IN THE COURT OF APPEAL OF BELIZE AD 2014

CIVIL APPEAL NO 8 OF 2012

BLUE SKY BELIZE LIMITED **Appellant**

v

BELIZE AQUACULTURE LIMITED **Respondent**

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BEFORE

The Hon Mr Justice Dennis Morrison	Justice of Appeal
The Hon Mr Justice Samuel Awich	Justice of Appeal
The Hon Mme Justice Minnet Hafiz-Bertram	Justice of Appeal

Rodwell Williams SC and Mrs J Ellis-Bradley for the appellant
Eamon Courtenay SC and Miss Pricilla Banner for the respondent

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7 November 2014

MORRISON JA

Background

[1] In its judgment in this appeal given on 27 June 2014, the court allowed the appeal and entered judgment for the appellant on its claim in the Supreme Court for $490,202.22, being the price of goods sold and delivered to the respondent. In addition to the claim for the purchase price of the goods, the appellant also claimed $66,437.49, "being the interest at 1.75% per month calculated as at the 22nd October, 2010 and interest accruing until payment in full".

[2] The parties were invited by the court to make written submissions within 21 days of the date of the judgment as regards (i) the "actual amount which the appellant is entitled to recover under the judgment, given in particular the claim for interest at 1.75% per month, calculated as at 22 October 2010, and interest accruing until payment in full"; and (ii) the costs of the proceedings in this court and in the court below. At that time, the court also indicated that, upon receipt of the parties' submissions, these matters would be dealt with by the court on paper, without the need for any further hearing.The appellant's submissions (settled by Mr Rodwell Williams SC) were filed on 18 July 2014, while the respondent's submissions (settled by Miss Pricilla Banner) were filed on 6 August 2014.

Interest

[3] Rule 8.6(3) of the Supreme Court (Civil Procedure) Rules 2005 ('the CPR') sets out what information a claimant who seeks an order for the payment of interest from the court is required to provide in the claim form or statement of claim:

> "A claimant who is seeking interest must –
> (a) say so expressly in the claim form; and
> (b) include details of –
> (i) the basis of entitlement;
> (ii) the rate;
> (iii) the period for which it is claimed; and
> (iv) where the claim is for a specified sum of money,
> (aa) the total amount of interest claimed to the date of the claim; and
> (bb) the daily rate at which interest will accrue after the date of the claim,
> in the claim form or statement of claim."

[4] In its claim form filed on 22 October 2010, the appellant set out its claim for interest as follows:

> "The Claimant's claim is for:
>
> 1. $490,202.22.
>
> 2. In the alternative damages.
>
> 3. $66,437.49 being the interest at 1.75% per month calculated as at the 22nd October, 2010 and interest accruing until payment in full.
>
> 4. Cost. [sic]"

[5] In the statement of case which accompanied the claim form the appellant amplified the claim for interest (at paras 4-5):

> "4. It was a term of the agreement between the Claimant and the Defendant that the Defendant was to pay for the BFO supplied to them [sic] on the 15th of each month, for BFO delivered the preceding month.
>
> 5. It was also a term of the Agreement between the Claimant and the Defendant that a surcharge (interest) was to be levied on amounts invoiced and outstanding at 1.75% of value of payment due commencing after 15th of the following month after each billing cycle. The surcharge due up to the date of filing this claim (22nd October, 2010) is $66,437.49. The surcharge continues to accrue."

[6] Attached to the statement of case was the appellant's statement showing how the principal amount of $490,202.22 was arrived at.

[7] The appellant's claim for interest was based on clause 5 of the agreement between the parties dated 1 May 2009:

> "5. **Billing and Payment**
>
> a) The Seller shall invoice the Buyer for every delivery for all products delivered. All invoices shall show the weekly prices in accordance with the provisions of Clause 4.

b) Payment shall be made in Belize dollars by the Buyer on the fifteen day each month (Payment Due Date) for all products delivered during the prior month.

c) A surcharge of 1.75% the value of the payment as per sub-clause b) will be levied for on all payments made after the payment due date. This surcharge will be calculated on a daily prorated basis as follows: - Overdue amount x days overdue/30 x 1.75%.

d) In the event that the surcharge is being levied in accordance with sub-clause c), the Seller shall submit an invoice to the Buyer for the surcharge amount to be paid on the next payment due date."

