

IN THE PRIVY COUNCIL

No.17 of 1971

ON APPEAL
FROM THE SUPREME COURT OF HONG KONG

BETWEEN

TAK MING COMPANY LIMITED
- and - (Appellant)

YEE SANG METAL SUPPLIES COMPANY
(Respondent)

UNIVERSITY OF LONDON INSTITUTE OF ADVANCED LEGAL STUDIES 10 MAY 1973 25 RUSSELL SQUARE LONDON W.C.1
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CASE
- for the -
APPELLANT

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Appellant.

ON APPEAL
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TAK MING COMPANY LIMITED
Appellant

- and -

YEE SANG METAL SUPPLIES COMPANY
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APPELLANT

10 1. This is an Appeal from a Judgment dated 1st December, 1970, of the Supreme Court of Hong Kong in its Appellate Jurisdiction (Blair-Kerr, Mills-Owens and McMullin J.J.) dismissing an Appeal from a Judgment dated 7th July, 1970, of the said Supreme Court of HongKong in its Original Jurisdiction (Pickering J.) whereby it was ordered that the Judgment given on 3rd January, 1969, by the said Supreme Court in its Original Jurisdiction (Pickering J.) be corrected by the deletion of the full stop at the end thereof and the addition of the words "and such balance if any is to bear interest at the rate of 8% per annum from the date of commencement of this action until the date of payment".

20 2. These proceedings were commenced by a Writ issued on the 16th day of November, 1966. The Respondent was the Plaintiff in the action, the Appellant was the 2nd Defendant and the 1st Defendants were building contractors, Defag Construction Company. At the time the Writ in the action was Issued, the Respondent had obtained Judgment against the 1st Defendants for the amount of his claim.

3. The Statement of Claim is dated 13th day of March, 1967, and included a claim for interest upon the principal amount claimed at the rate of 8% per annum from the commencement of the action. At the time that the Statement of Claim was filed Order 15 Rule 7 of the Code of Civil Procedure then applied in Hong Kong and provided as follows: "When the action is for a sum of money due to the Plaintiff the Court may in the judgment order interest at such rate as the Court may think proper to be paid on the principal sum adjudged from the commencement of the action to the date of judgment, in addition to any interest adjudged on such principal sum for any period prior to the commencement of the action; and further interest, at such rate as may for the time being be fixed by the Court, shall be recoverable on the aggregate sum so adjudged, from the date of the judgment to the date of payment".

RECORD

4. The action was tried before Pickering J. between 9th October and 17th October, 1968. At the outset the Learned Trial Judge granted the joint Application by the Appellant and the Respondent for the question of liability to be tried and the question of damages postponed and he made the Order accordingly.

5. By his Judgment dated 3rd January, 1969, the Learned Trial Judge gave Judgment for the Plaintiff and ordered that the quantum of damages should be determined separately. The said Judgment was handed down in Open Court on 3rd January, 1969, when both parties were represented by Counsel. No reference was made in the said Judgment to the question of interest and no Application was made on behalf of the Plaintiff for an award of interest on such sum as would be found due when the quantum of damages was assessed.

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et seq.

6. On 8th February, 1969, Counsel for the parties appeared before Pickering J. in Chambers and by consent an Order was made for the appointment of a Mr. D.A. Bailey to assess the quantum of damages payable by the Appellant to the Respondent. No Application was made for an award of interest to the Plaintiff on 8th February, 1969, but Mr. Swaine, Counsel for the Plaintiff, asked to be on record as intending to make an Application for interest at the appropriate time.

7. By his assessment dated 30th July, 1969, Mr. D.A. Bailey assessed the quantum payable by the Appellant to the Respondent at \$332,635.17.

