[2017 Gib LR 293]

BUNYAN v. CHURCH LANE TRUSTEES LIMITED

COURT OF APPEAL (Kay, P., Goldring and Rimer, JJ.A.): October 20th, 2017

Civil Procedure—judgments and orders—interest on judgment debt—under Supreme Court Act 1960, s.36, as amended, Minister for Justice to fix rate of interest—Judgment Debts (Rates of Interest) Order 2000, made by Chief Justice prior to amendment, continues to apply until Minister makes direction

Interim costs orders had been made against the appellant.

The appellant had been unsuccessful at first instance and on appeal in an action against the respondents. Interim costs orders totalling £50,000 had been made against her. The Registrar had found that no interest was payable on those costs but that decision had been reversed by the Chief Justice.

Section 36 of the Supreme Court Act 1960 had provided that "every judgment debt shall carry interest . . . at such rate as the Chief Justice may, with the approval of the Governor, by order direct . . ." In 2000, the Chief Justice, with the Governor's approval, by the Judgment Debts (Rates of Interest) Order 2000, art. 2, ordered that the rate at which judgment debts carried interest would be the same rate prescribed for such debts from time to time in the English High Court. In 2007, s.36 of the 1960 Act was amended so as to provide that judgment debts should carry interest "at such rate as the Minister with responsibility for justice may by order direct . . ."

The appellant appealed against the Chief Justice's decision on the grounds that (a) the 2007 amendment of s.36 of the 1960 Act rendered the 2000 Order null and void—the Minister had been given a discretion to make a direction as to the rate of interest which he had not exercised (in the relevant time period for the present case), and the requirement to pay interest under the amended section was contingent on the Minister making such a direction; and (b) the 2000 Order was in any event invalid—when enacting s.36 of the 1960 Act, Parliament must have intended that the rate of interest on judgment debts should be decided by rule-makers in Gibraltar, but by fixing the rate by reference to that which applied from time to time in England, the Chief Justice had effectively annulled the effect of the section and sub-delegated or assigned the exercise of his power to the relevant rule-maker in England.

Held, dismissing the appeal:

(1) The clear intention behind s.36 of the 1960 Act, both before and after the amendment in 2007, was that judgment debts "shall" carry interest, *i.e.* that payment of interest on such debts was mandatory. The court did not accept the appellant's submission that in amending the section Parliament had intended that the obligation to pay interest should cease until and unless the Minister for Justice made a direction under it. That was contrary to any sensible reading of the section. It was inconceivable that Parliament in 2007 could have intended that, in the absence of any ministerial direction, interest on judgment debts in Gibraltar should cease to be payable. The section plainly differentiated between the right to receive interest on a judgment debt on the one hand and the means by which it was set on the other. The 2007 amendment did no more than delegate the right to set the rate of interest from one person (the Chief Justice) to another (the Minister). The power of the Chief Justice, with the consent of the Governor, to set the rate of interest under the unamended section was no different in nature from that delegated to the Minister under the section as amended. Each of them was exercising legislative power conferred by Parliament. Each would be subject to judicial review for any abuse of that power. Parliament's intention in 2007 was that the judgment creditor's right to interest should continue, which indicated an intention that the 2000 Order should continue. There was nothing inconsistent in the Order remaining in force (paras. 18–19).

(2) When he made the 2000 Order, the Chief Justice had not delegated to another person or body his power under s.36 of the 1960 Act. The Order of 2000 was not in excess of the power entrusted to the Chief Justice under s.36 of the 1960 Act. On the contrary, he had exercised that power. He did so, as he was entitled to do, by fixing the rate of interest by reference to an external rule or factor. He could equally validly have done so by fixing the rate of interest to bank base rate, for example. There was no question of his having acted *ultra vires* (para. 20).

Case cited:

(1) *Mitchell* v. *Traverso*, 2016 Gib LR 205, referred to.

Legislation construed:

Interpretation and General Clauses Act 1962, s.34: The relevant terms of this section are set out at para. 7.

Judgment Debts (Rates of Interest) Order 2000, art. 2: The relevant terms of this article are set out at para. 3.

Supreme Court Act 1960, s.36: The relevant terms of this section are set out at para. 2.

s.36, as amended by the Supreme Court (Amendment) Act 2007, s.5: The relevant terms of this section are set out at para. 4.

