Judgment 17/2012

Woodbourne Trustees Ltd and Generali Worldwide Insurance Company Limited
Civil Action File No 993
Royal Court
20th March 2012

Applications for interest on costs and disbursements (see judgment 3/2011)

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 20th day of March, 2012 before Richard Southwell, Esquire, Q.C., Lieutenant Bailiff

In the matter of WOODBOURNE TRUSTEES LTD ("Plaintiff") and GENERALI WORLDWIDE INSURANCE COMPANY LIMITED ("the Defendant");

WHEREAS on the 13th day of March, 2012 THE COURT heard Advocate A.M. Ozanne for the Plaintiff and Advocate J.E. Roland for the Defendant and heard submissions as to whether interest in respect of costs for the period before the Judgment of the 6th day of December, 2011 ("the said Judgment") is payable and ADJOURNED the matter for written Judgment to be handed down in due course;

THE COURT this day handed down a written Judgment for the said decision in the terms attached hereto which:

1. Found that the parties never reached a binding agreement on interest in respect of costs for the period before the said Judgment; and

2. Directed the parties to decide whether to settle or to resume argument on whether the Court has jurisdiction and power to make an order in favour of the Plaintiff in respect of interest on costs for the period before the said Judgment ("Issue 2"), and, if so, whether an order in favour of the Plaintiff in this respect should be made and in what amount; and

3. Reserved costs so far incurred on the present application for subsequent decision if and when Issue 2 is brought before the Court for determination and if either party wishes such costs not to be reserved, brief written submissions are to be exchanged and filed within one week of the handing down of this Judgment.

A J Nicolle
Her Majesty's Deputy Greffier

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

ORDINARY DIVISION

BETWEEN

WOODBOURNE TRUSTEES LTD

a company incorporated pursuant to the laws of Bermuda

Plaintiff

and

GENERALI WORLDWIDE INSURANCE COMPANY LIMITED

Defendant

Before Lieutenant Bailiff Richard Southwell QC

Advocate for Plaintiff: A M Ozanne

Advocate for Defendant: J Roland

Judgment handed down: 20th March 2012

JUDGMENT

1. The substantive judgment of this Court was delivered in draft on 6 December 2010 and formally handed down on 17 January 2011. For the purposes of costs, the date that judgment was delivered has been treated as 6 December 2010. On 17 January 2011 I heard applications for (*inter alia*) costs, and a short judgment was handed down on 20 January 2011. Since then costs and disbursements have been dealt with by agreement and paid, as has also the matter of interest on costs to the extent that interest was payable in respect of the period since judgment.

2. The question whether interest for the period before judgment is payable in respect of costs remains in dispute. On 13 March 2012 (over a year since the previous judgment was handed down) I heard an application by the Plaintiff filed on 1st November 2011 in respect of such pre-judgment interest on costs. The issues arising in this respect appear to me to be these:

    (1) Whether an agreement was reached between the parties during 2011 under which such pre-judgment interest on costs is payable (as the Plaintiff contends), or under which no such pre-judgment interest on costs is payable (as the Defendant contends). This issue logically divides into two sub-issues:

        (i) whether any agreement was reached between the parties at all; and

(ii) if an agreement was reached, whether or not one term of the agreement provided for payment of pre-judgment interest on costs.

(2) If no agreement was reached,

(i) whether this Court has jurisdiction and power to make an order in favour of the Plaintiff in respect of pre-judgment interest on costs; and

(ii) if this Court has such jurisdiction and power, whether an order in favour of the Plaintiff in this respect should be made, and if so, in what amount.

