

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)**

**GRENADA
CLAIM NO. GDAHCV2016/0144**

BETWEEN:

DERICK STEELE

Claimant

and

PRICKLY BAY WATERSIDE LIMITED

Defendant

Before:

The Hon. Mde. Justice Agnes Actie

High Court Judge

Appearances:

Mr. Gregory Delzin with him Mrs. Michelle Emmanuel-Steele for the Claimant

Ms. Claudette Joseph with her Mr. Ian Sandy for the Defendant

2021: February 24;
October 26;
November 1

JUDGMENT

[1] **ACTIE, J.:** The central issues in this claim are whether the claimant is entitled to interest as damages and whether the claim is statute barred.

The Claimant's case

- [2] On 9th May 2016, the claimant, Derick Steele (Mr. Steele) filed a claim against the defendant, Prickly Bay Waterside Limited (Prickly Bay), a limited liability company, for payment of the sum of US \$728,039.40 in interest as damages pursuant to an agreement and consent order made on 18th May 2007, interest at a rate of 6% per annum, among other reliefs. In response to the claim, Prickly Bay asserts that Mr. Steele is not entitled to interest or interest as damages and in any event the claim is statute barred. In light of the foregoing, the main issue for determination is whether Mr. Steele is entitled to payment of interest in the sum of US \$728,039.40, together with interest at a rate of 6% per annum from the date of filing of the claim to present.

Background

- [3] Mr. Steele and Prickly Bay were parties to a previous claim in GDAHCV2006/0162. On 18th May 2007, the parties entered into a compromise agreement which was reduced into writing and formalized by way of a consent order. The consent order annexed certain agreements, including a sale agreement which is the subject of this claim. Under this agreement, Prickly Bay agreed to purchase Mr. Steele's property situate at L'Anse aux Epines, Saint George, Grenada and the sale was to be completed on 18th May 2009. In accordance with clause 4 of the sale agreement, Prickly Bay agreed to pay interest in the sum of US \$225,000.00 which was calculated on the balance of the purchase price in the sum of US \$2,250,000.00.
- [4] Further, clause 6 of the consent order provided that concurrent with the execution of the sale agreement, Prickly Bay was to provide an irrevocable bank guarantee for payment of the balance of the purchase price. The guarantee was negotiated with British American Insurance Company Limited (BAICO) and the parties entered the consent order.
- [5] On 16th December 2011, Mr. Steele instituted enforcement proceedings against Prickly Bay for the appointment of a receiver and orders for sequestration of assets of its directors. Prickly Bay countered the application claiming that it had complied

with the terms of the consent order by the payment of the balance of the purchase money to BAICO. On 26th August 2015, Henry J granted Mr. Steele's application and ordered (1) an injunction to restrain Prickly Bay from dealing with the property until the appointment of a receiver by the court; (2) the appointment of David Holukoff as a receiver of the income and capital assets of the defendant to obtain payment of the balance of the purchase price, among other reliefs.

[6] Prickly Bay appealed the judgment of Henry J. However, the parties through their legal practitioners engaged in a series of email correspondence between 30th September 2015 and 9th October 2015 proposing settlement. On 4th November 2015, the parties entered into a second consent order before a single judge of the Court of Appeal, Thom JA. The second consent order included a clause which provided that Prickly Bay shall forthwith pay to Mr. Steel the sum of US \$2,475,000.00 being the balance of the purchase price which was paid to Mr Steele on 6th November 2015.

[7] By letter dated 4th January 2016, Mr. Steele through his legal practitioner demanded payment of the sum of US \$728,039.40 being interest as damages from Prickly Bay. By letter dated 18th January 2016, the legal practitioners for Prickly Bay rejected the claim that it was liable to pay interest as damages. Being dissatisfied with the above response from Prickly Bay, on 9th May 2016, the Claimant, Derick Steele (Mr. Steele) filed the extant claim against the Defendant, Prickly Bay Waterside Limited (Prickly Bay), for payment of the sum of US \$728,039.40 in interest as damages pursuant to the agreement and consent order made on 18th May 2007 together with interest at a rate of 6% per annum, among other reliefs.

[8] Mr. Steele avers that he received payment of the sum of \$2,475,000.00 pursuant to the second consent order six years after the due date for payment of the sum under the first consent order. Therefore, Mr. Steele contends that in light of Prickly Bay's breach of the first consent order, he has been deprived of the benefit and use of that money, the benefit of interest which may have accrued and the difference in value

of the count between 18th May 2009 and 6th November 2015. Accordingly, Mr. Steele contends that he is entitled to damages to compensate him for this loss.

