

**EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
BRITISH VIRGIN ISLANDS
(COMMERCIAL DIVISION)**

CLAIM No: BVIHC (COM) 2014/0062

BETWEEN:

JSC VTB BANK

Claimant

and

(1) ~~ALEXANDER KATUNIN~~

(2) SERGEY TARUTA

Defendants

Determined on the basis of written submissions:

Mr. Grant Carroll and Mr. Daniel Mitchell of Ogier for the Claimant
Mr. Adrian Francis and Mr. Carl Moran of Maples for the Defendant

2022 January 31

JUDGMENT

- [1] **JACK, J [Ag]:** On 29th November 2021, I determined a number of supplemental issues. This followed a judgment delivered orally on 15th June 2021 where I held that the claimant was entitled in principle to a judgment against the defendant (“Mr. Taruta”) for the judgment debt ordered to be paid by the Meshchansky District Court of Moscow in its judgment of 28th February 2014 (as varied by a subsequent decree of the same Court dated 24th March 2014). The precise amount due was stood over for determination on 25th November 2021.
- [2] On that date, the parties agreed that the sum due under the Meshchansky judgment was US\$29,993,498.25. I stood over further an issue as to whether interest under the

Judgments Act 1907¹ should run from 15th June 2021 or from 25th November 2021. This is my determination of that issue.

[3] There is also an issue as to what sum should be ordered by way of an interim payment as to costs, which I deal with below.

[4] Further Mr. Francis on behalf of Mr. Taruta sought to make submissions on the form of the order appointing receivers. However, I have already approved that order. I am not minded to vary the order in the absence of any formal application to that effect. Likewise there is no formal application before me for a stay of execution, which is the last of the matters raised by him.

The date from which interest runs

[5] I turn then to the date from which interest should run. The **Judgments Act 1907** provides that:

“...every judgment debt shall carry interest at the rate of five per centum per annum from the time of entering up the judgment, or from the time of the commencement of this Act in cases of judgments then entered upon and not carrying interest, until the same shall be satisfied, and such interest may be recovered in the same manner as the amount of such judgment.”

[6] Mr. Francis submits that it is only once the judgment debt has been quantified that interest starts running. He relies on the House of Lords decision in **Thomas v Bunn** for this proposition. Lord Ackner said:²

“The wording of [the English provision] clearly envisages a single judgment which constitutes the ‘judgment debt’. This ‘judgment debt’ can only arise where the judgment itself quantifies the sum which the judgment debtor owes to his judgment creditor. The language of the section does not envisage an interlocutory judgment, but only a final judgment.”

¹ Revised Laws of the Territory of the Virgin Islands, cap 35.

² [1991] 1 AC 362 at p 380.

- [7] The law in relation to costs orders, Mr. Francis submits, is anomalous. Interest under the **Judgment Act** runs from the date of the order awarding costs (the *incipitur* rule) not from the date on which costs are quantified: **Stichting Nems v Gitlin**,³ applying **Hunt v R M Douglas (Roofing) Ltd**.⁴ It should not, he submits, be applied generally.
- [8] Mr. Carroll by contrast says that **Thomas v Bunn** is a case on damages and indeed specifically damages for personal injury. Their lordships were hearing three appeals together. In each there had been interim judgments on liability with quantum subsequently to be determined at trial. The House of Lords determined that interest under the English **Judgments Act 1838**⁵ only ran from the judgment on the quantum of damages. Different rules, he says, apply to claims for debt.
- [9] I do not agree with Mr. Carroll. In my judgment his proposed differentiation between claims for damages and for debt overlooks Lord Brightman's observations in **Thomas v Bunn**, where he referred to:⁶

