Judgment 9/2009 **Buckley v Ronez Ltd – Royal Court (Civil Action File 1186) – 2 March 2009**

Judgments (Interest) (Bailiwick of Guernsey) Law, 1985 – personal injury claim – special damages – need for certainty as to the practice of the Court – interest, from the date of the summons to the date of trial, to be payable on special damages at the rate which would apply in England, namely 3% - application for costs - 'without prejudice' offers of settlement prior to trial – plaintiff did not respond to defendant's final offer of c.£58,000 (as against the award at trial worth c.£46,000) – plaintiff awarded recoverable costs up to the date of that offer – defendant awarded its recoverable costs after that date (See Judgment 4/2009)

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

Civil 1186

The 2nd Day of March 2009 before Richard John Collas Esquire, Deputy-Bailiff sitting alone

KEVIN MICHAEL BUCKLEY

Plaintiff

v

RONEZ LTD

Defendant

Whereas following a trial in December 2008 and by Act of Court dated 19th January 2009, the Royal Court awarded damages to the Plaintiff in this matter in the total sum of £43,485.19 in respect of personal injuries suffered as a result of an accident at work when he was employed by the Defendant;

And whereas the Court reserved its decision in respect of interest and costs, subject to hearing submissions from Counsel;

And whereas on 25th February 2009 the Court heard Advocates L Le R Strappini and M G A Dunster counsel for the Plaintiff and Defendant respectively make submissions thereon the Court this day gave judgment in the terms attached hereto and ORDERED;

1. That the Plaintiff shall recover all the costs incurred by him up to and including 1st December 2008.

2. That the Plaintiff shall pay to the Defendant its recoverable costs incurred after 1st December 2008.

3. That interest shall be payable on general damages at the rate of 2 per cent per annum from 16 February 2005 to the date of trial and on special damages at 3 percent per annum from the date they were incurred in March 2004.

4. Each party shall bear its own costs in respect of the hearing on interest and costs.

S M D Ross
Her Majesty's Deputy Greffier

Approved Judgment
2 March 2009
Error in paragraph 3 corrected 4 March 2009

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

Between:

KEVIN MICHAEL BUCKLEY

Plaintiff

-V-

RONEZ LTD

Defendant

DECISION ON INTEREST AND COSTS

Date of hearing: 25th February 2009

Judgment handed down: 2nd March 2009

Before: Richard John Collas Esq., Deputy-Bailiff sitting alone

Advocate for Plaintiff: **L Le R Strappini**
Advocate for Defendant: **M G A Dunster**

Cases, texts & legislation referred to:

1. The Judgments (Interest) (Bailiwick of Guernsey) Law, 1985, as amended.
2. *Douglas v Gallienne*, Guernsey Court of Appeal, 14th November 1990, at page 15G,10 GLJ 72
3. 1988 White Book, Order 6, Rule 2, Note 16
4. *Carver v BAA [2009] 1WLR 113*
5. *Roache v News Group Newspapers Limited [1998] EMLR 161, 168 – 169*
6. 2008 White Book, paras 7.0.22 and 36.1.1

Introduction

1. Following a trial in December 2008, the Royal Court awarded damages to the Plaintiff in this matter in the total sum of £43,485.19 in respect of personal injuries suffered as a result of an accident at work when he was employed by the Defendant. The decision of the Court was handed down by Act of Court dated 19th January 2009. The

Court reserved its decision in respect of interest and costs, subject to hearing submissions from Counsel.

Interest

2. The Court's powers to award interest on a judgment debt are to be found in The Judgments (Interest) (Bailiwick of Guernsey) Law, 1985, as amended. Section 1 of the 1985 Law deals with interest in respect of the period prior to judgment at the discretion of the Court and section 2 deals with post-judgment interest which is recoverable on every judgment debt at a prescribed rate which is currently 8% per annum.

3. In the present matter, counsel initially disagreed as to the rate of interest that should be awarded in respect of both special damages and general damages. By the time of the hearing, they had agreed the rate in respect of general damages, but were disagreed as to the rate of interest to be payable in respect of special damages.

4. I was not referred to any decision of the Royal Court in which the Court had been asked to consider the rate of interest to be applied but I drew the attention of Counsel to a passage in the Judgment of the Guernsey Court of Appeal in *Douglas v Gallienne*, 14th November 1990, at page 15G, in which Sir Godfrey Le Quesne said:

> "*It seems to me that it is very desirable that in future, when interest has to be awarded under the provisions of the Law of 1985, some guidance should be given to the Jurats of the proper method of calculating the interest. Some guidance should be given to them about the appropriate rates to be used for different periods and, if I may put the matter compendiously, attention should be paid to the various questions and the various authorities which will be found set out in the White Book in the notes to Order 6, rule 2. I refer in particular to what, in the 1988 edition, which is the latest edition available to me here, appears as note 16.*"

5. The passage in the 1988 White Book at Order 6, Rule 2, Note 16, appears to me to be largely similar to the passage which appears in the 2008 White Book at paragraph 7.0.22.