[8] In its defence and counterclaim filed on 2 December 2010, the respondent dealt with the question of interest as follows (at paras 4 and 5):

"4. Paragraph 4 of the Statement of Claim is admitted.

5. Paragraph 5 is admitted save and except that the Defendant says that the said surcharge is not owed to the claimant since the fuel delivered to the Defendant was not of the type and specification ordered by the Defendant pursuant to the contract. Further, the Claimant has never demanded or collected interest from the Defendant in respect of late payments made by the Defendant."

[9] On the basis of the pleadings, Mr Williams SC submitted that the appellant's claim "was for the price of goods sold and delivered together with interest at the contractually agreed rate of 1.75% per month on any unpaid balance". Mr Williams further submitted that, in keeping with the requirements of the rules, the appellant "not only specifically pleaded the interest claimed, it also set out the basis upon which it became entitled to the claim for such interest". Mr Williams also stated that, both in the pleadings and in the viva voce evidence given on behalf of the respondent, the debt and the claim for interest were admitted.

[10] In support of these submissions, Mr Williams referred us to section 166 of the Supreme Court of Judicature Act ('the SCJ Act'). That section, as is well-known, empowers the court, in any proceedings for the recovery of any debt or damages, to include interest in the sum for which judgment is given, "on the whole or 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 judgment" (save that the section does not authorise "the giving of interest upon interest" and is expressly inapplicable "in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise"). By the terms of the section, both the decision whether or not to order interest and the rate of interest are left to the discretion of the court. Mr Williams also referred us to the decision of Awich J (as he then was) in the consolidated cases of **L & R Transfer Ltd v The Town Council of Orange Walk** (**Claim No 371 of 2005 and Claim No 450 of 2005**, judgment delivered 31 May 2010), in which the learned judge approached the award of interest (at para 26 of his judgment) on the basis that, the date from which interest should be calculated having been fixed by the agreement of the parties, "the only question for decision is…what rate should the court fix". Accordingly, Mr Williams submitted, the court should give effect to "the contractually agreed interest [of] 1.75% per month" in this case.

[11] Miss Banner for the respondent took a radically different approach. She submitted that what clause 5 of the agreement provides for is the payment of a "one-time surcharge" for late payment, and not for the payment of interest. Further, that the language of the clause does not contemplate interest on an accruing basis, either before the filing of a claim, on obtaining judgment or after judgment. In the alternative, Miss Banner submitted that, if what clause 5 describes as a surcharge is interpreted to mean interest, accruing until payment in full, the appellant did not in its pleadings strictly or substantially comply with rule 8.6(3) of the CPR. And in any event, it was submitted, clause 5 cannot apply after judgment, since section 167 of the SCJ Act fixes the rate of interest on judgment debts at 6% per annum.

[12] To make the point that a 'surcharge' is "a wholly different creature" from 'interest', Miss Banner referred us to the definitions of the words in Black's Law Dictionary (8th edn, pages 831 and 1482 respectively):

> "**Interest rate**: the percentage that a borrower of money must pay to the lender in return for the use of the money, usually expressed as a percentage of the principal payable for a one-year period."
>
> "**Surcharge**: An additional tax, charge, or cost, usually one that is excessive." (Emphasis supplied)

