

JERSEY / JUDGMENT

Doorstop Ltd -v- Gillman and Lepervier [2012] JRC 199 (01 November 2012)

[2012] JRC 199

Source: bailii.org · Research copy typeset by Esheria. Not court-issued or certified.

judgment

the deputy bailiff: 1. On 16 th March, 2012, at the ordinary Friday afternoon sitting of the Samedi Division, the Royal Court gave judgment to the plaintiff against both defendants in default of appearance. In each case the judgments carried interest at the rate of 8% until the date of repayment, but left the matter of contractual interest over to a date to be fixed on notice to the defendant. It subsequently became apparent that the defendants would continue to be unrepresented, and the Court appointed Advocate Heywood as amicus curiae given the issues of law which arose. We would like to take the opportunity of paying tribute to both counsel for the arguments which were advanced and for the way in which the legal issues were presented. The Claims 2. There were two judgments against the first defendant. The first arose out of an action where the plaintiff claimed the sum of £936,698.92 under a note of hand dated 30 th April, 2008, together with contractual interest from 7 th December, 2011, the date on which the summons was issued, until the date of repayment at the rate of 1.5% per month or such other rate as the Court may deem just. The sum claimed under this summons was broken down as to the capital of £637,864, and contractual interest at 1.5% per month from 30 th April, 2009, until 7 th December, 2011, in the sum of £298,834.92. 3. The second action against the first defendant was for the sum of £74,122.51, broken down as to a capital sum of £45,623.47, and contractual interest at 2% per month from 1 st May, 2009, until 7 th December, 2011, the date on which the summons was issued, and said to be due under a note of hand dated 22 nd May, 2008. Again, there was a claim for contractual interest until the date of repayment. 4. The claim against the second defendant was a claim in guarantee in relation to the larger of these two obligations of the first defendant, namely the sum of £936,698.92, pursuant to a guarantee and indemnity dated 2 nd May, 2008. Again, the claim was for contractual interest at 1.5% per month until the date of repayment in full. 5. The judgments given in favour of the plaintiff on 16 th March, 2012, were against both defendants in the reduced capital sum of £590,950 in respect of the first loan and against the first defendant only in the sum of £41,000, with interest at the rate of 8% on the larger capital sum from th April, 2008, and on the smaller capital sum from 22 nd May, 2008, until the date of repayment. The judgment for interest thus awarded 8% on capital from the date of loan instead of the contractually agreed interest. 6. In a nutshell, the plaintiff's claims for contractual interest are based on the proposition that a deal was made between the plaintiff and the defendants, and

the Court should give effect to it - la convention fait la loi des parties . It was asserted that there was no allegation of fraud, duress or other similar vice de consentement , and accordingly the Court neither should nor could interfere with the parties' agreement. To the extent that the Court therefore imposed a bar on recovery of interest at rates in excess of 8%, and disallowed recovery of compound interest, as interest upon interest, this was contrary to law. In his skeleton argument, Advocate Blakeley asserted that neither public policy, equity, inequality of bargaining power or excessive unfair advantage would apply where a claim was made for contractual interest at rates of 40% per annum or less. It was in the light of the importance of this particular issue that the amicus was appointed. The Contract 7. There were two notes of hand subscribed by the first defendant in favour of the plaintiff, the first of which was also the subject of a guarantee and indemnity from the second defendant. The first note of hand is in these terms:- "On demand I, Anthony Henry Gillman, promise to pay Doorstop Limited of Three Oaks House, Rue Milbraie, St Lawrence or their assigns ("the Lender") the sum of £390,950 ("the Sum"), bearing interest for value received, until repayment by us in full, together with interest and legal costs incurred, subject to the following terms and conditions: To pay interest at the rate of 12% per annum thereon, payable six monthly in arrears, to the Lender; To pay to the Lender an additional two hundred thousand pounds sterling on or before 30th April 2009 unless the Lender demands that the loan is to be repaid on or before 30th October 2008 in which case only an additional one hundred and one thousand pounds sterling will be payable; To repay the sum on or before 30th April 2009 unless the Lender demands earlier repayment; To pay any legal fees and costs incurred with the drawing up, registration, re-registration and cancellation of the loan; To agree to the registration of such a loan as a charge against our real property in Jersey; If the loan, agreed interest and costs are not repaid on or before 30th April 2009, additional penalty interest will be payable at a rate of 1.5% per month on the total sum then owing." 8. This note of hand was signed by the first defendant. 9. The second note of hand was dated 22 nd May, 2008, also signed by the first defendant in favour of the plaintiff, in the sum of £41,000, but subject to these conditions:- "(1) To pay interest at the rate of 12% per annum thereon, payable six monthly in arrears to the Lender; (2) To repay the capital sum advanced on or before 30th April 2009; (3) To pay any legal fees and costs incurred with the drawing up, registration, re-registration and cancellation of the loan; (4) To agree to the registration of such loan as a charge against our real property in Jersey; (5) If the loan, agreed interest and costs are not repaid on or before 30th April 2009, additional penalty interest will be payable at a rate of 2% per month on the total sum then owing." 10. The guarantee and indemnity addressed to the plaintiff was executed on behalf of the second defendant and was in these terms:- "In consideration of your entering into a loan agreement by way of a note of hand dated 30th April 2008 with Anthony Henry Gillman (hereinafter called "the Customer") of [address] for the capital sum of £390,950 plus interest We, the UNDERSIGNED HEREBY AGREE: To pay you on demand any sums of money which may at any time be owing to you by the Customer under the terms of the note of hand; To indemnify you against any loss resulting from or arising out of the note of hand and to pay the same on demand and whether or not you will have exercised all or any of your remedies in respect of the Customer and/or the Goods; That the amount of your loss for the purpose of this indemnity whether or not the note of hand and/or hiring shall have been terminated by any party thereto shall include (but

not be limited to) the total amount which the Customer would have had to pay under the terms of the note of hand together with all expenses you may incur in the exercise or enforcement under the terms of the note of hand the amount actually paid to you under the agreement by the Customer. That any liability hereunder shall be unaffected by any time, indulgence or release to or any compromise or composition concluded with the Customer or any guarantor or indemnifier or by your failure to take perfect or hold unimpaired any security from the Customer or any guarantor or indemnifier, or by any invalidity or unenforceability of the note of hand or the rescission [sic] or termination of the agreement by either party thereto or otherwise or by any other act, matter or thing which but for this clause might operate to discharge my liability hereunder; That we hereby abandon any right weI [sic] may have to insist that all recourses first had against the assets of the Customer or any other person before any liability hereunder is enforced or to require that I or the Customer or any other person to be made a party to any proceedings against us or the Customer or any other person; Any demand made by you hereunder shall be validly made if delivered or sent by post to us at the above mentioned address or at my private or business address for the time being or the address last known to you as our private address or at our private address and if sent by post shall be deemed to have been received within 72 hours after the time of posting. THIS DOCUMENT CONTAINS THE TERMS OF A GUARANTEE AND INDEMNITY, SIGN IT ONLY IF YOU WISH TO BE LEGALLY BOUND BY THE ABOVE MENTIONED TERMS." 11. The legal issues which we are required to determine seem to us to be these:- (i) What jurisdiction, if any, does the Court have to interfere with a contractually agreed rate of interest whilst the loan is outstanding, and, if there is such a jurisdiction, on what basis should it be exercised in this case? (ii) In considering the first question, is any distinction to be drawn between the position prior to the issue of proceedings and the position after the issue of proceedings? (iii) What is the Court's jurisdiction and what ought the approach to be in respect of interest after the date of judgment up to the date of repayment? (iv) What approach should the Court take to claims for compound interest? (v) Is the nature of the claim against the guarantor conceptually different such that a different result in terms of interest might flow vis-à-vis the guarantor? The interest rate during the loan period 12. Advocate Blakeley submitted that the starting point was that *la convention fait la loi des parties*, albeit there would be some safeguards. There was, he submitted, a need for certainty in commercial transactions. It would be wrong to invoke public policy, in his view, unless there was some evidence of duress or arm-twisting

