

EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

BRITISH VIRGIN ISLANDS
BVIHCV2008/0192
BETWEEN:

OCEAN CONVERSION (BVI) LIMITED

Claimant

and

THE ATTORNEY GENERAL OF THE VIRGIN ISLANDS

Defendant

Appearances on Paper:

Mr. Baba Aziz of the Attorney General's Chambers for the Attorney General
Mr. Sydney A Bennett QC and Ms Anthea L Smith, both of J.S.Archibald & Co, for Ocean
Conversions (BVI) Limited

JUDGMENT

[2009: 1 December]

(Claim for interest under contract – whether properly pleaded – CPR Part 8 Rules 8.6(4) and (5) – whether made out – Court's inherent or implied power to award pre-judgment interest - section 7 of the West Indies Associated States Supreme Court (Virgin Islands) Ordinance (CAP 80) – **Alphonso v Deodat Ramnath** (56 WIR 183) considered)

[1] **Bannister J [ag]:** On 17 September 2009 I gave judgment on the claim by Ocean Conversion (BVI) Limited ('OC') to be paid for water supplied by it to the Government of the British Virgin Islands ('the Government') between 1 January 2007 and the date of judgment. In short, I ordered that the Government pay OC the difference between sums actually paid and US\$21.73 per thousand lGal for the period between 1 January 2007 and 20 December 2007 and the difference between the sums actually paid and US\$13.91 per thousand lGal thereafter.

[2] After I had handed down my decision on this part of the case, Mr Bennett QC, who appeared together with Ms Anthea L Smith for OC, raised the outstanding question of interest. It was agreed

that this should be dealt with on paper by way of written submissions and this judgment is given after consideration of the submissions delivered to me by each party.

- [3] I must deal with a preliminary point taken by Mr Aziz for the Government. He says that it is now too late for OC to claim interest. He says that after I had given judgment on the issue of quantum for the period of supply falling after 20 December 2007, I was *functus officio*. In support of this submission, he cites part of my reasoning, set out in my judgment of 28 October 2009 in these proceedings, for refusing to entertain in these proceedings a claim by the Government for *mesne profits* based upon its prayer for 'further or other relief' in its possession claim. A claim for further or other relief is not in any sense a stand alone claim. There was no suggestion, either immediately before or at the time when I gave judgment in the possession proceedings, that any issue remained outstanding in those proceedings. In the present proceedings, OC has from the outset included a pleaded claim for interest. Whether that claim succeeds is the issue before me now, but it is clearly outstanding and remains to be dealt with. The Court is not, therefore, *functus officio*.

The pleadings

- [4] In paragraph 6 of its further amended statement of claim OC sets out the invoices delivered by it to the Government between 2 February 2006 and 6 April 2009 for water supplied by OC to the Government., together with the amounts paid by the Government to OC over that period. The difference between the amount shown by the invoices delivered and the amounts received is claimed to be US\$13.7 million. In paragraph 11 of its further amended statement of claim, OC claims interest at 18% per annum on each of the unpaid invoices. Annexed to the further amended statement of claim are 14 so-called late payment invoices, said to have been delivered by OC to the Government by way of a claims for late payment of interest. Neither the further amended statement of claim nor any of the annexed late payment invoices sets out the principal sum on which each interest claim is based, the amount of time elapsed since payment became due, or the method by which the calculation is made.

[5] CPR Part 8 rules 8.6(4) and (5) are in the following terms:

- '(4) 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.
- (5) If the claim is for a specified sum of money, the total amount of interest claimed to the date of the claim and the daily rate at which interest will accrue after the date of the claim must be expressly stated in the claim form.'

[6] OC's pleadings clearly make an express claim for interest, but equally clearly fail to comply with sub-rule 8.6(4)(b) and (possibly) sub-rule 8.6(5). However, the witness statement of Mr Ramjeet Jerrybandam, who appeared to give evidence at the main hearing, sets out the basis of calculation of interest (which relies upon clause 4.7.2 of the original contract, providing for payment within 20 days of receipt of invoice and for interest to be paid on 'past due' invoices at the rate of 1.5% per month). I doubt that sub-rule 8.6(5) applies to the present case, since although in form it is a claim for a specified sum of money due at the date of the claim, in substance it is a claim for payment of water supplied by OC down to the date of judgment. In his written submissions, Mr Aziz says that OC has substantially complied with these sub-rules by providing further details as the rule requires. As will be seen, I do not agree.