Defendant's case

[9] In response to the claim, Prickly Bay in its defence filed on 30th June 2016 asserts that Mr. Steele is not entitled to interest or interest as damages and in any event the claim is statute barred., Prickly Bay denies asserts that there is no contractual, legal or procedural entitlement to interest and states that:

- (1) The parties settled and concluded the action by entering into a consent order in the Court of Appeal dated 4th November 2015 which provided that upon complying with the order “the injunction and receivership orders granted pursuant to paragraph 6 (1) (i) and (ii) of the said order of Henry J dated 26th August 2015 shall stand discharged and the Appellant (Prickly Bay) will have satisfied its obligations in relation to the first respondent (Mr. Steele) pursuant to the said order of Henry J dated 26th August 2015”.
- (2) Therefore, having complied with the consent order before the Court of Appeal, Prickly Bay contends that having met all of its obligations thereunder they were led to believe that the issues between them were finally resolved and there would be no further or fresh action in relation to the consent order of 18th May 2007 and the order of Henry J dated 16th August 2015. In the premises, Mr. Steele is now estopped from re-litigating the matter to assert any entitlement for interest as damages as claimed or at all.
- (3) Notwithstanding the above, Prickly Bay further asserts that:
 - (a) Mr. Steele is not entitled to interest or interest as damages under the consent order dated 18th May 2007, because interest under that agreement was expressed to be in a specific sum which Prickly Bay has already paid;

- (b) Mr. Steele is not entitled to interest in law and it relies on section 27 of the West Indies Associated States Supreme Court (Grenada)¹ for its full meaning and effect;
- (c) The issue of interest was not canvassed before Henry J dated 26th August 2015 neither did Mr. Steele's application include a prayer for interest and accordingly the learned Judge's order did not include any order for payment of interest.

Claimant's evidence

- [10] Mr. Steele in his witness statement avers that he commenced the action in Claim No. GDAHCV2006/0162 to stop Prickly Bay from construction of a block of buildings at the Prickly Bay Marina which were immediately in front of his home in L'Anse aux Epines in the parish of Saint George. Mr. Steele applied for an injunction to restrain Prickly Bay from building in excess of the agreed heights. However, his claim for an injunction was refused by the High Court. Thereafter, Mr. Steele avers that he appealed, but that appeal was unsuccessful. Mr. Steele, then appealed to the Privy Council and was successful on that appeal. Subsequently after, he was offered a settlement by Prickly Bay and after some negotiations, the parties reached a settlement which was entered into a consent order.
- [11] Under the consent order, it was agreed that Prickly Bay would purchase his property situate at L'anse aux Epines for the purchase price of US \$2,500,000.00. Mr. Steele avers that he was paid a deposit in the sum of US \$250,000.00. The balance of the purchase price in the sum of US \$2,250,000.00 together with interest calculated on the balance at the rate of 5% per annum was to be paid to him by completion date of 18th May 2009. The amount of interest due on the completion date would be US \$250,000.00. However, Prickly Bay breached the consent order, since it failed to pay the balance of the purchase price by the agreed completion date.

¹ Cap 336 of the 2010 Continuous Revised Edition of the Laws of Grenada.

- [12] On 16th December 2011, Mr. Steele states that he initiated enforcement proceedings against Prickly Bay to enforce the terms agreed upon. In the application, Mr. Steele avers that he claimed for interest at a rate of 6 % per annum from 18th May 2009. The application was heard on 11th and 12th April 2012 before Henry J. However, before Henry J delivered her decision, Prickly Bay filed an application to join British American Insurance Company Limited as a party to the first claim. On 26th August 2015, Henry J delivered her judgment and ordered an injunction against Prickly Bay, the appointment of a receiver, the payment of the balance of the purchase price by Prickly Bay, among other things. Mr. Steele avers that the legal practitioners for Prickly Bay sent email correspondence to his legal practitioners making an offer to pay the amount ordered by Henry J. The parties engaged in further correspondence between 7th and 9th October 2015.
- [13] Thereafter, Mr. Steele says that a consent order was entered on 4th November 2015, before the Court of Appeal in Grenada Civil Appeal No. 2015/0026 wherein Prickly Bay agreed to pay the balance of the purchase price and there was a mutual understanding that he would have the right to pursue a claim for interest separately. Mr. Steele avers that having regard to the assurance given by Prickly Bay in their correspondence that he was at liberty to pursue his claim for interest in a separate action, he decided to rely on this representation and pursue a compromise without prejudice to his claim for interest.
- [14] On 6th November 2015, Prickly Bay paid the balance of the purchase price some six years, five months and twenty days after the due date agreed in the first consent order. As a result of the delay of six years in payment of the balance of the purchase price, Mr. Steele says that he suffered loss and has been deprived of the benefit and use of the that money and the benefit of the interest which may have accrued in his favour had he invested same. Mr. Steele avers that he received rental income from the property (pool apartment and main house) between 21st June 2014 and 31st August 2016 in the sum of \$180,628.46.

- [15] On 4th January 2016, Mr. Steele through his legal practitioners wrote to Prickly Bay's legal practitioners claiming the payment of the outstanding interest owed in the sum of US \$728,039.40. However, by letter dated 18th January 2016, the legal practitioners for Prickly Bay responded and rejected this claim for interest. In the premises, Mr. Steele claims interest as damages in respect of the Prickly Bay's breach of the first consent order to compensate him for the loss he suffered as a consequence.