- thus arose the safeguards which the law recognised involving fraud, duress, and *erreur*. These in any event would vitiate the contract. While it may be that it would be desirable to have protection for vulnerable persons from onerous contracts, first of all there would need to be some evidence of vulnerability, of which there was none in this case, but in any event, there would need to be some legislation. As there is no legislation, the Court should enforce the parties' bargain. Accordingly, his submission was that if the interest rate was agreed to be 200% per day, the Court should give judgment for that amount. If the plaintiff was in the business of lending money, it has an expectation of receiving the contracted rate of interest. By capping the interest, the Court was in effect capping the profit. By way of comparison, he

submitted that if a wine merchant had a mark-up of 100% and claimed in Court the cost of the wine which he had delivered, invoiced with that mark-up, the Court does not cap the profit in such a case by not giving judgment for the agreed price for the wine. It would be wrong to discriminate between the moneylender and the wine merchant, jeweller or other tradesman. Money was simply a commodity as any other commodity and the Court should not intervene. 13. Similar arguments were made in connection with the claims for compound interest. There was no reason not to give such interest. The interest was compensatory and if the parties agreed a compound basis for interest, the Court should give effect to that bargain. 14. Advocate Blakeley referred us to *Clyde-Smith and Others-v-Ann Street Brewery Company Limited*

[1994] JLR 254 where, at page 262, line 45, the Court of Appeal referred to the terms of the contract between the consulting engineer and the defendant which provided that interest would "accrue from day to day at the rate of 2% per annum above the current bank rate" in relation to monies unpaid under the fee agreement. Neill J A at page 263, line 12 said this:- "... the Royal Court had clearly been satisfied that the A. C. E. conditions of engagement formed part of the bargain between the plaintiffs and the defendant company. On this basis, it appeared to be manifest that the parties had actually reached agreement that simple interest should be paid. They had further agreed the rate of interest and the date from which interest would accrue on a day to day basis. In a case in which the parties had made a bargain for the payment of interest, the litigant has no need to call upon the Court to exercise its statutory power under the 1971 Law to award interest. The Court will award interest under its common law and inherent power to ensure that the contractual provisions are carried out according to their terms." 15. The reference to the 1971 Law was of course a reference to the Interest on Debts and Damages (Jersey) Law 1971 (the "1971 Law"), now repealed and replaced by the Interest on Debts and Damages (Jersey) Law 1996, ("the 1996 Law"). 16. It does not appear to us that this dictum in *Clyde-Smith and Others-v-Ann Street Brewery Company Limited* to which we have been referred is directly in point in the instant case. The Court of Appeal were there faced with a case where the creditor had accepted, after the date of the issue of proceedings but before the return date for the summons, a cheque in full settlement of the claim - as a result, when the creditor appeared on the return date to claim only interest and costs, the Court refused to award that interest on the grounds that it had no jurisdiction to do so under the 1971 Law. The Court of Appeal considered that there was a need for reform of the 1971 Law (and, in passing, we note that those comments were given effect by the reforming law in 1996) but determined that it was able to give judgment for interest in accordance with the contract in order to enforce effectively the terms of that contract. Accordingly, the appellants, who had not claimed contractual interest, would be permitted to amend their pleadings so to do. The case is authority therefore only for the proposition that the Court has a jurisdiction, both under its common law and inherent power, to enforce contractual provisions, but it is otherwise not particularly helpful on the more detailed points which we now have to consider. 17. On the submission that it would be wrong to invoke public

policy, Advocate Blakeley relied on the judgment of the Privy Council in *Pao On and Others-v-Lau Yiu Long and Another*

[1979] UKPC 2 . In that case, the Privy Council was considering whether the guarantee, upon which the appellants relied, contained a valid consideration for the respondent's indemnity; whether the extrinsic evidence as to the circumstances in which the guarantee was given established any valid consideration additional to the consideration, if any, stated in the agreement; and whether the guarantee was unenforceable in any event, the respondent's consent having been induced by duress. The law of Hong Kong in relation to guarantees and indemnities is unlikely to be the same as the law of Jersey, and accordingly a decision of the Privy Council on such a matter is not binding upon us, but it was not directly on these points that Advocate Blakeley sought to rely upon the case. He relied on a passage in the judgment of the Board, delivered by Lord Scarman, at page 11 where, having rejected the view that the Board should extract from American case law a principle which answered the question then under consideration, Lord Scarman said this:- "That question, their Lordships repeat, is whether, in a case where duress is not established, public policy may nevertheless invalidate the consideration if there has been a threat to repudiate a pre-existing contractual obligation or an unfair use of a dominating bargaining position. Their Lordships' conclusion is that where businessmen are negotiating at arm's length it is unnecessary for the achievement of justice, and unhelpful in the development of the law, to invoke such a rule of public policy. It would also create unacceptable anomaly. It is unnecessary because justice requires that men, who have negotiated at arm's length, be held to their bargains unless it can be shown that their consent was vitiated by fraud, mistake or duress. If a promise is induced by coercion of a man's will, the doctrine of duress suffices to do justice. The party coerced, if he chooses and acts in time, can avoid the contract. If there is no coercion, there can be no reason for avoiding the contract where there is shown to be a real consideration which is otherwise legal. Such a rule of public policy as is now being considered would be unhelpful because it would render the law uncertain. It would become a question of fact and degree to determine in each case whether there had been, short of duress, an unfair use of a strong bargaining position. It would create anomaly because, if public policy invalidates the consideration, the effect is to make the contract void. But unless the facts are such as to support a plea of "non est factum" which is not suggested in this case, duress does no more than confer upon the victim the opportunity, if taken in time, to avoid the contract. It would be strange if conduct less than duress could render a contract void, whereas duress does no more than render a contract voidable." 18. These comments from the Privy Council are persuasive even though the Privy Council was considering a law of contract different from our own. They are in many respects reflective of the underlying principles which give rise to the maxim *la convention fait la loi des parties*. That maxim has been enshrined in Jersey law for centuries. As we noted in *Incat Equatorial Guinea Limited and Others-v-Luba Freeport Limited*

[2010] JLR 287 at page 294, para 22, the strength of the maxim lies in the rationale that a man is the best judge of his own interests, and the best rules are those freely agreed by free men. 19. It is at that point that the comparative illustration provided by Advocate Blakeley becomes of particular interest. The Court has no doubt that it would be inappropriate for it to examine profit margins which were available to wine merchants, jewellers or other traders if the contract upon which the trader relied was clear as to the basis upon which payment to the trader ought to be made. Those seem to us to be classic cases where the maxim *la convention fait la loi des parties* would apply, and just as in England and Wales the Court does not look into the adequacy of the consideration payable, the nature of the contract in Jersey is such that the Court will not consider the extent to which the trader is making, or not making, a profit - unless of course it is relevant to do so as a result of some of the established rules upon which a contract might be set aside, or be not enforced. 20. Nonetheless the situation has always been different in relation to money lending. As Advocate Heywood pointed out, the historic position under the ancient law of Normandy was that no interest could be charged on a money sum. The underlying rationale was that money was not a commodity in itself but was a tool to be used in exchange by way of trade, and that as a matter of principle the charging of interest would be prohibited. 21. Poingdestre, however, took a different view in Jersey. Having noted that the provisions of the *Ancienne Coutume* regarding usury were no longer followed at the time he wrote, he says this in his *Commentaires sur l'Ancienne Coutume de Normandie* at page 19:- "Quoy que Messrs. De Guernezey dissent en leurs remarques, ce chapitre ne peut en ce temps être pratiqué quant à la forfaiture de leurs meubles; et il ne seroit ni juste ni utile au public que cette rigueur là fust pratiquée, en un temps où les intérêts modérés sont approuvés par les loix civiles pour donner cours aux monnoyes pour l'utilité des Marchands et advancement du trafic et pour subvenir à ceux dont les nécessités requièrent cette approbation; que sy lesdits intérêts passent les bornes de la loy la Justice a pouvoir de punir les délinquants selon l'exigence du cas, sans passer à l'autre extrémité." 22. This was unofficially translated in this way by Advocate Heywood:- "Whatever the gentlemen from Guernsey say in their comments, this chapter may not be put into practice at this time concerning the forfeiture of their movable property; and it would be neither just nor in the public interest for this to be rigorously followed, at a time where moderate interest is approved by civil law to permit useful liquidity for merchants and to facilitate commerce and to cater to the needs of those who require this approval; justice may only punish offenders if the said interest exceeds the limit set by law, on a case by case basis, without going to the other extreme." 23. In his *Lois et Coutumes de l'Ile de Jersey*, when discussing differences between the law of Jersey and the law of Normandy, Poingdestre makes it plain at page 30 that:- "Les Loix penales contre les Usuriers & Presque tout le Titre des chattels aux Usuriers sont abolies." Translated as:- "Penal laws against usurers ... have been abolished". 24. In his *Privileges, Loix et Coustumes de l'Isle de Jersey*, Le Geyt says this at *Livre Quatrieme, Titre 1, Article 4*: "Les obligations penales, en case de non-payement sont reductibles aux legitimes interests & dommages. On ne peut stipuler d'interest d'argent à plus de six pour cent par an: ce qui excède est confiscable &