3. I heard full argument on Issue (1). Though Issue (2)(i) was the subject of some submissions on the Defendant's behalf, it was not fully argued. If I find that no agreement was reached, then Issue (2) as a whole will have to be the subject of a further hearing and a further judgment, unless of course the parties succeed in disposing of the need for such a further hearing by a compromise agreement. Putting this in context, the total of the sums paid by the Defendant already in damages, interest and costs must be well in excess of US$1.5 million (or its equivalent in pounds sterling). But the amount of pre-judgment interest on costs is stated by Miss Ozanne to be £54,112.01 as at 13 March 2012. The disparity between this small total amount still in dispute and the costs incurred already in this present application is likely to be stark.

4. As indicated in the second sentence of paragraph 3 above Miss Roland briefly addressed the question in Issue 2(i) whether this Court has jurisdiction and power to award pre-judgment interest on costs. She did so because in her submission the starting point for considering Issue (1) is that this Court has no such jurisdiction and power. I cannot decide Issue 2(i) at this stage, not having heard full argument from both sides on it; but I bear in mind in considering Issue (1) that on the Defendant's side it is submitted that there is no such jurisdiction and power in this Court, whereas the Plaintiff will be contending that such jurisdiction and power do exist.

5. In the affidavits placed before the Court on behalf of the Defendant a number of references were made to instructions or lack of instructions from the Defendant to its Advocates. As I pointed out to Miss Roland, such references ran the risk of waiving litigation immunity in respect of the instructions which were actually given by the Defendant; and therefore the introduction of such references might be thought to be unwise. In any event, whatever might be the Defendant's instructions or lack of instructions would in my judgment (and as Miss Ozanne submitted) be wholly irrelevant to the task I have now to undertake of analysing the email and letter communications between the two firms of Advocates from 10 February 2011 onwards.

6. In the course of the submissions, reference was made to the following:

(1) Paragraph 139 of the judgment of 6 December 2010 in which reference was made to the claim by the Plaintiff for interest before and after judgment.

(2) The rival skeleton submissions filed for the hearing in January 2011 in which the Plaintiff sought pre-judgment interest on the capital sums awarded by the December 2010 judgment, and the Defendant did not challenge the amounts claimed, and in which no claim was made for pre-judgment interest on costs and disbursements. In my judgment this is understandable because the issues as to pre-judgment interest on costs and disbursements would not arise until the time came when the Court had to consider the amounts of costs and disbursements and the amounts of interest on them.

(3) Paragraph 25 of the January 2011 judgment which dealt with the agreed figures for pre-judgment interest on the capital sums awarded, and paragraph 26 which

stated that post-judgment interest would have to be paid by the Defendant at the statutory rate of 8% on costs and disbursements of the Plaintiff.

(4) The decision of the House of Lords in *Sirius International Insurance Company v FAI General Insurance Ltd* [2004] UK HL 54 in which the House of Lords emphasised the need to search for the commercially realistic meaning of words used in a contract, rather than the literal meaning which might be wholly unrealistic. I note that this Court was referred only to the brief extract published in the Times Newspaper, and not to the full report of the decision which is readily obtainable from the BAILII website. References should not be made to newspaper reports when the full text of a decision is available.

(5) An extract from Chitty on Contracts dealing with methods of contract interpretation as laid down in recent House of Lords and Supreme Court decisions, including *Sirius*.

(6) The Guernsey Royal Court decision in *Brownstone Insurance (Guernsey) Ltd (in liquidation).*

(7) *KR et al v Bryn Alyn Community Holdings Ltd* [2003] All ER(D) 101, an irrelevant decision of the English Court of Appeal.

(8) *Buckley v Ronez Ltd* 2009-10 GLR 120 Collas DB.

(9) An extract from the section of Pothier's Treatise on the Law of Obligations containing (*inter alia*) in his 7th Rule for the Interpretation of Agreements the "*contra proferentem*" rule in a form similar to the rule in English law.

I have taken all these into consideration, though in the end it seems to me that the position is clear on the face of the letters and emails which have to be interpreted.