Defendant's evidence

- [16] Mr. Richard Lee, a director of Prickly Bay, gave evidence in support of the company. On 18th May 2007, Mr. Steele and Prickly Bay settled a suit GDAHCV2006/0162 on terms contained in a consent order with several annexures thereto (the first consent order). The first consent order included an agreement for sale which provided that Prickly Bay agreed to purchase Mr. Steele's property at L'anse aux Epines. At the time of execution of Agreement B, Prickly Bay was in a position to pay to Mr. Steele the full purchase price for the property. However, Mr. Steele was not in a position to give vacant possession of the property and insisted on a delayed completion date of two years and a licence to occupy for a further twelve months after the completion date.
- [17] Clause 4 of Agreement B provided that Prickly Bay was to pay Mr. Steele interest in the specified sum of \$US \$225,000.00. The interest was calculated at 5% for the specific period of 24 months on the agreed purchase price which was US \$2,250,000.00. Clause 4 of the Agreement B was the entire agreement between the parties for the payment of interest to Mr. Steele. There was never an intention expressed or implied that any additional sum would in future be paid by Prickly Bay.
- [18] Notwithstanding that Mr. Steele was not able to complete the sale, Mr. Steele objected to Prickly Bay holding on to the balance of the purchase price and the interest until he was able to give vacant possession. Mr. Steele insisted that the money be held by a third party in trust for him until the completion date. Therefore,

Mr. Steele demanded that he be provided with an irrevocable guarantee and that the benefit of the guarantee would be immediately assigned to him. The guarantee was provided by BAICO on 18th May 2007 and BAICO insisted on an assignment to Mr. Steele executed on 22nd August 2007.

[19] On 13th May 2009, Wilkinson, Wilkinson & Wilkinson, the legal practitioners for Prickly Bay, requested details of completion for 18th May 2009 as Prickly Bay had complied in full with the consent order by procuring that Mr. Steele held a guarantee from BAICO. However, that request was refused and by the completion date BAICO was already experiencing financial difficulty. Although BAICO fully acknowledged its obligation to Mr. Steele, it failed to pay him the balance of the purchase price that Prickly Bay had paid into them at the Mr. Steele's insistence.

[20] On 16th December 2011, Mr. Steele commenced enforcement proceedings against Prickly Bay. The application sought no relief or contained no prayer for the payment of interest. On 25th August 2015, Henry J granted Mr. Steele's application. However, Henry J's order at paragraph 61 of her judgment does not award interest. Prickly Bay appealed Henry J's judgment. While the appeal was pending, the parties engaged in discussions with a view to complying with the terms of Henry J's order, thereby finally settling the appeal and all related matters with Mr. Steele. Mr. Lee avers that during those discussions Mr. Steele for the first time claimed further interest under the consent order which took him by surprise as there was never any understanding between the parties that interest beyond what was agreed in the said order would be paid. Additionally, Mr. Lee avers that Mr. Steele did not claim interest in his application nor did Henry J make an order for interest.

[21] By email dated 9th October 2015, Mr. Lee avers that Mr. Steele was informed that, although Prickly Bay was prepared to fully comply with the terms of Henry J's order, it would not pay any additional interest because Mr. Steele was not entitled to none. Mr. Steele did not reply to Prickly Bay's said email of 9th October 2015. The parties then proceeded to full and final settlement of the dispute between them. There was

no agreement or understanding between the parties that the settlement was without prejudice to any right Mr. Steele felt he had to separately file an action for further interest. The consent order was entered in the Court of Appeal on 4th November 2015. Under this second consent order, the parties agreed, among other things, that the injunction and receivership orders made by Henry J stood discharged and that Prickly Bay would have satisfied its obligations to Henry J's order.

[22] Additionally, Prickly Bay maintains that Mr. Steele suffered no loss whatsoever. He retained ownership and possession of the property for more than five years after his licence to occupy expired, that is from 17th May 2010 to 12th November 2015. During that period Mr. Steele was free to use the premise to his advantage. Mr. Lee states that Mr. Steele appears to be seeking interest for the period of his personal occupation and that of him family after the licence expired. Mr. Lee avers that when Prickly Bay took possession of the premises on 12th November 2015, there was a tenant renting the property at US \$5,300.00 per month. The tenancy was carried over to Prickly Bay and the premises have been continuously let since then. Mr. Lee avers that had Mr. Steele let the property at a similar rent between 17th May 2010 and 2015 when he transferred it to Prickly Bay, he would have realised net income in excess of US \$300,000.00.

[23] In the premises, Prickly Bay maintains that it is not liable to pay Mr. Steele any further interest, be it interest as damages or otherwise. Prickly Bay paid the said interest and the balance of the purchase price on 18th May 2007 into BAICO and on 6th November 2015 under the second consent order.

