

JERSEY / JUDGMENT

Singer v Thomas [2003] JRC 232 (19 December 2003)

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judgment

THE COMMISSIONER: 1. Mr. Singer, the plaintiff in this action, approached Advocate Voisin to see if he could assist him in raising urgently required funds. He had been a hotelier but had disposed of his hotel interests. He had substantial property assets. He had purchased "Château La Rocque" in 1984 for £250,000. In 1998, when Mr. Singer met with Advocate Voisin, it had a potential sale value of £2.8 million but it needed works to be carried out on it. There was a first charge on the property of £315,000 in favour of National Westminster Bank Finance. "Château La Rocque" is a landmark property on the promontory to the west of La Rocque Harbour. The plaintiff also owned a substantial residential property (an eight bedroomed house with seven bathrooms) known as "The Anchorage" at Gorey. Four units of accommodation at the property were let and at the time brought in an annual income of about £20,000. That money Mr. Singer used for living expenses and to service a loan of £125,000 secured on the property in favour of Standard Chartered Bank. The plaintiff also owned a property in Kensington Place which he had planning permission to develop and which he intended to sell. It had then an anticipated sale price of some £200,000 and was unencumbered. In theory, the financial situation was rosy. In reality, it was not. Mr. Singer had two substantial overdrafts with Standard Chartered Bank and the National Westminster Bank. He had no liquid funds. 2. The situation described by one bank manager as "complex" did nothing to encourage any of the financial institutions approached by Advocate Voisin to lend further. The plaintiff was hoping to achieve a lending of some £175,000 to carry out essential works at "Château La Rocque". 3. The plaintiff had a friend. He had known Mr. Thomas since 1976. In October 1997, he had borrowed £10,000 from Mr. Thomas. This was on condition that he paid interest of 10% on a twelve month basis. The period could have been extended. Mr. Singer took out insurance for death cover of £11,000 (which was the original amount plus interest) and he collected a cheque from Mr. Thomas' stockbroker in the sum of £8,955.63p on 17th October 1997. There was a further cash payment and a cheque. That device (if such it was) avoided any declaration of interest which would have incurred a tax value. It is important only for what was next to happen. 4. Mr. Thomas told us that he had much admiration for Mr. Singer. When he learnt of his difficulty he telephoned him and offered to lend him a large sum. Mr. Thomas and Mr. Singer were virtually neighbours at Gorey and Mr. Singer went to Mr. Thomas' house. 5. He knew that Mr. Thomas was acted for by Michael Voisin & Co. They were

also his lawyers - otherwise, why would he have approached Advocate Voisin to seek funding? And why would Advocate Voisin have acted for him in his quest for funds without demur? 6. That Voisin & Co. acted for Mr. Singer this Court has not the slightest doubt. The firm had acted for him on planning procedures, on his finance, was to act on the sale of 37 Kensington Place and acted in relation to a matter of fees due to Ogier & Le Masurier (his wills were with that firm). They were also, (after the events which concern us here) to act in his matrimonial affairs. When Advocate Voisin wrote to Mr. Singer on 2nd April 1998 on the fund raising enterprise, he addressed him as "Dear John". The letter bears the billing number "100545". Every letter sent to Mr. Thomas once the transaction was in train bears the same reference number. Mr. Singer had undertaken to pay all Mr. Thomas' legal expenses. 7. Mr. Singer asked Mr. Thomas for £170,000 over two years. Mr. Thomas was only prepared to offer £150,000 over one year. We heard much discussion on the matter and we saw a schedule of proposed interest payments. 8. There are amendments on two copies of calculations - one written on by Mr. Thomas