C. Gomez for the appellant;
L. Baglietto, *Q.C.* and *C. Bonfante* for the respondent.

1 **GOLDRING, J.A.:**

Introduction

The appellant, Mrs. Bunyan, was unsuccessful both at first instance and on appeal in an action against the respondents. Its detail does not matter for present purposes. Interim orders for costs in the total sum of £50,000 were awarded against her. On May 18th, 2016, Mr. Registrar Yeats found that no interest was payable on those costs. On April 25th, 2017, the Chief Justice reversed that decision. On September 27th, 2017, the court dismissed the appeal against the Chief Justice's decision. It did so for the following reasons.

The relevant statutory provisions on judgment interest

2 Section 36 of the Supreme Court Act 1960 provided that—

> "every judgment debt shall carry interest, from the time the judgment is entered until it is satisfied, at such rate as *the Chief Justice* may*, with the approval of the Governor*, by order direct and such interest may be levied under a writ of execution on the judgment." [Emphasis supplied.]

3 On May 18th, 2000, the Chief Justice, with the Governor's approval, by the Judgment Debts (Rate of Interest) Order 2000, art. 2, ordered that "the rate at which judgment debts shall carry interest shall be the rate prescribed for such debts from time to time in the High Court in England."

4 On June 28th, 2007, s.5 of the Supreme Court (Amendment) Act 2007 amended s.36. As amended, the section read:

> "Every judgment debt shall carry interest, from the time the judgment is entered until it is satisfied, at such rate as the *Minister with responsibility for justice* may by order direct and such interest may be levied under a writ of execution on the judgment." [Emphasis supplied.]

5 In short, on the face of it, by the amendment the requirement to pay interest on every judgment debt remained. The responsibility for setting its rate moved from the Chief Justice, with the Governor's approval, to the Minister for Justice. Throughout the time these proceedings were taking place, the Minister had made no order setting the rate, although he since has.

The issues in the appeal

The primary issue

6 There was no dispute but that the amendment constituted a substantive repeal of the relevant words of s.36. The primary dispute revolved around the effect, if any, that that substantive repeal had on the provisions of the Order of 2000.

7 Section 34 of the Interpretation and General Clauses Act 1962 provides:

> "Where any Act or part of an Act is repealed, any subsidiary legislation made thereunder shall, if in force at the date of such repeal and *unless a contrary intention appears*, remain in force, *so far as it is not inconsistent with the repealing Act*, until it has been revoked or amended by subsidiary legislation made under the provisions of the repealing Act, and shall be deemed for all purposes to have been made thereunder." [Emphasis supplied.]

8 Mr. Gomez, on behalf of the appellant, submitted that the Chief Justice was wrong to conclude that the Order of 2000 survived the amendment to s.36 by reason of the application of s.34.

The secondary issue

9 A secondary point was taken by Mr. Gomez. He submitted that the Order of 2000 was in any event invalid. It breached the doctrine of *delegatus non potest delegare* and/or was in excess of the power entrusted to the Chief Justice under s.36 of the 1960 Act before its amendment (*ultra vires*). The Chief Justice was wrong to conclude otherwise.

The appellant's argument

The primary issue

10 I will try and encapsulate Mr. Gomez's submissions on this aspect.

11 The Order of 2000 was made under s.36 of the 1960 Act before it was amended in 2007. The 2007 Amendment rendered it null and void. By the amendment, the Minister was given a discretion as to whether or not to make a direction. The requirement to pay interest under the amended section was contingent on the Minister making such a direction. He did not do so. The requirement to pay interest therefore fell away. The use of the word "shall" in conjunction with "may" supported such an interpretation of the section.

12 Mr. Gomez accepted that while s.14 of the Contract and Tort Act 1960 gave the trial judge the power to include in an award "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 . . .” it did not provide for such payment after judgment. In short, therefore, it was Mr. Gomez’s submission that the intention of Parliament in passing the amendment to s.36 in 2007 was to remove any entitlement to interest on judgment debts in Gibraltar until and unless the Minister made a direction under it.