Expert Report

[24] On 7th April 2017, Mr. Henry A. Joseph, a chartered accountant by profession, filed his expert report. Mr. Joseph is of the opinion that, having regard to the facts surrounding the non-payment of interest due to Mr. Steele by Prickly Bay and considering the time value of money, Mr. Steele should be compensated for his loss to the extent of US \$665,879.00. Mr. Joseph summarised his conclusions as follows:

- (1) Prickly Bay was obligated to pay Mr. Steel the remainder of the purchase for the property being US \$2,250,000.00 together with interest of US \$225,000.00 totalling US \$2,475,000.00. This amount was settled in full on 8th November 2015 being seventy-seven months after the contracted completion date.
- (2) Generally, the value of a dollar at any date would be lower than what it was worth in the past. This diminution in value is principally the result of inflationary trends.
- (3) The spending power of the funds received on 8th November 2015 would be less than what it would have been had Prickly Bay settled on the due date of 18th May 2009.
- (4) Additionally, due to the late receipt of the funds Mr. Steele has lost the opportunity to invest the funds that were due to him 18th May 2009. There are many ways that these funds could have been invested. A safe form of investment would be with a deposit at a financial institution or in the purchase of Government securities.
- (5) The interest rate at financial institutions varied between one percent (1%) and three percent (3%) per annum. On the other hand, the interest on Government securities varied from four and a half percent (4.5%) to six percent (6%) per annum.

Issues

[25] The following issues are to be determined:

- (1) Whether Mr. Steele is entitled to interest as damages as a result of the Prickly Bay's breach of the agreement and consent order.

(2) Whether Mr. Steele is estopped from claiming additional interest as damages which could have been pursued in proceedings before Henry J and in the consent order entered before the Court of Appeal.

(3) Whether the claim for interest is statute barred.

Discussion and Analysis

Whether Mr. Steele is entitled to interest as a damages

[26] Mr. Delzin, Counsel for Mr. Steele, submits that under the contract which formed part of the consent order of 18th May 2007, it was agreed that Prickly Bay would pay to Mr. Steele, in addition to the agreed purchase price, a fixed amount of interest at the rate of 5% per annum for the period commencing 18th May 2007 to the completion date for the sale of the property being 18th May 2009. Counsel submits that the defendant defaulted in its obligation to complete the sale and to pay Mr. Steele the agreed purchase price and interest.

[27] Additionally, counsel submits that at common law where contracts for the repayment of money expressly provide for the payment of interest, a claimant is entitled to recover interest by way of damages for breach of an obligation to pay even though there was no express agreement for the payment of interest for any period after repayment should have been made. Counsel relies on the learning from the learned authors of McGregor on Damages² and principles set out in **Miliangos v George Frank Textiles (No.2)**³ and other cases⁴.

[28] Counsel submits that Mr. Steele is entitled to recover interest as damages against Prickly Bay on account of its breach of its obligations to pay on the date agreed as effectively Mr. Steele was deprived of the benefit of the monies.

² 15th edition; Ch 14 pg 57.

³ Miliangos v George Frank Textiles (No.2) 1977 QB 489

⁴ Robert Cook v John Fowler J.G. Wood v J. Roberts (1874) L.R. 7 HL 27; Trans Trust S.P.R.L v Danubian Trading Co. Ltd. [1952] 2 QB 297; In re Roberts- Goodchap v Roberts (1880) 14 Ch D 49.

[29] Contrastingly Ms. Joseph, counsel for Prickly Bay submits that it is an established principle of the common law that interest will not be payable on sums that are due under a specific written agreement (such as a consent order) unless the agreement on its face provides for the payment of interest or is implied from usage of trade. This principle was stated in **Page v Newman**⁵ and affirmed in **London Chatham and Dover Rly Co v South Eastern Rly Co**⁶. Counsel submits that these principles remain the position at common law and relies on the learning from the House of Lords authority in **President of India v La Pintada Cia Navegacion SA**⁷.

Statutory and Equitable discretion (common law) to award interest as damages

[30] The text **Chitty on Contracts**⁸ under the rubric “The Award of interest at common law” provides:

“In 1985, the House of Lords in **President of India v La Pintada Cia Navegacion SA** refused to depart from its previous decision in 1893 in **London, Chatham and Dover Railway Co. v South Eastern Railway Co**⁹ which laid down that the common law does not permit the award of interest by way of general damages for delay in payment of a debt beyond the date when it was contractually due. It has, however, always been open to the parties to make express provision in their contract for the payment of interest, which the court enforce (except in situations covered by specific statutory provision). The courts were sometimes prepared to infer an agreement to pay interest where the inference could be based on the course of dealing between the parties or on a relevant trade usage.”

[31] Ms. Joseph submits that the relevant statutory provision would be **Section 27 of the West Indies Associated States Supreme Court (Grenada) Act**¹⁰ (Supreme

⁵ (1829) 9 B & C 378.

⁶ [1893] AC 429.

⁷ [1984] 2 All ER 773 (HL) at pages 779-780 per Lord Brandon.

⁸ Volume 1 at Para 27-137(28th Edition) at page 1346

⁹ [1893]A.C.429

¹⁰ Cap. 336 of the 1990 Revised Laws of Grenada.