[13] Miss Banner submitted that if, as she contended, clause 5 cannot be read as an agreement to impose interest, the appellant can only base its claim for interest on section 166 of the SCJ Act, in which case it will be a matter for the court's discretion to determine whether interest should be ordered on the debt at such rate and for such period as it may see fit. In this regard, we were referred to the decision of Edwards J (as she then was) at first instance in **Anthony Eugene v JosephJn Pierre**(**Claim No. SLU HCV 2004/0097, Saint Lucia High Court**, judgment delivered 21 February 2007). In that case, the claimant, who was seeking to enter a default judgment, had failed to state expressly in the claim form that he was seeking interest, and to include in the claim form or statement of claim the details of the basis of entitlement, the rate of interest, the period for which it was being claimed, the total amount of interest claimed to the date of the claim, and the daily rate at which interest would accrue after the date of the claim (in accordance with rules equivalent to rule 8.6(3) of the CPR). In these circumstances, the learned judge determined (at para [29]) that the claimant was only entitled to the amount claimed in the claim form, "together with interest at the statutory rate".

[14] As regards the meanings of 'surcharge' and 'interest', in addition to the extracts from Black's Law Dictionary relied on by Miss Banner, I have also taken the liberty of consulting the Concise Oxford English Dictionary (11th edn, revised, pages 1449 and 740), where 'surcharge' is defined as "an additional charge or payment"; and 'interest' is defined as "money paid for the use of money lent, or for delaying the repayment of a debt".

[15] In my view, both sets of definitions suggest a clear difference between the concepts of 'surcharge' and 'interest'. The former is apt to convey the idea of an additional charge levied on a transaction, not necessarily calculated by reference to the

principal amount, while the latter is apt to convey the idea of a payment agreed or ordered to be made to someone for being kept out of his money, usually calculated as a percentage of the amount outstanding to the creditor.

[16] The principal question which therefore arises is whether, as the appellant maintains, clause 5 provides for the payment of interest on unpaid balances, or, as the respondent contends, clause 5 must be taken to mean what it says; that is, that the appellant was entitled to add a surcharge of 1.75% per month to invoices for products delivered each month which were not paid on or before the 15th day of the succeeding month. The starting point must naturally be clause 5 itself, which, on its face, speaks to a surcharge and not to interest. But, of course, the actual label given by the parties to an obligation is not necessarily decisive of its true meaning and effect, both of which must be gathered by the court from the actual words used by the parties in the agreement, the context in which the words are used and the object of the agreement as a whole.

[17] One feature of the clause which tends to suggest that the parties intended to stipulate for interest in the ordinary sense of the word, is that the additional amount is to be calculated at 1.75% “on all payments made after the payment due date”. The use of a percentage formula for the calculation of the surcharge certainly introduces the standard language associated with the payment of interest into the equation.

[18] But, on the other hand, the mechanism agreed by the parties for charging the surcharge to the respondent, which is that “the Seller shall submit an invoice to the Buyer for the surcharge amount to be paid on the next payment due date”, appears unusual if what was intended was that, upon late payment, interest should begin to accrue on unpaid balances. For what this mechanism plainly suggests is that, in the event of a late payment for goods delivered and invoiced in a particular month, the seller’s invoice for the 1.75% surcharge in the succeeding month, if unpaid, will result in an additional debt due from the buyer to the seller for the amount of the surcharge. And further, as Miss Banner submitted, there is nothing in the language of clause 5 b) or c) that provides for the accrual of the surcharge once this invoice has been delivered.

These considerations, which I have found to be decisive, have led me to the view that what the 1.75% surcharge was intended to represent was something more akin to a fee (or penalty) for late payment, rather than interest on unpaid balances.

[19] In any event, quite apart from the true nature of the obligation created by clause 5, I would observe parenthetically that there was plainly no compliance in this case with the mechanism set out in the clause. Thus, in his witness statement dated 12 May 2011 (which was admitted in evidence at the trial by consent), Mr Albert Moore, the person with responsibility for the accounting and financial aspects of the appellant's business, placed before the court the invoices submitted by the appellant to the respondent over the period 12 December 2009 to 8 February 2010 (14 in all). However, none of the invoices was in respect of the surcharge provided for in clause 5 of the agreement, a fact which seems to support the respondent's statement in its defence that the appellant "has never demanded or collected interest from the Defendant in respect of late payments made by the Defendant" (see para [8] above).