“the decision in **Attorney-General v Lord Carrington**.⁷ This case is of respectable antiquity. It was decided only five years after the **Judgments Act 1838** was passed, and therefore at a time when the pre-existing practice against which the Act falls to be construed, must have been well present in the minds of all concerned. In that case an information had been filed seeking to recover two annuities from the estates of the second Lord Carrington. By a decree made in December 1842 the lands were declared chargeable with one of the annuities and the master was directed to take an account of the arrears. It was also ordered in the same decree that the amount so found due should be paid by the defendant into the bank. The master made his report in April 1843. It was contended by the informant that under sections 17 and 18 of the Act the defendant was liable to pay interest on the sum certified calculated from the date of the decree down to the date of the master's report. The defendant, however, argued, at p 461: ‘that there was no decree whereby any sum of money was payable, at least until the amount had been ascertained by the master.’ Lord Langdale MR found for the defendant and held that he was not chargeable with interest during this period. This case has stood for 150 years without, so far as I am aware, exciting any adverse comment, and I see no compelling reason for departing from its principle today.”

³ [2019] ECSCJ No 402 (Jack J).

⁴ [1999] 1 AC 398

⁵ 1 & 2 Vict c 110 section 17.

⁶ At p 371.

⁷ (1843) 6 Beav 454.

- [10] In England, the law has moved on. As Leggatt J (as he then was) explained in **Involnert Management Inc v Aprilgrange Ltd**:⁸

“There has been a further relevant statutory change since **Hunt’s** case was decided. At the time of that decision section 17 of the **Judgments Act** provided for judgment debts to carry interest ‘from the time of entering up the judgment’ — which was construed as meaning the date on which the judgment was pronounced. When the [English] Civil Procedure Rules were introduced in April 1999, section 17 was amended so as to provide for interest to run ‘from such time as shall be prescribed by rules of court’. [English] CPR 40.8(1) provides that, where interest is payable on a judgment pursuant to section 17 of the **Judgments Act 1838**, ‘the interest shall begin to run from the date that judgment is given unless ... (b) the court orders otherwise’. That rule accordingly gives the court power to order interest under the **Judgments Act** to run from a later date than the date of the costs order.”

- [11] The Eastern Caribbean rules were less prescriptive than the English RSC. Order 42 rule 3 of the Eastern Caribbean RSC provided:

“(1) A judgment or order of the Court or of the Registrar takes effect from the day of its date.

(2) Such a judgment or order shall be dated as of the day on which it is pronounced, given or made, unless the Court or the Registrar, as the case may be, orders it to be dated as of some other earlier or later day, in which case it shall be dated as of that other day.”

- [12] This flexibility is reproduced in our CPR where rule 42.8 provides:

“A judgment or order takes effect from the day it is given or made, unless the court specifies that it is to take effect on a different date.”

There is, however, no express power given by primary legislation to direct that an order take effect from a different date to that on which it is pronounced.

⁸ [2015] EWHC 2834 (Comm), [2015] 5 Costs LR 813.

[13] Mr. Francis submits that the absence of any statutory underpinning to CPR 42.8 means that I do not have the power to order that interest run from 15th June 2021. In an earlier judgment in the **Stichting Nems v Gitlin** litigation,⁹ Adderley J was asked to make a charging order absolute. This was opposed on the basis that there was no statutory basis for making a charging order, so the Court had no power to make such an order, despite the terms of CPR Part 48: see **Levy v Ken Sales & Marketing Ltd** on a similar point in the Privy Council on appeal from Jamaica.¹⁰ The judge held that in the absence of primary legislation giving the Court the relevant jurisdiction, he had no power to grant a charging order.

[14] An appeal was allowed against the decision of Adderley J.¹¹ This was on the ground that there was statutory underpinning in this Territory for the charging order regime in CPR Part 48. The UK **Judgments Act 1838** and **Judgments Act 1840**¹² were in force in this Territory (a point not brought to Adderley J's attention) and these provided a statutory basis for the making of a charging order absolute. The Court of Appeal did not, however, cast any doubt on the principle that the CPR cannot change the substantive law. I thus agree with Mr. Francis' submission that the CPR *on its own* cannot justify a backdating of the order quantifying the amount of the judgment.

