EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2016/0032

BETWEEN:

PICKLE PROPERTIES LIMITED

Appellant

and

STEPHEN LESLIE PLANT

Respondent

Before:

The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]
The Hon. Mr. John Carrington	Justice of Appeal [Ag.]
The Hon. Mr. Eamon H. Courtenay	Justice of Appeal [Ag.]

Appearances:

Mr. Romie Tager, QC with him, Mr. William Willson for the Appellant
Ms. Elspeth Talbot Rice, QC with her, Mr. David Welford for the Respondent

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2017: July 14;
2018: January 30.

Commercial appeal – Claim of contribution – Contribution of co-guarantor to settlement of claim – Whether the respondent is entitled to reimbursement of one-half the amount of contribution from the co-guarantor of the Guarantee after settlement of a claim with mortgagee – Whether the right to a contribution from the appellant was lost due to the questioned conduct of the respondent – Whether the Properties sold at an undervalue is reasonable grounds to deny re-imbursement of guarantee – The relevance of the delay of the delivery of the judgment and the implications on the fair trial principle – Does failure to fully comply with the CPR 8.6(4) amount to automatic failure to be awarded interest in a claim – Rule 8.6(4) of the Civil Procedure Rules 2000

This is an appeal by the appellant, Pickle, against the decision of the learned judge in a claim for contribution brought by the respondent, Mr. Plant. The judge, having found that Mr. Plant had made out a claim for contribution from his co-guarantor, ordered Pickle to

reimburse one-half of the settlement of £625,000.00 previously paid to the Anglo Irish Asset Finance plc, later known as IBRC Asset Finance plc ("the Bank") by Mr. Plant.

The Bank provided financing of £4,250,000.00 under a loan facility dated 25th August 2007 to Newmarket Properties Limited ("Newmarket") which was owned in 50% benefit each by the respective families of Steven Paul Sharp ("Mr. Sharp") and Mr. Plant. Newmarket used the financing to acquire two properties, Smithfield House and Wolverley House ("the Properties") located at Digbeth, Birmingham, England which were to be leased commercially. Mr. Plant and Pickle both gave guarantees to support the financing given by the Bank to Newmarket.

The venture later failed. The Bank appointed agents and instructed them to effect a sale of the Properties as soon as possible. After several bids, the Bank accepted an offer of £475,000.00, being unaware of Mr. Plant's interest in the purchasers, two Gibraltar companies, Uddington Holdings Limited and Lethia Holdings Limited.

In May 2012 the Bank formally demanded £923,304.89 being £500,000.00, the limit of the Guarantee and £423,304.89 in interest on the entire debt of Newmarket. Pickle ignored the claim. Mr. Plant disputed the interest claimed by the Bank which after initiation of litigation by the Bank, was settled at £125,000.00. But Mr. Plant had incurred solicitor's costs of £68,579.09. The reduction in liability for interest and the sale of the Properties by the Bank was largely achieved due to Mr. Plant's initiatives. Mr. Plant paid the amount of principal on the Guarantees and interest of £625,000.00 to the Bank to discharge both Guarantees and the legal fees. Through Mr. Sharp, as agent of a trust for the benefit of his family, Pickle was aware of much of the facts at the relevant time including Mr. Plant's interest in purchasing the Properties, and being offered a chance to join in the purchase, Mr. Sharp declined.

The learned judge found that Pickle and Mr. Plant were equally liable as co-guarantors for the debt of Newmarket. The learned judge found that Mr. Plant's defence of the Bank's claim was reasonable and prudent and thus gave rise to an entitlement to relief in his favour. Accordingly, the judge held that it was appropriate to order a 50% reimbursement by Pickle to Mr. Plant. The trial judge awarded interest to Mr. Plant at the rate of 3.5%, compounded annually, from the respective dates when Mr. Plant paid £500,000.00 under the Guarantee, the £125,000.00 to settle the Bank's Claim, and £68,579.09 in solicitors' costs.

The issues raised on appeal were whether the trial judge erred in concluding that Pickle is obliged to make the one-half contribution as claimed and to pay interest and costs as co-guarantor to the Guarantees. Further, Pickle asserted that the judgment showed that the appellant was not afforded a fair trial, or, on a fair reading of the judgment, the trial judge did not properly adjudicate the issues and sufficiently explain his reasoning and ultimate conclusion.

Held: dismissing the appeal and awarding costs to the respondent in the appeal and in the court below, that:

1. Based on the principles of contract and equity, Mr. Plant was free to seek to enforce the reimbursement based on the Guarantees. Parties to an agreement are obligated in both contract and equity to fulfil the requirements of said agreement. Mr. Plant and Pickle jointly and severally guaranteed Newmarket Limited's indebtedness to the Bank, with the Guarantee being capped at £500,000.00 plus interest. A right, including the percentage of contribution arises between co-sureties (or co-guarantors) where: (1) the surety and the co-surety have guaranteed a common liability, (2) the co-surety had paid more, or is about to pay more, than his rateable proportion of the total guaranteed debt and (3) the right to contribution has not been contractually excluded or lost. Once the debt to the Bank has been ascertained each is only bound to pay a half. To relieve itself from contributing its one-half share, the disputing party has to prove that this was an improvident bargain. In the case at bar, Mr. Plant paid more than his rateable share of the total guaranteed surety, with the inclusion of the solicitor's costs, the one-half contribution was reasonable and prudent in the circumstances. Ergo, the learned judge was correct to rule Pickle to be liable on this basis of non-conformity with the Guarantee.

   Re Snowden (1881) LR 17 Ch D 44 applied; **Gillett v Rippon** (1835) 3 B & Ad 409 applied.

2. The equitable maxim 'he who comes into equity must come with clean hands' or alternately, equity will not permit a party to profit by his own wrong has been agreed by the courts that a party's alleged conduct must have reference to the very matters in controversy. With classifications as: (1) cases where the plaintiff is engaged in a continuing course of fraudulent or illegal conduct and (2) cases where a party's misconduct is at an end, and he seeks restoration of the status quo, or other affirmative relief. Mr. Sharp was aware of Mr. Plant's interests in purchasing the properties and encouraged to partake in the purchase. The trial judge was correct to adjudicate that the submissions of Pickle that Mr. Plant acted improperly or disadvantageously were without merit as steps were taken to protect the Bank's interests during the sale of the properties. These complaints were only raised in objection to Mr. Plant's claim for contribution after the settlement of the debt to the Bank. The Properties were acquired by Uddington Holdings Limited and Lethia Holdings Limited, the Gibraltar companies, and not by Mr. Plant. Strictly speaking, if a secret profit was had, it was had by the Gibraltar properties and not Mr. Plant. There is, in this case, no basis for piercing the corporate veil, and no such argument was advanced by Pickle.

