EASTERN CARIBBEAN SUPREME COURT

IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2014/0022

BETWEEN:

[1] ANDREY ADAMOVSKY
[2] STOCKMAN INTERHOLD S.A.

Appellants

and

[1] ANDRIY MALITSKIY
[2] IGOR FILIPENKO

Respondents

BEFORE:

The Hon. Dame Janice M. Pereira, DBE	Chief Justice
The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mde. Joyce Kentish-Egan, QC	Justice of Appeal [Ag.]

Appearances:

Mr. Justin Fenwick, QC and with him Mr. George Spalton and Mr. Dan Wise for the Respondents

Mr. Peter McMaster, QC and with him Mr. Andrew Willins and Mr. Sebastian Said for the Appellants

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2015: May 20;
2017: February 3.

Commercial appeal – Cross appeal against quantum of pre-judgment interest award made by trial judge – Whether pre-judgment interest rate attached to compensatory award inappropriate – Whether trial judge erred in awarding pre-judgment interest at a rate of less than 1% per annum – Calculation of pre-judgment interest – Measure to be applied when awarding pre-judgment interest

The respondents in this appeal instituted proceedings against the appellants with respect to funds which they alleged were wrongfully extracted and appropriated by the appellants from a company called 'Oledo Petroleum Limited' in which the respondents were 50/50 shareholders with the first appellant. In the court below, the trial judge found that the first

appellant had indeed transferred the funds from the account of Oledo Petroleum Limited into the account of the second appellant and had used the money for his own benefit, with the resultant diminution in the value of the respondents' 50% shareholding in the company by US$35,802,000.00 The appellants were ordered to pay to the respondents the sum of US$35,802,000.00 by way of compensation for the diminution in the value of their shareholding, together with interest and costs. The appellants, dissatisfied with the decision of the trial judge, appealed, whilst the respondents cross-appealed against the quantum of interest awarded to them. The appellants' appeal was dismissed and only the respondents' cross-appeal was left for determination by this Court.

The respondents, in their cross-appeal, contended that the decision of the trial judge not to award interest at an enhanced rate was wrong and that the learned judge erred in determining that the rate of interest to be applied should be less than 1% per annum. They submitted that the interest award should be compound interest on a restitutionary basis to compensate them for the loss of the benefit of the use of the misappropriated funds or, in any event, should be more than an order for payment of simple interest at the lowest available rates. They complained that the decision of the learned judge that simple interest should be paid at the lowest rates offered by the bank during that relevant period was wrong.

In response to the cross-appeal, the appellants contended that the respondents' claim in the court below was not one for compensation for loss actually suffered by them for being kept out of the substantive sum awarded or for restitution for unjust enrichment, which claims might have attracted interest at the rates claimed by the respondents on appeal. Instead, the respondents' claim was for unfair prejudice in accordance with section 184I of the BVI Business Companies Act 2004. The appellants also submitted that the judge's power to award interest is a discretionary one and that the respondents had failed to meet the high threshold for appellate interference with the exercise of a trial judge's discretion.

Held: allowing the respondents' cross appeal to the extent that the award made by the trial judge of pre-judgment interest of US$1,270,636.05 to be paid by the first appellant and US$1,309,274.23 to be paid by the second appellant is set aside and substituted by an award of pre-judgment interest from 18th January 2010 to 1st October 2014 at the rate of 8.5% per annum on the sum of US$34,745,442.00 in the case of the first appellant and US$35,802,000.00 in the case of the second appellant, and awarding costs to the respondents on the cross appeal to be assessed, if not agreed within 6 weeks from the date of this order, that:

1. The jurisdiction of the Court to award pre-judgment interest is clear. A party wrongfully deprived by another of money to which the first party is entitled ought to be compensated for his loss, not just by an award to him of the sum of money to which he was entitled, but so too by an award of the time value of the money from the date of its appropriation to the date on which it is ordered to be paid to him. The rate of pre-judgment interest awarded by a judge is an exercise by him of a judicial discretion.

Creque v Penn [2007] UKPC 44 applied; **Jennifer Prescott v Aldrick Parris and John H. Primus** SLUHCVAP2013/0013 (delivered 30th October 2015, unreported) consolidated with **Aldrick Parris v Jennifer Prescott** SLUHCVAP2013/0025 (delivered 30th October 2015, unreported) followed; **Wallersteiner v Moir (No 2); Moir v Wallersteiner and others (No 2)** [1975] 1 All ER 849 applied.