- the other writing was not recognised by Mr. Singer, which is perhaps surprising when some two years later Mr. Singer, according to Mr. Thomas, asked him for the paper "which he had written on". The matter is of little importance, as the amendments are de minimis. Suffice it to say that on our calculations, £20,000 on £150,000 yields an interest rate of 13.235% and not 12%. 9. Although Mr. Kendall could not recall who approached him initially to give instructions, we have no doubt that it was Mr. Singer. It would, on the evidence before us, have been about July 1998. By this time, some monies had already been advanced to Mr. Singer by Mr. Thomas in five tranches : £8,955.63 and £44.37 on or about 17th October, 1997. £1,000 on or about 21st October 1997. Then, (dates are approximate), £40,000 on 8th July 1998, £9,000 on 11th September 1998, £40,000 on 25th September 1998, £10,000 on 7th October 1998 and £40,000 on 8th October 1998. The payment of £9,000 on 11th September 1998 was £10,000 less the £1,000 "interest payment" agreed for the October borrowing. That totals £149,000. There is no receipt and no detailed record of these payments made and received. They were agreed between two friends in business. 10. Mr. Singer's evidence was that he did not want the monies over one year: that was too short a period for him to carry out the necessary further renovations to the property and find a purchaser. He had already told Mr. Kendall, an écrivain partner of Michael Voisin & Co. that he was to borrow £150,000. Mr. Kendall spoke to Mr. Bernard Knight and asked him to prepare the documentation. Mr. Knight is a highly experienced draftsman - well-known to the profession over many years of practice. He is now retired. 11. Mr. Kendall submitted a draft bond to Mr. Thomas. It had as its draft appendages a guarantee, an authority to register against the realty of Mr. Singer's company, Bower Ltd. and a security interest agreement over a policy assurance taken out by Mr. Singer on his death. Mr. Kendall, in writing to Mr. Thomas, surprisingly did not have an address for service for Mr. Singer. The bond makes no mention of an interest rate, although interest was anticipated to be paid at the end of the first year. Mr. Kendall sent an internal memorandum to Mr. Knight. He asked what the rate of interest would be on default. Mr. Knight has written in 30%. 12. Matters proceeded apace. A further draft was sent to Mr. Thomas and to Mr. Singer in September 1998. The bond is again for £150,000. The interest

after one year is 30%. The bond and its accompanying documents is to run for one year and the borrower "promises and engages to repay to the lender in full on or before the thirtieth day of September 1999". 13. In evidence, Mr. Kendall, an écrivain of sixteen years' experience, said that he made it clear to Mr. Singer both verbally and in writing, that he was only acting for Mr. Thomas. That evidence is not confirmed by Mr. Singer. Indeed, his reaction to that evidence in the witness box was of total disbelief. The only written evidence we have is that a letter written to Mr. Singer on 29th September 1998 is headed in capital letters "SUBJECT TO CONTRACT". We have no reason to doubt the integrity of Mr. Kendall. He believed that he was acting for Mr. Thomas and not for Mr. Singer, but in our view, it was incumbent upon him in those circumstances to make the situation abundantly clear to Mr. Singer. He did not. It is not enough for Mr. Kendall to say, as he did, that he believed he had made it clear verbally at the outset that he was acting for Mr. Thomas, if Mr. Singer did not understand that to be the situation. 14. We can follow the arrangements made by Mr. Thomas and Mr. Singer, because those arrangements are now clear to us on the evidence we have heard. 15. Originally, Mr. Singer had asked Mr. Thomas for £170,000 for two years. Mr. Thomas was not prepared to lend for that period. Mr. Kendall prepared a draft bond. On the face of it, the intention was that £150,000 was to be lent for a period of one year, with an as yet unspecified amount of interest to be paid on default or at the end of the first year. Mr. Thomas had no doubt what was intended. He wanted a bond for £150,000 with interest on the first year to amount to a further £20,000. that interest was to be hidden in order to avoid having to pay tax on it. We heard from Mr. Cameron, of the firm Killmister Cameron and Co., who has been Mr. Thomas' accountant for some 20 years, and who was not consulted in any way until after all the documentation was signed. He was not shown the documentation and he has never seen it. He was asked for his advice by Mr. Thomas and he gave him an R.10 form to complete, as he had no doubt but that the unspecified sum was interest, despite the belief of Mr. Thomas that he had devised a legitimate tax saving scheme. In fairness to Mr. Thomas, he consulted his accountant as soon as the agreement had been completed. In that context, it does seem strange that Mr. Thomas did not communicate that information to his lawyer. 16. In his amended Answer, the defendant says that he agreed to lend £150,000 which he would provide in various "tranches" to the plaintiff to 8th October, 1998. He calculated the amount paid by 8th October as £150,000 and "rounded up" the interest of 12%. He pleads that the plaintiff (having received £150,000) would enter into an acknowledgment and bond in favour of the defendant in the sum of £170,000. The capital and interest - £150,000 together with the £20,000 (rounded up from £19,862) if not paid in full on or before 8th October 1999 would then incur a penalty of 30% interest. 17. By the time the engrossed bond had been signed by Mr. Singer, he had received a total of £149,000 (which includes the sum of £9,000 received on or about 11th September 1998). 18. We have considered that question with some care. There is no documentary evidence available. Someone is mistaken. We have a bank statement of Mr. Thomas which shows a cash withdrawal of £10,000 on 11th September. That, of course, proves nothing. Mr. Thomas had some recollection of going to the bank with Mr. Singer to withdraw the money - there had been a somewhat similar episode in October 1997 but that had been a reconciliation in cash of

