Judgment 59/2003

Cantermerle Investments Limited v Durand Limited and Johnson – Royal Court (Civil action file 500) 9th October, 2003

Civil action – settlement – fulfilment of guarantee – delay – award of interest prior to judgment

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 9th day of October, 2003 before Alan Robin Winston Hancox, Esquire, E.G.H., C.B.E., Lieutenant Bailiff; sitting alone.

In the matter of

CANTERMERLE INVESTMENTS LIMITED

Plaintiff

-v-

DURAND LIMITED

First Defendant

And

WILLIAM NEVILLE HEATON JOHNSON

Second Defendant

Whereas on 20th August, 2003, the Lieutenant Bailiff considered an application for summary judgment in the terms attached hereto and heard thereon Advocate C.A. Tee, Counsel for the Plaintiff and William Neville Heaton Johnson in person;

The Lieutenant Bailiff this day gave judgment in the terms attached hereto and:

1. AWARDED judgment in favour of the Plaintiff in the sum of £150,000 as prayed;
2. ORDERED the Defendants pay to the Plaintiff interest at eight per cent from the 31st May, 2003 and 10th June respectively until this day.

S. M. D. ROSS
Her Majesty's Deputy Greffier.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

ORDINARY DIVISION

Between:

In the matter of

CANTERMERLE INVESTMENTS LIMITED

Plaintiff

-v-

DURAND LIMITED

First Defendant

and

WILLIAM NEVILLE HEATON JOHNSON

Second Defendant

Judgment

1. In the present action before the Court (the Second Action) the Plaintiff Company has claimed £150,000 from the First Defendant Company and the Second Defendant (Durand) under a guarantee executed by Dr. Johnson pursuant to a Settlement Agreement of 30th January this year (the Settlement) whereby Durand agreed to pay Cantermerle £250,000 by instalments of £100,000 on 28th February, 2003, and £150,000 on 31st May, 2003.

2. The consideration stated in the Agreement of 30th January was the irrevocable and final withdrawal of a previous claim, against Durand only, which was the subject of an action commenced by a Cause tabled on the 25th August, 2000 (the First Action), and which, in turn, was based on promissory notes for two amounts of £50,000 and one of £65,000 as recited in that Cause. The promissory notes arose from five loans totalling £165,000 made by Cantermerle to Durand between September, 1996, and February, 1998.

3. The first instalment due under the Settlement was duly paid as recited in paragraph 12 of Advocate Tee's supporting Affidavit of 16th July. However, Durand having defaulted on the second instalment due on 31st May, the Plaintiff sued the Defendants jointly for £150,000 in the Second Action commenced by Cause filed on 13th June, 2003, Dr. Johnson being joined as Guarantor for having failed to comply with Carey Olsen's formal demand of the 9th June on behalf of the Plaintiff. The sum claimed is split between two applications for Summary Judgment against both the Defendants, dated 25th July and 15th August, 2003, brought under Rule 17 of the 1989 Rules, for £138,000 and £12,000 respectively.

4. The reason for the separation of the two amounts appears in correspondence passing between Advocate Wessels of Ozannes, who were then acting for the Defendants (and appear to have done so for Durand from an early stage in the First Action) Advocate Tee and M/s Donnelly of Carey Olsen, and KPMG's Tax Department, in May and early June of this year. The correspondence related to the supposed (I use the word advisedly) incidence of Guernsey income tax on the interest element of the sum payable under the Settlement. If it was exigible then, said Mr. Wessels in his letter of 6th May, his client (meaning Durand) would be legally obliged to withhold £12,000 as the estimated maximum tax liability that would accrue on the interest element.

5. Accordingly by their letter of 11th June, two days before Carey Olsen's threatened proceedings Ozannes sent Durand's post-dated cheque for £138,000, stating, *inter alia*, that the

funds needed to defray the liability under the Settlement were not yet to hand, that they had deducted the £12,000 and that:

> "The cheque is dated for 27 June 2003 when my client expects funds to be available.
>
> In the circumstances of the matter my client asks your client to agree to defer the proceedings to allow time for the cheque to clear and to engage with us in respect of an approach to the Income Tax office in order to obtain clearance in respect of the Settlement Agreement and any interest element therein."

This was backed up by a letter written in Christian name terms to Dr. Johnson from KPMG advising that Durand should withhold £12,000 by way of tax unless the Administrator of Income Tax confirmed otherwise.

6. This request was roundly rejected by M/s Donnelly in her letter of 12th June which made adverse comments on the advice from KPMG, in particular that it did not refer to the Settlement Agreement (I think this must mean the *contents* of the Agreement since KPMG's letter opens as follows:

> "I have been asked to set out our views on the tax position in respect of the interest element of the settlement agreement with Cantermerle."

and follows with the advice to withhold tax 'on such sums as represent interest'), that, in any event, any liability to tax was *res inter alios acta*, as between Durand and the Income Tax Authority and could not affect the commitment by Durand (and therefore by Dr. Johnson as Guarantor) to repay the full balance of £150,000 to Cantermerle. It was for Durand to settle the tax liability, if it existed, and not to saddle Cantermerle with Durand's obligation.