Interest between 1 January 2007 and 20 December 2007

[7] In his written submissions Mr Bennett QC relies upon my judgment in the main proceedings as establishing that OC is entitled to be recompensed as if the contract was still on foot down to 20 December 2007. In his written submissions, he gives a figure of US\$286,996.04 as being the interest for late payment due as at 20 December 2007. He also produces, at page I of Tab 3 to the

bundle supporting his written submissions ('Tab 3'), a schedule which he says shows OC's calculation of this interest. The figure of US\$286,996.04 appears in a line which is introduced by a note referencing the figure to invoice number 227. It is not possible to see either from the interest schedule or from any other of the documents in Mr Bennett QC's Tab 3 upon what principal sum and over what period this sum of US\$286,996.04 has been calculated. The sum claimed for interest down to 31 December 2007 in the table at paragraph 11 of the further amended statement of claim is not the sum of US\$286,996.04 claimed in Mr Bennett QC's written submissions, but US\$399,433.38, claimed in a Late Payment Interest Invoice #FC-001 dated 31 December 2007 which is annexed to the further amended statement of claim. There is no explanation as to how this different sum (which also makes an appearance in the interest schedule against April 2008) is calculated, or how it relates to the sum of US\$286,996.04 now said to be due.

[8] A further puzzle is that invoice 227, which appears in the table at paragraph 6 of (and is annexed to) the further amended statement of claim, itself claims the identical sum of US\$286,996.04 as 'late interest' down to 31 December 2007. In the interest schedule at Tab 3 of Mr Bennett QC's supporting documents, it turns out that the whole of this figure has now been attributed to the first 20 days only of December 2007. No explanation is offered for this attribution.

[9] The root of the difficulty is that OC has not, even now, complied with Rule 8.6(4)(b)(ii) and (iii). OC's entitlement, by analogy with clause 4.7.2 of the contract, is to interest at 18% per annum on unpaid (or part unpaid) 2007 invoices calculated over a period between a date falling 20 days after each relevant invoice was delivered and 20 December 2007 or earlier payment. None of the material supplied by OC, in its pleadings or otherwise, sets out the relevant period between the date 20 days after delivery of the invoice and 20 December 2007 during which the whole or any part of a 2007 invoice remained unpaid. It is thus impossible even to check the calculation of – let alone to verify - the entitlement of OC to interest on unpaid invoices (or part) as at 20 December 2007.

[10] The problem is not made simpler by a consideration of the 'Payments' and 'Total Receivable Outstanding' columns of page 1 and the figures at pages 5 and 6 of Tab 3. On their face, the workings set out on those pages show the interest payment of US\$286,996.04 as paid (or '100%

collected'), presumably as a consequence of the appropriation by OC of subsequent payments by the Government to invoice 227-1, of which the interest payment of US\$286,994.04 formed part. On OC's own documents, therefore, it appears that none of these interest claims is outstanding.

[11] I have considered whether I should permit OC to revisit these figures, but I have come to the conclusion that I should not. It is not simply a matter of pleading. It seems to me that OC has failed to establish that any specific amount of interest referable to the period from 1 to 20 December 2007 remains outstanding. As a result the Court is without the necessary materials to enable it to make an award under that head and accordingly I make none.

Interest between 21 December 2007 and judgment

[12] Mr Bennett QC asks for interest on that part of the claim which covers the period from 21 December 2007 to judgment. He says that I have power to award it either under or by reference to the English Law Reform (Miscellaneous Provisions) Act 1934 ('the 1934 Act'). Mr Aziz agrees. But I think that I need to be satisfied, even in those circumstances, that I have power to award interest before I can properly do so.

[13] I was referred by Mr Bennett QC to **Alphonso and ors v Deodat Ramnath**¹, where the Court of Appeal upheld an award of interest made by the trial judge to the victim of a running down accident that occurred in this Territory. The lead judgment in the Court of Appeal was given by Satrohan Singh JA. Dealing with interest the learned Justice of Appeal said that there was serious challenge to the figure of 9% which the trial judge had used as the rate for pre-judgment interest, but I cannot gather from any of the judgments in the Court of Appeal that there was any challenge to the contention that the successful claimant was entitled, at the discretion of the Court, to pre-judgment interest. Indeed, it seems to me that there cannot have been, since otherwise the argument would have been reflected in the judgments. Indeed, the judgments contain no indication as to the basis upon which interest was claimed or as to the source of the Court's power to award it.