Court Act). Further, counsel submits that Mr. Steele has not met any of the 4 elements set out in the **La Pintada** case. Firstly, the position at common law does not apply in the instant case because the first consent order was specific on the question of interest. It did not specifically provide for the payment of additional interest to meet the common law threshold. The second is that this is not an admiralty claim, so the second element set out in **La Pintada** will not apply. The third element will also not apply as this is not a claim in equity but one in law of recovery of interest as damages on the unpaid balance of a sum owed. Fourthly, Section 27 of the Supreme Court Act as it stood when the first consent order was entered on 18th May 2007 will operate to prevent Mr. Steele from claiming interest as damages as pleaded, because there was no specific provision for such additional interest in the first consent order.

[32] In **La Pintada**, Lord Brandon espoused the following principles with respect to a claim for interest as damages in the court's equitable and statutory jurisdictions:

Thirdly, the area of equity. The Chancery courts, again differing from the common law courts, had regularly awarded simple interest as ancillary relief in respect of equitable remedies, such as specific performance, rescission and the taking of an account. **Chancery courts had further regularly awarded interest**, including not only simple interest but also compound interest, **when they thought that justice so demanded, that is to say in cases where money had been obtained and retained by fraud, or where it had been withheld or misapplied by a trustee or anyone else in a fiduciary position.**

Fourthly, the area of statutory law. The relevant statutory provision in force in 1981, when *Tehno-Impex* [1981] Q.B. 648 was decided, was section 3(1) of the Law Reform (Miscellaneous Provisions) Act 1934. That subsection provided:

“(1) In any proceedings tried in any court of record for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment: Provided that nothing in this section — (a) shall authorise the giving of interest upon interest; or (b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or (c) shall affect

the damages recoverable for the dishonour of a bill of exchange¹¹.” (Bold emphasis mine).

- [33] The relevant statutory power to award interest on debts and damages is provided under **section 27 of the Supreme Court Act**.

27. Power of courts to award interest on debts and damages

In any proceedings for the recovery of any debt or damages, in the High Court or the Court of Appeal, the Court **may, if it thinks fit, order that there shall be included in the sum for which judgement is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgement**, but nothing in this section— (a) shall authorise the giving of interest upon interest; or (b) **shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise**; or (c) shall affect the damages recoverable for the dishonour of a bill of exchange. (Bold emphasis mine)

- [34] There has been a slight shift in the principles where the court may allow damages for non-payment of debts subject to the proof of the loss, remoteness of damages rules, obligations to mitigate damages and any other relevant rules relating to the recovery of the alleged losses¹². The court may allow interest where it can be inferred from course of dealing between the parties or where the claimant had actually incurred interest charges, or it may be reasonably inferred in contemplation of the delay. Therefore, the court will examine the circumstances of the case to determine whether it should exercise its discretion.

- [35] Mr. Steele at paragraph 8 of his witness statement averred that ***“in my application I claimed that further interest was to be paid on the balance of the purchase price at the rate of 6% per annum from May 18th, 2009”***. However, the court notes that neither the consent order dated 18th May 2007, nor the judgment of Henry J dated 26th August 2015 contained any order for further interest as a relief. A fair reading of the written judgment of Henry J¹³, where the learned judge reproduced

¹¹ [1984] 2 All ER 773 at pages 779-780.

¹² *Sempra Metals Ltd. v Inland Revenue Commissioners* [2008] A.C. 561

¹³ Paragraph 4 of judgment of Henry J dated 26th August 2015.

Mr. Steele's prayers for relief, reveals that Mr. Steele's application did not contain a prayer for interest as damages or interest at all. Additionally, even if the application did contain a prayer for interest, it is noted that Mr. Steele did not appeal the learned Judge's refusal to award interest.

- [36] A fair reading of the agreement annexed to the first consent order does not suggest that there was an understanding in the parties' dealings that interest would accrue in the event that the balance of the purchase price remained unpaid after the completion date. This was admitted by Mr. Steele at paragraph 4 of his witness statement that *"a deposit of US\$250,000 was paid to me and the balance of the purchase price of US\$2,250,000 together with interest calculated on the balance at the rate of 5% per annum was to be paid to me by the completion date of May 18th, 2009. The amount of interest due on the completion date would be US\$225,000."*
- [37] The court is of the view that the agreement which was crystallised into a consent order dated 18th May 2007 did not contemplate that further interest of 5% per annum would accrue on the balance of the purchase price of US \$2,250,000.00 in the event that the balance remain unpaid after the completion date. There was no such term for further interest in the first consent order. Additionally, the post-judgment interest provision under Section 27A of the Supreme Court Act was not enacted when the first consent order was entered and did not have retroactive effect on previous judgments of the court. Therefore, post-judgment interest did not run-on balance of the purchase price and as such it is not applicable in the circumstances.
- [38] The court notes that Mr. Steele asserts that as a consequence of the default in payment, he has been deprived of the use and benefit of his money and the benefit of any accrued interest on those monies owed to him. Further, the court notes Mr. Steele's evidence that he rented the property and collected over EC \$180,628.46 as rental income between 21st June 2014 and 31st August 2016.
- [39] Contrastingly, Prickly Bay states that when it took over the property on 12th November 2015, there was a tenant renting the property at US \$5,300.00 per month.