   Benmax v Austin Motoro Co. Ltd. [1955] AC 370 applied; **Assicurazioni Generali SpA v Arab Insurance Group** [2002] EWCA Civ 1642 applied.

3. To determine whether a property has been sold at an undervalue the Court has to consider an admixture of questions of credibility, findings of primary facts and judge's evaluation of those facts. For the Court to interfere with the

trial judge's conclusions on these issues it would have to be concluded that the learned judge was plainly wrong. In the case at bar, the trial judge was correct to rule that the properties were not sold at an undervalue, the Bank in its own self-interest insisted on moving quickly and accepted market price, with no secret profit being made and was deemed commercially sound. It was the Bank's duty to the owners of the properties to obtain the best purchase price. Mr. Plant's involvement in the transaction had no effect on this purchase price. Further, Mr. Plant has not lost his equitable right to contribution against the appellant because Mr. Plant's involvement in advertising and bidding of the properties does not give rise to serious concerns.

Piglowska v Piglowski [1999] UKHL 27 applied; **Skipton Building Society v Scott** [2001] QB 261 applied**.**

4. In deciding whether delay in the delivery of a judgment in lower court is sufficient to set aside the judgment it is necessary to show that the length of the delay and its possible impact on the ability of the trial judge to properly deliberate on the issues and that as a result the trial was unfair. In deliberating this fair trial point the appellate court is required to assess whether the trial judge properly considered and resolved the issues based on the evidence and applicable law. Further, in conducting this exercise, the appellate court should not substitute its views or conclusions for those of the trial judge. A delay, however long, may not by itself be sufficient to allow an appeal against a decision of a trial judge. This Court is not to conduct a re-trial. The appellate court must be satisfied that the judgment is not safe and that to allow it to stand would be unfair to the complainant.

Harb v Abdul Aziz [2016] EXCA Civ 566 applied; **Cobham v Frett** [2001] 1 WLR 1775 applied.

5. Prima facie, the High Court will not award interest upon the failure to comply with Civil Procedure Rule 8.6(4). However this is not always the case. The court below has the power to award interest pursuant to its equitable jurisdiction, both compound interest as well as simple interest.

Creque v Penn [2007] UKPC 44 applied; **Andrey Adamovsky & Anor v Andrily Malitskily & Anor** [2007] UKPC 44 applied; **Jennifer Prescott v Aldrick Parris et al** SLUHCVAP2013/0013 & SLUHCVAP2013/0025 (delivered 30th October 2015, unreported) followed.

JUDGMENT

Introduction

[1] **COURTENAY JA [AG.]**: This appeal is about a business venture that was financed, and which failed. The venture was bank financed and supported by a

Guarantee. One of the parties to the Guarantee honoured a claim on the Guarantee and seeks contribution from the co-guarantor for one-half the amount paid. The question is whether he is entitled to such contribution. The trial judge found that he was. That decision and a related interest point have been challenged on this appeal.

[2] The appellant, Pickle Properties Limited ("Pickle"), a BVI company and the respondent, Stephen Plant ("Mr. Plant"), both gave guarantees, both dated 25th August 2007 ("the Guarantee") to support financing provided by Anglo Irish Asset Finance plc (later known as IBRC Asset Finance plc) ("the Bank") to Newmarket Properties (Guernsey) Limited ("Newmarket") which undertook a business venture relating to two properties in Birmingham, England. In the event, the venture failed and the respondent paid £625,000.00 to the Bank to discharge the Guarantee. At trial, the respondent successfully claimed a contribution of one-half that amount from the appellant. The trial judge also awarded the respondent interest at the rate of 3.5%, compounded annually, from the respective dates when the respondent paid three separate sums of money.

[3] The appellant contends, on diverse grounds, that the trial judge erred in concluding that it is obliged to make the contribution as claimed and to pay interest and costs ("the Contribution Point"). The appellant further contends that because of the one-year delay in the delivery of the judgment, the trial judge failed to properly assess the evidence and in the end failed to perform his judicial function ("the Fair Trial Point"). In the event, the appellant seeks to have the judgment set aside and asks for a re-trial before a different judge.

[4] The structure of this judgment is as follows: (a) a review of the essential facts; (b) an identification of the issues for determination; (c) discussion and decision on the Contribution Point; (d) the discussion and decision on the Fair Trial Point; (e) the discussion and decision on the Interest Point; and (f) conclusions.

The Essential Facts

[5] The following is the essential background giving rise to the dispute between the parties. An exhaustive recitation of the facts is not necessary to understand how the issues thrown up in this appeal arose.

[6] The Guarantee, given by Mr. Plant and Pickle was of a £4.25 million loan facility ("the Loan Facility" and "the Loan") from the Bank to Newmarket which was owned 50% for the benefit of the family of Steven Paul Sharp ("Mr. Sharp") and 50% for the benefit of the respondent and his family. More specifically, Pickle's shares were owned by a trust for the benefit of the family of Sharp.

[7] The respondent, his wife, Linda Plant, and Mr. Sharp had bought, developed and sold properties together for several years. In 2006-07 they established Newmarket and obtained the Loan which was secured by, among other security, an unlimited first fixed legal charge in respect of two properties owned by Newmarket in Digbeth, Birmingham (Smithfield House and Wolverley House) ("the Properties"), and by the Guarantee.

[8] The development of the Properties, as conceived by the parties, did not occur primarily because of the crash of the property market. It is fair to say that the following are incontestable facts, helpfully set out in and taken from the respondent's written submissions:

(a) Mr. Plant and Pickle jointly and severally guaranteed Newmarket's indebtedness to the Bank, the Guarantee being capped at £500,000.00 plus interest.

(b) Newmarket's debt fell due for repayment. Newmarket did not pay.

(c) The Bank required Newmarket's properties, over which it had fixed charges, to be sold and they were.

(d) After crediting the sale proceeds of the Properties against Newmarket's indebtedness the Bank was still owed over £4 million.

(e) The Bank called on Mr. Plant and Pickle to pay under the Guarantee.

(f) Pickle ignored the Bank.

(g) Mr. Plant paid the Bank £625,000.00 and incurred £68,579.09 in legal fees in reducing the Bank's claim from £1,040,256.73 plus costs to £625,000.00

(h) Mr. Plant asked Pickle to pay him a 50% contribution to that outlay. Pickle refused.

[9] A major point of contention between the parties was the manner in which the Bank sold the properties. In this regard, it is important to note that neither side called any witness from the Bank, nor has the Bank been sued.

The Sale of the Properties

[10] In August 2006, the Bank provided a £4.25 million facility to Newmarket to purchase Smithfield House and Wolverley House in Birmingham, England. The facility was supported by the Guarantee given on 21st August 2002 by Mr. Plant and Pickle. The Loan was to be repaid by 27th July 2008. It was not.

