IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-2977
[2015] NZHC 3046

BETWEEN	CRAIG ALEXANDER SANSON AND DAVID JOHN BRIDGMAN Applicants
AND	EBERT CONSTRUCTION LIMITED Respondent

Hearing: 7 and 8 September 2015

Appearances: M J Tingey and N Moffatt for Applicants
A Van Ammers and R J Gordon for Respondents

Judgment: 17 December 2015

JUDGMENT OF ASSOCIATE JUDGE J P DOOGUE
[on Payment of Interest]

This judgment was delivered by me on
***17.12.15 at 4.30 pm**, pursuant to*
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

[1] On 6 October 2013, I entered judgment against the respondent in this proceeding on the application for an order under s 294(5) of the Companies Act 1993 in relation to payments which the company in liquidation had made to the respondent and in regard to a transfer of a property that was transferred to the respondent.

[2] I reserved leave to the parties to seek further directions on the matter of what, if any, interest ought to be paid on the judgment amount.

[3] The matter of costs was also reserved for further argument but counsel advised me that they have now resolved that issue and therefore this judgment is concerned solely with the question of payment of interest.

[4] Counsel for the respondent, Mr Gordon, submitted that the Court should defer consideration of the interest point until the appeal against my judgment has been determined. I do not accept that submission. Given the nature of the arguments that the respondent has put forward on the proper basis for calculation of the interest in this case, and the amount that is at stake, there would be a high probability of an appeal against any decision in that regard as well. To adopt the respondent's suggestion would mean that if the principal judgment remained in place following the Court of Appeal's decision, it would then be likely that the matter would have to come back to this Court for resolution of the interest question. In the absence of a decision by this Court on the interest point now, there may be difficulties in the Court of Appeal being able to decide the question of interest itself.

[5] The position which Mr Tingey, for the applicant, takes is that interest is payable and that it ought to be payable on the judgment sum from the date when the liquidators in this proceeding were appointed. Mr Gordon, on the other hand, contends that the payment of interest ought not to start any earlier than the date when the liquidators gave notice of claim to the respondent on 24 February 2014. Both counsel are agreed that whatever period is selected, interest should be payable at the rate provided for under s 87 of the Judicature Act 1908.

[6] In my view, the principle governing the payment of interest in a situation of the present kind reflects the elements identified in the judgment of Somers J in *Day v Mead*, which was concerned with an award of interest under s 87 in circumstances where a solicitor had been found to be in breach of his fiduciary obligations to his client.[1] Somers J stated:[2]

> The first and obvious point is that s. 87(1) confers a discretion - "the Court may, if it thinks fit" order interest "on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment". The discretion not being limited by any express provision must therefore be exercised as the justice of the case requires.
>
> Next I think the general purpose for which the power was conferred on the Court was to enable proper compensation to be given to the plaintiff. So long as he is out of the debt or damages the plaintiff is unable to obtain those advantages which possession of the money to which he is entitled would afford him. The corollary is that the defendant who has had the money, but ex hypothesi ought not to have had it, enjoys its uses he may have put it out at interest or otherwise have profitably employed it, or, if he needed to borrow in order to pay he has saved the interest he would have incurred in such borrowing. In times of inflation these matters have particular force, a point mentioned in the context of equitable interest in Wallersteiner , v. Moir (No.2) (1975) 1 Q.B. 373, 388.

[7] In the same judgment, it was concluded that, generally, justice may require interest to accrue from the date the cause of action arose to the date the judgment was delivered, for it is from that date that the plaintiff's entitlement to the debt or damages arises.

[8] To similar effect was the decision of McMullin J in *Westpac Banking Corp v Nangeela Properties Ltd* where, having noted the consequences of not ordering interest, it was stated:[3]

> The making of an order that a preferential payment be set aside without more would enable a payee to retain profits earned on moneys which the Court has held the payee is not entitled to retain because the payment ought never to have been made in the first place. And a payment once made can be expected, particularly in today's commercial world and in the banking business, to be used to earn interest or make profits for the payee. Therefore I think it can be said that effect can better be given to an order for return of a preferential payment under s. 311 (b) by the making of an order for payment

---

1 *Day v Mead* [1987] 2 NZLR 443 (CA).

2 At 470.

3 *Westpac Banking Corp v Nangeela Properties Ltd (in liquidation)* [1986] 2 NZLR 1 (CA) at 8.

> of interest on the sum involved. If it were otherwise the payee could retain the benefit of gains made on property which it ought not to have had and the liquidator would thereby be deprived of interest, which in some cases could represent a substantial amount, earned in the interim on the payment so set aside.

[9] In that case, the Court decided that interest should run from the date when the cause of action accrued, which, that case, being an insolvent transaction decision, was the date of the winding up.