Prickly Bay argues that had Mr. Steele let the property at a similar rate from 17th May 2010 to 2015, he would have realised net income in excess of US \$300,000.00. However, the court notes that apart from Mr. Steele's and Prickly Bay's factual assertions of the rental income of the property, no documentary evidence, including rental agreements, rental property appraisals or financial documents were tendered before the court for consideration. Damages to be recovered must be pleaded, proved and would be subject to same to well established principles of remoteness and right to mitigate losses. Therefore, the court is constrained and is not in a position to assess the rental income of the property but can only surmise that the property ought to have been able to generate substantial rental income having regard to the purchase price of USD \$2,500,000.00

[40] Further, it is the evidence, and the court accepts that Mr. Steele requested an irrevocable guarantee from Prickly Bay for the payment of the balance of the purchase price together with agreed interest. This guarantee to Mr. Steele was negotiated between BAICO and Prickly Bay. Prickly Bay asserts and the court accepts that before the balance of the purchase price became due on the completion date, it demanded BAICO to pay the sum of monies as guaranteed. However, BAICO failed or neglected to pay the sums as guaranteed.

[41] This action by BAICO, in the court's view, left Prickly Bay in a precarious position, having paid the balance of the purchase price into BAICO to guarantee its obligation to pay Mr. Steele on the completion date. This default was not contemplated by the parties. The court notes that even Mr. Steele at paragraph 6 of his witness statement avers that: ***"given these guarantee arrangements, which the Defendant complied with, it was not anticipated that there would be a default in payment of the balance of the purchase price"***. Therefore, notwithstanding Prickly Bay's breach of the consent order and agreement by reason of its failure to pay the balance of the purchase price together with interest as agreed, the court is not of the view that Prickly Bay acted in bad faith in light of its position with BAICO failing to pay the agreed monies as guaranteed.

[42] Taking the above facts and evidence in the round, the court is not satisfied that the circumstances surrounding the delay in the payment of the balance of the monies under the agreement/first consent order were of such nature that would require the court to remedy the “*injustice*” to provide Mr. Steele with interest as damages. As indicated earlier damages must be pleaded and proved and would be subject to the rule of remoteness and mitigation. Accordingly, the court is not of the view that the circumstances of this case demand an exercise of its discretion under the common law or statutory discretion under Section 27 of the Supreme Court Act to award interest as damages. In the circumstances, Mr. Steele’s claims for interest are refused.

[43] Notwithstanding the above conclusion the court will address the other issues raised for completeness.

Estoppel

[44] Counsel for Mr. Steele raised the issue of Estoppel and submits that Prickly Bay has by its defence (1) denied there was an “agreement or understanding between the parties that settlement of the claim with the defendant fully complying with the clear terms of Henry J’s order was without prejudice to any right the claimant felt he had to pursue a fresh claim against the defendant.”; (2) averred that Mr. Steele is “estopped from re-litigating the matter or asserting any entitlement for interest as damages as claimed or at all”.

[45] Counsel submits that Mr. Steele relies on statements made in correspondence between the parties leading up to the second consent order of 4th November 2015 that there was a clear understanding and underlying assumption between the parties that the negotiation and entering into of the second consent order was without prejudice to Mr. Steele pursuing his claim for interest.

[46] Counsel contends that an estoppel by convention arose, and Prickly Bay is estopped from seeking to deny this understanding or to defeat this claim by such

denial. Mr. Steele relies on the emails annexed to the claim which he believes expressly disclose the underlying assumption between the parties that led to the agreement of the consent order. Counsel submits that Prickly Bay is bound by the express terms contained in the emails which formed the basis of the underlying assumption and agreement that led to the consent order where the parties agree that the question of the claim for interest would be pursued by Mr. Steele in a subsequent action.

[47] Counsel posits that Mr. Steele's reliance of the emails prevents Prickly Bay from disputing the right of Mr. Steele to bring the claim for interest as damages. It creates, it is submitted, an estoppel by convention. Counsel notes that in the case of **Johnson v Gore Woods**¹⁴, the House of Lords considered that the circumstances of the estoppel by convention could also be an estoppel by representation each having the same effect, that is it would be unconscionable to allow Prickly Bay, to abandon or claim a different state of affairs either in fact or in law. Counsel relies on the learning from **Halsbury's Laws of England**¹⁵, where the learned authorities defined what is meant by estoppel by convention and the case of **Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd**¹⁶.