peut, outre l'amende au Roy, se repeter du Creancier qui l'auroit recue. Il en faut excepter l'argent qu'on preste à la grosse adventure." Translated as:- "Penal obligations, in case of non-payment, are reducible to legitimate interest and damages. It is forbidden to stipulate interest of more than 6% per annum: anything above this may be confiscated and, as well as the King's fine, may be recovered from the creditor who received it. It is necessary to make exception for money which one lends a great adventure." 25. The position in relation to the charging of interest was placed on a statutory footing in the Code of 1771, which provides as follows:- "Conformément à l'Ordonnance établi par l'Acte de la Cour à héritage, le vingt-troisième Septembre mil sept cent quatorze, l'intérêt d'argent ne doit point excéder cinq par cent, sur peine d'être réputé usuraire et les contravenans punis accordamment." Translated as:- "In accordance with the Ordinance established by the act of the Court of heritage, on 23 rd September, 1714, interest on money must not exceed 5%, otherwise it will be considered usurious and the guilty parties will be punished accordingly." 26. This last provision seems to confirm that usury (meaning the charging of interest in excess of 5%) was still a crime as at, and it would follow of course that the civil court would not give effect to a contractual provision which was criminal, because this would be illegal. What is also of interest, however, is that Poingdestre reports that moderate interest rates might be approved, which seems to suggest some jurisdiction in the Court to qualify the agreement of the parties, even if, according to Le Geyt, there were in practice provisions which limited the interest, when he was writing, to a maximum of 6% per annum. 27. The provision in the Code of 1771 to which we have referred was repealed by Article 1 of the Code of 1771 (Amendment) (Jersey) Law 1962 (the "1962 Law"). Article 2 of this Law empowered the States to make regulations prescribing the maximum rate of interest on money owed, but it does not appear that any such regulations have been made. Article 3 of this Law however specifically provided that, save as set out in repealing the Code of 1771, the 1962 Law did not affect the existing law against usury, if any. By reference to the extracts from Poingdestre, Le Geyt and the Code of 1771, it is clear that the customary law of Jersey did recognise that there was a law against usury. 28. Advocate Heywood submitted that from these various authorities one could draw the following conclusions:- (i) The customary law of Jersey and Normandy originally forbade the charging of any interest on a loan. (ii) By the time of Le Geyt and Poingdestre, the customary law of Jersey had developed to permit the charging of "moderate" or "reasonable" interest on a loan; interest rates higher than that were considered usurious (and Le Geyt put the maximum at 6%). (iii) The Courts were able to intervene where usurious interest rates were charged. (iv) The Code of 1771 set the level of permissible interest at 5%, which continued until repealed by the 1962 Law. (v) Although the 1962 Law removed the statutory cap on the level of interest which might be charged, no laws passed since then have limited interest rates either generally or in specific instances. Discussion 29. It seems clear that the definition of usury has changed over the centuries. At some points it appears to have been treated as extending to the charging of any interest upon a loan. In later times, usury appears to have been defined as the charging of excessive interest. Whatever the definition, usury was treated as morally repugnant. Dante in "la

divina commedia" treated usury as offending divine goodness and scorning nature. Today, it seems to us that the charging of interest, of itself, cannot possibly be regarded as usurious. That is not to say that the Court is required to permit claims for interest at any rate; but it is relevant to identify the legal basis upon which it is asserted that a restriction on the interest rate which the Courts might allow is permissible. 30. That the Royal Court has imposed restrictions on interest rates in the past seems to us to be undeniable. The extracts from Le Geyt and Poingdestre to which we have referred earlier in this judgment do indeed make it plain that the customary law of Jersey in those days had developed to permit the charging of interest on a loan provided that the interest was moderate or reasonable. Le Geyt put the maximum at 6%. The act of the Cour à héritage of 23 rd September, 1714, shows that the Court then regarded interest at up to 5% as permitted but anything above that would be considered usurious. The Code of 1771 placed this decision of the Royal Court on a statutory footing. In his *Traité du Droit Coutumier de l'île de Jersey*, C S Le Gros, at page 308 recites some decisions of the Royal Court on the question of usurious interest. The first is *Young-v-Barnes Ex 1861 April 6 th*. This was an action by the plaintiff for payment on a note of hand where Le Gros describes the defendant as having claimed that the interest rate was usurious. The Court's conclusion was in these terms:- "Considérant que la défenderesse ne présente aucune pièce à l'appui de sa prétention, la Cour, en écartant ladite prétention, a condamné la défenderesse au paiement de la demande et aux frais." 31. What is of interest in that extract is not that the Court considered that usury was not a defence, but simply that the defendant had failed to produce the proof that the interest rate charged was usurious. 32. Le Gros then goes on to refer to the case of *Alcock-v-Lumley Ex 1893 29 th July* where the defendant had consented to a note of hand in the sum of £100, and contended that the interest rate agreed of 60% was irrecoverable under the laws of the Island of Jersey. The decision of the Royal Court was that the note of hand made it plain that the loan was governed by English law and that being so there was no limit to the interest rate which was enforceable, and the claim of the defendant was therefore rejected. Once again there is no suggestion in the report that the Royal Court would have taken the same view had it been applying the Jersey law on usurious rates of interest. In both cases, the underlying assumption

- at least of the defendant, and in the former case, of the Court - is that if there had been a usurious rate of interest, that would have been a good basis upon which the defendant might have succeeded in resisting the claim. We have not been addressed on the subject, and express no view upon whether, as a matter of the application of the law of conflicts of laws, the same result would have been reached today in the latter of these cases. 33. We then come to the 1962 Law, amending the Code of 1771. It is of interest to note that although the provision under the title "intérêt" in the Code of 1771 was repealed, Article 3 of the 1962 Law provides that that law did not affect any existing law against usury. It seems to us that means that the existing laws against usury were in effect recognised as continuing. In other words the repeal of the provision in the Code of 1771 was simply a repeal of the rate of 5%, and was not a repeal of the laws against usury; from which it follows that one is driven back on the

