

# Interest in the Local Court:

## Hungerfords v Walker

Lord Oliver said, in his address *Requiem for the Common Law*, that a title for a paper is simply designed to allow one to say what one wants.

The title to this paper is for just that purpose; it is certainly not meant to imply that we are un- or disinterested in the Local Court.

As was pointed out in the July issue of *Balance*, there is no statutory provision allowing for the award of interest from accrual of cause of action to judgment in the Local Court (cf s84 *Supreme Court Act*).

I am told that the former Chief Magistrate advised the Law Society that a rule under s21(2)(f) is to be gazetted shortly. It remains to be seen what the transitional provisions for that rule will be.

There is a provision in r38.01 for interest on costs and judgment, but that does not extend to awarding interest up to judgment.

### The Rule

In the absence of statutory authority, there is no common law power to award interest to judgment. This is clearly stated in *Hungerfords v Walker* (1989) 63 ALJR 210 by Mason CJ and Wilson J at 213, and Brennan and Deane JJ at 219.

But an award in the nature of interest, indeed better than interest under statute, can be obtained by applying the rule in *Hungerfords v Walker*. There, the High Court by majority (Dawson J dissenting) held that a court, when awarding damages at common law for breach of contract or negligence, can include an award for damages by way of interest for the loss of use of the money which the plaintiff paid or lost as a direct result of the defendant's breach of contract or negligence (Mason CJ and Wilson J at 210); Brennan and Deane JJ at 219.

As Brennan and Deane JJ point out at 219:

*"There is...a critical distinction*

by CAMERON FORD

*between an order that interest be paid upon an award of damages and an actual award of damages which represents compensation for a wrongfully caused loss of use of money and which is assessed wholly or partly by reference to the interest which would have been earned by safe investment of the money or which was in fact paid upon borrowings which otherwise would have been unnecessary or retired."*

Their Honours said that while there was no common law power to award interest in the former situation, there was no reason why damages could not be awarded in the latter "as compensation for a wrongfully and foreseeably caused loss of the use of the money."

In that case, the appellants were accountants who had overcalculated the respondents' income, causing them to pay more tax than necessary. The respondents recovered some payments from the tax office, but for the balance which was statute barred, they sued the accountants. Included in the claim was one for interest on the money since it was paid; alternatively, damages for the loss of use of the money.

At trial, Bollen J found that, had the respondents had the money, they would have used most of it in their business, and it would have earned them around 10 per cent. He awarded them that percentage on the amount which he thought would have gone back into the business.

On appeal, the Full Court (King CJ with whom Millhouse and Jacobs JJ agreed) held that the respondents would have used most of the money to pay off their most expensive debts. Accordingly, damages were assessed at 20 per cent of the amount owing, less an amount which it was inferred would not have been used in the business.

From this the appellants appealed

to the High Court, and the respondents cross-appealed. The appellants said that they should not have to pay anything in the nature of interest, and the respondents that the inference should not have been drawn that they would not have used all of the money in the business.

Their Honours in the majority held that the damages were recoverable because they were necessarily within the contemplation of the parties, foreseeable by the appellants, and not too remote (Mason CJ and Wilson J at 218; Brennan and Deane JJ at 219). They declined to interfere with the discounting.

### When is it recoverable?

The rule in *Hungerfords* was expressed as applying to torts and contracts. Strictly speaking, it is binding only in relation to those causes of action.

But in my opinion the rule has a wider application, and is intended so to have by the High Court. Mason CJ and Wilson J based the rule upon:

*"the fundamental principle that a plaintiff is entitled to restitutio in integrum. According to that principle, the plaintiff is entitled to full compensation for the loss which he sustains in consequence of the defendant's wrong, subject to the rules as to remoteness of damage and to the plaintiff's duty to mitigate his loss"* (at 215).

After quoting the words of Fitzgerald J applying the rule, in another case relating to false and misleading conduct, their Honours said:

*"Notwithstanding that these remarks were made in relation to the payment of money in consequence of misleading conduct, the underlying principle is one of wider application. The point is that the loss of the use of money paid away is so directly related to the wrong that the loss cannot be classified simply as due to the late payment of damages"* (my emphasis).

In my submission, the rule can be properly stated thus:

**Where a court would order restitutio in integrum, it can include an award of damages by way of interest for the loss of use of money which the plaintiff paid or lost as a direct result of the defendant's wrongdoing.**

#### What is recoverable?

Paraphrasing Mason CJ and Wilson J at 215, if a plaintiff sustains loss or damage in relation to money which he has paid out or foregone, he is entitled to recover damages for the loss of use of the money when the loss or damage sustained was reasonably foreseeable as liable to result from the relevant wrongdoing.