Judgments *nunc pro tunc*

[15] That, however, is not the end of the matter. Even if there is not a statutory power to backdate a judgment, there may be a common law power. In **Re MG Engineering and Consulting Ltd**,¹³ whilst sitting in Gibraltar, I had to consider whether I could retrospectively change an order which had fixed a liquidator's remuneration at a very low figure.¹⁴ I held:

“24. A general power, if it exists, must, in my judgment, be sought in some separate and identifiable common law power. There was a common law power to make orders *nunc pro tunc* (i.e. backdating the order). This was recognized in the first

⁹ [2018] ECSCJ No 351.

¹⁰ [2008] UKPC 6.

¹¹ [2019] ECSCJ No 186.

¹² 3 & 4 Vict c 82.

¹³ 2015 Gib LR 354, www.gibraltarlaws.gov.gi/judgments/in-the-matter-of-mg-engineering-and-consultancy-limited-671

¹⁴ An appeal was allowed on a ground not argued before me, but without casting doubt on the passages of my judgment cited: 2016 Gib LR 113, www.gibraltarlaws.gov.gi/judgments/in-the-matter-of-mg-engineering-and-consultancy-limited-684

civil procedure rules, the **Hilary Rules 1834**,¹⁵ rule 3, and was repeated (with minor drafting amendments) in rule 56 of the **Hilary Rules 1853**,¹⁶ which provided that— “...all judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in term or vacation, when signed, and shall not have relation to any other day; but it shall be competent for the court or a judge to order a judgment to be entered *nunc pro tunc*.”

25. Pollock B in **Hemming v Batchelor**¹⁷ said: ‘I refer to this rule [rule 56] for the purpose of drawing attention to the word “competent.” This word is explained by what was the practice before any such rule of court existed. It was then the practice of the courts, if either party died pending the time taken for argument on a motion in arrest of judgment or for a new trial, to enter judgment as of the term in which judgment would otherwise have been given. This judgment *nunc pro tunc* was a fiction of which the Courts availed themselves for the purpose of aiding the party whom they thought entitled to judgment.’

26. The backdrop to this fiction was the rule of substantive law that personal actions died with the plaintiff (*actio personalis moritur cum persona*). (The rule has been abolished, save in respect of defamation, in Gibraltar: **Contract and Tort Act 1960**, section 12(1)¹⁸.) If a case was tried at *nisi prius* and the jury gave judgment for the plaintiff, then there might be a substantial delay before any motions brought by the defendant were heard by the full court in Westminster. If the defendant’s motions were unsuccessful but the plaintiff had died in the meantime, it was considered unjust not to allow the judgment to be backdated to the time when the plaintiff still lived.

27. Rule 56 was carried over into the [English] RSC. In the RSC’s last iteration in 1999, RSC Order 42 rule 3(2) provided that the court could order a judgment or order ‘to be dated as of some other earlier or later day, in which case it shall be dated as of that other day.’ This procedural provision did not survive into the [English] CPR [which applies in Gibraltar]: see [English] CPR 40.7(1) and 40.2(2)(a).

28. There do seem to have been some other limited circumstances in which the courts gave judgment *nunc pro tunc*. In **Webb v Taylor**,¹⁹ the Act of Parliament under which a bank was incorporated provided that the bank could not sue in its own name but rather had to sue in the name of its ‘public officer’. The action had been begun in the name of the appropriate officer, but by the time judgment had been recovered he had been replaced by another man. The problem only came to light when the defendant (who had been arrested for the debt under a writ of *capias ad satisfaciendum*) took the point. The Court of Queen’s Bench allowed the second officer’s name to be substituted with the order backdated *nunc pro tunc* to the date

¹⁵ Reproduced in the third volume of Nevile & Manning’s King’s Bench Reports.

¹⁶ Reproduced in an appendix to the first volume of Ellis and Blackburn’s Queen’s Bench Reports.

¹⁷ (1875) LR 10 Ex 54 at p 58.