customary law as set out by Poingdestre and Le Geyt (other than the rate) which restricted claims for interest to those which were moderate or reasonable. 34. Indeed our own experience is that during the last 40 years or so, the Royal Court has occasionally intervened to restrict the interest which it would allow in any judgment. Usually those restrictions arose on the return date of the issue of proceedings where the defendant was unrepresented, and judgment in a lesser sum than was claimed by the plaintiff was allowed by the Court, without any reasoned decision. Although this may not have happened very frequently twenty years ago, in our experience, that was the practice. In the last fifteen years or so, the Court has made it clear it would not give judgment for interest until repayment of the judgment debt at full contractual rates - at times it has allowed interest at 15% on the judgment debt until repayment but more recently has only permitted interest at 8% even where the claim was pursuant to contract. 35. More recently, the Court has, in practice directions, given indications of the maximum rate of interest which it would allow on judgments under first of all the 1971 Law and secondly the 1996 Law which is at an even lower rate. We recognise of course that those represented judicial directions in relation to a statutory jurisdiction to award interest, rather than an interference in an agreed bargain, but they show the Court's willingness to restrict interest rates to what is reasonable. 36. In our judgment, although the 1961 Law removed the cap on interest rates of 5%, it did not affect the laws on usury generally, and the position therefore remains broadly that the charging of interest at customary law must be moderate or reasonable. 37. It seems probable that the customary law rule arose out of judicial policy. In that respect therefore, the Royal Court of Jersey has not, for a very long time, been subject to the constraints to which Lord Scarman referred in the Privy Council decision of *Pao On and Others-v-Lau Yiu Long and Another* (paragraph 17 above). The policy may well have arisen at a time when the law did not distinguish quite so clearly between that which was illegal and that which was immoral. Whatever the original rationale, it is clear in our judgment that this was the customary law. 38. How does this fit with the maxim that *la convention fait la loi des parties*? We are conscious of the strictures of Bailhache, Bailiff, in *Grove and Briscoe-v-Baker*

[2005] JLR 348 when at paragraph 10 the Court said:- "It is convenient to deal first with the submissions of Mr Baker which can indeed be disposed of shortly. The old maxim is *la convention fait la loi des parties*. The Court is not empowered to rewrite contracts into which parties capable of contracting have entered with their eyes open. If there is a defect of consent, the Court may of course treat the contract as null; additionally the Court may in certain circumstances imply certain terms into the contract and modify it in that way. But in general terms, the Court has no jurisdiction to remake contracts which the parties have made of their own free will." 39. We do not think the Court is rewriting the contract if it merely refuses to give a judgment the effect of which is to enforce the judgment in full. If a party pays interest, pursuant to a contract, at interest rates which the Court would not permit were there to be an application for judgment for a claim for interest or repayment of capital, that is a matter for him. The Court is not rewriting the contract to that extent. All that it is doing is refusing to approve - by giving judgment - an arrangement which is

regarded as usurious on public policy grounds. It is the same approach as is taken when the Court does not enforce an agreed contractual assessment of what damages are payable in the event of a breach. 40. In a sense, this is very similar to the approach which the Court takes to applications for injunctions in restraint of trade pursuant to an obligation in a contract of employment where the employment has come to an end. In such cases - *Rossborough (Insurance Brokers) Limited-v-Boon and Aziz*

[2001] JLR 416 is an example of a case involving an application to vary an ex parte injunction in these circumstances, and there is reference therein to the Jersey cases of *Wallace-v-Taylor*

[1965] JJ 455 and *Nicol-v-Egan*

[1968] JJ 903

- the Court makes it plain that it will alter a restrictive covenant notwithstanding the importance of the maxim *la convention fait la loi des parties*. In these cases it does so by giving relief in equity. That relief is made available because the Court considers it would be unconscionable to enforce the contract as it was drawn. In our judgment, the public policy approach is very similar - in effect, the Court has indicated that it would be unconscionable to give judgment for interest rates which are not moderate or reasonable. 41. The provisions of the *Loi (1884) sur le prêt sur gages* have not gone unnoticed although they are not directly in point. Article 2 of that law permits a pawn broker to charge 2% per month, or for part of a month, on the principal sum which he has loaned the debtor. We do not think that is directly relevant to what we have to decide today. We notice first of all that the recitals to the legislation make it plain that the purpose of its introduction was to contain exorbitant profits, and secondly that this type of business, while it did offer advantages to the less well off in society, nonetheless could result in very serious abuse. The underlying purpose of the legislation was therefore to create a regulatory structure for those persons who were in business as pawn brokers. Article 19 makes it plain that the legislation did not extend to persons who were not in regular business as pawn brokers, and they were limited to receiving interest at 5% per annum. The legislation therefore represented, even in 1884, a regulatory compromise whereby those who had to go through a process of registration and formality were entitled to charge a higher interest rate. 42. We wish to add some further commentary with a view to seeking to minimise any market uncertainty as to what it means to require that interest charged be moderate and reasonable. Before doing that, we have however noted that the question of any potential cap on interest rates has generated and continues to generate interest in developed societies and it does not seem to us that the Royal Court's approach on this subject has been out of the way of current international thinking. It appears that France controls the level of interest that might be applied to loans by legislation. Article 1907 of the *Code Civil* provides that:- "*L'intérêt est légal ou conventionnel. L'intérêt légal est fixé par la loi. L'intérêt conventionnel peut excéder celui de la loi, toutes les fois que la loi ne le prohibe pas. Le taux d'intérêt conventionnel doit être fixé par écrit.*" Translated as:- "Interest is legal or contractual. Legal interest is fixed by the law. Contractual interest can exceed that fixed by the law, whenever the law does not prohibit it.

The rate of contractual interest shall be fixed in writing." 43. The Banque de France publishes a table of "Taux D'usure" each quarter, and it is clear that the rates of interest which can be applied depended on the type of loan which is made. As at June 2012, the highest interest rate permissible was 20.56% on personal loans of €1,524.00 or less, and 10.93% on personal loans of more than €6,000. 44. In England and Wales, while there may be no limit to the level of interest which might be charged, interest rates on loans are subject to regulation and legislative control under the Consumer Credit Act 1974 , to the extent that by Section 137 of that Act, a Court may find a "credit bargain" to be extortionate, in which case the credit agreement can be opened so as to do justice between the parties. The provisions of this Act were repealed by the Consumer Credit Act 2006 , which have broadened the power of the Courts to intervene in agreements between a creditor and a debtor such that the judicial focus should be on whether the relationship was an unfair relationship. If so, the Court is granted wide powers to remedy the perceived injustice. Whereas it seems that English law therefore has so far rejected the approach of setting a limit on the level of interest which might be charged, the legislation makes it plain that exorbitant interest rate charges are to be tackled on a case by case basis by the Courts. 45. What then are the principles upon which the Royal Court is likely to review carefully a claim for interest, even in undefended cases? We add the latter qualification because the Court, when giving judgment, is not exercising an administrative or rubber stamping function which gives effect to the plaintiff's claim. In all cases, the Court is exercising a level of supervision over that claim, and if it appears to be unconscionable to give judgment, whether the claim is defended or not, it is right that the Court should refuse to give judgment. 46. As with other contractual matters, the first principle is that *la convention fait la loi des parties* . The fact that a party has agreed to pay interest at a particular rate is always likely to be a highly significant factor. Especially in relation to prejudgment contractual interest, it will often be the most significant factor. However it is not a conclusive factor for the reasons given above. 47. The second principle is that what is moderate or reasonable will vary according to the circumstances of each loan, including (but not exclusively):- (i) The level of risk for the lender; (ii) The prospect of gain for the borrower; (iii) Market rates and practice generally; (iv) The sophistication of the parties to the loan; (v) The strength of the relative bargaining positions of the parties. 48. All factors will be assessed having regard to the circumstances as they existed at the time of the loan, because the Court is looking at whether the agreed interest rate is moderate and reasonable at that time. 49. We recognise that there is a spectrum of market rates in relation to particular types of borrowing. It will sometimes be the case that an agreed contractual rate will generally be at risk of failing to be enforceable where it falls outside that spectrum, and where the lender is unable to justify the higher agreed rate as being fair in all the circumstances of the case. One circumstance where, for example, it may be open to a lender to justify a higher rate of interest is where the loan is made to enable the borrower to indulge in a highly speculative exercise which, if successful, would generate a very substantial return for the borrower (a "grosse adventure"). In such a case, the level of risk for the lender and the prospect of gain for the borrower may justify the higher rate of interest. Nonetheless, market practice cannot be determinative by itself of