some £1,000. The money was in bankers' bags, according to Mr. Singer, who says he received it at Mr. Thomas' house. When counted, Mr. Singer told us it was £1,000 short, and Mr. Thomas told him that he had retained that sum "by way of interest". We accept Mr. Singer's version of events. 19. On 21st October 1998, the documents were engrossed and were signed by Mr. Singer. The witness to his signature was Mr. Knight. There was an acknowledgment and bond where Mr. Singer acknowledged his indebtedness to Mr. Thomas in the sum of £170,000. Mr. Singer had received £149,000. He undertook to repay (and Advocate Benest stressed the word "repay") the £170,000 in full on or before 8th October 1999, otherwise he would pay interest on the capital sum of 30% per annum. In any event, the capital sum and the interest on it, was to be paid on or before 8th October 2000. 20. There is no mention of interest to be paid during the first year. Provided that the terms of the bond are adhered to, the borrower shall repay £170,000 to the lender on the first anniversary of the bond. 21. At the same time, a security interest agreement was entered into. The collateral was a seventeen year policy on the life of Mr. Singer for £170,000 taken out by him with Royal and Sun Alliance. He was to pay a monthly premium (reviewable on each policy anniversary) of £38.82 per month. There was also a guarantee given by Bowers Limited (Mr. Singer's company) of £170,000 and an undertaking to adhere to the terms of the bond. The common seal of Bowers Limited was affixed and Mr. Singer and another Director/Secretary signed the guarantee. These were complex documents upon which Mr. Singer was not formally told to seek independent legal advice. 22. Independent legal advice - or any legal advice - might have led to clarifying amendments. Of one thing we are certain. Mr. Singer was desperate for the money and was certainly not coerced into signing any of the documents. 23. It is perhaps interesting to read a faxed letter sent to Mr. Thomas by Mr. Kendall on 8th July 1998, almost four months before the final documents were signed. 24. It reads in part - "Bond. This sets out the terms of the borrowing and I have proposed that interest should be payable from the date of demand for repayment of the capital sum should this arise under Clause 3 although the borrowing itself is interest free. Please let me know the rate you feel is appropriate". 25. That draft bond, it will be recalled, was for £150,000. 26. On the same day that Mr. Kendall faxed Mr. Thomas, he sent an internal memorandum to Mr. Knight. It is headed "Proposed loan of £150,000 by B. J. Thomas to J. A. Singer ". Mr. Knight annotated the typed copy in his own handwriting. "The address for Mr. Singer (which Mr. Kendall did not know) and the registered office of Bowers Limited is "The Anchorage" and the rate of interest on the Bond and on the Security Interest Agreement is 30% ". Had Mr. Singer and Mr. Thomas agreed to have the draft engrossed, Mr. Singer would have signed a bond (with its accompanying documentation) for £150,000 interest free, repayable on or before 30th September 1999, but with a proviso that if he committed any act of default or did not repay the £150,000, then an interest rate of 30% would be enforced and be accepted. 27. The position changed. On 30th September 1998, Mr. Knight wrote on a piece of blank paper - "£170,000 - repayable on or before 30/9/99". If not, interest 30% p.a. and up to 30/9/2000 lump sum at repayment". 28. He faxed to Mr. Thomas an "amended draft bond" which he had prepared "with the proposed loan to be made by you to Mr. J. A. Singer in the sum of £170,000". 29. The draft was amended on 30th September 1998. It was amended because Mr.

