Sayed Late Momin Shaikh … **Appellant**

AND

Syarikat Haji Abd Hamid Haji Bakar Dan Anak-Anak … **Respondent**

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 11 of 2006)

Power, P; Mortimer and Davies, JJ.A.
28th November, 2007.

The true meaning of the words 'judgment debt' in Order 42 rule 12 is that a judgment debt includes an award of costs. Interest on costs runs from the date the judgment is given – the incipitur rule.

Mr Daljit S. Sandhu and Miss Subrina Tan of Messrs. Sandhu & Company for the Appellant.
Mr Pg Izad Ryan Bin PLKD Pg Hj Bahrin of Messrs. Pengiran Izad & Lee for the Respondent.

Cases cited in the Judgment:

Hj Osman bin Hj Abdul Rahman v Julkifli bin Jenudin [2005] BLR 281.
Hunt v R M Douglas (Roofing) Limited [1988] 3 All ER 823.
Kay v Kay (Divorce Costs: Interest) [1977] Fam 39.
Pellogo v Tobishima. Civ App 19 of 2001
Thomas v Bunn [1991] 2 WLR 27.

Mortimer, J.A.:

This is a Personal Injuries action in which Hairol JC awarded the Plaintiff $182,314.11 and costs with interest on the judgment debt at the present rate of 6%.

After judgment a dispute arose between the parties as to whether the words judgment debt included the costs. The relevant part of Paragraph 3 (iii) of the draft judgment was disputed. It reads:

> *"… at 6% per annum on all the Judgment sums (inclusive of costs) from 18 July 2006 until full and final payment."*

The Judge heard argument on the point which turned on the provision of Order 42 Rule 12 of the RSC 1990 which provides:

> *"Except when it has been otherwise agreed between the parties, every Judgment Debt shall carry interest at the rate of 6% per annum or at such other rate as the Chief Justice may from time to time direct, such interest to be calculated from the date of Judgment until the Judgment is satisfied."*

The Judge was asked to decide simply whether "judgment debt" included the costs. On this he received limited assistance. The only case cited was *Pellogo v Tobishima.* Civ App 19 of 2001 in which this Court held that "interest on Judgment is awarded to compensate for the delay in payment thereafter". Rightly the Judge found that this case did not support the Plaintiff's contention and noted that he was not able to produce any other authorities to support it either. He concluded therefore:

> *"I do not think that the construction of Order 42 Rule 12 would bring its scope to include legal cost as legal costs are costs meant for the solicitors. As it is, there is nothing in the Rule to allow the Court to award interest on legal cost. However, there is clearly a justification to legislate for such provision considering the fact that there are considerable delays in some case of parties receiving payment of their legal costs."*

He ruled that the above paragraph 3 (iii) should not form part of the Judgment. The appellant seeks an order that the original unamended Para. 3 (iii) of the judgment should stand:

> 3. Interests be awarded as follows;
>
> (i)…….
>
> (ii)……
>
> (iii) *at 6% p.a. on all judgment sums (inclusive of costs) from 18 th July 2006 until full and final payment.* The above total sum *(excluding costs)* of B$182,314.11 shall………

Happily we have received much more assistance. The issues for our decision are as follows:

(i) Whether this is an appeal against an Order "relating only to costs". If so under Section 20 (2) (d) of the Supreme Court Act, (Cap 5) leave is required and no leave has been asked for or granted here.

(ii) Whether the words "judgment debt" in Order 42 Rule 12 includes costs awarded.

(iii) If so, does interest on the costs run from the date on which judgment is pronounced (the Incipitur Rule) or from the date on which the taxation of costs is completed by the issue of the Taxing Master's Certificate (the Allocatur Rule).

(iv) Finally, whether we should entertain the appeal, it not having been shown that the judge's discretion was wrongly applied in his award.

We can deal with the first and last of these issues very simply. This is not an Appeal from an "order relating only to costs". The Appeal concerns the true meaning of Order 42 Rule 12 and whether an order for costs is within the meaning of 'judgment debt'. It is an issue of construction and an important one of principle. See the decision of this court on the above section 20 (2) (d) in *Hj Osman bin Hj Abdul Rahman v Julkifli bin Jenudin* [2005] BLR 281.