2. An award of interest, being an exercise of discretion by a trial judge, an appellate court is entitled to set aside the award only if it is satisfied (1) that in exercising his or her judicial discretion the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and (2) that, as a result of the error or the degree of the error, in principle the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong. In the case at bar, there was no basis in law or in fact for the judge to have made a determination that business persons would allow huge sums of money to remain on non-interest or low-interest bearing accounts for nearly 5 years instead of using it in more profitable ways. The application of an objective test would lead a court to a determination that business people would use funds in a commercially reasonable manner.

   Dufour and Others v Helenair Corporation Ltd and Others (1996) 52 WIR 188 applied.

3. The measure to be applied when awarding pre-judgment interest will depend on the basis upon which interest is grounded. An award of interest can be made by statute, in equity or at common law. Where equity is invoked in aid of the common law, only simple interest is available. In this case, the principal award made by the judge was compensatory damages for the loss of value of the shares, which is a common law remedy. The award of interest in this case was not therefore founded upon equity's exclusive jurisdiction and as such only simple interest is available.

   Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Her Majesty's Commissioners of Inland Revenue and another [2007] UKHL 34 applied; **Wallersteiner v Moir (No 2); Moir v Wallersteiner and others (No 2)** [1975] 1 All ER 849 applied.

4. The appropriate rate for pre-judgment interest to be applied in commercial cases must be a realistic rate if the award is to serve its purpose. In this case, the appropriate rate is 8.5%, since the parties had agreed that that was the term deposit rate offered by the bank during the period.

   Creque v Penn [2007] UKPC 44 applied.

JUDGMENT

[1] **MICHEL JA:** This is an appeal against a decision of a judge in the Commercial Court of the Virgin Islands awarding pre-judgment interest to the respondents in the amount of US$1,270,636.05 payable by the first appellant and US$1,309,274.23 payable by the second appellant on the sum of US$35,802,000.00 adjudged to be due to the respondents on a claim brought by them against the appellants.

[2] The proceedings in the court below were instituted by the respondents against the appellants with respect to the sum of US$71,604,000.00 which the respondents alleged was wrongfully extracted by the appellants from Oledo Petroleum Limited (a company in which the respondents were 50/50 shareholders with the first appellant) and appropriated by the appellants for their own use and benefit. At the conclusion of the trial, the judge found that the first appellant had indeed transferred the sum of US$71,604,000.00 from the account of Oledo Petroleum Limited into the account of the second appellant and had used the money for his own benefit, with the resultant diminution in the value of the respondents' 50% shareholding in the company by US$35,802,000.00. The judge ordered that the appellants pay to the respondents the sum of US$35,802,000.00 by way of compensation for the diminution in the value of their shareholding, together with interest and costs.

[3] The appellants appealed against the judgment of the trial judge ordering them to pay the sum of US$35,802,000.00 to the respondents, together with interest and costs, whilst the respondents cross-appealed against the quantum of interest awarded to them by the trial judge. Although the trial judge did not state the rate of interest which he used in calculating the amount of interest to be paid by the appellants to the respondents, at paragraph 120 of his judgment dated 1st October 2015, he stated that the quantum of interest awarded by him on the sum of

US$35,802,000.00 was "such sum as would have been earned on that amount had it been kept on deposit with RIB between 18 January 2010 and judgment."

[4] The appellants' appeal against the judgment of the trial judge was dismissed because of the appellants' failure to provide security for costs as ordered by the Court, leaving only the respondents' cross-appeal in relation to pre-judgment interest for determination by the Court.

[5] The respondents' grounds of appeal, set out in the amended counter notice filed on 24th March 2015, are as follows:

1. The decision of the learned judge not to award interest at an enhanced rate (which was higher than the rates offered by the bank during the relevant period) was wrong because:

   (a) Having found that the appellants had misappropriated the funds of Oledo Petroleum Limited and applied them for their own use and benefit in circumstances where both Mr. Adamovsky and the respondents had substantial liabilities in respect of the borrowings of entities for which they had each assumed responsibility under the Dissolution Protocol, the learned judge erred in fact and law in deciding to award only simple (uncompounded) interest on the basis of money deposited with the bank;

   (b) Instead the learned judge should have found that the proper basis for an award of pre-judgment interest was (i) restitutionary compensation for the loss of the benefit of the use of the misappropriated funds (ii) at rates equivalent to those at which the parties, alternatively the appellants, were currently borrowing from financial institutions;

   (c) The respondents therefore contend that the learned judge should have found that the benefit to the appellants, and the

loss to the respondents, for which restitution should be made, was most fairly measured by an award of interest at a rate of 18.5% - 19.5% per annum compounded either monthly, or alternatively annually;

(d) Alternatively, in the exercise of his discretion, the learned judge should have found that 88% was an appropriate rate of simple interest to award for the entire period.