Singer approached Mr. Kendall, who redrafted the proposed bond. He informed Mr. Thomas, who stated that he was "absolutely shocked" by the amendment. The bond was now £170,000 for two years. Mr. Thomas told us that he insisted on 30% at the end of the first year to leave no doubt in Mr. Singer's mind that if he had not repaid by that time, the high rate of interest would operate. The plaintiff pleads that the defendant proposed to lend the sum of £170,000 interest free for the first year and thereafter at 30%. The pleadings say that - "The Plaintiff maintained his request for £170,000 and the defendant later agreed to lend the plaintiff the capital sum of £170,000 without interest for the first year and at an interest rate of £30% after the first year. The Plaintiff accepted the high interest rate as he intended repaying the capital sum after the period of two years." 30. Mr. Thomas, when confronted with this pleading in his examination in chief, described it as "complete rubbish". He has never departed from that view. 31. The Jurats have decided on the facts that the £170,000 is the £150,000 together with the £20,000 "interest". Mr. Singer wanted it documented. Mr. Thomas did not. 32. Mr. Knight could not recall any discussion at all in relation to the Bond, and yet on 20th October (the day before the final bond was signed), he faxed Mr. Thomas and said - "I discussed with Mr. Singer earlier today the two outstanding points relating to the documentation in respect of his borrowing of £170,000 from you". 33. There are then certain amendments to the "side letter" all of which were incorporated into the bond. The side letter (a letter addressed to Mr. Singer) had been most carefully drafted by Mr. Knight on a skeleton draft prepared by Mr. Kendall. The side letter was given to Mr. Singer after the bond was signed. He had seen it and amended it to his satisfaction. It covers such details as how the guarantee will affect the property "The Anchorage" and the circumstances under which the guarantee might be registered. 34. A letter to Mr. Thomas dated 20th October 1998 says this in conclusion - "I look forward to hearing from you on the above during the course of the day as Mr. Singer (who is to be away from the Island from tomorrow for some two months) is attending at our offices early tomorrow with a view to executing all relevant documentation and the side letter in a form approved by you should be handed to him at that time". In fact, Mr. Singer was away in the Far East for six months. This came as a complete surprise to Mr. Thomas, who was accustomed to Mr. Singer going away for two months in the winter. Mr. Thomas wanted to help his friend, but he did tell us that the document does not fully reflect the agreement. We have to ask ourselves why these two businessmen allowed the agreement to be concluded in the way that it was if they do not now agree its content. It was not foisted on them. They had discussed it. They had altered the drafts. In essence, Mr. Singer acknowledges being "well and truly indebted" to Mr. Thomas in the sum of £170,000. 35. When he signed the agreement on 21st October 1998, it was for one year and if it was not repaid at the end of one year, it would run for another one year but at 30% per annum. If the £170,000 were not repaid on 8th October 2000 (in the normal course of events) then Mr. Thomas could exercise his rights under the security interest agreement and under the guarantee given by Bowers Limited. He was more than adequately secured. 36. The agreement does not reflect the true position. Mr. Singer was never to get £170,000. The parties knew that. The lawyers did not. The £170,000 was £150,000 with interest of 12% "rounded up". We have interpreted it. That was the agreement as if the