7. By a letter of 10 February 2011 Miss Ozanne for the Plaintiff sent to Advocate Jeremy Wessels for the Defendant an offer of settlement in respect of costs, to which there would be added the disbursements of the Plaintiff, and "post judgment interest at the statutory rate of 8% on its costs and disbursements from 6 December 2010, until the date of payment."

8. Miss Ozanne's letter included the offer of an undertaking by the Plaintiff not to seek adverse publicity arising from this Court's judgment on the substantive issues. That judgment is available to any member of the public. At the hearing I questioned whether it is appropriate for such an offer to be made not to give adverse publicity to the judgment of the Royal Court as part of an approach designed to secure a compromise of a claim. That is a question which the Guernsey Bar may wish to consider.

9. Advocate Peedom of Mourant Ozannes replied after long delay on 12 April 2011 asking for some further details of the Plaintiff's costs, and offering an initial payment towards costs of £200,000.

10. Miss Ozanne wrote on 19 April 2011, agreeing to supply more details than had been requested, accepting the offered initial payment and withdrawing the offer to undertake not to publicise the judgment.

11. Mr Peedom wrote a preliminary response on 21 April 2011, and then on 6 May 2011 wrote agreeing on behalf of the Defendant to pay the sums for costs and disbursements set out in Miss Ozanne's letter of 10 February 2011 "plus interest at the statutory rate of 8% from 6 December 2010 until the date of payment" (ie post judgment interest), conditional on a written undertaking by the Plaintiff not to seek any adverse publicity arising from the substantive judgment.

12. I note that at that stage the parties were agreed on the financial settlement in respect of the Plaintiff's costs, and this included only post-judgment interest, and no pre-judgment interest, but the question of publicity remained outstanding.

13. On 1 June 2011 Miss Ozanne wrote rejecting the settlement proposed on 6 May 2011, complaining of the Defendant's conduct, but not indicating any different terms.

14. By the letter dated 24 June 2011 Mr Peedom repeated the offer of 6 May 2011, and apparently accepting that the non-publicity undertaking was not reinstated. He also sent a cheque for the initial payment of £200,000.

15. Miss Ozanne responded by an email of 11 July 2011, and I set out the text of this email:

> "***Woodbourne v Generali***
>
> *There have now been several exchanges in relation to the without prejudice offer to settle costs and disbursements in this matter.*
>
> *Our client's original offer is contained in the attached scanned documents being a letter from this firm dated 10 February to Advocate Wessels, followed by a clarifying email providing breakdowns of figures (again sent to Advocate Wessels) on 11 February.*
>
> *As you will recall the offer in relation to confidentiality has since been withdrawn by my client, a position your client (admittedly reluctantly) accepts.*
>
> *We are now instructed to accept your client's offer to settle the costs and disbursements made in response to the above letter and email in the amounts as detailed below:*
>
> ***Costs***
>
> *This is accordingly an agreement to accept costs (exclusive of disbursements) in the sum of £344,777.44 up to 31st December 2010 and from then until now as per the attached schedule (being a further £12,612.24 being 80% of £14,765.30). This makes a total of £357,389.68.*
>
> ***Disbursements*** *(are all stated exclusive of interest which must accordingly be added) to be paid as follows:*
>
> *Court fees and other miscellaneous disbursements - £20,407.54 (to 31st December 2010) + £9,394.76 (1 January to date as per attached schedule).*
>
> *LiveNote - £7,745.93.*
>
> *05/12/2011*
>
> *Paul Hubbard - £7,200.81*
>
> *James Watlington – US$11,104.13*
>
> *Craig Wilkey – UA$11,200.00 plus airfare of $907.55 and also $1300 for his hotel and travelling costs*
>
> *Graham Cottingham - £24,819.56*
>
> ***Total: £69,568.60 + US$24,511.68***
>
> ***Interest***

> *In addition post judgment interest will be added at the statutory rate of 8% on costs and disbursements from 6 December 2010, until the date of payment in full and final settlement.*
>
> *We confirm receipt and clearance of your cheque for £200,000.00 (two hundred thousand) on account of the above.*"