2. In the alternative, to the extent that the respondents' primary case is not accepted, the decision of the learned judge that simple (uncompounded) interest should be paid at the lowest interest rates offered by the bank during the relevant period was wrong because:

(a) The learned judge erred in applying a subjective test rather than an objective test when considering how the parties would have managed the funds during the relevant period;

(b) Had the learned judge applied an objective test he would have concluded that the parties would have sought to place the funds on deposit in an account which paid the most attractive rate of interest;

(c) It is inconceivable that the parties would not have sought to obtain the most favourable interest rates available to them at the relevant time in the knowledge that the funds were likely to have been kept on deposit for an extended period until agreement had been reached about distribution or the matter had been resolved by Court order;

(d) There was no evidence to support the inferences drawn by the learned judge that:

(i) the parties would have "bickered" over what should have happened to the funds; and/or

(ii) the parties would not have considered placing the funds on term deposit;

because the funds were at all material times under the exclusive control of the first appellant who would have undoubtedly ensured that interest was being generated at the most favourable rates;

(iii) The learned judge failed to take into account sufficiently or at all the fact that the parties were experienced businessmen. The learned judge ought to have applied a reasonable person test that took into account the parties' business experience;

(iv) The learned judge failed to take into account the fact that if the funds had remained in an account of Oledo Petroleum Limited, it is highly likely that proceedings would have been issued within no more than 3 months of the receipt of the Charleston monies in January 2010, namely by 1st May 2010, since there would have been a readily available fund against which a judgment could have been enforced, and that if proceedings had been issued, but the monies remained on short term deposit, the court would have made orders, including an order that the monies be placed on long term deposit at the first occasion on which the matter came before the court, which would have been by 1st August 2010 at the latest;

(v) Alternatively to (f), the learned judge failed to take into account the fact that even if proceedings had not been issued before the actual date of issue, and at that stage

the funds remained on short term deposit, the court would almost certainly have ordered at the first hearing of this matter on 15th August 2012, or alternatively, the second hearing on 28th August 2012, that the funds should be preserved and should be placed on long term deposit pending the court's determination of the disputed issues;

(vi) The learned judge failed to take into account sufficiently or at all the fact that the bank paid interest on deposits at maturity. He therefore ought to have ordered that interest be compounded at the conclusion of each term;

(vii) The learned judge further erred, in any event, by not awarding interest on a compounded basis (whether on the basis that compounded interest was consistent with the judge's finding that the appellants had to provide restitution to the respondents in respect of the value of the respondents' shares which was lost in January 2010 and/or to reflect commercial reality).

[6] On 24th March 2015, the respondents filed a skeleton argument in support of their cross-appeal; on 27th April 2015, the appellants filed written submissions in opposition to the cross-appeal; and on 8th May 2015, the respondents filed a skeleton argument in reply to the appellants' submissions.

[7] The appeal was heard on 20th May 2015, with oral submissions made by Mr. Justin Fenwick, QC on behalf of the respondents, augmenting the skeleton arguments filed on 24th March and 8th May 2015, while Mr. Peter McMaster, QC made oral submissions on behalf of the appellants, augmenting the written submissions filed on 27th April 2015.

[8] In their written and oral submissions, the respondents contended that the trial judge, having determined that they were entitled to be compensated in the sum of US$35,802,000 for the diminution in the value of their shareholding, and that they were entitled also to be paid interest on that sum for the period between 18th January 2010 when the diminution in value occurred and the date of judgment, erred in determining that the rate of interest to be applied should be less than 1% per annum. They submitted that the interest awarded should be compound interest on a restitutionary basis to compensate the respondents for the loss of the benefit of the use of the misappropriated funds or, in any event, by an award of interest other than an order for payment of simple interest at the lowest available rates.