£170,000 (capital and interest) were not repaid at the end of one year then the "in terrorem" rate of 30% would apply for one further year. At the end of that time the security interest agreement and the guarantee would claw in. 37. Mr. Singer never received more than £149,000. On 1st September 2000 (over one month before the terms of the bond came unequivocally to an end), Mr. Singer attempted to pay £150,000 plus interest from 9th October 1999 to 1st September, with an appropriate deduction for tax. 38. It does seem to us surprising that when Mr. Singer attended upon Mr. Kendall on 1st September 2000 with a cheque to discuss the repayment, he was then advised to seek independent legal advice. 39. On 1st September 2000, Mr. Knight wrote a memorandum to Mr. Kendall. It reads - "Memorandum From: B. A. Knight To: J. P. Kendall File 100545-5 Re: J. A. Singer In accordance with the Bond dated 21st October 1998, Mr. Singer was to repay Barrie Thomas £170,000 on or before 8th October 1999. If he failed to do so he has to pay interest at 30% per annum from 9th October 1999 until the date of repayment which is to be on or before 8th October 2000. Interest on £170,000 @ 30% p.a. for the period 9th October 1999 to 1st September 2000 inclusive I calculate to be £45,844.26. If no deduction of Jersey Income Tax is taken into account this would make the total repayment of capital and interest today of £215,844.26. If income tax at 20p in the £ is allowed against a completed R10 Form this gives a deduction of £9,168.85 i.e. Interest £45,844.26 Less Income Tax £9,168.85 Net £36,675.41 This would make the total repayment today of £206,675.41 plus an R10 Form. 40. Mr. Kendall wrote to Mr. Singer on 5th September. His letter reads - "Voisin & Co. Our ref: JPK/BAK/VP/100545-5 J. A. Singer, Esq., Anchorage, Gorey Coast Road, Gorey, St. Martin Jersey 5th September 2000 Dear Mr. Singer, I refer to the Bond dated 21st October 1998 which you subscribed in favour of Mr. B. J. Thomas and subject as hereinafter provided I calculate the total amount payable by you to Mr. Thomas tomorrow to discharge the loan and interest amounts to £207,232.78. The interest element of the repayment is £46,540.98 less income tax at the rate of 20p in the £, £9,308.20, a net payment of £37,232.78. The payment referred to above has been calculated on the understanding that on making the payment on 6th September 2000 you deliver to Mr. Thomas a duly signed certificate of deduction of Jersey Income Tax in the form enclosed herewith. Yours sincerely. J. P. Kendall Enc." 41. Before that Mr. Singer had written to Mr. Thomas on 3rd September 2000. His letter reads - "3rd Sept 2000 Dear Barrie, As you know last Friday afternoon I called at the offices of Michael Voisin & Co to repay the £150,000 and as required 30% interest calculated from 9th October 1999 to date. A problem arose after speaking to John Kendall as his calculations were based on the capital repayment of £170,000 and 30% interest. John thought it best to telephone you to confirm that I in fact received £150,000 and not £170,000 as he had made his calculations from. After John spoke to you, the phone was passed on to myself and you explained to me you had confirmed to John Kendall that £150,000 total had been lent but you were looking for £170,000 plus 30% interest from 9th October 1999 to date. After which John Kendall spoke to me saying he understood from you that I had received (sic) only £150,000 and that there had been other agreements between us, and that it would be better for me to speak to you so as to settle the matter. There was as we both know various options discussed including interest charged at 12%, interest free, and interest at 30% for the final year. I am not

prepared to pay 30% on funds not received (sic). You told me the 30% interest charge was to speed me on with the completion of the La Rocque property and then dispose, as you know at this point in time this is not the factor, you want extra to what I have borrowed plus 30% from the 9th of October 1999 and only last week you told me you wanted 30% interest if you agreed (sic) to a further year term. I understood you were helping me when you first lent me money but these figures (sic) are excessive. You have told me I have to stick to the letter of the agreement. The letter of the agreement is of the borrowing of £170,000 of which I have received (sic) in total £150,000 and I am in a position to confirm that being the total amount borrowed will pay together with interest as set out in the agreement and document endorsed. If you wish to speak to me directly on this matter I will be here most of the day and tonight. Regards, John" 42. Advocate Benest was consulted. She made another final offer on 11th September 2000. Her letter enclosed a cheque for £183,336.96 being the £150,000 plus gross interest in the sum of £41,671.37 less tax retained in the sum of £8,334.27p. This offer was made in full and final settlement. 43. Seven days later Michael Voisin & Co. replied. It is an interesting letter. We set out two paragraphs of it - "I note that you have purported to settle your client's outstanding liability by sending a cheque for £183,336.96. I write to formally reject the offer made in settlement and ask that your client repay the amount due pursuant to the Acknowledgement and Bond subscribed on 21st October 1998. I have firm instructions to insist that the full amount is paid and will not enter into negotiations when it is clear from the documentation that your client acknowledged his indebtedness to my client at the outset in the sum of £170,000. I would refer you to all of the documentation and correspondence relating to this borrowing and, in addition to the Bond itself, to the Royal and Sun Alliance Policy entered into by your client which provided for life cover of £170,000." 44. On 18th November 2002, the Master issued a consent order. The plaintiff consented to pay, and has paid, without prejudice to the continuing claims £140,000 with interest at 30% for 328 days from 9th October 1999 to 1st September 2000, being £37,742.30 less 20% income tax at £7,548.46, being a total of £30,193.84. Why the consent order was not made for £149,000 is not clear. Certainly another £9,000 was actually received. We have found this on the facts. 45. We now come to the nub of the matter. It is based on the second issue that the parties asked us to decide. Is the plaintiff's remaining capital liability under the terms of the acknowledgment and bond £170,000 or the £149,000 that he actually received? 46. Advocate Benest asked us a rhetorical question. She said