[11] Between February and June 2011, there were meetings between the Bank, represented by Mr. James Thompson ("Mr. Thompson"), with Mr. Plant and Mr. Sharp to discuss the fact that the facility had not been repaid. At a meeting held during September 2011, attended by the same persons, it was decided that the Properties would be put on the market. The Bank reserved the right to put them up for auction.

[12] Importantly, the Bank wanted the Properties properly advertised and sold as quickly as possible. This latter factor had an impact, as it necessarily would, on

the length of the period that the Properties were on the market and the price for which the Properties were eventually sold.

[13] Mr. Knight Frank ("Mr. Frank") and Mr. Stephens McBride ("Mr. McBride") were appointed joint agents by the Bank to market the Properties. Mr. Frank recommended that the Properties be marketed for £1 million, and proposed a marketing strategy that was premised on a competitive bidding approach supplemented by brochures and billboards. The evidence suggested that this strategy was not implemented in toto, but a more targeted approach, as suggested by Mr. McBride, was adopted. Importantly, there is no evidence that the Bank was dissatisfied with the marketing approach that was adopted.

[14] Bids were received for: £375,000.00, £400,000.00, £425,000.00, and two bids for £450,000.00. The Properties were sold on 23rd January 2012 for £475,000.00 to Uddington Holdings Limited and Lethia Holdings Limited, the Gibraltar companies beneficially owned by Mr. Plant.

The Bank's Claim on the Guarantee

[15] After the Properties were sold, Newmarket remained indebted to the Bank in the sum of £3,775,000.00.

[16] In February 2012, the Bank turned to the Guarantee and asked Mr. Plant for a proposal to settle the amount due under the Guarantee. The Bank contended that the amount due was £500,000.00 as principal and £329,216.06 in interest. Mr. Plant informed Mr. Sharp of the demand; Mr. Sharp ignored the demand.

[17] Mr. Plant disputed the Bank's calculation of interest, and instructed solicitors to advise and represent him. In the event, the Bank sued seeking a declaration as to the correct interpretation of the interest clause. By this time, the Bank was claiming some £1,040,256.73.

[18] The Claim was settled for a fixed sum of £625,000.00 which Mr. Plant paid. In disputing and defending the Bank's Claim, Mr. Plant incurred solicitors' fees of £68,579.09.

[19] Therefore, Mr. Plant sought contribution from Pickle for the one-half of the principal sum of £500,000.00, interest in the sum of £125,000.00 and the legal costs of £68,579.09.

[20] In the face of a debt exceeding £4 million, and a claim under the Guarantee of some £1,040,256.73, the matter was settled through the sale of the Properties for £475,000.00 and a payment under the Guarantee of £625,000.00 and legal fees of £68,579.09. This resolution was achieved largely through the instrumentality of Mr. Plant. Mr. Sharp was aware of much of these facts at the relevant time but chose to ignore the Bank's claim and ensuing litigation.

The Issues

[21] There are eight grounds of appeal set out in the notice of appeal. However, they can be conveniently grouped under three heads. They are:

(a) the Contribution Point;

(b) the Fair Trial Point; and

(c) The Interest Point.

[22] The main issue at trial was whether the respondent had lost his right to contribution from the appellant. The trial judge concluded that he had not. I will deal with this point first. I have found it convenient to deal with both contract and equity at the same time, although I recognise that they are separate bases on which the right to contribution can be sought and lost.

The Contribution Point

[23] It was the respondent's case at trial and on this appeal that the appellant was liable to contribute equally to the amounts paid to the Bank under the Guarantee and in legal fees. The respondent asserts that the appellant was contractually liable to do so because Mr. Sharp promised that the appellant, a BVI company, "was good for the money". Further, the respondent argues that as a co-guarantor, the appellant is liable to contribute equally in respect of the monies paid by him.

[24] The appellant says that it should not be called upon to contribute equally with the respondent to the amount paid by the respondent to the Bank. The respondent asserts that the appellant is obligated both in equity and in contract.

[25] In equity, the appellant says that the respondent participated in a dishonest scheme that was unjust and resulted in him benefitting from the scheme in breach of his duty to the appellant as a co-guarantor. The appellant submits that the respondent thereby lost his right to seek contribution from the appellant. The following points are deployed by the appellant:

If the respondent had a right to seek contribution from the appellant, he lost it by his unconscionable and improper conduct by:

(a) Being surreptitiously involved in and directing the efforts to find a purchaser for the Properties;

(b) Purchasing the Properties from the Bank at an under-value;

(c) Failing to inform the Bank that he would be the ultimate beneficial owner of the Properties;

(d) Ultimately, the sale of the Properties by the Bank was not at arms-length or bona fide; and

(e) Enjoying a personal benefit on the purchase of the Properties in breach of his duty to the appellant, the co-guarantor.

[26] As to contract, the appellant's case is that although it did sign the Guarantee, Mr. Sharp did not, as a matter of fact, agree and could not, for lack of authority, agree that the appellant would contribute equally with the respondent.

[27] The essential clause of the Guarantee executed by the appellant and the respondent stated:

> "The Guarantors HEREBY JOINTLY AND SEVERALLY GUARANTEE to the Bank the repayment by the Borrower of all moneys and liabilities (including interest) now or hereafter to become owing to the Bank by the Borrower whether alone or jointly with another or others and whether as principal or surety and whether actually or contingently or any account whatsoever together with all legal and other expenses which the Bank incurs in enforcing or attempting to enforce any rights against the Borrower including without limitation all capital (such capital limited to a sum of £500,000.00 only) together with all interest and costs otherwise payable under the Facility Agreement."[1]

[28] There was before the trial judge expert evidence on guarantees from Mr. Richard Millett and Mr. Tom Smith, both Queen's Counsel. They both stated that a right to contribution arises between co-sureties (or co-guarantors) where:

(a) The surety and the co-surety have guaranteed a common liability.

(b) The surety has paid more, or is about to pay more, than his rateable proportion of the total guaranteed debt *qua* surety; and

(c) The right to contribution has not been contractually excluded or lost.

[29] There can be no dispute that the appellant and the respondent guaranteed the liabilities of Newmarket to the Bank, hence the first condition is satisfied. Further, the fact is that they jointly and severally guaranteed the repayment of the debt

[1] Interest and Capital Guarantee at p. 17, para. 2.

owed by Newmarket to the Bank up "(…to a sum of £500,000.00 only) together with all interest and costs otherwise payable under the Facility Agreement".[2]

[30] Pursuant to the Guarantee the respondent paid the Bank £625,000.00 towards the Newmarket debt and incurred £68,579.09 in legal fees in defending the claim instituted by the Bank to enforce the Guarantee. The law is that once the debt due to the Bank was ascertained, as between the appellant and the respondent "each of them is only bound to pay a half".[3] Therefore, as the Guarantee was for £500,000.00, the respondent paid "more than his rateable proportion of the total guaranteed debt *qua* surety".[4] In our view, the sole question that arose was whether the right to a contribution from the appellant was lost because of the questioned conduct of the respondent.