[48] With respect to the issue of estoppel, Counsel for Prickly Bay argues that the rationale behind Mr. Steele's reliance on the doctrine of estoppel is not clear. Counsel submits that there was no agreement between the parties that Mr. Steele is entitled to additional interest or to maintain this action. Mr. Steele's claim that there was an agreement between the parties that the compromise of the appeal was without prejudice to any right that Mr. Steele had to subsequently claim interest on the balance of the purchase price is incorrect. In fact, Prickly Bay took the view and maintained it throughout the negotiations that Mr Steel had no right to interest over and above that which was stipulated in the first consent order. Counsel says that

¹⁴ [2002] 2 AC 1 at pages 33 C-; 38 H-41 C and 60 H-61 A.

¹⁵ Estoppel (Vol 47(2014))/ 4. Estoppel by Convention para. 368.

¹⁶ [1982] QB 84 at 121. See also *Dixon and Another v Blindley Heath Investments Ltd* [2015] All ER (D).

the second consent order on the appeal represents the entire agreement between the parties in compromise of the appeal. Had the parties reached such agreement as alleged, it would have been reflected in the second consent order as a specific term, especially since the parties vigorously debated the issue.

[49] In the court's view, a fair reading of the email of 9th October 2015 reveals that notwithstanding Prickly Bay's statement that Mr. Steele was at liberty to pursue a claim for additional interest, the court notes that Prickly Bay stated categorically that such a claim had no basis in law and would be vigorously opposed. Given the context in which this statement was written, it does not suggest that Prickly Bay agreed with Mr. Steele that he should pursue a separate claim for interest. The statement suggests the contrary. The statement placed Mr. Steele on notice that Prickly Bay did not agree that he was entitled to any further interest as damages and if he desired to pursue such a claim, it would be vigorously opposed.

[50] Therefore, the court does not accept Mr. Delzin's contentions that the email created an understanding or agreement between the parties that, without prejudice to the settlement, Mr. Steele still had a right to pursue a separate claim for interest as damages. There appears to be no agreement to this end. Further, the court notes that the parties settlement discussions on terms of Henry J's judgment occurred between late September 2015 and early October 2015 during the pendency of the appeal. The email correspondence also reveals that the issue of additional or further interest as damages was very much a live issue between the parties. Those discussions led to a second consent order which was entered on 4th November 2015 with no express or implied provision for the payment of interest. Therefore, the court accepts Ms. Joseph's submission that had those settlement discussions between the parties on the issue of additional interest materialise into an understanding or agreement, such a term would have been entered as a clear term in the consent order on appeal.

[51] Given the above evidence and facts, the court is not satisfied that there was an understanding or agreement between the parties to settle the terms of the Henry J judgment, without prejudice to Mr. Steele right to file a separate claim for interest as damages. In the premises, Mr. Steele's arguments on the principle of estoppel by convention does not arise in the circumstances. Further, the court is of the view that the consent order dated 4th November 2015 before the Court of Appeal discharged and settled the obligations of Prickly Bay under Henry J's judgment of 26th August 2015. There are no special circumstances that give way for this present claim for additional interest as damages. Therefore, Mr. Steele is estopped from litigating an issue which could have or should have been pursued in his 2011 enforcement application before Henry J and in the consent order before the Court of Appeal. The claim accordingly fails on this ground as well.

Whether the claim for interest is statute barred.

[52] In determining whether the claim is statute barred, the issue is whether the claim for interest emanates from a simple interest debt, specialty debt or judgment debt.

[53] Prickly Bay in its defence contended that Mr. Steele's case is statute barred as the cause of action is outside of the six-year limitation period under Section 40 of the Limitations of Action Act. **Section 40 of the Limitations of Actions Act** provides that no action for debt (not on specialty), shall be brought but within six years next after the cause of action.

[54] Conversely, counsel for Mr. Steele argues that the contract between the parties is a contract under seal and the consent order being a contract of record are both considered contracts by specialty. Counsel relies on the authority of **Aiken and others v Stewart Wrightson Members' Agency Ltd and others**¹⁷ and the learning from the authors of **Law of Contracts: Historical Writings in Law and Jurisprudence**¹⁸. The learning provides that:

¹⁷ [1995]3 All ER 449

¹⁸ Vol. 1 (T. Parsons.) Buffalo: William F. Hein & Company 1980 which was extracted from Words and Phrases Legally Defined by Lexis Nexis.

“Contracts by specialty are those which are reduced to writing **and attested by seal** – or, to use the common phrase, contracts under seal, and contracts of record. These last are judgments, recognisances, and statutes staple. **But the term ‘contracts by specialty’ is sometimes confined to contracts under seal.**” (Bold emphasis mine)

- [55] Mr. Delzin submits that the claim is not statute barred as **Section 36 of the Limitation of Actions Act** provides that the applicable limitation period to bring an action on specialties is 20 years. **Section 36 of the Limitation of Actions Act** states:

Limitation of actions of debt on specialties, etc.