¹ 56 WIR 183

[14] In upholding the learned trial judge's interest award, Satrohan Singh JA appears to have been applying **Jefford v Gee**². Certainly, it is true to say that the application, or non application, of interest to different heads of the claimant's claim follows the guidelines set out in **Jefford v Gee**³. But **Jefford v Gee** also made clear that absent express statutory provision or mercantile custom (as in the case of certain Admiralty claims) the English High Court had no inherent power to award pre-judgment interest on either debt or damages in the absence of contractual entitlement. Since the relationship of the parties after 20 December 2007 was non-contractual, it follows, if that is right, that I cannot award interest to OC in respect of its recoveries relative to that period unless I can identify some express power enabling me to do so.

[15] I certainly have no express power under any Virgin Islands legislation, but Mr Bennett QC says that I have a power flowing from section 7 of the West Indies Associated States Supreme Court (Virgin Islands) Act (CAP 80) ('the Act'). Section 7 is in the following terms:

'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.'

Mr Bennett QC says that on 1 January 1940 the 1934 Act was in force in England. Therefore, he says, the High Court has the power to award interest which the 1934 Act gave to the English High Court on 25 July 1934.

[16] If this submission were correct, it would mean that every statute in force in England at the beginning of 1940 and which gave the High Court in England power to make orders of any sort (on divorce, for example, or as to the control of rents) would have effect in the Territory by a sidewind. In my judgment the submission is misconceived. Section 7 of the Act deals with (a) jurisdiction and (b) powers and authorities incidental to jurisdiction. The basic meaning of the word jurisdiction in this context is the power to decide matters. Thus, the High Court in England in 1940 had, in

² [1970] 1 All ER 1202

³ See at page 151 of the report

relation to persons subject to it, unlimited jurisdiction (in contrast to the County Courts, for example, which had certain financial and other limits placed upon the extent of their jurisdiction). This basic jurisdiction may be conferred by statute (section 7 of the Act is a good example of this being done) but once conferred and subject to any limitations contained in the provision conferring it, it does not depend upon any further statutory authority for its exercise. The High Court in England also had in 1940 (and still has) a so-called inherent jurisdiction. Familiar examples are the power to regulate its own processes, to stay proceedings, to restrain abuses and (in 1940) to punish contempts of court. This use of the word jurisdiction is slightly different from the basic meaning, but the essential feature is that its exercise, like that of the basic jurisdiction, is independent of statute: see **Davey v Bentick**⁴. When section 7 of the Act refers to powers and authorities *incidental* to such jurisdiction, it is referring, in my judgment, to this inherent jurisdiction. It is not referring to specific powers conferred on the High Court under particular English statutes. Such specific powers are not *vested* in the High Court of Justice in England. They are made available to it by legislation passed for the purpose.

[17] Section 11 of the Act takes the matter no further. Section 11 prescribes how the jurisdiction vested in the High Court is to be exercised. If there is a lacuna as to the exercise of that jurisdiction, the law and practice administered for the time being by the High Court of Justice in England is to apply by analogy. But the law and practice referred to is the law and practice going to the exercise of the jurisdiction vested in the High Court. The 1934 Act is not concerned with the exercise of the jurisdiction of the High Court in England.

[18] The Privy Council case of **Creque v Penn**⁵ does not assist Mr Bennett QC. That part of the decision dealing with interest turned upon the equitable rule that a purchaser who goes into possession before the price is paid must pay interest from the moment he goes into possession until payment of the price. The Privy Council was able to apply this rule in Mrs Creque's favour because of the express provision of section 14 of the Act. The decision has no bearing on OC's claim at law to be paid a reasonable price for the water it supplied after 20 December 2007. So far from supporting OC's contention that section 7 of the Act allows me to apply the 1934 Act, the

⁴ [1893] 1 QB 185 (CA) at 187

⁵ [2007] UKPC 44

wording of section 14 shows that where the Act wishes to confer on the High Court power to grant particular remedies, it says so in terms. Neither section 7 nor section 11 contain analogous wording covering common law claims.

[19] In my judgment, therefore, **Alphonso v Deodat Ramnath** must be taken to have proceeded upon an assumption, shared by both parties and which neither the trial judge nor the Court of Appeal saw fit to disturb, that the High Court of the Virgin Islands has a power derived from or analogous to the 1934 Act to award pre-judgment interest. It is not, in my judgment, binding authority to that effect. In my view, I have no such power and accordingly I make no award of pre-judgment interest for the period after 20 December 2007.

Coinclusion

[20] For the above reasons, OC's claims to interest fail.

Commercial Court Judge

1 December 2009