[10] Mr Gordon submitted that for more than five and a quarter years, the respondent had no knowledge of, and thus no ability to mitigate, any potential claim. Therefore a conclusion that the respondent should have to pay interest over the period of five and a quarter years (which is apparently the period from the appointment of the liquidators until formal notification of their claim) would be, in Mr Gordon's submission, unjust and an inappropriate exercise of the Court's discretion under s 295. Essentially, the position that was taken for the respondent was that had the liquidators followed through with greater diligence, they would have made demand on the respondent well before they did on 20 February 2014.

[11] Mr Gordon made a similar submission in the substantive proceeding which was to the following effect:

> 58. The effect of the Liquidators' inexcusable delay has been entirely to the prejudice of Ebert. It is not just that Ebert was (to adopt Cooper J's words) lulled into a false sense of security. It was completely unaware of the Liquidators' intention to set aside the transactions (if indeed they ever held that intention before February 2014) until receipt of a letter, out of the blue. What is more, the money that Ebert received from BOSI back in 2008 had (as one would expect) long been on-paid; including to its sub-contractors who worked building the Shoalhaven Apartments, and to pay GST to the IRD. No creditor can reasonably be expected to anticipate and provision for potential repayment of an otherwise valid transaction this long after it had occurred.

[12] I concluded in the principal judgment that the respondent did in fact know (through Mr Martin, the CEO of the respondent) that there was a risk of the transactions being set aside. It would in any event be surprising that a well-informed CEO in Mr Martin's position would not have a general appreciation of the entitlement of liquidators to seek the recovery of money paid out by an insolvent company, as the company in liquidation was in this case. I therefore consider that,

consistent with my judgment, and on the merits of the case, Mr Gordon's point is unsustainable.

[13] In any case, I note that no attempt was made to analyse what steps the respondent could have taken to mitigate the potential effects of a conclusion that they were recipients of payments and property under insolvent transactions. It is implicit in counsel's submission that the money was used to meet operating expenses of the respondent. The absorption of these amounts into the working capital of the company no doubt assisted the respondent to make profits. Conversely, at the very least, it spared the respondent the need to arrange such funding elsewhere at its own cost.

[14] The point that the respondent raised about the company having spent the money on its operations is essentially that the respondent changed its position to its detriment. In a context which has some similarities to the point advanced here, Lord Goff of Chieveley in the House of Lords decision of *Lipkin Gorman (a firm) v Karpnale Ltd,* a case involving the recovery of money had and received, noted in relation to the change of position argument there put forward:[4]

> At present I do not wish to state the principle any less broadly than this: that the defence is available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full. I wish to stress however that the mere fact that the defendant has spent the money, in whole or in part, does not of itself render it inequitable that he should be called upon to repay, because the expenditure might in any event have been incurred by him in the ordinary course of things. I fear that the mistaken assumption that mere expenditure of money may be regarded as amounting to a change of position for present purposes has led in the past to opposition by some to recognition of a defence which in fact is likely to be available only on comparatively rare occasions.

[15] Although the context here is different, I consider that the situation in *Lipkin Gorman* provides some guidance on how the discretion to award interest should be exercised in the present case.

---

4 *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548 (HL) at 580.

[16] I note that the respondent has not put forward any analysis to show that the cost of maintaining the requisite capital levels through borrowings would have been less than what it would have to pay should the Court award s 87 interest for the period that it was in possession of money which, in terms of my judgment, I concluded belonged to the company in liquidation. There is therefore no detriment established to the respondent for applying TPL's money to fund its activities instead of raising it in some other way, such as borrowing it.

[17] In any case, in the principal judgment, I concluded that there was a reasonable explanation as to why the liquidators did not give notice of the claim till 2014. In the circumstances of this particular case, it is possible to view the lapse of time as increasing the extent of the benefit the respondent received from having the use of TPL's money. The fact that it is now required to account for a benefit that has been augmented by the passage of time needs to be balanced against the countervailing fact that it has had the benefit of use of that money for the same increased length of time.

[18] The approach taken in this judgment should not be construed as recognising a plaintiff's right to interest, regardless of how long it has taken to initiate proceedings and bring them to trial. Claimants seeking interest should not suppose that no matter how dilatory they have been, they will receive an award of interest. Such an approach would not be correct because it would provide a disincentive to claimants to act with reasonable expedition, a requirement that is reinforced by HCR 1.2 which states that the objectives of the rules include the speedy determination of proceedings. Consistent with reinforcing that objective, the Court will make enquiries in cases where it is appropriate to do so, whether the conduct of the claimant has resulted in unnecessary elongation of the period for which interest is claimed.

[19] For these reasons, I consider that the interest ought to be payable from the date of liquidation. There is no dispute that the appropriate calculations result in the sum of $693,922.17 being owing. There will be an order accordingly.

[20] The parties have reached agreement on costs and in that regard there will be an order by consent that the respondent is to pay costs and disbursements of $29,172.16.

_____
J.P. Doogue
Associate Judge