what is reasonable or moderate. 50. We add that inter institutional lending, although theoretically subject to the same legal rules, is very likely to lead to a reluctance on the part of the Court to intervene - on the basis that the parties to such lending are sophisticated business people, operating in a regulated world, where market practice will be a good indicator of what is moderate and reasonable. 51. For the avoidance of doubt, we do not share the view that, in today's world, money is not a commodity like most other commodities. Accordingly, one can contract about money, just as one can contract about wine or jewellery or other goods. The rationale behind the 1971 Law and its successor in 1996 is that money is a commodity with a value, hence a jurisdiction conferred by statute to award interest on a debt which does not otherwise carry interest. Nonetheless, in our view lenders, including institutional lenders, do have a responsibility towards those who want to borrow money. An urgent need for funds can make a person vulnerable and vulnerable people may be inclined to agree terms which reasonable people would not agree - no longer can one say that such persons are the best judges of what is in their own interests. Responsible lenders will not lend to those who will obviously not be able to make repayment or upon terms that offend the rules against usury. It is with this in mind that the Court does not - indeed cannot - ignore the customary law of this Island which requires the Court not to enforce the contract to the extent that an interest rate is immoderate or unreasonable. The question for us today is how to develop the customary law in such a way as is appropriate for 2012. Interest after the contract period 52. Advocate Blakeley invited us to review the right to charge interest during three different periods - what he called the primary period, namely the period up to breach, the secondary period, namely the period between breach and judgment and the tertiary period namely the period after judgment. In his submission, the nature of the claim for interest in respect of the tertiary period was clearly a claim for damages. He contended that in relation to the primary period, the claim for interest was a claim in debt which arose out of the contract; and in relation to the second period, the nature of the claim for interest was a claim pursuant to contract because that contract between creditor and debtor was in effect a rolling contract - non-payment of interest did not necessarily constitute a breach of contract because indeed the contract envisaged that there might from time to time be late payment of interest, hence the increased interest rate during that period. Accordingly, a provision such as that which is to be found under paragraph 6 of the note of hand (see paragraph 7 of this judgment above) reflected a continuing liability under the contract, and not a claim for damages. 53. The significance of the division of the different periods was that he accepted that the Court had jurisdiction to reduce a claim for interest where the award of interest represented an award of damages, and a penalty clause could therefore be interfered with by the Court, whereas in the earlier periods there was a contractual obligation with which the Court could not interfere. However he went on to submit that in the tertiary period there might be circumstances where the contract could provide for interest to run at a contractual rate post judgment, and in that event the Court would have no discretion to interfere with the rate because it was not awarding damages but merely giving effect to the contract. 54. By contrast, Advocate Heywood contended that there were only two periods - the contract period, during which

the loan was outstanding and interest would run in accordance with the contract, and the post contract period, after the loan had become due, and interest might be claimed until the date of repayment albeit on a different legal basis depending upon the nature of the contract. 55. The Court agrees with the submissions of Advocate Heywood as to the different periods in respect of which interest falls to be considered, namely pre and post the loan becoming due for repayment. 56. We have already referred to restrictive covenants in employment contracts where the covenant continues to be enforceable against the employee notwithstanding that the employment contract has come to an end. This is an example of a contractual obligation, to which the Courts may give effect, when the contract has terminated. 57. Where there is a contract for a loan of a specific amount, bearing interest, and either with a stipulated date for repayment or an express or implied provision by which notice can be given for repayment, the contract in our view comes to an end when repayment is due. The fundamental basis of the contract no longer exists. The contract by which the loan was made is, as it were, notionally traded in by the creditor for the right to a judgment which can be enforced against the assets of the debtor, if repayment is not made. The debtor is no longer entitled to the benefit of the loan. It has fallen due for repayment. 58. There are at least two consequences of this

conclusion.

The first is that, at least theoretically, failure to make repayment on the due date might result in the creditor claiming damages for breach of contract. If so, the usual rules for the assessment of damages would apply. The loss which the creditor has suffered from being out of his money may be more than a question of mere interest, in circumstances where the debtor was aware of a particular use to which the loan monies were intended to be put, had repayment been made. 59. In the majority of circumstances however, the damages to the creditor for being out of his money will be properly fixed by a calculation of interest. It may be that the parties have agreed in advance what that loss will be, and the note of hand or bond which has been subscribed by the debtor may contain provisions for a calculation of that interest if the capital is not repaid when due. If they have made that agreement, the Court can be requested by the debtor to construe the provisions which had been agreed for the payment of an interest rate as effectively a penalty which should be reduced. The Court may decide of its own motion to treat a provision in a contract which contains an increased rate of interest for failure to make repayment on the due date as a penalty. It may particularly be concerned to do so in circumstances where the claim for additional interest as part of the contract but after the conclusion of the contract period includes a provision for compound interest. 60. The second consequence of this approach is that the provisions of the 1996 Law in relation to interest may apply. This prompts the question as to whether they must apply, whether there is provision in the contract for interest on the amount of the loan at the due date or not. 61. As to the question of penalty interest generally, the Court is faced with the same competing interests of upholding the maxim *la convention fait la loi* des parties and yet also ensuring that justice and fairness is achieved. It is clear that the Court has previously not enforced agreed contractual terms in the area of penalty clauses

- see for example *Basden Hotels Limited-v-Dormy Hotels Limited*

[1968] JJ 911 at page 915, the Court said this:- "It is apparent that where there is a stipulated penalty, the Court has power to reduce it (see Pothier, *Traité des Obligations*, Partie II, Chap. V, Nos. 338 et seq.; Code Le Geyt, Livre IV, Titre I, Art. 4 (p.68) "Les obligations pénales, en cas de non-payement, sont réductibles aux légitimes intérêts & dommages"; *Arthur v. Procr. Gen. de Desreaux*

(1882) 208 Ex. 95)." 62. The judicial discretion to intervene where the penalty clause is excessive in relation to the loss actually suffered by the injured party to which Pothier referred was, interestingly, removed by Article 1152 of the Code Civil of 1804 which stipulated that where an agreement provided that the party who failed to execute it should pay a certain sum as damages, the other party could not be awarded either a greater or a lesser sum. However in 1975 the French legislature added a second paragraph to Article 1152 which reinstated the judicial discretion. The judge is now permitted, even of his own motion, to reduce or increase the agreed penalty if it is manifestly excessive or derisory. 63. The approach taken by Pothier was followed in *Her Majesty's Viscount-v-Treanor*

[1969] JJ 1243 where, at page 1245, Le Masurier, Bailiff, said this:- "If, as we believe him to be, Pothier is a surer guide to the Jersey law of contract than are the English authorities, then we have no need to consider whether the conventional sum stated in the quoted stipulation represents a penalty or liquidated damages. Our task is only to determine whether the sum is or is not excessive. It can be inferred from what Pothier says later in Article 346 that the penalty will not be considered excessive unless it exceeds the maximum damages which the obligee could have suffered as a result of the breach of the principal obligation." 64. Article 2 of the 1996 Law enables the Court to include in the sum for which judgment is given simple interest at such rate as it thinks fit on the whole or any part of the debt or damages in respect of which judgment is given interest at such rate as it thinks fit. The 1996 Law differs from the 1971 Law, in accordance with the suggestions of the Court of Appeal in *Clyde-Smith* (supra), in that if payment is made before judgment, the Court also has a statutory power to give judgment for simple interest at such rate it thinks fit on the relevant sum for the whole or any part of the period between the date on which the cause of action arose and the date on which the sum was paid. 65. Article 2(4) provides as follows:- "Interest shall not -