[31] The trial judge found, inter alia, that the Properties were not sold at an undervalue - they were sold at market price and therefore the respondent did not make a secret profit. He held that the respondent's involvement in the way the Properties were advertised for sale, and that his failure to make full and frank disclosure to the Bank regarding his involvement in the purchase of the Properties did not affect the fact that the Properties were sold at market price. Therefore, he concluded that the respondent had not lost his equitable right to contribution from the appellant. Was he right in so concluding?

[32] The trial judge's conclusions are an admixture of findings of fact, findings of mixed law and fact, and findings based on inferences drawn from proven facts.[5] Particularly so on the critical issue of whether the Properties were sold at an undervalue.

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[2] Interest and Capital Guarantee at p.17, para. 2.
[3] Re Snowden (1881) LR 17 Ch D 44 at pp. 47 – 48 per Brett LJ.
[4] Para. 19 of lower court judgment dated 16th June 2016.
[5] Para. 32 of lower court judgment dated 16th June 2016.

[33] For this Court to interfere with the trial judge's conclusions on these issues, I would have to conclude that he was plainly wrong. This approach was neatly expressed in **Piglowska v Piglovski**:[6]

> "First, the appellate court must bear in mind the advantage which the first instance judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility and findings of primary fact. But it goes further than that. It applies also to the judge's evaluation of those facts. If I may quote what I said in **Biogen Inc. v. Medeva Ltd**. [1997] RPC 1:
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> > 'The need for appellate caution in reversing the trial judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance. . . of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation.'
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> The second point follows from the first. The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case but also of a reserved judgment based upon notes, such as was given by the District Judge. These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account. This is particularly true when the matters in question are so well known as those specified in section 25(2). An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself."

[34] I have carefully reviewed the trial judge's assessment of the evidence on both sides, and the rival contentions of the Parties. The evidence showed that bona fide offers were received near to the sale price and for the eventual sale price of the Properties for £475,000.00. That this price was well below the suggested asking price of £1,000,000.00 cannot be gainsaid. But as the trial judge pointed

[6] [1999] UKHL 27.

out, where the Bank insisted on moving quickly it was unrealistic to have expected a price near the suggested price. Under cross-examination, Mr. Sharp accepted that the Bank wished to have the Properties sold quickly.[7] Further, it was open to the trial judge to rely on the fact that it was the Bank itself that decided to accept the offer of £475,000.00 without being aware that the respondent had an interest in the purchase. I note that offers received ranged from £375,000.00 to £475,000.00. There was no evidence that the market was prepared to offer anything near the £1 million suggested by Mr. Frank, the real estate agent. This strongly suggests that the Bank has prepared to accept an offer at this price because it was commercially sound and in its interest, and reflective of what the market would bear. The fact that the respondent was involved in the advertising and in the bidding, does give rise to serious concerns and may have evoked strong feelings in Mr. Sharp for the appellant, but, ultimately, it had no effect on the market price or the price the Bank accepted. The decision not to extend the period of advertising and to wait for possible higher offers was made by the Bank in its own self-interest and not to serve the respondent's interest.

[35] It is noteworthy that the appellant did not call as a witness Mr. Frank, the estate agent appointed by the Bank to advise on the sale and to solicit bids. More importantly, there is no documentary evidence originating from Mr. Frank that suggests that the £475,000.00 was an undervalue. The appellant did not adduce evidence that there were other buyers willing to buy the Properties at a higher price. Whether Birmingham Properties Group ("BPG") would have entered a bidding war is speculative. What the evidence revealed is that the Bank was prepared to accept the £475,000.00 and did so. It was for the appellant to lead evidence to establish that BPG was prepared to go higher, or that there were other buyers out there ready to buy at a higher price, within a short period of time. There is no such evidence.

[7] Para. 7 of the lower court judgment dated 16th June 2016.

[36] In the circumstances, it was open to the trial judge to reach the conclusion that the Properties were not sold at an undervalue. I cannot find that "he was plainly wrong" in the findings he made and conclusions that he ultimately reached. I have therefore concluded that the trial judge's finding that the Properties were not sold at an undervalue should not be disturbed.

[37] In light of this conclusion, it follows that the respondent did not enjoy a secret profit. The shares held in Rightstar Investments Limited and Stairkey Limited had been pledged to the Bank, and were transferred by the Bank to Uddington Holdings Limited and Lethia Holdings Limited, the Gibraltar companies. Mr. Plant no doubt had an interest in the holding companies, but as I have said, he did not enjoy a secret profit.

[38] In analyzing the overall equities, it is important to note that Mr. Sharp was aware of Mr. Plant's interest in purchasing the Properties.[8] Further, Mr. Plant invited Mr. Sharp to participate in the purchase of the Properties from the Bank. These items of evidence undermine Pickle's argument that Mr. Plant was acting improperly or somehow disadvantaging Pickle. Had Pickle truly believed that Mr. Plant had acted improperly or unjustly, or that the Bank had acted negligently in the exercise of its power of sale, he would, acting reasonably, have said so at the time and would have taken steps to protect its position. As Mr. Sharp knew of Mr. Plant's interest in acquiring the Properties, why did he not inform the Bank of this? Pickle did not complain about Mr. Plant's interest in buying the properties. Indeed, Pickle's complaints were only raised in answer to Mr. Plant's claim for contribution.

[39] There is a further point to be made. The Bank was not made a party to these proceedings. The appellant did not initiate an ancillary claim against the Bank. There has been, as far as I am aware, no claim presented by the appellant against the Bank asserting that it negligently sold the Properties at an undervalue, and that it was therefore liable in damages and that the appellant and the respondent

[8] Para. 31 of the lower court judgment dated 16th June 2016.

were discharged from their liabilities, or their respective obligations reduced *pro tanto* to the Bank as a result as outlined in **Skipton Building Society v Stott**.[9] In a rather curious development, the appellant relied on hearsay evidence from Mr. Thompson, a former employee of the Bank who had dealt with the matter during his employment with the Bank. I accept the trial judge's conclusion that the evidence of Mr. Thompson was of little assistance to the appellant. It did nothing to undermine the central conclusion that the Properties were not sold at an undervalue. This point is not without significance as it was the Bank that owed the owners of the Properties a duty to obtain the best price for the Properties.[10] The respondent owed the appellant no such duty. In the absence of very compelling evidence, I think a court would be slow to conclude that the Bank sold the Properties at an undervalue without the appellant joining the Bank.