[20] The point gains added significance, in my view, when it is borne in mind that clause 5 states that, "**In the event that the surcharge is being levied in accordance with sub-clause c)**, the Seller shall submit an invoice to the Buyer…" (my emphasis). This gives rise to the clear implication ,it seems to me, that the omission by the seller to render invoices for the surcharge to the buyer may have been an indication that the seller did not intend to enforce its right to levy the surcharge. In fact, Mr Moore's first reference to the claim for the surcharge was in the penultimate paragraph of his witness statement, in which he asserted that the respondent "also owes [the appellant] the sum of 1.75% on the balances owing…so that at 28 June, 2011 when the trial of this matter is scheduled, the amount owing as surcharge/interest will be … $136,279.07".

[21] Further, from the appellant's statement showing the calculation of the amount due for "surcharge/interest" as at 28 June 2011 (which was attached to Mr Moore's witness statement and also admitted in evidence by consent), it is clear that the route by which the appellant arrived at the total of $136,279.07 was to treat the outstanding balances as accruing interest at 1.75% for each month that they remained outstanding.

As I have already indicated, it seems to me that this methodology was not supported by the terms of clause 5.

[22] In my view, therefore, in agreement with Miss Banner, clause 5 did not stipulate for interest on unpaid balances, as the appellant contends. But even if I am wrong about this, there still remains the question of whether the appellant complied with rule 8.6(3) in its pleadings. As has been seen, the rule requires a claimant who makes a claim for interest to include details of the basis of its entitlement to interest; the rate of interest; the period for which interest is claimed; and, where the claim is for a specified sum of money, the total amount of interest claimed to the date of the claim, and the daily rate at which interest will accrue after the date of the claim. In this case, while the appellant did set out in the statement of case the basis of its claim for interest (clause 5 of the agreement), the rate at which interest was claimed (1.75% per month) and the amount due to the date of the filing of the claim ($66,437.49), no information was provided as to the daily rate at which interest would accrue after the filing of the claim. The requirement that the daily rate of interest accrual must be pleaded is, in my view, as important a requirement as any of the others, all of which are designed to furnish the defendant with the information needed to enable it to know and assess the full extent of the claim against it. Given that in this case the claim for $66,437.49 for interest already accrued to the date of filing of the claim was itself not particularised, I consider this to be a sufficiently significant gap in the information provided by the appellant in the pleadings to disentitle it to interest on this basis.

[23] I would therefore conclude that the appellant is not entitled to interest, either on the basis that clause 5 of the agreement between the parties did not give it a right to contractual interest or, alternatively, on the basis that, even if it did, the claim for interest was not properly pleaded in accordance with rule 8.6(3) of the CPR.

[24] But this is not the end of the matter: in the absence of agreement, as the respondent accepts, section 166 of the SCJ Act gives the court a discretion to order that a sum for interest should be included in the sum for which judgment is given, on all or part of the debt or damages, at such rate and for such period (between the date when

the cause of action arose and the date of judgment) as the court thinks fit. In my view, there can be no doubt that, as confirmed by the judgment of this court pronounced on 27 June 2014, the appellant has been kept out of the money due to it for the purchase price of the goods sold to the respondent. In these circumstances, I consider that the appellant is clearly entitled to an order for interest under section 166, on the principal sum outstanding from, at the very latest, the date of the filing of the action to the date of judgment. As far as the rate of interest is concerned, in the absence of any evidence to the contrary ,I would accept Miss Banner's submission that the appropriate rate in the circumstances of this case is a rate equivalent to the rate prescribed by section 167 of the SCJ Act as that payable on judgment debts, that is, 6% per annum. I would accordingly order that the respondent is to pay interest on the principal amount for which judgment has been given, that is, $490,202.22, at the rate of 6% per annum from 22 October 2010 to 27 June 2014.