6. As I said, by the time of the hearing before me, counsel had agreed the method of calculation of interest on the award of general damages, that is at the rate of 2% per annum from the date of service of the summons commencing the proceedings, which was 16th February 2005, until the date of trial and I make an Order in those terms.

7. In relation to special damages, the dispute between counsel boiled down to whether the rate of interest should be calculated on the English basis, namely at one half of the "appropriate rate", being the rate of interest allowed on money in Court placed on the Short Term Investment Account, which I was told would be one half of 6%. Or, whether it should be at the rate of one half of the rate at which post-judgment interest

is awarded in Guernsey, namely one half of 8%. In arguing for the latter, Advocate Strappini, on behalf of the Defendant, submitted:

> "*The correct approach in Guernsey is not to use the English "special discount rate", which has no application here, but to use the current Judicial Interest Rate of 8%, which clearly has. After all, it was at all material times open to [the Defendant] to pay [the Plaintiff] his losses as they accrued, instead of which it maintained a denial of liability to the very end of the trial, thus keeping [the Plaintiff] out of the compensation which was justly due to him".*

8. I have every sympathy for Advocate Strappini's argument and I have no desire to import matters of English law and practice into Guernsey unless it is clearly proper to do so.

9. However, two facts have influenced my decision. First, I must of course have due regard to decisions of the Court of Appeal which are binding upon the Royal Court and, in my view, the Court of Appeal in *Douglas v Gallienne* was clearly directing the Royal Court to adopt, at least in general terms, the principles that govern the award of interest in England.

10. The second factor that influenced me was that it is my understanding from my days in private practice, and this understanding was confirmed by Advocate Dunster, that the practice of legal practitioners dealing with personal injury and clinical negligence claims is to follow the English principles. I consider it to be very important that there should be certainty in this area. The vast majority of such claims are, fortunately, settled by agreement without coming to trial. It is important that those who are advising parties as to the terms on which cases are to be settled should be in no doubt as to the method of calculation of interest.

11. Whilst it is often attractive to adopt a Guernsey solution to Guernsey cases, I believe that for me to depart from the Court of Appeal's clear guidance might create confusion and thereby hinder, rather than assist, in achieving such settlements. I can see no need to adopt a separate practice in Guernsey and I therefore order that the rate of interest to be applied to the award for special damages is to be the same as would be awarded in England namely a rate of 3% per annum. Counsel agreed that the period during which the interest is to accrue is to be the period during which the special damages have accrued which, in the present case, commenced in March 2004.

Costs

12. Counsel agreed that costs are at my discretion, as the trial judge; a discretion that I must of course exercise in a judicial manner. They also agreed that costs normally follow the event. That would normally mean that the Plaintiff would recover his costs, having successfully recovered an award for damages. However, the position is not that simple because of offers made by the Plaintiff prior to trial.

13. Advocate Strappini advised me that the first offer was received by the Plaintiff in March 2008; three years and three months after proceedings were issued. He called it a derisory offer of £10,000 plus reasonable costs (I believe at that time the Plaintiff's claim was pleaded in the sum of £275,000 plus interest and costs).

14. The Plaintiff took exception, not only to the amount of the award, but also to certain allegations made in the letter which were not true and were not pursued at trial.

15. The next offer was in a letter dated 2nd July 2008 marked "*Without Prejudice save as to costs"*. The offer was for £40,000 inclusive of any benefits which can be offset from his compensation, plus the Plaintiff's reasonable costs.

16. That offer was rejected by Advocate Strappini in a letter dated 18th July 2008, also marked "*Without Prejudice save as to costs",* which contained a counter offer of £281,502, plus costs. That was based upon the amount on which his claim was then pleaded, less a discount of 20% to allow for the uncertainties of litigation.

17. I was not told of any further negotiations or discussions until a letter dated 12th November 2008 marked *"Without prejudice save as to costs"* in which the Defendant offered £45,000 inclusive of repayable benefits (worth £43,618.15) in respect of the Plaintiff's claim for damages and interest and, in addition, the Defendants offered to meet the Plaintiff's reasonable costs.

18. I believe the Plaintiff did not respond to that offer and on 27th November 2008, the Defendant made a payment into Court in the sum of £43,618.15, under Rule 62 of the Royal Court Civil Rules 2007.