[9] In their submissions, the appellants contended that the respondents' claim in the court below was not one for compensation for loss actually suffered by them for being kept out of the substantive sum awarded or for restitution for unjust enrichment, which claims might have attracted interest at the rates claimed by the respondents on appeal. Instead, the respondents' claim was for unfair prejudice in accordance with section 184I of the **BVI Business Companies Act 2004**[1] and the judge's power to award interest is a discretionary one arising under the Act itself or under the statutory discretion to award pre-judgment interest by virtue of the **Law Reform (Miscellaneous Provisions) Act 1934** of the UK. They submitted that the respondents had not met the high threshold for appellate interference with the exercise of a trial judge's discretion, as articulated by Chief Justice Sir Vincent Floissac in **Dufour and Others v Helenair Corporation Ltd and Others**.[2]

[10] The basis of the award made by the learned judge is in essence that the respondents are entitled to compensation for the loss of the value of their shares as a result of the transfer of funds from a company in which they held a 50/50 shareholding with the first appellant to a company owned exclusively by the first

[1] Act No. 16 of 2004, Laws of the Virgin Islands (as amended by Act No. 26 of 2005, Laws of the Virgin Islands).
[2] (1996) 52 WIR 188.

appellant, and to interest from the date of the transfer of the funds (18th January 2010) to the date of judgment (1st October 2014) for having been kept out of their money during that period. In paragraph 119 of the judgment, the judge determined that "that can be met most fairly by ordering [the appellants] to pay an additional sum equal to the amount of interest which would have been earned had the funds remained, as they should have done, on deposit with RIB until agreement had been reached about distribution or the matter had been resolved by court order". He concluded that the disposition of the funds by the parties would have dragged on and on and on and that nobody would have agreed to put the money on any particular term or any other deposit and so he would make an award of interest uncompounded at whatever the lowest rates from time to time obtainable from Regional Investment Bank ("RIB") would have been. The judge then proceeded to make an award of interest on an amount in excess of US$35M for a period of nearly 5 years at a rate of less than 1% per annum.

[11] Inasmuch as the rate of pre-judgment interest awarded by a judge is an exercise by him of a judicial discretion, an appellate court is entitled to set aside his award if – in the words of Sir Vincent Floissac in **Dufour v Helenair Corporation** -

> "the appellate court is satisfied (1) that in exercising his or her judicial discretion the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and (2) that, as a result of the error or the degree of the error, in principle the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong".[3]

[12] This, I believe, is such a case. There is no proper basis in law or in fact for the judge to have determined that business persons dealing in amounts of several millions of dollars would simply allow huge sums of money to remain on non-interest or low-interest bearing accounts for nearly 5 years instead of using the money in more profitable ways, whether by paying off or reducing high-interest loans or investing in high-yield ventures or at least placing the money on high

[3] At pp. 189-190.

interest-bearing accounts. Indeed, the very basis of the claim against the appellants in the court below was that the first appellant extracted funds from the account of a company jointly owned by him and the respondents to pay high-interest loans owed by the first appellant and to make a profitable investment in another company. In any event, the application of an objective test would lead a court to a determination that business people would use funds in a commercially reasonable manner, which would not be to leave large sums of money in non-interest or low-interest bearing accounts for several years when these funds could be utilised in several other ways to the commercial advantage of the holder.

[13] It cannot be disputed that a party wrongfully deprived by another of money to which the first party is entitled ought to be compensated for his loss, not just by an award to him of the sum of money to which he was entitled, but so too by an award of the time value of the money from the date of its appropriation to the date on which it is ordered to be paid to him. This latter award is what is referred to as an award of pre-judgment interest.

[14] In the present case, although the trial judge did not order the payment of US$35,802,000 to be made to the respondents on the basis that the money was appropriated directly from them, since on the facts the money was appropriated from a company in which they had a 50% shareholding, the judge ordered that the respondents be compensated in that amount because the value of their 50% shareholding in the company was effectively reduced by that amount from the 18th day of January 2010 when the funds were transferred by the first appellant to the account of the second appellant. This award by the trial judge is not the subject of any extant appeal and does not therefore merit further consideration; what is in issue though in this appeal is the quantum of the pre-judgment interest award made by the judge.