[40] There was considerable evidence before the Court regarding valuation of the Properties. There were comprehensive valuation reports put forward by both experts, Mr. Paul Arnell and Mr. David Farrow ("Mr. Farrow"). Mr. Arnell's expert valuation of the Properties was £430,000.00, whilst Mr. Farrow's was £1 million. In deciding this appeal, I have not found it necessary, as the trial judge did, to evaluate this evidence and to prefer either valuation. Ultimately, I have carefully reviewed the evidence as to the actual bids received, and the trial judge's assessment of that evidence. I attach more weight to the actual bids, and regard the expert evidence as of little assistance in deciding whether the Properties were sold at an undervalue on the facts of this particular case. Had there been a claim against the Bank alleging negligence in the exercise of its power of sale, the expert evidence may have been more relevant in seeking to establish the market value of the Properties.

[41] On the question of whether Mr. Sharp had expressly agreed with Mr. Plant that Pickle would be equally liable with Mr. Plant on the Guarantee, the evidence was

[9] [2001] QB 261 at paras. 20 – 21.
[10] [2001] QB 261 at paras. 21.

in stark conflict. Mr. Plant testified as to the conversation, Mr. Sharp flatly denied it. What Mr. Sharp denied was the detail of whether he assured Mr. Plant that "any liability under the [G]uarantee would be shared equally between Pickle and [Plant]".[11] The trial judge preferred the evidence of Mr. Plant and believed that the conversation occurred, and that Mr. Sharp agreed, on Pickle's behalf, that Pickle would be equally liable.

[42] There is no doubt that the trial judge had evidence of Mr. Sharp's involvement in what Mr. Plant was doing at the material time in February 2012. This was, on the evidence, an eminently reasonable conclusion for the trial judge to reach. Mr. Sharp's version would mean that the conversation did not occur at all. It is clear that the trial judge was less than impressed with Mr. Sharp's evidence on this point.[12] A review of Sharp's cross-examination as appears in the trial transcript reveals that Mr. Sharp was indeed deliberately evasive on his authority to act on Mr. Pickle's behalf. He certainly gave the impression of a witness that "repeatedly tried to skate a fine line between being involved and distancing himself based on his lack of formal legal capacity".[13]

[43] As the trial judge's conclusion was evidence-based, and influenced by Mr. Sharp's testimony on this issue, I am not inclined to disturb this conclusion. I affirm the trial judge's conclusion based on my review of the transcript, and without enjoying the trial judge's advantage of seeing the witnesses, would not, as in **Benmax v Austin Motor Co Ltd.**[14] disturb his well-founded conclusion. On this issue I bear in mind the view expressed by Clarke LJ in **Assicurazioni Generali SpA v Arab Insurance Group (B.S.C.)**:

> "The extent to which findings of fact depend upon oral evidence or what Lord Hoffmann called the "penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance" will vary from case to case. In the instant case, the judge had the considerable advantage of seeing the witnesses and of assessing their credibility, although, as ever,

[11] Para. 107 of the lower court judgment dated 16th June 2016.
[12] Para. 111 of the lower court judgment dated 16th June 2016.
[13] Para. 111 of the lower court judgment dated 16th June 2016.
[14] [1955] AC 370.

> he did so against the documentary material that was available. In these circumstances we should, I think, take particular care before holding that his conclusions of fact were wrong, especially since, (as appears below) some of his conclusions depended to a significant extent upon the view which he formed of the witnesses."[15]

[44] I have concluded that Pickle did agree that "any liability under the [G]uarantee would be shared equally between Pickle and [Plant]".[16] Additionally, and alternatively, I affirm the trial judge's conclusion that Mr. Plant did not, by his conduct, lose his right to contribution from Pickle.

[45] For completeness, I note that the appellant contended that as the respondent was seeking equitable relief, "he who comes to equity must come with clean hands". That is true. Whilst a lot of criticisms and insinuations were cast at Mr. Plant, I reiterate, that on the central issue – whether the Properties were sold at an undervalue – I find that Mr. Plant's 'hands were clean'.

[46] Whilst in his formidable oral argument on behalf of the appellant, Mr. Tager, QC pressed this issue very strongly, he did not identify specific equitable maxims and law on which he relied. In his written submissions the point was also taken quite shortly and is noticeably bereft of supporting authorities.

[47] Broadly speaking, the case made against the respondent is that he colluded with the property agent Mr. McBride to hold a sham advertising exercise, by using a front man, he hid from the Bank the fact that he was a prospective purchaser and as a result ended up with the Properties at 'a steal'. This taken together with other allegations of improper conduct: not giving the Bank an accurate statement of his affairs, not wanting the Properties to be sold at auction, and that he had previously entered into sham charges to defeat creditors should have led the judge to conclude that Mr. Plant behaved inequitably and thereby lost any right to equitable relief.

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[15] [2002] EWCA Civ 1642 at para. 22.
[16] Interest and Capital Guarantee at para. 2 at p. 17.

[48] I have carefully considered the expert evidence on this point. Mr. Smith, QC, for the appellant, confined his conclusion on Mr. Plant's possible loss of his right to contribution on the basis that the Properties were sold at an undervalue. I have concluded that that did not happen.

[49] Mr. Millett, QC, for the respondent, provided a more comprehensive analysis of the possible ways in which Mr. Plant may have lost his right to contribution from Pickle. But he made a senior point, which has not been answered by Pickle, namely, that Mr. Plant did not acquire the Properties. They were acquired by Uddington Holdings Limited and Lethia Holdings Limited, the Gibraltar companies, and not by Mr. Plant. Strictly speaking, if a secret profit was had, it was had by the Gibraltar properties and not Mr. Plant. There is, in this case, no basis for piercing the corporate veil, and no such argument was advanced by Pickle.

[50] Standing back, I view the case as follows. The appellant and the respondent, through Newmarket obtained financing from the Bank to acquire the Properties. By way of security, they charged the properties in favour of the Bank, and gave joint and several guarantees to support that financing. Newmarket failed to repay the Loan. The Bank decided that the Properties were to be sold as soon as possible, and appointed agents to achieve a quick sale. After receiving offers, the Bank decided to accept £475,000.00 being unaware that ultimately the respondent had an interest in the Gibraltar companies that purchased the Properties. Pickle, through Mr. Sharp, was aware that the respondent had an interest in purchasing the Properties, and was offered a chance to join in the purchase of the Properties but declined to do so. After the sale, the Bank moved on the Guarantee. The respondent defended the claim and settled the Bank's claim for an amount substantially less than the Bank claimed. In doing so he incurred solicitors' fees. Pickle stood on the sideline – watched and waited.