19. By letter also dated 27 November 2008, but not sent until Friday 28 November 2008, the Defendant made a further offer of £60,000 inclusive of benefits so, in effect, the offer was in the region of £58,500, plus recoverable costs. That offer was to remain open only until 10.00 am on the following Monday 1st December 2008, which was one week before the trial was due to commence. The Plaintiff did not respond to the offer and did not make any counter-proposals.

20. When interest has been calculated and added to the amount of the Judgment, the Plaintiff's award will be worth in the region of £46,000. With the benefit of hindsight, it can now be seen that the Defendant had a more realistic view of the value of the claim than the Plaintiff. Indeed, with the exception of the initial "derisory" offer, I would not be surprised if the Plaintiff now regrets that he did not accept any one of the offers put forward by the Defendant.

21. In his written submission, Advocate Dunster referred to the case of *Carver v BAA [2009] 1WLR 113*, in which a Plaintiff beat the Defendant's payment into Court by the sum of only £51. The Court of Appeal upheld the decision of the judge at first instance who found that the extra £51 gained was more than offset by the irrecoverable cost incurred in continuing to contest the case. So he concluded that the judgment award was not "more advantageous" than the offer for the purposes of Rule 36.14(1)(a) of the CPR.

22. In paragraph 27 of his judgment, Ward L J quoted the following observation of Sir Thomas Bingham MR in *Roache v News Group Newspapers Limited [1998] EMLR 161, 168 - 169*:

> *"The judge must look closely at the facts of this particular case before him and ask: who, as a matter of substance and reality, has won? Has the Plaintiff won anything of value which he could not have won without fighting the action through to a finish? Has the Defendant substantially denied the Plaintiff the prize which the Plaintiff fought the action to win?"*

23. Turning to the case before me, the Plaintiff won on liability in respect of the second of the two accidents for which he sought to hold the Defendant responsible. He lost on several other issues which Advocate Strappini described as "collateral issues" which were significant in the computation of his loss. I am prepared to accept that he has bettered the offer of £40,000 made on 2nd July 2008, although that may be close run when one takes into account any irrecoverable costs he may have incurred, plus the stress and anxiety he endured thereafter.

24. It is more difficult to say that he has bettered the payment into Court and the offer in the same amount which preceded it on 12th November 2008. However, I am prepared to give the Plaintiff the benefit of the doubt and to focus instead on the offer of £60,000 which is dated 27th November (but was communicated to the Defendant's Advocate verbally and in writing on 28th November) and was available for acceptance only until 10.00 am on 1st December. The value of the Court's award clearly falls some way short of the value of that offer.

25. Advocate Strappini submitted that I should take no notice of the offer, essentially, for several reasons. He argued that as it was not made under Rule 62 of the 2007 Rules, it should not confer on the Defendant the beneficial consequences to which it would have been entitled if the offer had been made in accordance with the Rules. As the date of the letter is the same as the date of the payment into Court, he argues the payment into Court should be the one that is considered and the offer, or proposal as he called it, of £60,000 should be ignored. Secondly, he argues that the offer was open for acceptance for such a short period of time that it should not be treated as a serious offer.

26. Advocate Strappini also asked me to take account of the manner in which the proceedings had been conducted by the Defendant, especially during the period when proceedings were being conducted on its behalf by insurers and later by a firm of

English Solicitors (I should perhaps add that I was told what the insurance position is in relation to this claim. I do not propose in this judgment to refer to it as my decision will be the same whether or not the Defendant is covered by insurance).

27. Advocate Strappini referred to unhelpful and difficult tactics adopted by the defence team which he considers were designed to cause material disadvantage to the Plaintiff. Such allegations were strenuously refuted by Advocate Dunster. I have given them further thought, as I said I would, and in particular I have re-read the appendix attached to Advocate Strappini's Skeleton Argument in which these matters are set out in some detail. In my view, Advocate Strappini was right to conclude that they are not such as to enable him to argue that the Defendant has conducted the matter unreasonably, scandalously, frivolously, vexatiously or has otherwise abused the process of the Court in such a way as to invoke the Court's powers under Rule 83(2)(b) of the 2007 Rules to order full or partial indemnity costs.

28. Advocate Strappini also stopped short of alleging that his client was prejudiced by any inequality of arms and he did not seek to argue that the Defendant's conduct had prejudiced the Plaintiff to the extent that he was not prepared for the trial of the case.

29. I can understand why the Plaintiff feels aggrieved by the manner in which the proceedings were defended at times. However, I do not think there is anything in the conduct of the Defence case in this matter that would justify a special costs order. Litigation can be a very painful, stressful and unpleasant experience although it will be no consolation to the Plaintiff to make that observation.

