

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY SIDE
2009/CLE/gen/00176**

BETWEEN

- 1) **BALMORAL DEVELOPMENT**
- 2) **BALMORAL ESTATES LIMITED**
- 3) **UNITED BAHAMAS DEVELOPMENT LIMITED**
- 4) **ARISTO INVESTMENT LIMITED**

Plaintiffs

AND

- 1) **COTTISLAW (a firm)**
- 2) **MR. GREGORY I.H. COTTIS**

Defendants

AND BETWEEN

- 1) **GREGORY I.H. COTTIS**
- 2) **COTTISLAW (a firm)**

Plaintiffs

AND

- 1) **JASON KINSALE**
- 2) **BALMORAL DEVELOPMENT LIMITED**

Defendants

Before: The Hon. Sr. Justice Stephen G. Isaacs

Appearances: Clinton Clarke Jr. for the Balmoral Group of Companies, the Plaintiffs
Brian Moree, Q.C., and Sean Moree and Rodman Deleveaux for Gregory I.H. Cottis and Cottislaw (a firm) - the Defendants

Hearing Date: 19 October and 4 November 2016

DECISION

- (a) Distribution of payments made against judgment debt
- (b) Slip rule to correct amount claimed - oversight of amended claim - pre-judgment and post judgment interest to be applied.

There are two applications before the Court, one by the Balmoral Group (the Plaintiffs), and another by the Cottis Group (the Defendants). The Plaintiffs have applied to distribute funds held on account in a manner described in their Summons, and the Defendants have applied to correct the judgment herein under RSC O.20 r.10 (the slip rule), as a result of an oversight by the Court to take into account the Amended Defence and Counterclaim, which pleading claims an amount that is larger than funds held on account to settle the judgment debt.

2. On 22 March 2016, it was ordered following a trial that the Plaintiffs pay to the Defendants the sum of \$200,000.00 for services rendered with interest accruing at 6% from the date of judgment until payment.

3. The Plaintiffs have applied by Summons filed on 8 July 2016 for the following relief:

"...an Order that the sum of one hundred and fifty thousand dollars (\$150,000.00) ordered to be held in a joint interest bearing account at a commercial bank in accordance with the Order of the 21st of February 2014 and that the amount of one hundred thousand dollars (\$100,000.00) also ordered to be held in a bank account of McKinney, Bancroft & Hughes in accordance with the Order of the 2nd of March 2009 along with the further Order of the 22nd of December 2009 be paid out to the Balmoral Group for the purposes of satisfying the award granted to the Defendants ("the Cottis Group") on the 22nd day of March 2016 for 'services rendered' in the amount of two hundred thousand dollars (\$200,000.00) in satisfaction of the causes of action in which it was paid in and that the Cottis Group recover against the Balmoral Group its costs of this action to be taxed up to the date of the last said Order for payment to be held between the parties and that the costs thereafter be the Balmoral Group costs in this action to be taxed if not agreed."

4. The Plaintiffs had paid into interest bearing accounts the total sum of \$250000.00, which they correctly submit would leave a balance of \$50,000.00 that can be applied to costs awarded to the Defendants.

5. I will dispose of the Plaintiffs prayer for cost first. Simply put if the amount held to the Defendants' order is greater than the award made, only then would the Plaintiffs be entitled to costs after the last Order for payment to be held between the parties. If it is adjudged that the award that ought to have been granted is greater than the funds held to the Defendants' order, it would follow that the Plaintiffs' are not entitled to costs for any period.

6. There is the logistical difficulty to granting the order for payment as prayed by the Plaintiffs due to the overlaying Summons (as amended) filed by the Defendants on 20 October 2016 for the following orders:

- (i) Provide for post-judgment interest at the statutory rate of 6.75% and
- (ii) Provide for pre-judgment interest on the award of \$200,000.00, or the amount allowed under paragraph (iii) below, at such amount as the Court deems just from the date of accrual of the cause of action to the date of the aforementioned judgment; and
- (iii) Correct the judgment award from \$200,000.00 to \$290,222.00 to reflect the amount set out in the prayer for in the Amended Defence and Counterclaim filed herein on 3rd April 2014

7. The issues raised by the Defendants must be resolved before any of the funds referred to at paragraph 3 can be paid out, because these issue may alter the way in which the amount of \$250,000.00 held in escrow ought to be treated.

8. The starting point is to dispose of the item (iii) of the Defendants' Summons. RSC O.20 r.10 provides:

"Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Registrar."

9. By the Judgment of 22 March 2016 the Defendants were awarded the sum of \$200,000.00 for services rendered with interest accruing at 6% from the date of judgment until payment. This figure was lifted from the Defence and Counterclaim filed 11 April 2011 By oversight the Amended Defence

and Counterclaim was not taken into consideration, which fixes the claim at \$290,222.00. I accept that it was the intention of the Court to award the figures in the Amended Defence and Counterclaim. The intention is made clear by the fact that no other relief sought by the parties was granted.

10. It is common ground that \$250,000.00 has been paid to the Defendants pursuant to (a) a Consent Order filed 2 March 2009 (as amended) for \$100,000.00 to be paid and (b) an Order filed 28 March 2014 for \$150,000.00 to be applied to the Judgment award. Had the Defence and Counterclaim not been amended, the amount of \$50,000.00 would have been available to apply to the order for costs.