¹⁸ Likewise in this Territory: Causes of Action (Survival) Act 1951 section 2(1), Revised Laws of the Virgin Islands Cap 10. Exceptions to the abolition of the common law rule are made for defamation claims and certain matrimonial claims.

¹⁹ (1843) 1 Dow & L 676.

of the judgment, thereby validating the writ of *capias ad satisfaciendum*. The rationale appears to be that the real plaintiff throughout was the bank; the misnomer of the public officer was an immaterial procedural matter which could and should be rectified. Under section 11 of the **Common Law Procedure Act 1852**,²⁰ a plaintiff could apply to renew an originating writ within the period of six months, but there was an issue as to whether the day of renewal was to be counted within or without the six-month period. In **Black v Green**,²¹ the Master refused to renew a writ on the ground that it was one day out of time. The Court of Common Pleas, on a renewed application, considered the Master was wrong not to have renewed, but by the time the matter came before the full court, the six months had on any view expired. In those circumstances, the court ordered that the order be backdated as the only way to do justice.

30. Whether this common law power to backdate orders still survives is not a matter I need to determine. (Arguably the power is a matter of substantive law, which the CPR cannot alter. If there were a split trial of liability and quantum in a libel claim and the claimant died between the two trials, it might be necessary as a matter of substantive law to backdate the judgment on quantum.) However, regardless of whether the common law power to backdate orders still exists, it is, in my judgment, limited to these very specific types of cases. None of these includes cases where the court (as here) is being asked to vary the order of a judge of concurrent jurisdiction. I hold that there is no general power at common law to permit judgments and orders to be backdated.”

[16] Mr. Francis relied on this latter passage for the proposition that the current case did not fall within any of the common law exceptions. He relied on the House of Lords decision in **The Mayor, Aldermen and Councillors of the Metropolitan Borough of Stepney v John Walker & Sons**²² for the proposition that “the doctrine of *nunc pro tunc* cannot be said to be engaged to achieve a variation of an order to include a right which was not capable of being availed as at the date of the earlier order... [T]he Claimant's claim for interest was not a right available to it as at the date of the Recognition Order, as the claim had not at that stage been quantified, therefore interest was incapable of being quantified.”

[17] The **Stepney** case concerned local authority rating law and procedure. At the relevant time premises entered in the rating list as “industrial hereditaments” paid much lower rates than ordinary hereditaments. The local authority had refused to enter the premises in the 1929

²⁰ 15 & 16 Vict c 76.

²¹ (1854) 15 CB 262.

²² [1934] AC 365.

list as industrial and the ratepayer appealed to Quarter Sessions against that decision. The ratepayer lost on appeal but a special case was stated for the consideration of the King's Bench Divisional Court. Before that special case could be heard, the local authority published the 1930 rating list. Premises could only appear in the 1930 list as industrial hereditaments if they were classified as such in the 1929 list. Since the premises were not listed as such in the 1929, they could not appear in the 1930 list as industrial hereditaments. The premises in question were therefore not listed as industrial in the 1930 list. (One of the hereditaments had been listed in error as industrial in the 1930 list. This was subsequently corrected. Nothing turns on this for current purposes.) The ratepayer did not appeal the 1930 listing. The Divisional Court subsequently upheld the ratepayer's submission on the case stated and directed that the four hereditaments be listed as industrial in the 1929 list. By this time the 1930 list had become final. The right of appeal to Quarter Session had been lost in respect of the 1930 list.

- [18] The Court of Appeal made an order of mandamus ordering the local authority to correct the 1930 list in the light of the King's Bench decision in respect of the 1929 list. The House of Lords reversed that decision. The ratepayer, their lordships held, should have appealed the 1930 list to Quarter Sessions. The ratepayer had had another remedy, the appeal to Quarter Sessions, of which it had not availed itself, so mandamus should not have been granted. Mr. Francis, however, relied on this passage in the speech of Lord Russell of Killowen, where he said: ²³

"In truth the *nunc pro tunc* theory has been stretched to breaking point in the present case... I do not understand how it can apply so as to create retrospectively a duty which did not in fact or in law exist at the relevant date. Still less do I understand how on the *nunc pro tunc* theory an order of the Divisional Court, which was made in regard to the [1929] List, can create retrospectively a duty in relation to the [1930 List]. In my opinion it is not possible to say that the Borough Council failed at any time to discharge any public duty, and accordingly the essential foundation for mandamus is lacking."