13 Section 34 of the Interpretation and General Clauses Act, which had to be interpreted restrictively, could not save the Order of 2000. The change from “the Chief Justice with the approval of the Governor” to “the Minister with responsibility for justice” was deliberate and of major constitutional importance. Such an amendment of the Supreme Court Act was very rare. This radical change from an administrative to a parliamentary rule-maker evinced Parliament’s intention that from 2007 the rate of interest should come under its direct scrutiny. Mr. Gomez submitted that Jack, J. was wrong when, in *Mitchell* v. *Traverso* (1) (2016 Gib LR 205, at para. 12), not having heard adversarial argument, he characterized “the change in the person having power to fix the rate of interest is at most a neutral matter.” The Order of 2000 reflected “a contrary intention” and was “inconsistent” with the amended section. Both the Chief Justice and Jack, J. were wrong not so to conclude. The Order could not therefore be “deemed” to have been made under it. Mr. Gomez emphasized that the respondents had no existing right to interest when they issued proceedings in 2008. This was not a case in which rights had accrued before the law changed.

14 Mr. Gomez also submitted that the court should not “patch up” gaps left by Parliament by effectively imposing what would amount to an unjust rate of 8%.

15 In all the circumstances, the respondents can have no legitimate complaint. They were not entitled to interest.

The secondary issue

16 The submission came to this. When enacting s.36 of the Supreme Court Act in 1960, Parliament must be taken to have intended that the rate of interest on judgment debts had to be decided by rule-makers in Gibraltar, not England. The Chief Justice, by fixing the rate by reference to that which applied “from time to time” in England, “effectively annulled the effect of s.36 and sub-delegated or assigned the exercise of his power to the relevant rule-maker in England.” The Chief Justice was not entitled effectively to render s.36 “nugatory” by following, without any independent thought or judgment, what happened to be the ongoing rate of interest in England at any particular time.

Conclusion

The primary issue

17 While Mr. Gomez's submissions went far and wide, it seems to me this is at heart a straightforward issue.

18 The clear intention behind s.36 of the Supreme Court Act, both before and after amendment, was that judgment debts "shall" carry interest. In other words, the clear intention of Parliament was that payment of interest on such debts be mandatory. I cannot accept Mr. Gomez's submission that in amending s.36 Parliament intended that the obligation to pay interest should cease until and unless the Minister made a direction under it. Not only is that contrary to any sensible reading of the section, it also seems to me inconceivable that Parliament in 2007 could have intended that in the absence of any ministerial direction, interest on judgment debts in Gibraltar should cease to be payable. The section plainly differentiates between the right to receive interest on a judgment debt on the one hand and the means by which it is set on the other. Far from being constitutional or indicating an intention to subject the rate of interest to the scrutiny of Parliament, the amendment did no more than delegate the right to set that rate from one person (the Chief Justice with the consent of the Governor) to another person (the Minister). As Mr. Baglietto, Q.C. on behalf of the respondents submitted, the power of the Chief Justice, with the consent of the Governor, to set the rate of interest under the unamended section was no different in nature from that delegated to the Minister under the amended section. Each of them is exercising a secondary legislative power conferred by Parliament. Each would be subject to judicial review for any abuse of that power.

19 In short, Parliament's intention in 2007 was that the judgment creditor's right to interest should continue. That does not indicate an intention to revoke the Order of 2000. To the contrary, it indicates an intention it should continue. It follows that the amendment of 2007, far from suggesting a "contrary intention" under s.34 of the Interpretation and General Clauses Act, suggests an intention which continues from the Act as unamended. There is therefore nothing "inconsistent" with the Order remaining in force. The Chief Justice was right so to conclude.

The secondary issue

20 I can deal with this very shortly indeed. Mr. Gomez's submissions are quite without merit. The Chief Justice in the Order of 2000 did not delegate to another person or body the power he had under s.36. To the contrary, he was exercising that power. He was doing so, as he was quite entitled to, by fixing the interest rate by reference to an external rule or factor. As the Chief Justice said, he could equally validly have done so by

fixing the rate of interest to bank base rate, for example. No question of acting *ultra vires* begins to arise.

21 In the result, for the reasons I have set out above, the court dismissed the appeal.

22 **KAY, P.,** I agree.

23 **RIMER, J.A.,** I too agree.

Appeal dismissed.