This being so, the issue raised by the Defendants on the exercise of discretion falls to the ground with it. No discretion was involved in the judge's decision.

Judgment Debt

Our Order 42 Rule 12 is derived from the English Rules of the Supreme Court. The origin of the relevant English Rule is the Judgments Act 1838 before which interest on costs could not be recovered. The material parts of the Act for our purposes are in Sections 17 and 18 which read:

> *"(xvii) ... every Judgment Debt shall carry interest at the rate of £4 per cantum per annum from the time of entering up the Judgment.. until the same shall be satisfied, and such interest may be levied under a Writ of Execution on such Judgment.*
>
> *(xviii) … all Decrees and Orders of Courts of Equity, and all Rules of Courts of Common Law… whereby any sum of money, or any costs, charges or expenses shall be payable to any person, shall have the effect of Judgments in the Superior Courts of Common Law…"*

It is therefore abundantly clear that 'judgment debt' includes an order for costs. This has been the unchallenged position in the English courts for more than one and a half centuries. In consequence the meaning of the words 'judgment debt' under the English rule has never been in doubt. Our Order 42 Rule 12 is entirely based upon it and cannot now be in doubt either, especially as under the Application of Laws Act (Cap 2) the above 1838 English Act is in force in Brunei as a statute of general application.

At one stage Mr Izad, for the respondent, appeared to submit to the contrary but when asked he realistically abandoned the point.

Incipitur or Allocatur? TheRespondent's Case

Mr Izad submits that in this jurisdiction the allocatur rule should apply and be endorsed by this court. He relies on the reasoning of Lord Denning in *Kay v Kay (Divorce Costs: Interest)* [1977] Fam 39 to support a submission that the balance of justice favours the allocature rule even though the decision was overruled by the House of Lords in *Hunt v R M Douglas (Roofing) Limited* [1988] 3 All ER 823. He submits that this court should not follow *Hunt's* case having regard to Lord Ackner's concessions in his later speech in *Thomas v Bunn* 1991 2 WLR 27. He notes first that in both *Hunt's* case and *Thomas's* case Lord Ackner conceded at …..,

> *"that a satisfactory result cannot be achieved in every case whichever rule, the incipitur or the allocatur, was applied."*

Secondly, Mr Izad, asks this court to note that in *Thomas's* case Lord Ackner resiled from part of his reasoning in *Hunt* that the balance of justice favoured the incipitur rule. Referring to the acceptance of the incipitur rule at 40 A he said:

> *".....was I right in concluding that this acceptance is because 'a judgment for damages to be assessed, where the amount ultimately ascertained is treated as if it was mentioned in the judgment – no further order being required.' The answer is in the negative."*

Finally on this point Mr Izad refers to the same speech at 39 H where Lord Ackner concedes:

> *"I accept that it is an anomaly that an order for payment of costs to be taxed is construed for the purpose of Section 17 as a judgment debt, even though, before taxation is completed, there is no sum upon which execution can be levied."*

For these reasons Mr Izad says that the balance of justice favours the allocature rule and we should so find.

The Appellant's Case

Mr Sandhu, for the appellant, says that in spite of these concessions in *Thomas's* case we should nevertheless follow Lord Ackner's reasoning in Hunt's case, especially in this jurisdiction where the balance of justice remains with the incipitur rule. He points to the end of the judge below's ruling when he turns to the Brunei situation:

> *".. there is nothing in the rule to allow the court to award interest on legal costs. However, there is clearly a justification for legislation for such a provision considering the fact that there are considerable delays in some cases of parties receiving payment of their legal costs."*

Mr Sandhu relies also upon the history of the application of the rule in the English courts traced by Lord Ackner in *Hunt's* case.

We turn to briefly to this history. In early cases much turned upon the meaning of the words "time of entering up the judgment" as to when interest began to run. Different interpretations were given by the Common Law Courts and the Court of Chancery. At Common Law the Incipitur Rule was applied so interest ran from the time of entering up the judgment. The Incipitur being the Master's Book in which he entered the Judgment. On the other hand the Court of Chancery applied the Allocatur Rule with interest running from the master's certificate on taxation when the sum of costs was determined. This remained the position until after the Judicature Acts 1873 and 1875. The English Rules of 1875 left the Chancery Rules unamended and the Chancery practice continued until 1883. However, the 1883 Rules made one code applicable to all Divisions (including the Writ of *Fi.fa.)* and the Incipitur Rule then was applied in all divisions and noted in the Annual Practice.