²³ At p 384.

[19] In my judgment, the facts of the **Stepney** case are too far removed from the present for the case to assist. A feature of the rates was that, if the rateable value of a hereditament was changed, that affected the liability of all the other ratepayer in respect of the total due to be paid by the body of ratepayers. The effect of the Court of Appeal's grant of mandamus was to increase the liability of other ratepayers in the 1930 list, years after those ratepayers would have made their payments. There is nothing in the speeches in the House of Lords which casts doubt on the principles stated in **Hemming v Batchelor**.

[20] Mr. Carroll submits that the practice in the Court of Chancery followed that in the common law courts. In this, he seems to be right. In **Turner v London & South Western Railway Co**,²⁴ Sir Charles Hall VC quoted from **Chitty's Archbold's Practice of the Court of Queen's Bench**²⁵ and held:

"The Court will in general permit a judgment to be entered *nunc pro tunc*, where the signing of it has been delayed by the act of the Court. Therefore, if a party die after a special verdict, or after a special case has been stated for the opinion of the Court, or after a motion in arrest of judgment, or for a new trial, or after a demurrer set down for argument, and pending the time taken for argument, or whilst the Court are considering their judgment, the Court will allow judgment to be entered up after the death *nunc pro tunc* in order that a party may not be prejudiced by a delay arising from the act of the Court."

[21] Mr. Francis' submission that the "claim for interest was not a right available to it as at the date of the Recognition Order, as the claim had not at that stage been quantified" is, with respect, a circular argument. If the quantification is backdated, then there is no difficulty calculating the interest.

[22] There is nothing in the legislation in this Territory which points to the common law power to backdate orders being abolished. The exercise of the power in the current case would in my judgment fall well within the principles of **Hemming v Batchelor**. Accordingly, there is in my judgment a common law power to backdate judgments.

²⁴ (1874) 17 Eq 561 at p 566.

²⁵ 10th Ed (1858) at p 1502; 12th Ed (1866) at p. 1572, both edited by Samuel Prentice.

[23] This in my judgment is a sufficient jurisdictional basis to support the *vires* of CPR 42.8. Accordingly, this procedural rule is sufficient (despite the absence of any statutory changes as occurred in England) to give me the power to order that interest run from 15th June 2021 instead of 25th November 2021.

Whether to backdate

[24] In deciding whether to make such an order, an important consideration here is the compensatory principle discussed by Christopher Clarke J (as he then was) in **Novoship (UK) Ltd v Mikhaylyuk**.²⁶ In that case, the decision as to the principal owed was determined on 14th December 2012, but determination of the pre-judgment interest was adjourned to 18th January 2013. (The sums involved were even more staggering than in the current case, so the five weeks difference in the date from which **Judgments Act** interest ran was significant.) On the latter date the judge held:

“40. Depending on the facts of the case, [the pre-judgment] interest may have been compounded, as it is in the present case at quarterly rests. [The claimant] is then entitled from the date of judgment to interest on the sum of the principal and the interest. But any compounding ceases. Simple interest on the interest down to the date of judgment is some recompense for the absence of further compounding after the date of the judgment.

41. The following circumstances seem to me of relevance in the present case. Firstly, there has been a short interval of time between the determination of the principal and the determination of the interest.

42. Secondly, most of the interest is being compounded with quarterly rests, as agreed by the parties...

43. Thirdly, there has been no culpable delay.

44. Fourthly, it would not, I think, have been practical for the court to have dealt with interest on 14 December, having regard to the size of the issues then to be dealt with and the complications in relation to interest.