The fourth paragraph contains the words "*We are now instructed to accept your client's offer …… in the amounts as detailed below."* This seems to me to be an erroneous statement, since this email in the terms set out above did not coincide with what Mr Peedom had specified. Miss Ozanne submitted that under the heading "*Disbursements*" the reference to "*interest*" was to pre-judgment interest, since later under the heading "*Interest*" the words "*In addition post judgment interest will be added ……from 6 December 2010……*" was a provision for interest in addition to the interest already specified, which therefore had to be pre-judgment interest. This was, Miss Ozanne submitted, the point in the negotiation at which pre-judgment interest was first specified. Miss Roland submitted that a straightforward reading of the email indicated that all the references to interest were to post-judgment interest. In my judgment the wording used by Miss Ozanne was ambiguous and could be read either way. If Miss Ozanne's reading were correct this was on any view a counter offer and not an acceptance of Mr Peedom's offer. But in my view it was not in any event a clear statement of acceptance, since it introduced a figure for costs after 31 December 2010 in addition to any introduction (if any) of pre-judgment interest.

16. That was the view of Mr Peedom which he set out in his email of 13 July 2011. On the same day Miss Ozanne by email expressed doubt as to whether she had been making a counter offer.

17. On 26 July 2011 Mr Peedom agreed that the Defendant would pay the amounts set out in Miss Ozannes email of 11 July 2011, but requiring reinstatement of the undertaking as to publicity.

18. On 27 July 2011 Miss Ozanne emailed asking for confirmation that the Defendant would pay "*interest also as set out in our letter*". If by the word "*interest*" here Miss Ozanne was intending to refer to both pre- and post-judgment interest, the failure to spell this out made this email also ambiguous.

19. On 4 August 2011 Mr Peedom replied that interest would be paid on the specified amounts of costs and disbursements, except that the Defendant would not be willing to pay interest on the Plaintiff's professional fees incurred from 1 January 2011 to date, and he made the offer conditional on the giving of the non-publicity undertaking. Clearly interest on costs incurred from 1 January 2011 onwards would be post-judgment. Miss Ozanne submitted that otherwise the reference to interest included pre-judgment interest, because what was being agreed by the Defendant was "*interest*" as referred to in her email of 11 July 2011 which included pre-judgment interest. In my judgment the parties at this stage were not of one mind about interest. The word "*interest*" as used in the email of 11 July 2011 was ambiguous, and it seems likely that Miss Ozanne thought pre-judgment interest was included whereas Mr Peedom thought that only post-judgment interest was under consideration.

20. On the same day (4 August 2011) Miss Ozanne sent an email asking for confirmation that the rate of interest was 8%. She submitted that this question would not have been asked if only post-judgment interest was involved, since 8% was the statutory rate for post-judgment interest and no question about this would have been needed or appropriate. On 5 August 2011 Mr Peedom confirmed that "*the interest rate being offered is the statutory rate of 8%*". Miss Roland submitted that these words show that Mr Peedom was referring only to post-judgment interest. I agree. It seems therefore that the parties were not on the same track.

21. On the same day (5 August 2011) Miss Ozanne replied by email, seeking to accept Mr Peedom's offer, in these terms:

> "*I am instructed to accept your client's offer which is now to be regarded as binding. Our understanding of the offer (which we state for information and which is not intended to be a counter offer) is for a principal amount of legal costs (exclusive of disbursements) in the sum of £344,777.44 up to 31st December 2010 (plus interest on those costs at 8%) and for legal costs from 31st December until now (being a further £12,612.24 such sum however not attracting any interest).*
>
> *This makes a total of legal costs of £357,389.68 (exclusive of interest payable only until 31st December 2010 as stated above).*
>
> *We will inform you of the interest calculation unto 31st December asap.*
>
> *Disbursements (are all stated exclusive of interest which must accordingly be added) to be paid as follows:*
>
> *Court fees and other miscellaneous disbursements to date - £69,568.60 and US$24,511.68 with interest payable at 8% on all disbursements.*
>
> *Again we will let you have the interest calculation to date asap.*
>
> *Settlement is conditional upon Woodbourne (as Plaintiff as per your offer) agreeing (as it hereby does) to provide an undertaking that it will not seek adverse media publicity arising from the judgment. For the avoidance of any future doubt Mr Fergus McCann has never been our client.*"

