THE EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
COMERCIAL DIVISION

Claim No: BVIHC (COM) No 1 of 2018

BETWEEN:

STICHTING NEMS

Applicant

and

IGOR BORISOVITCH GITLIN

Respondent

ANNA RADCHENKO

Interested Party

Appearances:

Ms. Pauline Mullings of Sabals Law for the applicant
No appearance for the respondent or the interested party

2019: December 2;
December 10.

JUDGMENT ON INTEREST

[1] **JACK, J [Ag.]**: On 2nd December 2019, I heard an assessment of costs. The background concerns the enforcement of a judgment obtained by the applicant against the respondent for US$3,297,578.89, €19,807.86 and costs and interest. The applicant obtained *ex parte* a provisional charging order over some shares in Custom Marine Ventures Ltd on 16th October 2018. On 21st November 2018, Ms. Radchenko, the interest party, filed a notice of objection to the provisional charging

order. At the return date on 6th December 2018, Adderley J refused to make the charging order final. His written judgment is dated 19th December 2018. The applicant appealed and on 29th March 2019 the Court of Appeal allowed the appeal with costs.[1] The question of the making of a final charging order was remitted to this Court and on 31st July 2019 Adderley J made the charging order final. Costs were awarded against the respondent and the interested party.

[2] When I heard the assessment of costs, for the reasons which I gave orally I determined (a) the costs of the appeal in the sum of $41,856.00, (b) the pre-appeal costs in this Court in the sum of $18,324.00 and (c) the post-appeal costs in this Court in the sum of $29,468.25. Ms. Mullings sought interest under section 7 of the Judgments Act 1907 on (a) and (b) from 29th March 2019, the date of the Court of Appeal determination, and on (c) from 31st July 2019, the date of the final charging order.

[3] I raised with her the question whether in this jurisdiction interest runs from the date on which the order for costs to be assessed was made (the *incipitur* rule) or from the date on which the assessment was made (the *allocatur* rule). Ms. Mullings said that she thought that there was a case within this jurisdiction, or at least in the Eastern Caribbean, which determined this matter, so I adjourned consideration of the issue for her to find the case. Unfortunately, she could not find the case. Nor have I been able to find a local case on the subject. I therefore need to look at the history of the legislation.

[4] At common law there was no right to interest on judgments. That was changed in England by the Judgments Act 1838. Before the Judicature Acts 1873 and 1875, there had been a different practice in the common law courts and the courts of equity as to when time ran for the purpose of calculating interest on costs under the 1838 Act. The former applied the *incipitur* rule, the latter the *allocatur* rule. In an early case after the fusion of law and equity, the Court of Appeal held that the

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incipitur rule should apply: **Boswell v Coaks**.[2] In 1976, however, the English Court of Appeal held that, due to a change in the form of the writ of fi.fa, the *allocatur* should apply instead: **K v K (Divorce Costs: Interest)**[3]. The House of Lords overruled that case in **Hunt v R M Douglas (Roofing) Ltd**[4]. Their lordships held that the form of the writ of execution was irrelevant. Instead, the *incipitur* rule applied, so that interest under section 17 of the Judgments Act 1838 (UK) should run from the date of the order for costs to be assessed (or taxed).

[5] Section 17 of the UK Act provided[5] that:

> "…every judgment debt shall carry interest at the rate of four pounds per centum per annum from the time of entering up the judgment… until the same shall be satisfied…"

[6] Save that the rate of interest in this Territory is five per cent per annum, the Judgments Act 1907 is in identical terms.

[7] This raises an issue as to whether this Court is bound by the decisions of the English courts as to the construction of identically worded statutes. When the 1907 Act came into effect, statutory interpretation was based very strictly on the supposedly true construction of the words used. Nowadays we look more than in earlier times at the factual background to statutory wording and are more willing to look at local conditions in interpreting legislation. In these post-Colonial times, English decisions are treated as being persuasive, so that **Hunt** is persuasive, rather than binding, authority. In 1907, however, the position was quite different. The legislator at that time would have meant the Virgin Islands' Judgments Act to

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[2] (1887) 36 WR 65

[3] [1977] Fam 39, sometimes also cited as Keith v Keith

[4] [1999] 1 AC 398

[5] The section was subsequently amended so that the date from which interest shall run be determined by rules of court: The Civil Procedure (Modification of Enactments) Order 1998 (SI 1998 No 2940) Art 3(b); and gave the Rules Committee a power to give the court a discretion as to whether interest should run from the date otherwise provided in the rules of court: *ibid* Art 3(c). The English Civil Procedure Rules 1998 now provide for the *incipitur* rule to apply unless the court otherwise orders: CPR rules 40.8 and 44.2(6)(g). (The latter rule was formerly rule 44.3(6)(g).) The rate of interest in England is also changed: it is currently eight per cent per annum: Judgments Act 1838 (Rates of Interest) Order 1993 Art 2.

have precisely the same meaning as the Imperial Parliament's Judgments Act. I have to apply the intention of the 1907 legislator. Accordingly, in my judgment, **Boswell v Coaks** (as the most recent English judgment on the point in 1907) applies. (If **K v K** were still good law in England, an interesting question as to the authority in this Territory of **Boswell v Coaks** would arise, but in the light of **Hunt** I do not need to determine this issue.) Thus, in my judgment the *incipitur* rule determines from when interest runs.

Adrian Jack (Ag.)
Commercial Court Judge

By the Court

Registrar