8. On 6th August, 1969 an Inter Partes Summons was taken out by the Respondent for an Order that interest be paid by the Appellant to the Respondent on the sum of \$332,635.17 at the rate of 8% per annum from the commencement of the action until payment. The Inter Partes Summons was set down for hearing before Briggs J. on 16th August, 1969. The Respondent's Summons was stated to be made under Order 6 Rule 2A of the Rules of the Supreme Court of Hong Kong then in force. Order 6 Rule 2A came into force on the 1st day of May 1968 and provided as follows:-
"When the action is for a sum of money due to the Plaintiff the Court may in the judgment order interest at such rate as the Court may think proper to be paid on the principal sum adjudged from the commencement of the action to the date of the judgment, in addition to any interest adjudged on such principal sum for any period prior to the commencement of the action; and further interest, at such rate as may for the time being be fixed by the Court, shall be recoverable on the aggregate sum so adjudged, from the date of the judgment to the date of payment"

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The Learned Judge (Briggs J.) dismissed the Respondent's Summons with costs on 16th August, 1969.

9. Meanwhile, on 16th January, 1969 the Appellant had appealed against the Judgment of Pickering J. of 3rd January, 1969 to the Supreme Court of Hong Kong in its Appellate Jurisdiction (the Full Court). Judgment was given by the Full Court on 2nd June, 1969 dismissing the Appellant's Appeal. The Appellant further appealed from the said Judgment of the Full Court to the Privy Council and the Privy Council dismissed the Appeal on 6th October, 1971 in Privy Council Appeal No.38 of 1969.

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10. Order 6 Rule 2A of the Rules of the Supreme Court of Hong Kong was repealed on the 6th January, 1970, by L.N.5 of 1970. The Supreme Court Ordinance Cap. 4 of the Laws of Hong Kong was amended with effect from the 9th January, 1970, under the provisions of

Ordinance No.6 of 1970, by the addition of Sections 30A and 30B which provided as follows :-

10 30A. (1) Subject to subsection (2), the Court may, in any proceedings brought in the Court for the recovery of any debt or damage, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damage for the whole or any part of the period between the date when the cause of action arose and the date of the judgment :

(2) Nothing in subsection (1) shall :-

- 20 (a) authorise the giving of interest upon interest;
- (b) apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or
- 30 (c) affect the damages recoverable for the dishonour of a bill of exchange.

(3) The powers conferred by subsection (1) may be exercised :-

- 40 (a) whether or not interest is expressly claimed;
- (b) at any time after judgment is entered in any case in which it appears that the failure to apply for or to award interest was through inadvertence; and
- (c) in the case of a judgment entered by default or by order of the Registrar, by the Registrar.

(4) In subsection (3) :-

"Registrar" includes a deputy registrar and an assistant registrar appointed under section 18.

(Added, 6 of 1970, s.2)

10 30B. (1) A judgment debt shall carry interest at the rate of eight per cent per annum, or at such other rate as may be prescribed by rules of Court, on the aggregate amount thereof, or on such part thereof as for the time being remains unsatisfied, from the date of the judgment until satisfaction.

(2) In subsection (1) :-

"rules of Court" means rules made by a rules committee appointed under section 38.

(Added, 6 of 1970, s.2)

20 11. On 26th May, 1970, being some sixteen and a half months after the Judgment of 3rd January, 1969, the Respondent filed a Notice of Motion seeking an Order that the Judgment of Pickering J. dated 3rd January, 1969 be "corrected by the inclusion of an Order that the 2nd Defendant (Appellant) pay interest to the Plaintiff (Respondent) on the Judgment debt at the rate of 8% per annum from the commencement of the action". The Court (Pickering J.) was moved in the terms of the Motion on 26th June, 1970 and the Order for interest was sought under the "Slip Rule" Order 20 rule 11. Judgment was given by Pickering J. on 7th July, 1970 when the Application was granted and the following Order made "That the Judgment in this action of Mr. Justice Pickering dated 3rd January, 1969 be corrected by the inclusion of an Order that the 2nd Defendant (Appellant) pay interest to the Plaintiff (Respondent) on the Judgment debt of \$332,635.17 at the rate of 8% per annum from the date of commencement of this action to the date of payment and that each party should pay its own costs of this Application".