- (a) be ordered in respect of a debt under paragraph (1) or (3); or
- (b) run in respect of a judgment debt under paragraph (2)
- (i) for a period during which, for whatever reason - (ii) in the case of (a), interest on the debt already runs; in the case of paragraph (b), interest on the sum representing the judgment debt already runs." 66. Clearly awards of interest under the 1996 Law do not include compound interest. This is for two reasons. First of all the reference in Article 2 is to include in the sum for which judgment is given simple interest at such a rate as the Court thinks fit. Secondly Article 2(4) prevents interest running upon interest. 67. In our view the provisions

of the 1996 Law run in parallel with the Court's jurisdiction to award damages for breach of contract. The preamble describes the Law as one enacted by the States "to enable the Royal Court and the Petty Debts Court to award interest in any proceedings for the recovery of any debt or damages". The legislation is therefore enabling legislation in circumstances where the Courts do not already have jurisdiction to make such awards. It follows that the 1996 Law is of limited relevance to the instant case where it is clear that the parties had agreed in principle under the different loan notes that interest would continue to run on the debt outstanding after the same became due until repayment. 68. In the circumstances, after a debt has fallen due for repayment, the Court may give judgment for the interest at the rate agreed in the contract until the date of repayment, or may reduce that rate of interest if the agreed rate is considered to be excessive; or if there is no contractually agreed rate may award damages for breach of contract in failing to make the loan repayment on the due date in such amount as is reflected by a rate of interest which the Court thinks appropriate. In all these instances, the Court is giving judgment for damages for failure to repay the loan on the due date. If the Court does not give damages, then it may be open to it to make an award of interest under the 1996 Law - it would seem unlikely that there will be circumstances when the Court could give interest under the 1996 Law in addition to its assessment of damages for breach of contract, because this would in most if not all cases amount to giving interest upon interest. Compound Interest 69. As we have indicated above, the 1996 Law does not permit the Court to make an award of interest upon interest. Where an award of interest is made under this legislation therefore, the possibility of compound interest simply does not arise. 70. It may be however that in a contractual claim, the creditor asserts that a proper measure of his damages includes payment of compound interest. Indeed, the contract may provide for an agreement between creditor and debtor for the payment of compound interest after the contract period has expired. Where such a claim is made, it is for the Court to assess that claim having regard to the usual rules for the measurement of damages, and having regard to the overriding principles of assessing any claim for interest as described above in this judgment. It seems to us to be unlikely that in cases where the debtor is an unsophisticated borrower, the Court will give much weight to the fact that he or she may have agreed the payment of compound interest, but the nature of the judicial exercise which is described in paragraph 45 to 51 above is that all the circumstances of the case would have to be reviewed. 71. In particular we add that we would reject the Siren call, if it were to be made, that market certainty and ease of enforcement requires the Court not to enter the kind of analysis of the circumstances of each loan which is envisaged by this judgment. It is clear from the legislation adopted both in England and Wales and in France and elsewhere that there is scope for abuse of a dominant position which is implicit in lenders having money and borrowers needing it. 72. The Royal Court has not considered the question of compound interest frequently. We were referred by the amicus to *Le Geyt in his Privileges, Loix et Coustûmes de l'Isle de Jersey, Livre quatrième, Titre I, Des Obligations* at Article 8 where *Le Geyt* reports simply:- "On ne peut valablement stipuler aucun interest d'interest, ni d'arrerage de rente constituée à prix d'argent, mais on peut stipuler l'interest de fruits & Levées & arrerages de rente donciere, ou pour merchandise vendue, après un terme de six

mois gratuitement donné pour le payment." 73. Compound interest was considered in *Sim-v-Thomas*

[2001] JLR 460 , albeit briefly. This was a claim for damages for breach of promise of marriage. At paragraph 28 the Court said this:- "The Court has specifically been asked to assess what that rate of interest [on a money sum] should be. The plaintiff asked for compound interest but the Court sees no basis for such a claim. In the opinion of the Court the rate of interest payable should be 3% above bank rate." 74. All this shows is that the Court did not make an award of compound interest. The Court did not rule as to whether it had power to make an award of compound interest. The judgment makes it plain that interest was not awarded pursuant to the 1996 Law, and accordingly the claim for interest must have formed part of the claim for damages flowing from what amounted to an unjust enrichment (as opposed to an actionable breach of promise). 75. It would not be right to leave this question of compound interest without referring to the case of *Sempra Metals Limited (formerly Metallgesellschaft Limited)-v-Inland Revenue Commissioners and Another*

[2008] 1 AC 561 . The Court of Justice of the European Communities had held that a tax regime which allowed resident parent companies but not non-resident ones to receive dividends from their resident subsidiaries without payment of advance corporation tax was an unwarranted restriction on the freedom of establishment and contrary to Article 52 of the EC Treaty. Accordingly companies which had been obliged to make advance payments of tax contrary to community law were entitled to reimbursement or reparation of the financial loss which they sustained. In this case, the issues which arose included the computation of interest on sums of tax prematurely and wrongly paid by *Sempra Metals Limited*. The House of Lords held that it was always open to a claimant to plead and prove actual interest losses caused by late payment of a debt which might include an element of compound interest, and that such losses would be subject to the principles governing all claims for damages for breach of contract. The House of Lords furthermore held that the Courts had a common law jurisdiction to award interest, simple and compound, as damages on claims for non-payment of debts as well as on other claims for breach of contract and tort. 76. There are interesting comments by a number of their Lordships. However, the underlying rationale in most of the judgments is that compound interest would be due on the application of a restitutionary principle, the House of Lords recognising that the Court has jurisdiction at common law to award compound interest where the claimant sought restitution for the time value of money paid under a mistake. Those of their Lordships who did not follow the decision on the basis of the common law restitutionary jurisdiction, still applied restitutionary principles by indicating that the Court should exercise a discretionary equitable jurisdiction on the basis of unjust enrichment. On the point of compound interest, Lord Hope said this at paragraph 41, page 588:- "Compound interest in domestic law 41. The fundamental point, however, is this. Compound interest is a necessary, and very familiar, fact of commercial life ... computation of the time value of the enrichment on the basis of simple interest will

inevitably fall short of its true value. Such a result would conflict with the principle that applies in unjust enrichment cases, such that the enricher must give up to the claimant the enrichment...." 77. Lord Nicholls put it this way, at page 592:- "51. My Lords, legal rules which are not soundly based resemble proverbial bad pennies; they turn up again and again. The unsound rule returning once more for consideration by your Lordships' House concerns the negative attitude of English law to awards of compound interest on claims for debts paid late. 52. We live in a world where interest rates for the use of money are calculated on a compound basis. Money is not available commercially on simple interest terms. This is the daily experience of everyone, whether borrowing money on overdrafts or credit cards or mortgages or shopping around for the best rates when depositing savings with banks or building societies. If the law is to achieve a fair and just outcome when assessing financial loss it must recognise and give effect to this reality. 53. Unhappily this is still not altogether so. To a significant extent the law remains out of step with everyday life in the 21st century. In the first half of the 19th century the common law adopted a restrictive rule; unpaid debts do not carry interest, either compound or simple. This was an exception to the ordinary common law principles applicable to the recovery of damages for breach of contract. ... 66. The detriment suffered by a tax payer by the premature payment of tax is loss of use of the money for the period of the prematurity. So if a tax payer had to borrow the money, and his claim is for damages, his loss comprises the cost of borrowing the money for the period of prematurity. Alternatively, if the tax payer's reparation claim is framed in restitution, the Inland Revenue's unjust enrichment comprises the benefit of having use of the money for the period of prematurity. Either way, the essence of the tax payer's claim is for an amount of money by way of interest in respect of the tax paid prematurely... 100. For these reasons I consider the Court has a common law jurisdiction to award interest, simple and compound, as damages on claims for non payment of debts as well as on other claims of breach of contract and in tort." 78. At page 628, Lord Walker of Gestingthorpe gave his conclusions in this way:- "183. The judgment of the Court of justice is in my opinion a powerful encouragement for this House to reconsider the basis of which a monetary award reversing unjust enrichment can and should take account of the time value of money. In modern economic conditions simple interest does not provide full compensation in a case where unjust enrichment does last for a significant period (a fact which is now reflected, as Lord Hope points out, in the practice of the European Commission). As Hobhouse J said in the *West Deutsche* case at first instance