This email did not in fact clarify the position in relation to interest. The references to "*interest payable only until 31st December 2010*" and to the "*interest calculation unto 31st December*" appear to include pre-judgment interest, since the post-judgment period would be only from 6 to 31 December 2010. But there is no explanation as to why post-judgment interest was to stop at 31 December 2010. In my view this email muddled the question of interest payable with the apparently agreed formula that only costs incurred down to 31 December 2010 would bear interest. The email did not amount to an acceptance of an existing offer by the Defendant, and was in reality yet another counter-offer.

22. There was then further long delay in the negotiation until 14 October 2011 when Miss Ozanne wrote again in these terms:

> "*I apologise for the delay in letting you have the interest calculations to 30 September 2011 and attach them now:*
>
> 1. *80% of the costs recoverable as at 31 December 2010 is £344,777.44 – the related interest is £64,897.43 at £75.56 per day.*
>
> 2. *80% of the costs recoverable to 30 June is £12,612.24 – agreed no interest to run on this figure.*
>
> 3. *80% of the costs recoverable from 1 July 2011 to date is £1,094.04. There is currently £260,00 unbilled time on file – agreed no interest runs on these figures.*
>
> 4. *The disbursements in Sterling are at £60,488.60 less £182.36 (as a result of our internal reconciliation exercise in your client's favour as figure was originally £69,568.60) total £60,306.24. We assume your client will agree this reduced sum.*
>
> 5. *The related interest is a s follows:*
>
>   a) *£20,539.94 – interest to 30 September is £2,814.35 at £4.50 per day*

b) Graham Cottingham £24,819.565 – interest to 30 September is £2,053.64 at £5.44 per day

c) Live Note £7,745.93 – interest to 30 September is £516.11 at £1.70 per day

d) Paul Hubbard £7,200.81 – interest to 30 September is £456.12 at £1.58 per day.

6. The disbursements in Dollars are agreed at $24,481.68 (again reconciliation has led to a reduction in this figure from $24,511.68 which reduction we assume your client will agree).

a) James Watlington $11,104.13 – interest to 30 September is $688.76 at $2.43 per day

b) Craig Wilkey $13,377.55 – interest to 30 September is $794.52 at $2.93 per day.

Your client has, of course, already paid £200,000 on account.

We look forward to receiving your client's final payment in relation to the balance of the principal outstanding and interest after which this long extant matter will have concluded."

23. This letter of 14 October 2011 was subjected by each of the Advocates to detailed analysis. In the second line the word "*attach*" appears merely to be a reference to what is set out below. As to item 1 it is unclear how the interest figure of £64,897.43 was arrived at. Miss Ozanne suggested that it represented the result of a complicated series of calculations taking the date on which each item of costs was incurred as the start point for a separate interest calculation; but if so, the end date of these calculations is left uncertain. Miss Roland suggested that it represented no more than a calculation of 8% on £344,777.44 over a period from 24 May 2009 to 30 September 2011. She had taken the date of 30 September 2011 since that was the date used by Miss Ozanne later in the letter in relation to disbursements. But the date of 24 May 2009 has no rational basis for a starting point, and it is improbable that this was the way the figure of £64,897.43 was arrived at. However, it seems clear that this figure did include pre-judgment interest, and that this would have been clear to Mourant Ozannes at the time. In relation to the interest on disbursements to 30 September 2011 Miss Ozanne told me that the start date in each case was when the disbursement was paid; and it appears that some of the start dates, if not all, were before the judgment date of 6 December 2010, and so pre-judgment interest was included. The sums claimed in this email represented a different offer by the Plaintiff and was in my judgment another counter-offer.