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12. Rule 11 of Order 21 of the Rules of the Supreme Court 1967 which was in force at all material times provides -

"Clerical mistakes in judgments or orders or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court on motion or Summons without an appeal".

10 13. The Appellant by Notice of Motion dated 16th July, 1970 appealed to the Full Court against the said Order. The Appeal was dismissed save that the Order of Pickering J. as to costs was varied. The Appellant respectfully submits that this Appeal ought to be allowed and the Judgments of the Supreme Court of Hong Kong in its Original and Appellate Jurisdictions ought to be reversed for the following (among other) :

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et seq

R E A S O N S

20 1. That the Learned Trial Judge was wrong in law in holding that the Respondent's Application for the payment of interest on the Judgment debt was not a matter which was res judicata. The Application made before Briggs J. and dismissed by him on 16th August, 1969 was for precisely the same substantive relief as was sought from Pickering J. on the Motion of 26th May, 1970. The Respondent's remedy, if dis-satisfied with the dismissal of its Application was to appeal against the Order of Briggs J. The Respondent could not seek the same substantive relief again from another Judge of equal jurisdiction. The matter was res judicata.

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30 2. It was the duty of the Respondent's Counsel on the Application by Summons before Briggs J. on 16th August, 1969 to advance all arguments on which the Respondent wished to rely in support of the Application for interest. It is an abuse of process for the Respondent to seek to litigate again in a different form the same issues already adjudicated upon.

40 3. That the Learned Trial Judge erred in law in holding that the "Slip Rule" was applicable. The "Slip Rule", Order 20 Rule 11

applies to "accidental" slips or omissions. The omission to ask for interest was not accidental in that on 8th February, 1969 the question of interest was specifically in the mind of Counsel for the Respondent but was not then sought. Moreover, the question of interest was further specifically in the mind of the Respondent's legal advisers in taking out the Summons of 6th August, 1969.

10 4. The award of interest is the award of substantive relief but it is in the discretion of the Trial Judge whether or not to make such an award. Such discretion must be exercised judicially. Interest does not automatically follow upon Judgment being given for the Respondent. If the Application had been made for interest on 3rd January, 1969 by Counsel for the Respondent, the Learned Judge before making any award of interest
20 would or should have heard arguments on the merits and on the law from Counsel for each party who actually appeared in the trial of the action.

5. It was not competent for the Learned Trial Judge to say, as he does in his Judgment at p.13 that he would (on 3rd January 1969) have made an Order of interest, in that he had not heard arguments of Counsel as to what award of interest if any should be made and it could not be assumed that he must necessarily then have made the award of interest that he did make.
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6. That the Learned Trial Judge was wrong in holding that in the circumstances of the case the Court should exercise its discretion in favour of the Respondent in granting the Application. If the Learned Judge had jurisdiction to make the Order sought he should have exercised his discretion against making the Order :-
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(i) Having regard to the Respondent's delay in seeking an award of interest.

(ii) Having regard to the fact that the right to interest was not argued at the trial by Counsel then appearing for the parties.

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(iii) Having regard to the fact that the Appellant would be put to the expense of

prosecuting two separate series of Appeals because of the Respondent's delay in making the Application and the desirability that there be an end to litigation. //

(iv) Having regard to the fact that the Respondent was seeking in a different guise to obtain relief refused to him by Briggs J. on 18th August, 1969 and against which Order the Respondent had not appealed.

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7. That in the premises the Full Court was wrong in law in upholding the Decision of Mr. Justice Pickering and that the Judgment of the Full Court should be reversed and the original Order of Mr. Justice Pickering dated 3rd January 1969 should be restored and that the Appellant should not be ordered to pay any interest to the Respondent.

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