[1994] 4 ALL ER 890, 955: "Simple interest does not reflect the actual value of money. Anyone who lends or borrows money on a commercial basis receives or pays interest periodically and if that interest is not paid it is compounded... I see no reason why I should deny the plaintiff a complete remedy or allow the defendant habitually to retain part of the enrichment which it has unjustly enjoyed."" 79. Lord Walker reached a solution not by declaring that the Court has jurisdiction at common law to award compound interest, but rather to extend the Court's equitable jurisdiction to do so. The debate around those two

options is not a relevant debate in Jersey. What is relevant, however, is the acceptance in the House of Lords in that case that in assessing a proper measure in compensation, the Court should apply a restitutionary principle - which also underlies the way in which the Courts assess claims for damages so as to put the plaintiff back in the position he would have been in had the contract been performed - and awards of compound interest as a mechanism for assessing the loss which should be reflected in an award of damages may be entirely appropriate. That indeed reflects the commercial reality for lenders and borrowers alike. Accordingly a lender may be able to say that if this particular borrower had not been in breach of contract, monies would have been repaid and could be re-lent in the market at compound interest; and a particular borrower may be in the position of saying that he was unable to obtain a loan in the market place other than at compound interest with periodic rests in accordance with current market practice. There is a powerful argument for saying that the Courts should have regard to market practice when assessing loss on restitutionary principles. However, such a principle naturally remains subject to the principles which would lead the Court to disallow a claim for interest which was immoderate or unreasonable, because if it would be disallowed by the Court notwithstanding a contractual obligation, the market practice of charging it could not be a proper basis for assessing the appropriate compensatory sum. The claim in guarantee 80. In any case involving a claim under a guarantee, the Court may need to look at the terms of the obligation. As Lord Reid said in *Moschi-v-LEP Air Services Limited and Others* 1973 AC 331 at pages 344/345:- "... I think that it is necessary to see what in fact the appellant did undertake to do. I would not proceed by saying this is a contract of guarantee and there is a general rule applicable to all guarantees. Parties are free to make any agreement they like and we must I think determine just what this agreement means. With regard to making good to the creditor payments of instalments by the principal debtor there are at least two possible forms of agreement. A person might undertake no more than that if the principal debtor fails to pay any instalment he will pay it. That would be a conditional agreement. There would be no prestable obligation unless and until the debtor failed to pay. They would then on the debtor's failure arise an obligation to pay. If for any reason the debtor ceased to have any obligation to pay the instalment on the due date then he could not fail to pay it on that date. The condition attached to the undertaking would never be purified and the subsidiary obligation would never arise. On the other hand, the guarantor's obligation might be of a different kind. He might undertake that the principal debtor will carry out his contract. Then if at any time and for any reason the principal debtor acts or fails to act as required by his contract, he not only breaks his own contract but he also puts the guarantor in breach of his contract of guarantee. Then the creditor can sue the guarantor, not for the unpaid instalment but for damages. His contract being that the principal debtor would carry out the principle contract, the damages payable by the guarantor must then be the loss suffered by the creditor due to the principal debtor having failed to do what the guarantor undertook that he would do." 81. The two different forms of guarantee are sometimes described as the conditional payment guarantee and the "see to it" guarantee. It appears to be the case under English law that Lord Reid treated

the former to be a claim in debt, albeit a contingent claim, and the latter to be a claim in damages. That may well be relevant for the purposes of the distinctions which English law draws between the two. 82. The question is whether the distinction is important under the law of Jersey. Both Advocate Blakeley and Advocate Heywood submitted that it was not, and although the matter has not been in that sense fully argued, we are inclined to agree with those submissions. In the case of a "see to it guarantee", the guarantor's liability to the creditor will be the creditor's loss at the date of the judgment. The damages which flow from that loss may be assessed by an interest calculation, or they may be assessed in some other fashion. It is conceivable that interest would be awarded not by way of damages but under the 1996 Law. It appears to us that the same approach would be taken if the nature of the guarantor's obligation is that he has given a contingent payment guarantee. Accordingly, we have not considered that it is necessary in this judgment to evaluate the guarantee document against the criteria to which Lord Reid referred. The present claim 83. Against those legal principles we now look at the arrangements for this particular contract. 84. The first thing to say is that the judgment of this Court of 16 th March, 2012, the defendant not having appeared, is not open to be revisited at this stage save insofar as it left over the matter of contractual interest. That question was left over against the statement in paragraph 1(b) of each judgment that interest was to run on the capital sums referred to in the different judgments at the rate of 8% per annum from 30 th April, 2008, in connection with the larger claims and 22 nd May, 2008, in connection with the smaller claim until the date of repayment in full. 85. There is no written judgment accompanying the Act of 16 th March, 2012, which is unfortunate as we have to construe what was left to us to decide. We think the position is that the Court, in leaving over the matter of contractual interest, assumed that the award of interest at 8% would amount to a lesser figure. It also appears, however, that there are two problems. 86. The problems are:- (i) In paragraph 1(b) of the Act, the Court has given judgment for interest from April th, 2008, (and not from the date the loan was repayable, nor from the judgment date) while at the same time leaving over to another Court the contractual interest claim, notwithstanding that the rate of interest awarded was not the contractual rate. This only makes sense if the Court was actually reducing the contractual rate of interest in accordance with the principles adumbrated by Poingdestre and Le Geyt , but if that was the intention, it is not obvious why the contractual interest claim should be adjourned. (ii) In the same paragraph of the Act, the Court has ordered interest from 30 th April, 2008, on a capital sum of £200,000 which was not actually due until 30 th April, 2009. There is no obvious rationale for this. 87. In our judgment, these problems arise from the same error, whether that be of the Court or in the Act, namely that interest should have been ordered to run at 8% from 30 th April, 2009, to the date of repayment in full. This was an error on the face of the record and we accordingly correct it by replacing in paragraph 1(b) of the Act the year "2008" with the year "2009". 88. In relation to the claim for contractual interest, what is left over, therefore, in the claims against both defendants is:- (i) the claim for interest at 12% on £390,950 for the period 30 th April, 2008, - 30 th April, 2009; (ii) the claim for additional penalty interest of 1.5% per month on £590,950, interest under (i) above and any costs

incurred, pursuant to paragraph 6 of the Note of Hand from 30 th April, 2009, to the date of repayment. What is also left over, but as against the first defendant only, is:- (iii) the claim for interest at 12% on £41,000 for the period 22 May, 2008, to 30 th April, 2009; (iv) the claim for additional penalty interest of 2% per month on £41,000, interest under (iii) above and any costs incurred pursuant to paragraph 5 of the Note of Hand from 30 th April, 2009, to the date of repayment. 89. We take first the claims for contractual interest at 12%, during the period of the loans, and consider those claims against the criteria set out in paragraphs 45-51 of this judgment. In that connection, we gave notice to the plaintiff of paragraphs 1 to 88 of the draft judgment so that it would have the opportunity of addressing us on the facts of this case having regard to the principles which are set out. The plaintiff has availed itself of that opportunity and indeed has submitted an affidavit sworn by Mr David Henry Tupper, a director of the plaintiff. 90. In that affidavit, Mr Tupper makes these points:- (i) The contractual terms are clear and unambiguous and there was no pressure imposed on the defendants to agree them. Although the plaintiff is not a commercial lender like a bank, the transactions were commercial transactions. (ii) The plaintiff was obliged to accept a second charge against the second defendant's property, and there was therefore a substantial risk to the plaintiff in making the loan. (iii) The defendants were involved in a property development scheme - Advocate Blakeley informed us this was in Jersey

- which for various reasons did not come to fruition. It apparently involved a sizeable piece of Jersey real estate. (iv) This was not the sort of lending which could be compared to normal mortgage borrowing. Secondary borrowing of this nature often attracts higher rates. (v) Neither plaintiff nor defendant was more sophisticated than the other. 91. In his submissions, Advocate Blakeley contended that we should be looking at the rate of interest under the contracts only, and not the overall return, and he submitted we should apply the rates which were agreed. He also submitted that we were entitled to take into account that this was a default judgment - a debtor should not be any better off by not turning up when summoned and just letting the Court scrutinise the claim than he would be if he did turn up. We did not really understand this submission. The point is not that the debtor is in any better position by not turning up, because the debtor's position will be the same whether the debtor appears to argue the matter or not. Either way, the Court has to scrutinise the claim which is being made before giving

judgment.