- "Would anyone in their right mind sign an acknowledgment and bond in these terms if they understood that they would have to pay £170,000 irrespective of the amount they actually received, plus interest thereon at 30%?" 47. Mr. Singer was clearly in his right mind. There is no question of that. That he should have been advised by letter to seek independent legal advice we have not a scintilla of doubt. Whether he would have taken it is not a question that we would wish to answer. 48. Advocate Benest gave us examples in law to support her client's argument. In *Wallis v Taylor*

(1965) JJ 455 the Court said this - "It is an established principle of Jersey law that "la convention fait la loi des parties" and the Court will enforce agreements provided that, in the words of Pothier (Oeuvres de Pothier , Traité des Obligations, 1821 édition at p.91) " elles ne contiennent rien de contraire aux lois et aux bonnes mœurs , et qu'elles interviennent entre personnes capables de contracter ". Where an agreement is freely entered into between responsible persons good cause must be shown why it should not be enforced".

49. Mr. Singer freely and without coercion entered into an agreement and bond, a security interest agreement and a guarantee which could not be clearer on the face of the documents. These two former friends had carried out a successful money lending exercise between them in October 1997. Financially, that arrangement was to the lender's benefit but the borrower, a businessman, was not averse to its terms. We find it very surprising that Mr. Singer, having agreed these swingeing terms, on the very day he signed the documents, left for six months in the Far East.

50. Mr. Singer in our view is bound to pay £9,000 with interest on the sum at 30% from 9th October 1999 to date of repayment less 20% income tax.

51. That leaves a "capital liability" to be decided of £21,000. This money was never received. Is the demand of that sum enforceable in law?

52. In July 1998 a first draft was prepared by Michael Voisin & Co. It showed an advance of £150,000 to be repaid within a year. There is no mention of interest. It makes no mention of the £20,000 by way of interest. If that agreement had been signed and Mr. Singer had rested on his verbal agreement it would have led to complex arguments. This draft was never engrossed.

53. Mr. Singer's argument on this is interesting. In his amended reply and answer to counterclaim he pleads at paragraph 5 - "The Defendant informed the Plaintiff that he wanted something "extra" for lending him the sum of £150,000. Interest at 12% on the capital sum of £150,000 for one year was calculated and it was proposed to the plaintiff that an approximate equivalent of £20,000 be paid by the plaintiff as the something "extra". Interest after an "interest free" first year would be calculated at 12%. The plaintiff understood that the defendant did not want to have to declare tax on the first year's interest received on the capital sum of £150,000 and for this reason the scheme was devised. The plaintiff refused to take part in any such scheme and the defendant then proposed to lend the sum of £150,000 interest free for the first year and thereafter at 30%."

54. Further draft agreements were produced but these were in the sum of £170,000. Mr. Thomas says that when the money is received, tax will be paid on it. We have to consider the amount due. Is it £170,000 to include the £20,000 "facility fee" in the first year? Or is it £149,000 because the balance has never been received?

55. As a matter of fact, the Jurats have ruled that on the evidence they have decided that it was never intended for £170,000 to be paid. What then is the balance between the sum actually received and the amount stipulated in the Bond as having been received?

56. Both counsel quoted from an extract from Simon's Direct Tax Service and in particular, from this passage - "In *Lomax v Peter Dixon & Son Ltd.* (1943) KB 671, 673 where the question was whether discount and premiums represented capital payments and were therefore not subject to income tax, Lord Greene MR dealt exhaustively with the subject of commercial loans and the relation of rates of interest to other terms of issue. He stated that the question whether a receipt