However, in 1965 new Writs of Execution were introduced and the old forms were replaced. In *Kay v Kay (Divorce Costs: Interest)* [1977] Fam 39 the Court of Appeal (Lord Denning MR giving the first Judgment) decided that in the absence of a note which had been omitted from the new forms it was open to the court to change the longstanding practice and apply the Allocatur Rule. But when *Kay's* case was considered in Hunt's *case* Lord Ackner said there was:

> *"no Warrant for the Court of Appeal to depart from the previous decision of the Court of Appeal in Boswell v Coaks (1887) 57 LJ CH 101 which was accepted to have been a correct decision when made and consistently applied for nearly a century thereafter."*

The House of Lords decided that the Incipitur Rule prevailed. Lord Ackner's reasoning, which we are invited to follow, is at 382 J:

> *"I respectfully agree with the observations of the Court of Appeal that a satisfactory result cannot be achieved in every case, but in my Judgment the balance of justice favours the Incipitur Rule for the following reasons:*
>
> *(i) It is the unsuccessful party to the litigation who, ex hypothesi, has caused the costs unnecessarily to be incurred. Hence the Order made against him. Since interest is not awarded on costs incurred and paid by the successful party before Judgment, why should he suffer the added loss of interest on the costs incurred and paid after Judgment but before the Taxing Master gives his Certificate?*
>
> *(ii) Since, as the Court of Appeal rightly said in Erven Warnink case [1982] 3 all ER 312, payments of costs are likely nowadays to be made to lawyers prior to taxation, then the application of the Allocatur Rule would generally speaking do greater injustice than the operation of the Incipitur Rule. Moreover, the Incipitur Rule provides a further necessary stimulus for payments to be made on account of costs and disbursements prior to taxation, for costs to be more readily agreed and for taxation, when necessary, to be expedited, all of which are desirable developments. Barristers, solicitors and expert witnesses should not be expected to finance their client's litigation until it is completed and the Taxing Master's Certificate obtained. If interest is not payable on costs between Judgment and the completion of taxation, then there is an incentive to delay payment, delay disbursements and taxation.*
>
> *(iii) It is common ground between the parties that the unsatisfactory situation illustrated in Kay v Kay can be simply dealt with by an express agreement between the solicitor and his client that any interest recovered on costs and disbursements after Judgment is pronounced but before the Taxing Master's Certificate is obtained, which costs and*

> *disbursements have not in fact been paid prior to taxation, shall as to the interest on the costs belong to the solicitor and as to the interest on disbursements be held by him for and on behalf of the person or persons to whom the disbursements are ultimately paid"*

Conclusion

Bearing in mind the qualifications accepted by Lord Ackner in *Thomas's* case.we agree with his powerful reasoning in *Hunt's* case and we respectfully follow it. The Incipitur Rule is one which can be simply and certainly applied. It follows the general rule that the party unjustifiably having the benefit of the money should pay interest to the party being kept out of it. Further, in this jurisdiction it has the advantage that it is then in the interest of the party against whom the order is made to ensure that payments on account are made, that taxation is not delayed and that once taxed the sums owing are rendered. This will tend to alleviate the problems referred to by the judge below.

For these reasons we allow this Appeal and rule that the words 'judgment debt' include an award of costs and that the incipitur rule should be applied so that interest runs from the time judgment is given.

The Order

The unamended Clause 3 (iii) of the draft judgment will be restored. It will read;

> *"(iii) at 6% on all the judgment debt sums (inclusive of costs) from 18 July 2006 until full and final payment."*

We appreciate that the words "(inclusive of costs)" are unnecessary in the light of this judgment. The remainder of the draft Clause is also unnecessary.
We further order nisi that the respondent shall pay the costs of the appeal to be taxed if not agreed. If either party wishes to be heard on costs the registrar must be notified before 10.00 am on Tuesday 3rd December.

Power, P.

Mortimer, J.A. **Davies, J.A.**