application by the Bank to correct the default judgment under the slip rule the default judgment is corrected to read 24th September 2003.

3. The application to set aside the judgment in default on the basis that it was entered for an excessive amount is refused.

4. All proceedings taken consequent to the entering of the judgment on 24th September 2003 are null and void and of no effect.

5. The application for an order that the Bank pay Mr. and Mrs. Rabess all sums obtained or realized in enforcing the judgment is refused.

[73] While Mr. and Mrs. Rabess have succeeded on some portions of their application they have not on others. I therefore make no order as costs.

Fidela Corbin Lincoln
Master