[15] In their written submissions, the appellants put forth that, by virtue of section 7 of the **West Indies Associated States Supreme Court (Virgin Islands) Act 1969**[4]:

> "The High Court shall have and exercise within the Territory all such jurisdiction (save and except the jurisdiction in Admiralty) and the same powers and authorities incidental to such jurisdiction as on the first day of January, 1940, were vested in the High Court of Justice in England."

[16] Before 1940, pre-judgment interest in England was awarded under section 3 (1) of the **Law Reform (Miscellaneous Provisions) Act 1934,** which is still applicable in the Virgin Islands, and provides:

> "3.-(1) In any proceedings tried in any court of record for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:
> Provided that nothing in this section-
>
> (a) shall authorise the giving of interest upon interest ; or
> (b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise ; or
> (c) shall affect the damages recoverable for the dishonour of a bill of exchange."

[17] This Court also has the power to award pre-judgment interest pursuant to section 14 of the **Eastern Caribbean Supreme Court (Virgin Islands) Act**. In the case of **Creque v Penn**,[5] a British Virgin Islands appeal from this Court, the Privy Council determined that the court had jurisdiction to award pre-judgment interest owing to its equitable jurisdiction pursuant to section 14 of the **Eastern Caribbean Supreme Court (Virgin Islands) Act**.

[18] In the recent case of **Jennifer Prescott v Aldrick Parris and John H. Primus**[6] consolidated with **Aldrick Parris v Jennifer Prescott**[7], this Court noted that "…the award of pre-judgment interest is a matter of discretion of a judge, but was

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[4] Cap. 80, Revised Laws of the Virgin Islands 1991.
[5] [2007] UKPC 44.
[6] SLUHCVAP2013/0013 (delivered 30th October 2015, unreported).
[7] SLUHCVAP2013/0025 (delivered 30th October 2015, unreported).

of the view that it was an error in principle to award the same quantum on pre-judgment interest as on post judgment interest."

[19] The jurisdiction of the court to award pre-judgment interest is therefore clear. In cases such as the present one, the English Court of Appeal held in **Wallersteiner v Moir (No 2); Moir v Wallersteiner and others (No 2)**[8] that:

> "The court had power under its equitable jurisdiction to award interest whenever a trustee, or anyone else in a fiduciary position, such as a director of a company, misused money which he controlled in his fiduciary capacity for his own benefit."

[20] Having been satisfied of this Court's jurisdiction to award pre-judgment interest, the question then arises as to how the interest is to be calculated or what measure should be applied when awarding pre-judgment interest.

[21] The measure to be applied when awarding pre-judgment interest will depend on the basis upon which the interest is grounded. It is therefore important to examine the different jurisdictional routes through which an award of interest can be made - by statute, in equity or at common law.

[22] The statutory basis arises by virtue of section 3 of the **Law Reform (Miscellaneous Provisions) Act 1934**, which gives the court a wide discretion when awarding interest.

[23] Lord Hope in **Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Her Majesty's Commissioners of Inland Revenue and another**[9] noted that interest is available in equity in cases that lie within equity's exclusive jurisdiction, such as cases involving a person in a fiduciary position in respect of profits improperly made. It is also available in the exercise of equity's jurisdiction in aid of rights that are enforceable at common law. In cases that lie within equity's exclusive jurisdiction, compound as well as simple interest is available. As Steven Elliot puts

[8] [1975] 1 All ER 849.
[9] [2007] UKHL 34.

it in his essay on "**Rethinking Interest on Withheld and Misapplied Trust Money**"[10] : "when applying the inherent jurisdiction, the courts have been able to craft interest awards that meet economic realities." However, where equity is invoked in aid of the common law, only simple interest is available.

[24] In the case of **Westdeutsche Landesbank Girozentrale v Islington London Borough Council**,[11] the House of Lords held, by a majority, that it would be usurping the function of Parliament if it were to, in equity, award compound interest in aid of the bank's claim for repayment of the principal sum, as the court was not authorised to award compound interest in the exercise of its common law jurisdiction.

[25] The common law rule was generally that interest could not be awarded by way of damages for non-payment of debt, for breach of contract or for tort. However, the House of Lords in **Sempra Metals Ltd** extended the law to provide that, where the court upholds a claim for non-payment of debt, damages for breach of contract or tort, the court may award simple or compound interest by way of damages. In these types of claims, interest can be awarded subject to the rules of remoteness and causation that govern the substantive award of damages.