was to be regarded as capital or income must be decided from the terms of the contract as properly interpreted in the light of all admissible extrinsic evidence, but that he pointed out that in many cases mere interpretation of the contract led nowhere". He cited the simple scenario where A lends £100 to B on the terms that B will pay him £110 at the end of two years with no other terms as to interest and the contract does not explain the nature of the difference of £10. The justification for regarding the £10 difference as interest might be first that the transaction being obviously a commercial one, the lender must be presumed to have acted on ordinary commercial lines and to have stipulated for interest on his money; and secondly, that the £10 difference was interest charged at a reasonable commercial rate. He also considered the more complicated example whereby A lends £100 to B at a reasonable interest rate and stipulates £120 at the maturity of the loan. Here, the £20 could be compensation for the capital risk or it could be deferred interest. If it is evident from the negotiations that the £20 was compensation for the capital risk, he held that it should not be treated as income". 57. It is interesting to note that if Mr. Singer is correct, he has never asked for payment in full of the "balance" that he now demands. That is, the balance between the 149,000 that he actually received and the £170,000 that he acknowledged that he was indebted to the lender "his heirs, executors and assigns". 58. Is the agreement "contre la loi"? We agree with Advocate Preston that we can distinguish this case on its facts from the case of *T. W. Jameson Ltd. v Olivia Harris*

- (1981) JJ 17. In that case, the builder had carried out illegal work so he was not entitled to remuneration for that work. The building bye laws were clear. The builder had been in business in Jersey for thirty years and knew - or ought to have known - that the work was illegal. In this case, we have a scheme devised by Mr. Thomas to avoid tax. 59. Was this done in contravention of the provisions of a Jersey law - that is, Article 85 of the Income Tax (Jersey) Law or any other provision of that Law? 60. We do not think that it was. Had the scheme worked as Mr. Thomas suggested it, the Comptroller of Income Tax would not have become involved. Usury is no longer an offence. It is with some reluctance that we have to find for the defendant. On the question of mitigation of loss, Mr. Singer attempted to discharge his liability under the terms of the acknowledgment and bond by payment of £150,000 with interest thereon at 30% from 9th October 1999 to 1st September 2000, less an appropriate deduction for tax. This was rejected. Ten days later, on 11th September, his newly appointed lawyer, Advocate Benest made a further offer totalling £183,336.96p. That is £150,000 plus gross interest of £41,671.37p less 20% tax retained in the sum of £8,334.27p. That cheque was tendered in full and final settlement. It too was rejected. 61. Advocate Benest argued on the appeal case of *Pickersgill & Le Cornu v Riley*
- (2002) JLR 459) but that passage does not deal, and was not intended to deal, with offers made "in full and final settlement". 62. It was only in November 2002 that the consent order was made. 63. Interest at 30% was payable in the bond from 9th October 1999 until the date of repayment of the capital sum. Of course, it was envisaged that the whole payment of capital and interest would be paid on or before 8th October 2000. Advocate Benest says that from 8th October 2000 we should apply a more reasonable rate. 64. In *H. M. Viscount*

v Treanor

(1969) JJ 1243 at 1245, the Court quoted from Pothier , saying that: "if, as we believe him to be, Pothier is a surer guide to the Jersey law of contracts 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 sum. Our task is only to determine whether the sum is or is not excessive." 65. Advocate Benest asked us to consider two articles from his " Traité des Obligations". Article 343 " Cette peine est stipulée dans l'intention de dédommager le créancier de l'inexécution de l'obligation principale : elle est par conséquent compensatoire des dommages et intérêts qu'il souffre de l'inexécution de l'obligation principale ". And Article 346, "La peine stipulée en cas d'inexécution d'une obligation peut , lorsqu'elle est excessive être réduite et modérée par le juge ". 66. Mr. Singer has already expressly agreed to pay 30%. It is in the Consent Order. He paid £140,000 with interest at 30% for 328 days from 9th October 1999 to 1st September 2000. We find no assistance in Pothier . 67. The plaintiff must pay a further £29,000 at 30% simple interest from 9th October 1999 to the date of repayment. There will be a sum retained of 20% tax. 68. We have no hesitation in ordering that each side will bear its own costs. Authorities Wallis -v- Taylor

(1965) JJ 455 . Viscount -v- Treanor

(1969) JJ 1243 . Pothier : Traite des Obligations: Articles 343 and 346. Lomax -v- Dixon and Son, Ltd (1943) KB 671. T. W. Jameson Ltd -v- Harris

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