“No action of debt for rent upon an indenture of demise, of covenant or debt upon any bond or other specialty, of debt upon any recognisance, or debt upon any award where the submission is not by specialty, for an escape, or for money levied under any writ of execution, and no action for a penalty, for damages, or for a sum of money given to the party grieved by any statute now or hereafter to be in force, shall be commenced but within the periods hereinafter expressed, that is to say: the said actions of debt for rent upon an indenture of demise, of covenant or debt upon any bond or other specialty, and of debt upon any recognisance, within twenty years after the cause of such actions; the said actions by the parties grieved, within two years after the cause of such actions: Provided that nothing herein contained shall extend to any action given by any statute where the time for bringing the action is by any statute not hereinafter mentioned specially limited.” (Underlining supplied)

- [56] Further, it is submitted that actions upon the specialties in this claim include an action for general damages for breach of an obligation comprised thereunder. Mr. Steele was not only entitled to bring an action to enforce Prickly Bay’s primary obligation under the contract but is also entitled to bring an action against Prickly Bay for damages which is considered a secondary obligation¹⁹.
- [57] Mr. Delzin argues that the first consent order dated 18th May 2007 is a specialty debt. Given the learning above the court accepts Mr Delzin’s argument that the contract made under seal is created a binding obligation on the defendant and

¹⁹ Aiken & Ors. v Stewart Wrightson Members’ Agency Ltd and others [1995] 3 All ER 449.

confirmed an interest, right and property²⁰ in the claimant and accordingly attracts the twenty (20) years limitation period. In any event, the present proceedings were filed on 9th May 2016, and the first consent order was dated 18th May 2007 and crystallised into a consent order of the court and has the force and effect of a judgment of the court. Former Chief Justice Byron C. J. in the Court of Appeal case of **Mirsand Town Planning and Architects Limited v Samuel S. Conde Asociados C. Por. A**²¹ *“the prevailing legal principle is that the order being made by consent has contractual force.”*. Therefore, Mr. Steele’s right to bring this action under the first consent order was not extinguished and was well within the twelve-year limitation period pursuant to section 30 of the Limitation of Actions.

[58] However, the claim is for interest for the late payment of the debt on 6th November 2015. Prickly Bay paid the balance of the purchase price some six years, five months and twenty days after the due date agreed in the first consent order. The claimant’s extant claim is for the payment of \$728,039.40 as damages by way of interest for the period of May 18, 2009 to November 6, 2015. The parties were asked to address the court as to whether the provisions of Section 33 of the Limitation of Actions Act was applicable in the circumstances.

[59] **Section 33 of the Limitation of Actions Act** provides that no arrears of rent or interest to be recovered for more than six years. The section reads:

“No arrears of rent, or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, **or any damages in respect of such arrears of rent or interest, shall be recovered** by any distress or action, **but within six years next after the same became due**, or next after an acknowledgment of the same, in writing, has been given to the person entitled thereto, or his or her agent, signed by the person by whom the same was payable, or his or her agent” (my emphasis)

[60] Thus, from the standpoint of the issues, the court is of the view that the limitation period for the filing of action on a specialty debt is twenty (20) years and twelve (12)

²⁰ Chitty on Contracts Para 1-042 (28th Edition)

²¹ BVIHC VAP2000/0020 per Byron C. J. at para 18, page 9.

years on a judgment which binds the debtor's real estate as it applies to mortgages. Mr. Steele's claim on the first consent order and on the judgment, debt is within the limitation period. However, Section 33 is pellucidly clear that an action for the recovery of damages in respect of such arrears of rent or interest shall not be recovered by action but within 6 years next after the same became due. It is the evidence that the defendant, Prickly Bay paid the debt in excess of six years after it became due. The court is of the view that the present action seeking interest as damages is statute barred considering the provision of Section 33. Accordingly, the claimant's claim also fails on this point.

Conclusion

- [61] Henry J's judgment dated 26th August 2015 on the claimant's enforcement proceedings ordered Prickly Bay to comply with the terms of the agreement/consent order to pay the balance of the purchase together with agreed interest. This was a judgment of the court and would have attracted post-judgment interest under section 27A of the Supreme Court Act at the rate of 6% from the date of judgment until the final payment. However, the court notes that the parties settled and discharged Prickly Bay's obligations under Henry J's judgment in the consent order dated 4th November 2015 before the Court of Appeal.
- [62] Additionally, the court notes that the issue of interest on the delayed payment after the completion date under the first consent order was not pursued or canvassed before Henry J or on appeal in the second consent order. There must be an end to litigation. Both parties were represented by counsel, and it had always been open to the claimant to make express provision for the payment of interest on the late payment after the contractual date or to make the claim for damages in the action for the enforcement before Henry J or on appeal.
- [63] Applying the legal principles to the facts of this case, this court is of the view that the claimant is not contractually entitled to accrued interest neither is he entitled to

interest as damages, whether under statute or common law. Accordingly, the claim stands dismissed with costs to the defendant.

ORDER

[64] For all these reasons, it is ordered as follows:

- (i) The claim filed on 9th May 2016 is dismissed and
- (ii) The Claimant, Derick Steele, shall pay prescribed costs to the Defendant Prickly Bay Waterside Limited pursuant to CPR 65.5, unless otherwise agreed.

Agnes Actie

High Court Judge

By the Court

Registrar