[25] The appellant also seeks an order for the payment of interest on the debt at 1.75% per month from the date of judgment to the date of payment. However, quite apart from the reasons I have already attempted to state why interest at that rate is not in my view available to the appellant in this case, the question of payment of interest after judgment is expressly covered, as the respondent submitted, by section 167 of the SCJ Act, which provides as follows:

> "Every judgment debt shall carry interest at the rate of six per centum per annum from the time of entering up the judgment until the same is satisfied, and such interest may be levied under a writ of execution on such judgment."

[26] It is therefore clear that, even without an order of the court to this effect, the total amount for which judgment is given (including, as in this case, interest ordered to be paid pursuant to section 166 of the SCJ Act) will carry interest at the rate of 6% per annum from the date of judgment until payment.

Costs

[27] The matter of costs can be dealt with more shortly. Mr Williams submitted that, it being "trite law that costs follow the event", the result of the dismissal of the appeal and the respondent's notice is that the appellant is entitled to its costs, in this court and in the court below. As to the quantification of the costs, Mr Williams next invited this court to assess the costs payable to the appellant, under the provisions of Part 64 of the CPR, at $85,957.52 in the Supreme Court and $84,530.50 in this court.

[28] As regards the costs of the Supreme Court proceedings, Miss Banner accepted that, subject to the ascertainment of the precise amount due to the appellant for interest, costs should be awarded to the appellant on the basis of prescribed costs, in accordance with rule 64.5 of the CPR. In relation to the costs of the appeal, Miss Banner submitted that the court should order costs in favour of the appellant, to be taxed or agreed.

[29] In so far as the costs of the Supreme Court proceedings are concerned, I would order that, subject to the calculation of the precise amount due to the appellant for interest (as set out in para [24] above), the appellant is to have its costs, such costs to be agreed or, if not agreed, to be fixed by the Registrar in accordance with rule 64.5 of the CPR.

[30] In relation to the costs of the appeal, the appellant's submissions proceed on the basis that the CPR applies to proceedings in this court. But, according to rule 2.4 of the CPR, "'court' means the Supreme Court of Judicature established under section 94 of the Constitution". This is hardly surprising, given what the full title of the CPR ('Supreme Court (Civil Procedure) Rules 2005') plainly implies. It therefore seems to me that any reference in the CPR to 'court', unless otherwise indicated by the language or the context, must accordingly be taken to be a reference to the Supreme Court, and not to this court.In my respectful view, the appellant's reliance on rule 63.4, which provides that "[t]he Court hearing an appeal may make orders about the costs of proceedings giving rise to the appeal as well as the costs of the appeal", is therefore misplaced: this

rule clearly relates to appeals brought before the Supreme Court under Part 60 of the CPR, which "deals with appeals to the Supreme Court from any tribunal or person under any enactment other than an appeal by way of case stated" (rule 60.1(1)), and not to appeals to this court brought pursuant to the Court of Appeal Act and the rules made thereunder.

[31] The upshot of this is that an order pursuant to rule 64.5 of the CPR, which provides for prescribed costs, is not an option that is available to this court. I would therefore order that, applying the longstanding principle of the common law, consistently applied by this court, that costs should normally follow the event (as to which see, for instance, **In re Elgindata Ltd (No 2) [1992] 1 WLR 1207, 1214**), the appellant is to have the costs of the appeal, to be taxed if not sooner agreed.

Conclusion

[32] In summary, I propose the following orders for costs:

1. The respondent is ordered to pay to the appellant interest at the rate of 6% per annum on the sum of $490,202.22, from 22 October 2010 to 27 June 2014.

2. Subject to the calculation of the precise amount due to the appellant for interest (in accordance with para [24] above), the appellant is to have its costs in the Supreme Court, such costs to be agreed or, if not agreed, to be fixed by the Registrar in accordance with rule 64.5 of the CPR.

3. The appellant is to have the costs of the appeal, to be agreed or taxed.

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MORRISON JA

AWICH JA

[33] I concur in the judgment and orders proposed by Morrison JA.

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AWICH JA

HAFIZ-BERTRAM JA

[34] I concur in the reasons for judgment given, and orders proposed, in the judgment of my brother Morrison JA, which I have read in draft.

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HAFIZ-BERTRAM JA