11. In the circumstances the entire amount of \$250,000.00 must be applied to the judgment debt and a balance of \$40,222.00 would remain owing. The amounts owed as interest and costs are obviously to be assessed separately. The judgment therefore is to reflect the amount of \$290,222.00.

12. I have considered the Plaintiffs' submission that the amounts paid are to be treated as payment into Court, and therefore the amounts paid in, being more than \$200,000.00 as originally claimed, limits Counsel for the Defendants claim for costs up to the time of payment in, and the Plaintiffs would have their costs thereafter. (See **Cunningham v Osprey Developers Co [2002] B.H.S. J. No 85; Halvanen Insurance Co Ltd v Central Reinsurance Corporation and Another [1988] 1 W.L.R.R. and Flightline Ltd v Edwards and Another (2002) Times 23 August.**)

13. The acceptance of the submission that the figure of \$290,222.00 as claimed in the Amended Defence and Counterclaim is the correct amount of the claim has neutralised this submission, because the total award is greater than the amount paid in.

Post Judgment Interest

14. The award of interest post judgment is made under s.2 of the Civil Procedure (Award of Interest) Act (the Act) which provides:

"2. Every judgment debt shall carry interest at such rate as shall be prescribed by rules of court made by the Rules Committee constituted by section 75 of the Supreme Court Act, and such interest may be levied under a writ of execution on such judgment:

Provided that nothing in this section shall apply in relation to any judgment debt upon which interest is payable as of right, whether by virtue of an agreement or otherwise.

- (2) Interest under this section shall run --**
- (a) if the judgment has been obtained in the Supreme Court, from the time of entering it up; and**
- (b) if the judgment has been obtained in a Magistrate's Court, from the date when it was pronounced in open court,**

and in either case until the same is satisfied."

15. Under the Civil Procedure (Rate of Interest) Rules 2008, the Rules Committee fixed the rate of interest post judgment at the prime rate of the Central Bank plus two per centum per annum. I take judicial notice that the prime rate of the Central Bank is 4.75%. It follows therefore that post judgment interest is fixed at 6.75%. The interest awarded on the judgment debt in this matter is hereby adjusted to 6.75% from the date of judgment until payment.

Pre-judgment Interest

16. The award of pre-judgment interest is within the discretion of the Court. It seems logical that the Defendants are entitled to pre-judgment interest, since the Plaintiffs' have had use of the money since the debt became due, and thereby depriving the Defendants of the benefit of those funds. The award of pre-judgment interest is governed by S.3 of the Act, which provides:

"3. (1) In any proceedings tried in any court, whether or not a 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. As Lord Salmon said in **General Tire & Rubber Co. v. Firestone Tyre & Rubber Co. Ltd.** [1975] 1 W.L.R. 819::

Interest is not awarded as punishment against a wrongdoer for withholding payments which he should have made. It is awarded because it is only just that the person who has been deprived of the use of the money due to him should be paid interest on that money for the period during which he was deprived of its enjoyment. No one suggests that the appellants acted dishonestly or unreasonably in withholding the money for five years; nor that they caused any of the delay in the granting of the patent. This, however, in my view, has little relevance. They enjoyed the use of the money during the whole of this time and in law it is deemed to have been due to them from the beginning of that period."

18. The principle was re-visited in the Law Commission Report on Pre-judgment Interest on Debts and Damages (2004) where it is stated at paragraph 1.9:

"Awards of interest are designed to compensate claimants for the cost of being kept out of their money. They should put claimants into the position they would have been in had the debt or damages been paid when they fell due. We wish to introduce a system of pre-judgment interest that provides fair compensation to claimants without unduly penalising defendants and which encourages faith in the civil justice system by meeting the legitimate expectations of litigants. On the other hand, we do not wish to increase disputes or legal costs."

19. As to the discretion of the Court to apply the slip rule to correct an order to include pre-judgment interest, the case of **Tak Ming Co Ltd v Yee Sang Metal Supplies Co [1973] 1 All ER 569** clearly demonstrates that there is such a discretion to bring the rule into operation even where there was an accidental omission by Counsel to ask for it. The use of this discretion was seen in operation in the local case of **Rosbach v Delquay Overseas Ltd (trading as Green Turtle Cay Club) [2012] 1 BHS J. No. 98**, where **Hepburn J.** (as she then was) applied it.

20. In the circumstances at hand the Defendants are awarded pre-judgment interest from the accrual of the cause of action in July 2008 to the date of Judgment at the rate of 2.4%, the average rate payable by retail bank on fixed deposits between 2008 and 2016.

21. The interest yielded from the funds now held on interest bearing accounts at commercial bank

as agreed, has to be taken into account with regard to pre-judgment interest. The Plaintiffs are obliged to make up any shortfall, and alternatively, given credit for any interest accrued on those account that yield more than 2.4%.

22. I now return to the distribution of the funds held on account. Now that it has been established that the amount held is less than the debt owed being \$290,222.00, both sums of \$100,000.00 and \$150,000.00 held on separate accounts, are to be applied to the judgment debt. A balance of \$40,222.00 with the applicable interest before and after judgment as seen above.

23. In the circumstances the Plaintiff are not awarded cost from the last Order for payment to be held between the parties. All costs flow to the Defendants. No order for costs is made on this application.

Dated the 16th day of March A.D. 2016.


Stephen G. Isaacs
Senior Justice