[51] It seems to me that as a result of his efforts, Mr. Plant was able to secure the Properties for a competitive price and offered Pickle an interest in the Properties. This was declined. Mr. Plant substantially reduced the liability of the Guarantors in the face of a substantial claim from the Bank. Pickle enjoyed the benefit of this result.

[52] For completeness, I will briefly address the £125,000.00 paid to settle the Bank's interest claim, and the £68,579.09 in solicitors' costs claimed by the respondent. The law seems settled on these points.

[53] On 11th May 2012 the Bank formally demanded £923,304.89 being £500,000.00, the limit on the Guarantees and £423,304.89 in interest on the whole of Newmarket's debt. The respondent disputed liability for this amount of interest contending that the Bank was only entitled to interest on the principal amount of £500,000.00 guaranteed. The Bank sued and the respondent defended whilst the appellant ignored the claim. The amount of interest claimed by the Bank was eventually settled for £125,000.00, and in doing so the respondent incurred £68,579.09 in solicitors' costs.

[54] As discussed by Mr. Millett, QC in his expert report, there was a strong argument that the Bank's interpretation of the interest liability clause of the Guarantee, which read in part, "all interest and costs otherwise payable under the Facility Agreement", was correct. In the circumstances, the settlement achieved by the respondent was eminently reasonable. To relieve itself from contributing its one-half share, the appellant, as opined by Lord Tenterden, CJ in **Gillett v Rippon**,[17] had to prove that this was "an improvident bargain". The appellant has failed to so prove. In fact, the appellant has enjoyed a substantial benefit from the respondent's successful defence of the Bank's interest claim.

[55] Turning to the £68,579.09 in solicitors' costs, the learned authors of **Law of**

[17] (1835) 3 B & Ad 409 at p. 147.

Guarantees opined that the law is:

> "The surety cannot as a rule recover as part of his claim for contribution his costs of defending an action against him by the creditor, unless either he was specifically authorized by the co-sureties to defend the action or he was prudent and reasonable in doing so. Where by defending the claim the common liability of the co-sureties is materially reduced, the surety may recover these costs in contribution from his co-sureties."[18]

[56] It is pellucid that "by defending the claim the common liability of the co-sureties [wa]s materially reduced",[19] and therefore the respondent is entitled to succeed on this head as well.

[57] I make clear that for the reasons stated by the trial judge which I have affirmed above, the appellant is obliged to contribute one-half of the £500,000.00 paid by the respondent under the Guarantee, the £125,000.00 paid to settle the Bank's interest claim, and £68,579.09 in solicitors' costs.

[58] When called upon to pay his rateable share, the appellant developed and deployed technical arguments to avoid liability. Central to its position is that the Properties were sold to the Gibraltar Companies at an undervalue by way of a dishonest scheme. In the end, I have found that the facts are against the appellant and its claim has failed on all scores. In all the circumstances, it would be wholly unfair to find against the respondent.[20]

[59] I turn now to consider the appellant's contention that it did not, in any event, get a fair trial.

The Fair Trial Point

[60] The facts are the following. The trial was completed on 1st July 2015. Written submissions were filed by the respondent on 2nd September 2015 and by the

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[18] 7th edition at para. 12-015.
[19] Para. 99 of the lower judgment dated 16th June 2016.
[20] Stewart v Braun [1925] 2 DL R 423 at p. 431.

appellant on 30th September 2015. Judgment on the principal claim was delivered on 16th June 2016 and on the interest issue on 17th June 2016.

[61] The appellant contends that judgment should have been delivered by December 2015 the latest. Because it was not, it is submitted that the trial judge deprived himself of the advantages of fresh recall of the witnesses and their demeanour, had a faded memory of the key facts did not fairly assess the evidence and failed to properly analyse the issues joined on the pleadings. The appellant says that the delay impacted the judge's recollection and appreciation of the evidence and issues, and so he 'took short-cuts' when writing his judgment and delivered an inadequate judgment. In the result, the appellant was deprived of a fair trial.

[62] The resolution of this issue requires an identification of the issues that had to be resolved by the trial judge. It requires me to assess whether the trial judge properly considered and resolved these issues based on the evidence and applicable law. In conducting this exercise, I am to ensure that I do not substitute my views or conclusions for those of the trial judge. This Court is not to conduct a re-trial.

Overview of the Pleadings

[63] First the amended statement of claim. The sole relief sought by the respondent against the appellant in the court below in the amended statement of claim was contribution for fifty percent of £625,000.00 paid by him to the Bank and the £68,579.09 in solicitors' costs.

[64] The respondent relied on the representations and actions of Mr. Sharp to allege that he represented the appellant in agreeing that the appellant would contribute equally with the respondent in meeting their liability under the Guarantees.

[65] With respect to the £625,000.00, the respondent based his claim on section 1 of the English Civil Liability (Contribution) Act 1978 or alternatively in equity. As to

the £68,579.09 in solicitors' costs, he contended that the one-half contribution was "reasonable and prudent in the circumstances".[21]

[66] I turn to the re-amended defence of the appellant. The appellant denied that it was in any way liable to the respondent. It alleged that Mr. Sharp was not its agent and was not authorised to represent or agree anything on its behalf. Further, it denied that Mr. Sharp or any authorised representative agreed that the appellant would contribute equally to meet liability of the Parties under the Guarantee. It further alleged that the Bank had acted to the detriment of the appellant and had repudiated the Guarantee with the result that the appellant was released from any liability under the Guarantee. Further or alternatively, it was contended that the way the sale had been conducted, and the respondent's involvement with the said sale, caused the Properties to be sold at an undervalue to the respondent and in breach of his duty as co-guarantor to act honestly. Additionally, the release of the securities procured by the respondent deprived the appellant of its right of subrogation and thereby released the respondent from any liability it might have had to contribute under the guarantee.

[67] The appellant also resisted liability to contribute by asserting that a right to contribution only arises where a co-guarantor has paid the entire amount payable under a guarantee. In the instant case, the respondent had paid less than the full amount of the liability of Newmarket, and therefore no right to contribution accrued. Further it had not been pleaded that Newmarket was insolvent, to the extent that Newmarket was released, then the appellant was also released.

[68] The right to seek contribution from a co-guarantor is an equitable remedy and therefore all the equitable maxims applied. In all the circumstances of the respondent's actions, he had forfeited any right to contribution from the appellant.

[21] Amended claim form at para. 1(a), p. 1.

[69] It was also contended that the settlement entered into between the respondent and the Bank was unreasonable and the appellant was therefore released from liability.

[70] The respondent's reply to the re-amended defence was full and joined issue with the pleaded case. Nothing turns on its contents, for the purpose of the Fair Trial Point, and therefore it is unnecessary to detail it in this judgment.