92. Advocate Blakeley submitted the Court should not intervene in the agreed contractual rate unless there was what he called an obscene rate of interest. It was not clear when an interest rate became obscene, but he did contend that the interest rates in this case did not fall into that category. He submitted that we should ignore the question of the additional sums which were due and focus only upon the interest rate in the loan contract. It was put to him that if that were the right approach, it would be possible for a party to structure a loan arrangement by requiring payment of an additional sum, on top of the capital originally

loaned, and a very moderate rate of interest separately. The effect of this would be to conceal what was in fact a very significant sum by way of interest. Mr Blakely's contention was that nonetheless it was the rate of interest and not the overall return which was critical. The additional sums in this case were a bonus which would flow from successful completion of the property development. 93. The difficulty with this latter argument is that the additional sums were due whether the property development was successful or not. It seems to us to be impossible to characterise them as a bonus for a successful property development. 94. It is against these facts that we considered the claims for contractual interest at the rate of 12%, compounded on six monthly basis, and the claim for additional penalty interest at the rate of 2% per month in the case of the loan of £41,000 and 1.5% on the loan of £390,950, noting that in the case of the larger loan, the penalty interest of 1.5% per month ran on the additional sums as well as on the original capital and the outstanding interest calculated at 12% per annum, payable six monthly. 95. The Court approaches the two loans separately because they were different loan contracts. 96. In relation to the first loan, the Court approaches the matter in this way. First of all, we accept that the principle of *la convention fait la loi des parties* is an extremely strong principle, and that strong reasons are necessary to interfere with it. Here two businessmen, with their eyes open, made a commercial deal by which one company lent another money with which to complete a property development. There is no evidence they were not fully aware of the terms of the deal, and such evidence as there is suggests that they were. If the borrower had been successful in completing the development, presumably a substantial profit might have been made. In those circumstances, it was not obvious at first glance that the borrower should be entitled to come to Court and refuse payment of the sums, including interest, which he had agreed. 97. The Court considers that the payment of the additional sums cannot be regarded as any form of bonus payment or profit share, because they were due whether the debtor successfully developed the land or not. Assessing the extent of the risk and prospect of gain at the time the loan was made, as set out in paragraphs 47 and 48 above, means that in fact one disregards the fact that the development has actually turned out to be unsuccessful. We are charged to assess whether the agreed interest rate was moderate and reasonable against circumstances which included a level of risk for the lender and the prospect of gain for the borrower; and of course if successful there would have been very little risk for the lender and the prospect of much gain for the borrower, but the opposite in the event the development failed. In the circumstances therefore we consider the question as to whether the borrower would be entitled just to refuse payment if the property development went well is not a conclusive question, because that introduces a material fact

- namely that the development went well - into an assessment which has to be made at a time when that was uncertain. 98. To require payment of an additional sum of £200,000 with repayment of the loan of £390,950 amounts to a return of 51.16% for the use of money for one year. In our judgment that is a return which renders the additional charge of 12% interest to be usurious. Indeed we think any rate of interest charged on top of a return of this kind on a loan of money in the circumstances which applied here would be regarded as

usurious. Accordingly we disallow the claim for contractual interest at the rate of 12%, or indeed at any rate for the period April 2008 to April 2009. For the same reason, we disallow the claim for additional penalty interest at the rate of 1.5% per month on the sum of £590,950, that being the capital of the first loan together with the additional sum of £200,000. 99. We now turn to the second loan, and consider the claim for contractual interest at 12% on £41,000 for the period 22 nd May, 2008, to 30 th April, 2009, and the claim for additional penalty interest at the rate of 2% per month on the capital, any outstanding interest and costs. 100. The circumstances of this loan do not include any requirement for payment of additional sums. We do not think it is appropriate to have regard to the first loan as one of the circumstances to be taken into account in relation to the second loan. As at the date the second loan was made, there was no reason, at least on the evidence before us, to consider that the first loan would not be repaid in full. Accordingly, we have regard to whether or not the rate of 12% was a contractual rate with which, in respect of a pre-judgment claim, the Court should interfere. 101. We do not consider that rate to be so excessive or unreasonable that we ought to interfere with it. It is at the margins of the spectrum to which we referred at paragraph 49; there was a level of risk for the lender, and a prospect of gain for the borrower and the parties were of equal sophistication. We do not think there is anything in the surrounding circumstances as summarised in paragraph 47 that leads us to think we should interfere with the agreed contractual position. Accordingly we give judgment to the plaintiff against the first defendant for contractual interest at the rate of 12% on £41,000 for the period 22 nd May, 2008, to 30 th April, 2009, the date for repayment. 102. Different considerations apply to interest after the contract period, as set out in paragraphs 52 to 68 of this

judgment.

Our view is that the additional penalty interest is properly described as a penalty, and was excessive, and accordingly the current order for interest at the rate of 8% from 30 th April 2009 on the sum of £41,000 stands without adjustment. 103. As to costs, the plaintiff is not to be responsible for the costs of the amicus, which are to be paid out of public funds. The Court recognises that the plaintiff has incurred costs in relation to the argument after the judgment date of 16 th March, 2012, but as Advocate Blakeley conceded these cannot be claimed against the defendants. Advocate Blakeley contended that it was in the public interest that the argument on this area of law should take place, and that therefore his client's costs should be paid out of public funds as well. Had he been successful, that is a contention with which I might have been more sympathetic. At the end of the day, however, his client was claiming interest at rates which the Court has found to be excessive and unreasonable, and I do not think the public should be required to meet his costs in doing so. The plaintiff's costs after 16 th March, 2012, must therefore lie where they fall. Authorities *Clyde-Smith and Others-v-Ann Street Brewery Company Limited*

[1994] JLR 254 . Interest on Debts and Damages (Jersey) Law 1971. Interest on Debts and Damages (Jersey) Law 1996. *Pao On and Others-v-Lau Yiu Long and Another*

- [1979] UKPC 2 . Incat Equatorial Guinea Limited and Others-v-Luba Freeport Limited
- [2010] JLR 287 . Commentaires sur l'Ancienne Coutume de Normandie. Lois et Coutumes de l'Ile de Jersey. Privileges, Loix et Coustûmes de l'Isle de Jersey. Code of 1771 (Amendment) (Jersey) Law 1962. Young-v-Barnes Ex 1861 April 6 th . Alcock-v-Lumley Ex 1893 29th July. Grove and Briscoe-v-Baker
- [2005] JLR 348 . Rossborough (Insurance Brokers) Limited-v-Boon and Aziz
- [2001] JLR 416 . Wallace-v-Taylor
- [1965] JJ 455 . Nicol-v-Egan
- [1968] JJ 903 . Loi (1884) sur le prêt sur gages. Consumer Credit Act 1974. Consumer Credit Act 2006. Basden Hotels Limited-v-Dormy Hotels Limited
- [1968] JJ 911 . Code Civil of 1804. Her Majesty's Viscount-v-Treanor
- [1969] JJ 1243 . Sim-v-Thomas
- [2001] JLR 460 . Sempra Metals Limited (formerly Metallgesellschaft Limited)-v-Inland Revenue Commissioners and Another
- [2008] 1AC 561 . Moschi-v-LEP Air Services Limited and Others 1973 AC 331. Page Last Updated: 13 Sep 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bailii.org/je/cases/UR/2012/>

CASE PAGE <https://chat.esheria.ai/case-law/jersey/doorstop-ltd-v-gillman-and-lepervier-2012-jrc-199-01-november-2012>

Prepared on 28 October 2026 · Esheria