Nevertheless, after the proceedings were in train, but effectively without prejudice to them, Carey Olsen took two important steps, namely

(1) They paid in the cheque for £138,000 on the due date, but it was returned by HSBC (on whom it was drawn) very shortly after with the endorsement 'Payment Stopped: Awaiting confirmation: Please represent.' It does not appear to have been re-presented. By then Ozannes were no longer on the record, as Dr. Johnson explained at the hearing that he found the legal costs were getting out of hand and 'in despair' had resolved to handle the case in person.

(2) They wrote independently to the Administrator of Income Tax on 31st July enclosing, *inter alia,* KPMG's letter of 10th June and querying the advice therein. On 11th August they received his reply to the effect that the £250,000 due under the Settlement was wholly capital in nature and that it should accordingly be paid gross and without deduction. Carey Olsen sent the Administrator's letter by hand to the Defendants on 12th August and renewed their demand for the immediate payment of the total outstanding amount of £150,000 plus full indemnity costs.

7. At the Interlocutory Court on 25th July the application for Summary Judgment in respect of the £138,000 was set for Review on 15th August and for hearing on the 20th. The day before the Review Carey Olsen filed the application for Summary Judgment for the £12,000, and both applications were consolidated by Order on the 15th August.

8. Early on the 19th Dr. Johnson informed H.M. Deputy Greffier that the case had been settled, and faxed Advocate Tee to say that he had effected the transfer of funds to Carey Olsen's client account. He followed this up with a fax at 12.52 p.m to Mr. Ross and to M/s Donnelly to

say that £150,000 had been transferred to Carey Olsen's account at 11.24a.m. At 11.43 Carey Olsen sent another ultimatum to Dr. Johnson reiterating that which they had said on the 12th August, and adding that they would seek to recover interest as well as costs. This clearly means interest at Court rates, in view of their Application the same date claiming full indemnity costs and interest from the date of the default.

9. Thus, when the consolidated applications came on for hearing on the 20th the capital sum due had been paid. Dr. Johnson said in Court that the reason he had countermanded the cheque was because he was bewildered by the turn of events and also that he needed clarification on the tax issue and considered it was best to settle that matter first. He added that far from his conduct being vexatious, he was the one who had been vexed and he had been inhibited from settling the matter earlier, largely because of the provocative and acrimonious manner in which Carey Olsen's had handled the case.

10. M/s Donnelly subsequently wrote to the Court on 23rd September abandoning the Application insofar as it related to indemnity costs, by which time I had embarked upon this Ruling, so I am now strictly concerned only with the matter of interest, submissions on Cantermerle's recoverable costs being reserved, at Carey Olsen's request, until delivery of this Ruling. However that which I have said, and am about to say, is relevant to the case, inasmuch, as if Paragraph 1 of the Application of 19th August was still live I should, subject to hearing Dr. Johnson further and any witnesses he might have wished to call on behalf of the Defendants, have felt this is a very strong case for the award of full indemnity costs to the Plaintiff. In particular I do not agree that the case was badly handled by Carey Olsen. True M/s Donnelly pursued the claim with vigour and on each occasion when a query arose sought to dispose of it decisively. In my view they had every right, even duty, to do so in view of the Defendants' conduct, especially the stopping of the cheque for £138,000.

11. Reverting to the prayer for interest, Miss Tee relied on Section 1 (1) of the Judgments (Interest) (Bailiwick of Guernsey) Law 1985 which provides:

> "In any proceedings in the Court for the recovery of any debt…..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 the Court thinks fit on the whole or any part of the debt……for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:……."

Section 2 then provides that the rate of interest on a judgment debt shall be 8% per annum which may be recovered by the judgment creditor as part of the judgment, and that is the rate now sought by the Plaintiff as being appropriate to the period between the cause of action and the judgment.

12. There can be no doubt that the date of the cause of action so far as Durand is concerned is the 31st May, 2003, and I so find. So far as Dr. Johnson is concerned Clause 2 of the Guarantee provided that the Guarantor
(a) unconditionally guaranteed the *due and punctual* performance of all Durand's obligations under the Settlement, which had been executed contemporaneously therewith, and (b) that he agreed to pay *on demand* all sums of money which had then become due and payable. Carey Olsen by their letter of 9th June, formally demanded payment from Dr. Johnson of the second instalment of £150,000, by 4 p.m on 10th June, making it clear that proceedings would follow in the event of non-compliance. This was a lawful demand, clear and unequivocal in its terms, and stated at the outset that it was a demand for payment. I therefore have not the slightest hesitation in finding that the cause of action against the Second Defendant arose on the 10th June, 2003.