[26] At paragraph 118 of his judgment, the trial judge stated that:

> "Stockman must be made jointly and severally liable with Mr. Adamovsky (but without the benefit of his set off) to compensate the [respondents] for the loss of value of their shares as a result of the transfer of the proceeds of sale of the Charleston shares to Stockman, not in equity on the basis of knowing assistance or receipt, but because Stockman joined with Mr. Adamovsky in unfairly prejudicing [the respondents] as members of Oledo."

He went on to hold that the claim was one for compensation and there was nothing to justify the payment of any further compensation beyond compensation for having been kept out of the money. This would, therefore, suggest that what

[10] [2001] 65 Conv 313
[11] [1996] AC 669.

the trial judge had awarded was compensatory damages for the loss of value of the shares, which is a common law remedy.

[27] The respondents did not challenge the making by the judge of a compensatory award, but challenged the rate of interest that should have been attached to it. The respondents, in their cross-appeal, have claimed in the alternative:

(i) pre-judgment interest on the sum of US$35,802,000 (less the amount of a set off) from 18th January 2010 to 1st October 2014 at the rate of 19.5% per annum compounded, owing to the benefit that the first appellant would have enjoyed by avoiding interest on his loans at that rate;

(ii) pre-judgment interest at the rate of 88% (uncompounded), again owing to the benefit that the first appellant would have enjoyed by avoiding interest on his loans at that rate;

(iii) pre-judgment interest at the rate of 8.5% per annum, being the interest rate offered for a term of 5 years as at 18th January 2010; or

(iv) pre-judgment interest at such rate as this Court thinks fit.

[28] The principal award made by the trial judge was not founded upon equity's exclusive jurisdiction. As such, the court cannot ground its award of interest on that basis. The principal award was made by the judge in the exercise of the court's common law jurisdiction. This is, therefore, a case in which the court may invoke its equitable jurisdiction to aid the common law in awarding interest. In these circumstances, it would be inconsistent to base the principal award on the compensatory measure and base the award of interest on the restitutionary measure.

[29] In light of the principal award being a compensatory one, it follows that the Court should apply a compensatory measure to the interest rate as well. Therefore, the respondents' submissions at (i) and (ii)[12] above cannot be entertained.

[30] It was previously stated that where equity is invoked to aid common law rights, only simple interest is available. Simple interest should therefore be attached to the principal sum in this instance, given that there was no challenge to the amount of the principal sum or how it was awarded, but only to the rate of interest that was applied to it. I will now address the appropriate rate of interest to be applied in this case.

[31] In **Creque v Penn,** the Privy Council stated that the rate of pre-judgment interest to be awarded should be "that on which the Plaintiff would have had to borrow money in place of the money wrongfully withheld by the Defendant". There being no evidence in this case that the respondents had to borrow any money in place of the money wrongfully appropriated by the appellants, one cannot use a borrowing rate as the rate at which to award pre-judgment interest. But the Privy Council, in the same case of **Creque v Penn**, approved the decision of the Jamaican Court of Appeal in **British Caribbean Insurance Co. Ltd v Perrier**,[13] where the court held that in commercial cases the rate of interest awarded must be a realistic rate if the award is to serve its purpose.

[32] In the circumstances, I find that the interest rate which ought properly to be applied in this case is the simple interest rate of 8.5% per annum, since the parties had agreed that that was the term deposit rate offered by RIB from January 2010 to the date of judgment.

[33] I would accordingly allow the respondents' cross-appeal to the extent that the award made by the trial judge of pre-judgment interest of US$1,270,636.05 to be

[12] At para.5 (1)(b) of this judgment.
[13] (1996) 52 WIR 342.

paid by the first appellant and US$1,309,274.23 to be paid by the second appellant is set aside and substituted by an award of pre-judgment interest from 18th January 2010 to 1st October 2014 at the rate of 8.5% per annum on the sum of US$35,802,000.00 in the case of the second appellant and US$34,745,442.00 in the case of the first appellant.

[34] I would also award costs to the respondents on the cross-appeal to be assessed, if not agreed within 6 weeks from the date of this order.

I concur.
Dame Janice M. Pereira, DBE
Chief Justice

I concur.
Joyce Kentish-Egan, QC
Justice of Appeal [Ag.]

By the Court
Chief Registrar