In other words, damages in the nature of interest are recoverable on amounts paid *by* the plaintiff, or *not* paid *to* the plaintiff, subject to the normal principles of recoverability, namely causation, foreseeability and remoteness. It is also subject to the general requirement that a plaintiff mitigate his loss (Mason CJ and Wilson J at 215).

Their Honours said at 215:

*"Judged from a commercial viewpoint, the plaintiff sustains an economic loss if his damages are not paid promptly, just as he sustains such a loss when his debt is not paid on the due date. The loss may arise in the form of the investment cost of being deprived of money which could have been invested at interest or used to reduce an existing indebtedness. Or the loss may arise in the form of the borrowing cost, ie, interest payable on borrowed money or interest foregone because an existing investment is realised or reduced."*

In other words, the plaintiff can recover what he would have earned with the money had he had it from the accrual of the cause of action, provided it is foreseeable and he has mitigated his loss. The types of loss are not limited to the two stated by their Honours above; it is more important to note that they said *may* arise, indicating that there were other ways in which loss could arise and be recoverable under the principle.

Loss will be more easily proved and quantified in commercial cases. But, in my submission, the principle is not limited to those cases. The majority in *Henderson* did not expressly or impliedly limit recoverability to commercial cases; indeed by basing recoverability upon the "fundamental principle" or restitutio in integrum, the Honours left it to be of wider application.

So, in a personal injuries case, for example, if the plaintiff would have used the money to pay off a mortgage, the amount of interest paid between the cause of action and judgment would arguably be recoverable. The touchstones, as always, are causation and foreseeability. It could be credibly argued that, given the appropriate characteristics of the plaintiff, the defendant would have foreseen the mortgage and the likelihood of its being paid off with the damages award.

Importantly for plaintiffs, if the damages are in the nature of interest, they are not restricted to simple interest, as is interest calculated under statute. Mason CJ and Wilson J said at 218:

*"The award of interest [below] was of necessity compound interest. Simple interest would not reflect accurately the extent of the respondents' loss. Simple interest almost always undercompensates the injured party's true loss."*

Thus, a plaintiff can be better off with a *Hungerfords* claim than if he were entitled only to statutory interest. It also means that quite sizeable amounts could be awarded by way of loss of just damages, a factor to bear in mind when determining jurisdiction.

#### Pleading

The principle enunciated in *Hungerfords* is not a new cause of action: it is a head of damage flowing from an already established cause of action. Mason CJ and Wilson J said at 216:

*"the problem is not concerned with finding a cause of action; rather it is a problem of defining the limits of an established cause of action."*

Nonetheless, being a discrete head

of damage it should be expressly pleaded. Mason CJ and Wilson J referred to *Wadsworth v Lydall* [1981] WLR 598 where the Court of Appeal, taking the recovery of interest in England a little closer to the *Hungerfords* rule, said that a plaintiff could recover if he can *plead and prove* that he has suffered damage.

The pleading need not be elaborate. It need only refer to the incurrance of the loss, identifying it and providing adequate particulars of it. A possible pleading might be:

**As a result of the defendant depriving the plaintiff of the use of the damages/debt/money claimed, the plaintiff has suffered the loss of use of that money.**

**Particulars: Had the plaintiff not been deprived of the money, he would have paid the money to the X Bank in discharge/partial discharge of Mortgage No 123456, and has thereby incurred interest on \$XXX at the rate of Z% per annum from the date the cause of action arose to judgment.**

No doubt, the remedy being relatively novel, there will be many arguments over particulars and interrogatories for the pleading to be refined further than posited.

#### Proving

To succeed in a *Hungerfords* claim, the plaintiff must prove: (1) that he would have used the money in a particular way during the period of deprivation; or (2) that he was forced to obtain funds from elsewhere; and (3) the amount he would have earned/saved had he used the money in the way intended; or (4) the cost of obtaining the money elsewhere.

If the money was to be used in a business, the fact and rate of the profitability of that business would have to be proved.

Where a plaintiff says that he would have invested the money in a bank at usual interest rates, arguably he need not strictly prove those rates. In

*Giner v Public Trustee & Priore* (unreported, NTSC 12/12/91),

Mildren J said that the court could use its own knowledge of interest  
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