45. Fifthly, I have decided to award **Judgments Act** interest from 14 December, thus bringing any compounding to an end.

²⁶ [2013] EWHC 98 (Comm), appeal dismissed (but without this point being argued) [2014] EWCA Civ 908, [2015] 1 QB 499.

46. In those circumstances, it seems to me that the right order is that interest shall run from 14 December. If I were to order **Judgments Act** interest to run on the principal from 14 December, but for there to be no interest on interest running until tomorrow, the claimants would in my judgment be unacceptably prejudiced. Compounding would have ceased on 14 December, without the benefit of interest on interest thereafter.”

[25] The purpose of our CPR 42.8 is to ensure that no injustice arises from the date on which a judgment is given. In the current case, there is no means by which pre-judgment interest can be awarded at all. The current case is thus *a fortiori* the situation in **Mikhaylyuk**. This consideration alone is sufficient in my judgment to justify an order that the judgment for the judgment sum be treated as entered up on 15th June 2021, so that interest runs from then. The total interest for the period has been calculated at some \$660,000. Even if these facts were not sufficient, it is (as I said in my judgment after the hearing on 25th November 2021) remarkable that the parties were able on that date to agree the judgment sum of \$29,993,498.25 without Mr. Osykin, the bank’s witness, having to give evidence. There is no reason why that agreement on quantum could not have been agreed earlier. It would be wrong to reward Mr. Taruta for delaying the evil day when the debt he owed was quantified.

[26] Accordingly, I shall order pursuant to CPR 42.8 that the judgment quantifying the debt be treated as taking effect from 15th June 2021, so that **Judgments Act** interest runs from that date.

Costs on account

[27] I turn to the application for an interim costs order. Mr. Francis accepts that in principle it is right to make such an order. The sole question is as to the amount to be ordered. The assessment of costs is complicated because originally the bank instructed Conyers. In 2020 it changed representation to Ogier. When this action was commenced in 2014, there were two defendants: Mr. Katunin and Mr. Taruta. Quite a lot of the early work appears to have been in relation to Mr. Katunin rather than Mr. Taruta. Mr. Taruta would not be liable for work solely done in relation to Mr. Katunin. Mr. Francis — rightly in my judgment — submits that on the interim application for costs I should take a conservative approach to Conyers’ fees, because of this uncertainty. I do not accept, however, that nothing should be awarded

on an interim basis in respect of Conyers' fees. Some work must relate to Mr. Taruta alone or to Mr. Katunin and Mr. Taruta jointly.

[28] The amounts claimed in the schedule of costs filed by Ogier are (a) \$240,587.74 in respect of Ogier's fees; (b) \$1,136.86 in respect of disbursements; (c) \$9,125.78 for an expert report on Russian law; and (d) \$116,475.60 in respect of Conyers' fees. This is a total of \$367,325.95.

[29] In **Sumitomo Mitsui Trust (UK) Ltd and another v Spectrum Galaxy Ltd**,²⁷ I suggested that a proper starting point for consideration of an interim payment should be 70 per cent of the costs claimed, but that this might be moved up or down. In the current case, because of the uncertainty about the extent to which Conyers' fees relate to Mr. Taruta rather than Mr. Katunin, a lower percentage is appropriate. In my judgment an interim payment in the sum of \$200,000 is appropriate. This represents somewhat less than 55 per cent of the total costs claimed.

Conclusion

[30] Accordingly, I order:

- (a) that the judgment quantifying the debt be treated as taking effect from 15th June 2021, so that interest under the **Judgments Act 1907** runs from that date;
- (b) that Mr. Taruta do make a payment on account of costs in the sum of \$200,000;
- (c) that the informal applications for variation of the receivership order and a stay of execution be refused, but without prejudice to Mr. Taruta's right to make a formal application for such relief, if so advised.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

²⁷ [2021] ECSCJ No 626 at [17].

Registrar