[71] Put shortly, in response, to the claim for contribution, the appellant deployed a wide range of defences both at law and in equity. The trial judge did not find favour with the appellant's case, and the appellant now contends, on the Fair Trial Point, that this was because the trial judge failed to properly apply his judicial mind to the facts and law that were live, and therefore the judgment should be set aside.

The Law

[72] The fundamental question raised by the appellant is: considering all the material before the trial judge – the pleadings and the evidence, and the delay in the delivery of the judgment, does the judgment show that the appellant was afforded a fair trial? Or, on a fair reading of the judgment, did the trial judge grapple with the issues and explain how and why he reached his decisions and ultimate conclusions? In short, does the appellant know why he lost? The appellant says that he does not know why he lost because the judge failed to properly consider the facts and issues and to then fully explain how he reached his decisions.

[73] Importantly, the appellant's case is not simply one of seeking a re-trial on the ground of delay per se; the appellant says that the delay in the delivery of the judgment impacted the quality and nature of the judgment delivered. It was so impacted that it did not constitute a judgment properly so called. To resolve these issues, it was necessary to closely review the judgment in light of the case made by the parties to see whether the trial judge properly judged the case, and whether he properly explained his decision.

[74] Factually, in order to decide the Contribution Point, the trial judge had all the relevant material before him on 30th September 2015 when the appellant's written submissions were filed. Although not impossible or unheard of, I consider that in view of the judge's extremely heavy caseload in the Commercial Court, it would be unfair to the trial judge to expect him to have started to write his judgment before that date. Judgment was delivered on 17th June 2016. On that reckoning, nine months elapsed before the judgment was delivered.

[75] There is no evidence or submissions before this Court of the average duration between the end of trial and the delivery of judgments in the High Court, whether in the British Virgin Islands or the wider OECS. This Court therefore has no empirical yardstick by which to measure the performance of the trial judge. This is not fatal to the appellant's argument.

[76] There is no question that a delay, however long, may not by itself be sufficient to allow an appeal against a decision of a trial Judge. It is necessary to show that the trial was unfair; the length of the delay and its possible impact on the ability of the trial judge to properly deliberate on the issues at large are the key factors to be considered in deciding whether the judgment must be disturbed.

[77] In support of its argument for allowing the appeal on the Fair Trial Point, the appellant relied primarily on **Harb v Abdul Aziz**.[22] Lord Dyson MR described the essential features of every judgment and I agree with his exposition:

> "Our system of civil justice has developed a tradition of delivering judgments that describe the evidence and explain the findings in much greater detail than is to be found in the judgments of most civil law jurisdictions. This requires that a judgment demonstrates that the essential issues that have been raised by the parties have been addressed by the court and how they have been resolved. In a case (such as this) which largely turns on oral evidence and where the credibility of the evidence of a main witness is challenged on a number of grounds, it is necessary for the court to address at least the principal grounds. A failure to do so is

[22] [2016] EWCA Civ 566 at para. 39.

> likely to undermine the fairness of the trial. The party who has raised the grounds of challenge can have no confidence that the court has considered them at all; and he will have no idea why, despite his grounds of challenge, the evidence has been accepted. That is unfair and is not an acceptable way of deciding cases."

[78] In my view, the principal grounds that arose for consideration by the trial judge were:

(a) whether Mr. Sharp had authority to act on behalf of Pickle, and in fact did so by agreeing to share liability equally with Mr. Plant under the Guarantee;

(b) whether the Properties were improperly/unprofessionally advertised;

(c) whether the Properties were sold at an undervalue;

(d) whether Mr. Plant enjoyed an unjust benefit because the Gibraltar Companies acquired the Properties;

(e) whether Mr. Plant, by his alleged improper conduct, lost his equitable right to contribution, as claimed, from Pickle; and

(f) whether Mr. Plant was entitled to recover interest and if so at what rate.

[79] Without identifying the specific paragraphs in his judgment that ran more than 50 pages, I am very satisfied that the trial judge considered each of the principal grounds that were at play in the case. I am equally satisfied that he gave sufficient reasons justifying his conclusions so that the appellant was able to understand why the judge found against it. To suggest otherwise is simply unfair to the trial judge.

[80] In its written submissions, the appellant identified three issues of complaint against the trial judge's treatment of the evidence. They were that the trial judge failed to properly consider:

(a) the effect of Mr. Rudiger Michael Falla's ("Mr. Falla"), a director of the corporate directors of Pickle, evidence on the limits of Mr. Sharp's authority to act for Pickle;

(b) Mr. Farrow's oral evidence that even on a quick sale, the market value of the Properties was closer to £750,000.00; and

(c) the oral evidence of Mr. McBride that he acted solely on the instructions of Mr. Plant, that he did not put BPG on an even playing filed with Mr. Fielding/Mr. Plant in reference to the bid of £475,000.00.

[81] I address these complaints in turn. First, the trial judge did not mention or grapple with Mr. Falla's evidence, oral or otherwise. What is clear is that the judge was persuaded, because of the dim view he took of Mr. Sharp's evidence on the question of his representing Pickle, that Mr. Sharp did act for Pickle and did commit Pickle. The question is, what is the effect of his not expressly stating that he considered Mr. Falla's evidence and what effect if any it had on the question of Mr. Sharp's authority to act for Pickle?

[82] Once the trial judge believed, as he did, that the conversation between Mr. Plant and Mr. Sharp occurred, and he believed the evidence of Mr. Plant over that of Mr. Sharp it is difficult to see how Mr. Falla's evidence would have changed his mind. The extent of Mr. Sharp's authority to act for Pickle is unlikely to have changed his mind on this point. The trial judge believed Mr. Plant and this implicitly rejected Mr. Falla's evidence. In this regard I am satisfied that the trial judge did have the issue in his mind when he said:

> "….He repeatedly tried to skate a fine line between being involved and distancing himself based on his lack of formal legal capacity.
>
> It seems clear that at least in his dealing with Plant, Sharp was intending to speak for Pickle, and was speaking for Pickle, at least to the extent that he was committing personally to cause to happen things to which 'he agreed', or at least that he was representing and assuring that things to

> which he 'agreed' would happen. In this way, he was taken by Plant as speaking for and making commitments for Pickle."[23]

[83] Secondly, it is also true that the trial judge did not mention the oral evidence of Mr. Farrow. He did have regard to his expert report, and particularly his supplemental expert report and the fact that Mr. Farrow suggested a market price of £1 million for the Properties.[24] There is nothing in the complaint.

[84] Third, as to Mr. McBride acting on Mr. Plant's instructions and not playing fairly with BPG, the trial judge expressly found "…the Court finds that there was no dishonest scheme of any kind involving McBride and plant to enable plant to acquire the Properties at undervalue".[25] The complaint is not tenable.