24. There followed a conversation between Mr Peedom and Miss Ozanne as described in paragraph 10 of Mr Peedom's affidavit (which is not apparently challenged by Miss Ozanne):

"*10. I recall reviewing the interest calculations contained in that letter on the date it was received and determining that the Plaintiff's calculations were vastly different. On that same date, I telephoned the Plaintiff's advocate, Ms Alison Ozanne and I enquired how interest on the Plaintiff's costs had been calculated, as it was not clear from the letter from AO Hall. Ms Ozanne said to me words to the effect that she believed that her client had calculated those costs and that it included pre-judgment interest, but that she would check. I asked for the basis upon which she considered her client was entitled to pre-judgment interest and she also said that she would check her file and the judgment and contact me.*"

25. Following this conversation Miss Ozanne sent two emails on 14 October 2011 to Mr Peedom (though to a different email account). In these she made clear that the 8% interest to be paid

on costs and disbursements was, as part of the "*Agreement reached between the parties*", to apply both pre and post judgment, and referred to the earlier emails of 11 July and 4 and 5 August 2011 showing that such agreement had been reached. On 24 October 2011 Mr Peedom replied by letter, in which he stated (*inter alia*):

> "*At no time have we negotiated the payment of interest on this basis [ie as including both pre- and post-judgment interest]*."

He then asked to be shown where in the Court's judgments entitlement to pre-judgment interest on costs was to be found.

26. On 27 October 2011 Miss Ozanne replied in a long letter setting out her view of the history of the negotiations, and how the Plaintiff contended that agreement had been reached for prejudgment interest to be included. Mr Peedom replied on 31 October 2011 contending that there was no basis for the suggestion either that pre-judgment interest had been considered or that it had been agreed. On 7 November 2011 Mr Peedom by letter set out the further sums for costs, disbursements and interest which the Defendant accepted as being payable, and so far as concerned interest, only post-judgment interest was included. Thereafter the Defendant paid further sums of £239,858.10 and US$26,110.70 which were the remaining sums it accepted to be due and payable; receipt was acknowledged by Miss Ozanne as being on account of monies due to the Plaintiff, but not in full and final settlement. The application to this Court had already been launched on 1 November 2011.

27. In the light of the above letters and emails I have reached the clear conclusion that the parties never achieved a binding agreement on interest. The Plaintiff contends that there was an agreement to pay both pre- and post-judgment interest. The Defendant contends that there was an agreement to pay only post-judgment interest. Both these contentions fail. In my judgment no final agreement was ever achieved, and the parties engaged in negotiations which could not result in a final agreement because of the lack of clarity in the many offers and counter-offers made by them. The Plaintiff through Miss Ozanne thought that it had made clear that pre-judgment interest was part of the overall agreement being negotiated, but the wording used was ambiguous, until it was spelled out clearly on 14 October 2011. The Defendant through Mr Peedom failed to pick up the signals that the Plaintiff was seeking to include pre-judgment interest, and so failed to make its position clear also until October 2011, when it became apparent that the parties were not agreed on interest. Out of the tangled wording of the parties' emails and letters no binding agreement on interest is to be found.

28. It will now be for the parties to decide whether they wish to settle, or to resume argument on Issue (2). As I have indicated, the sum in issue on interest was apparently only £54,112.01 at 13 March 2012. It will be for the parties to consider whether further costs are to be incurred in this matter. As regards the costs so far incurred on the present application, I propose to reserve those costs for subsequent decision if and when Issue (2) is brought before the Court for determination. If either party wishes to argue for such costs not to be reserved, brief written submissions are to be exchanged and filed within one week of the handing down of this judgment.