30. The present proceedings commenced before the introduction of the 2007 Rules. I would hope that similar proceedings commenced after the introduction of those Rules would be dealt with differently, especially as all parties are required to help the Court to further the overriding objective in Rule 1. I have not been told that any attempts were made to mediate the present case or to try to resolve it other than through the court and that is a disappointment. I cannot say that mediation would have been successful, but I am sure it would have given each of the parties a better understanding of how their opponent saw the issues and their respective merits.

31. I do not agree with Advocate Strappini's argument that as the offer was not made under Rule 62 of the 2007 Rules, it should not be treated as if it was made under that Rule. I am guided by the commentary in the 2008 White Book on Part 36 Offers to Settle and, in particular, a passage at paragraph 36.1.1 commenting on the new procedures for Part 36 offers:

> "*The need therefore to resort to a Calderbank Letter…… has been largely removed. ……However it should be noted that although the existence of a Calderbank type letter may be a very important consideration in the exercise of the court's discretion with regard to costs and is a fact which the court is*

required to take into account when exercising such discretion (CPR, r. 44.3) it is not to be equated with a part 36 offer".

32. Similarly, I am of the view that although a *Calderbank* or "Without Prejudice save as to Costs" offer in Guernsey does not carry with it the full consequences of a payment into Court or offer to settle under Rule 62. Nevertheless, it is an important consideration in the exercise of the Court's discretion with regard to costs. It is for the Court, in the exercise of its discretion, to decide how much weight to attach to a *Calderbank* letter in the circumstances of the particular case with which the Court is concerned.

33. In my view, it does not matter that the £60,000 offer made in the present case coincided with the date of the payment into Court of a lesser amount. The two were separate and distinct and either one of them was open to acceptance by the Plaintiff in accordance with its terms which, in the case of the £60,000 offer, meant it must be accepted prior to 10.00 a.m. on 1st December.

34. I have little sympathy with Advocate Strappini's argument that the offer was only open for a short period of time. Having received two previous offers, he was aware that the Defendant valued the claim at a substantially lower figure than the Plaintiff was seeking. The parties were a week away from trial and in the exercise of his duties to his client he must, in my opinion, have formed a view as to what level of offer he would advise his client to accept, or at least seriously consider. He should not have needed much time to decide how to advise his client on the offer. If his client need more time to consider the advice he could asked for an extension of time. Or, if he felt the offer was close but not quite high enough he could have asked for more time. Instead, Advocate Strappini did not respond to the offer.

35. Quite properly, Advocate Strappini did not disclose what advice he gave his client in relation to the offer and I would not expect him to do so. He admitted communicating the offer to his client, as he was required to do under his professional duties. His client chose to reject the offer. He was close to trial; he had a good idea of the expenses that would be involved in pursuing a hearing to a conclusion. He knew the consequences of rejecting the offer if he was not successful in doing better at trial. In my view, he must bear those consequences.

36. I do not reach this decision lightly. I accept, as Advocate Strappini argued, that his client was an honest man who believed in the reasonableness of his claim and pursued it in good faith to trial. I do not believe for a moment that he unduly exaggerated his symptoms or his losses. He may have held an unrealistic view of his prospects but I am sure his views were honestly held. I am sure that the amount he has recovered is substantially lower than he had hoped for and he may now regret refusing the offers made and the costs that he has incurred in obtaining judgment.

37. Unfortunately, those are the consequences of litigation. These are the risks that a litigant faces. Indeed, if his Advocate had not made a late amendment to plead a

breach of statutory duty giving rise to strict liability, the claim might have failed totally and the costs consequences might have been even more adverse.

Conclusion

38. My order as to costs is that the Plaintiff will recover all the costs incurred by him up to and including 1st December 2008. Those costs include any expenses in respect of the trial for which he would have been liable even if the offer had been accepted on 1st December. For example, any cancellation fee he would have had to pay to his expert witness and the Court fee for reserving a trial date shall be recoverable from the Defendant.

39. The Plaintiff shall pay to the Defendant its recoverable costs incurred after 1st December 2008. For the avoidance of doubt, the costs payable in respect of the Defendant's expert witness shall be the total costs payable in respect of him attending to give evidence in Guernsey less any cancellation fee that the expert would have been entitled to receive if the trial had been cancelled on 1st December.

40. As I have said, in respect of interest, interest shall be payable on general damages at the rate of 2 per cent per annum from 16 February 2005 to the date of trial and on special damages at 3 percent per annum from the date they were incurred in March 2004. I hope counsel can agree the figures but if not, they may come back.

41. Each party shall bear its own costs in respect of the hearing on interest and costs.