[85] The question is not whether or not the trial Judge mentioned specific items of evidence. The test is to be found in **Cobham v Frett**:

> "In their lordships' opinion, if excessive delay, and they agree that twelve months would normally justify that description, is to be relied on in attacking a judgment, a fair case must be shown for believing that the judgment contains errors that are probably, or even possibly, attributable to the delay. The appellate court must be satisfied that the judgment is not safe and that to allow it to stand would be unfair to the complainant".[26]

[86] It is undeniable that the trial judge exceeded the generally accepted yardstick of three months for the delivery of his judgment. However, I have carefully reviewed the judgment and conclude, quite firmly as the Court of Appeal in **Harb v Abdul Aziz**, that "the essential issues that have been raised by the parties have been addressed by the court and how they have been resolved".[27] I regard the judgment as safe and that the appellant received a fair trial in the court below.

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[23] Paras. 111-112 of lower court judgment dated 16th June 2016.
[24] Para. 38 of lower court judgment dated 16th June 2016.
[25] Para. 54, footnote 26 of lower court judgment dated 16th June 2016.
[26] [2001] 1 WLR 1775 at para. 35.
[27] [2016] EWCA Civ 566 at para.39.

The Interest Point

[87] The trial judge awarded interest to the respondent at the rate of 3.5%, compounded annually, from the respective dates when the respondent paid the £500,000.00 under the Guarantee, the £125,000.00 to settle the Bank's claim, and the £68,579.09 in solicitors' costs.

[88] The appellant took a pleading point. It argued that the respondent had failed to comply with Civil Procedure Rule 8.6(4) which provide:

> "A claimant who is seeking interest must -
> a. say so expressly in the claim form; and
> b. include, in the claim form or statement of claim, details of the –
> i. basis of entitlement;
> ii. rate; and
> iii. period for which it is claimed."

[89] In the amended statement of claim, under the chapeau AND THE CLAIMANT CLAIMS: the respondent sought "Costs and interest".[28] That's all on interest. In the amended defence, the appellant pled: "As to paragraphs 29 and 30 it is denied for the reasons set out above that the Claimant is entitled to the said or any relief."[29] There was therefore no specific denial of the claim for interest.

[90] Having regard to the state of the pleadings and evidence from Mr. Millett, QC on interest, and arguments in the written submission on behalf of the respondent, the trial judge held that the appellant had waived its right to object to the faulty pleading. He proceeded to award interest to the respondent.

[91] Whilst there are numerous decisions from the court below which hold that where a claimant fails to comply with rule 8.6(4), the High Court will not award interest, this is not always the case. Importantly, the Judicial Committee has, in **Creque v Penn**[30] awarded interest in the following circumstances:

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[28] Amended statement of claim dated 30th May 2014 at para. 3 at p. 2.
[29] Amended defence dated 24th July 2014 at para. 30 at p 17.
[30] [2007] UKPC 44.

> "The re-amended statement of claim asked for "interest on such sums found due at such rate and for such periods as to the court shall seem just," which amounted to substantial (though not complete) compliance with rule 8.6(4) of the Civil Procedure Rules 2000. There is no reason to suppose that either the failure to comply strictly with rule 8.6(4), or the absence of a formal respondent's notice, has caused any unfairness."[31]

[92] In **Andrey Adamovsky et al v Andriy Malitskiy et al**,[32] this Court has expressly recognized the jurisdiction of the court below to award interest pursuant to its equitable jurisdiction.[33] The Court also noted that "in cases that lie within equity's exclusive jurisdiction, compound interest as well as simple interest is available".[34]

[93] There was no evidence before the trial judge as to what rate of interest should be awarded to the respondent. He was left to consider the rival submissions, and to do the best he could in the circumstances. On the one hand, Mr. Plant sought 8% whilst Pickle noted that "the rate of return which would have been available to Sterling time deposits between 2012 and 2016 … ranged between 0.73% and 0.57%"[35]. Both parties agreed that the statutory post judgment rate is 5%.

[94] Accepting the view expressed by Michel JA in **Andrey Adamovsky**[36] (citing **British Caribbean Insurance Co. Ltd. v Perrier**[37]) "that in commercial cases the rate of interest awarded must be a realistic rate if the award is to serve its purpose", I would accept that the rate of 3.5% awarded by the trial Judge was not, in the circumstances of this case, unreasonable. Therefore I would not interfere with the exercise of his discretion.[38]

[95] Turning to the award of compound interest, the trial judge recognized that in the exercise of its equitable jurisdiction courts had long awarded compound interest.

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[31] [2007] UKPC 44 at para. 19.
[32] BVIHCMAP2014/0022 (delivered 3rd February 2017, unreported).
[33] At para. 17.
[34] At para. 23.
[35] Para. 33 of the lower court Interest Judgment dated 17th June 2017.
[36] At para. 31.
[37] (1996) 52 WIR 342.
[38] Jennifer Prescott v Aldrick Parris et al SLUHCVAP2013/0013 & SLUHCVAP2013/0025 (delivered 30th October 2015, unreported).

He noted, "In this jurisdiction, in which international and other cases are a significant factor, compensation should and can take account of the commercial realities recognized in Freightliner and Bank of America. It is important that this jurisdiction do so, particular in commercial cases of which this was one".[39] Finally, he specifically grounded his award "in relation to equitable compensation".[40]

[96] The respondent has been kept out of his money without any basis whatsoever. For this he is to be fairly compensated by the appellant. This is supported by the ruling in **Bank of America Canada v Clarica Trust Company**[41] whereby an award of compound interest achieves this objective.

[97] Again, I find no basis on which I can interfere with the exercise, by the trial judge, of his discretion to award compound interest.

Conclusion

[98] For the reasons set out above, I would dismiss this appeal.

[99] The trial judge reserved the question of costs pending submissions from the parties. As far as I can see, no such submissions were made. The question of costs did not feature in this appeal, either in the written cases or oral arguments of the parties. I do not think that this issue should remain unresolved.

Order

[100] I propose the following orders:

(a) the appeal is dismissed;

(b) the judgment of the trial judge is affirmed; and

(c) the respondent is to have his costs of this appeal and in the court below. The costs in the court below are, if not yet assessed or agreed, to be

[39] Para. 48 of the lower court Interest Judgment dated 17th June 2017.
[40] Para. 49 of the lower court Interest Judgment dated 17th June 2017.
[41] 2002 SCC 43.

assessed by a master if not agreed within four weeks from the date of this order. Costs in this Court are two-thirds of the costs agreed or assessed in the Court below.

I concur.
Paul Webster
Justice of Appeal [Ag.]

I concur
John Carrington
Justice of Appeal [Ag.]

By the Court

Chief Registrar