13. Reverting now to the history of this case the clear impression I receive is that of repeated indulgences by Cantermerle towards Durand Ltd. The first set of indulgences was the acceptance of the three promissory notes, in effect, in lieu of the indebtedness created by the five loans. It is also relevant to note at this juncture that according to paragraph 6) of the Niances and Pretentions

in Durand's Amended Defence filed in the First Action on 18th May, 2001, Dr. Johnson was the originator of Durand, which was formed in 1990 in order to develop intellectual property projects, and that he and his family were at all material times its controlling shareholders. It is a matter of record that he has been a Director of Durand since 1st January, 2001.

14. The inception of the matter appears to have been the negotiation of a loan facility of £200,000 from Cantermerle by one Nicholas Branch (who was the subject of a request for evidence on Commission emanating from this Court and addressed to the High Court in England on 12th December, 2001) in return for shares in Durand. The Defence filed in the First Action claimed that the promissory notes were invalid, but did admit to receiving three of the five loans alleged by the Plaintiff, namely those made in January, June and November of 1997, totalling ££90,000, but denied the receipt of the other two, totalling £75,000. Whatever the merits of the respective claims of the parties to it the First Action was unequivocally extinguished by the Settlement.

15. Therein lay the latest indulgence. The interest due at 8 per cent on the three promissory notes as at 31st July, 2000, shortly before the First Action was tabled, totalled £47,908.27, making, together with the principal sums, £212,908.27, which is the sum recited in the Settlement as being claimed in the First Action, the forbearance to sue for which formed the consideration (together with the Option to require Cantermerle to sell its shares in Durand) for the obligation which Durand thereby undertook to pay £250,000 to Cantermerle by way of the instalments stated. This sum exceeded the indebtedness by £37,091.73, which, however, as I have already said, was not regarded as income for tax purposes.

16. After considering the relevant correspondence it appears to me that the query regarding the liability to deduct the £12,000 was a red herring. It was first raised in Advocate Wessels' letter of the 6th May. The first reference to Section 48 of the Guernsey Income Tax Law appears in his letter of 29th May. The opening words of sub-section (1) state that where a non-resident person (Cantermerle is registered in Jersey) is liable to tax in respect of <u>any income</u> his agent in Guernsey (if he has one) shall be chargeable with that tax on his behalf. As M/s Donnelly pointed out in her letter of 12th June, the amount due under the Settlement was a lump sum and there is no provision anywhere within the four corners of the Agreement for the payment of interest.

17. As regards the advice tendered by KPMG it is true that the suggestion that Durand's auditors should provide a letter to support the supposed statutory obligation to withhold tax came from Carey Olsen. However there is no evidence to show the context in which that advice was given. Neither the Defendants nor their former Advocates vouchsafed to the Court the letter or content of the conversation which gave rise to KPMG's letter of 10th June, so as to indicate how the issue had been presented to the Accountants. In other words, to show the framework into which the advice could be placed. If the contents of the document of 30th January had been fully explained or made known to KPMG they would not, in my view at any rate, have referred to 'interest' and the 'interest element', because nowhere does the document mention either.

18. I draw an adverse inference from the Defendant's failure to provide evidence as to the circumstances in which KPMG's advice was given. I reject his explanation that his expressed desire was to get the tax matter resolved first because there was and is no warrant for reading into the Settlement Agreement a provision for retention for income tax purposes since it is plain from the document itself that no income arises. In my judgment the issue was interposed in order to gain time and amounted to a delaying tactic. Coupled with this is the undoubted fact that payment of the cheque, even for the £138,000 was countermanded, followed by the fact that the full amount was paid literally at the twelfth hour before the hearing of the consolidated Applications. The Defendants pushed the Plaintiff to the very brink of the hearing, which they must have known would increase costs and, furthermore, Dr. Johnson informed the Deputy Greffier over the telephone at 9.35a.m on the 19th that the case had been settled, when clearly it had not, because M/s Donnelly had made it crystal clear that her client would also be claiming interest and costs.

19. The foregoing, in my judgment, reveals a pattern of delaying tactics and underhand conduct within the *dictum* of Mance J. in Cepheus Shipping Corporation v. Guardian Royal Exchange Assurance PLC [1995] Lloyds Law Reports at page 648, and, as I said earlier, amounts to defending the claim, and both applications, unreasonably within the meaning of Rule 48 (4) (b) of the 1989 Rules, and would amply justify the award of indemnity costs if that part of the Application was still extant. As it is I order that the Defendants do pay to the Plaintiff interest at 8 per cent from the 31st May, 2003, and the 10th June, 2003, respectively until Judgment, which is today's date.

A.R.W.Hancox
Lieutenant Bailiff
9th October 2003

