

24/09; [2009] VSC 412

SUPREME COURT OF VICTORIA

CAMERON v McMAHON & ANOR (No 2)

Davies J

3 September 2009

CIVIL PROCEEDINGS – PRACTICE & PROCEDURE – INTEREST ON JUDGMENT FOR DAMAGES – WHETHER GOOD CAUSE TO THE CONTRARY HAS BEEN SHOWN: SUPREME COURT ACT 1986, S60.

1. Section 60 of the *Supreme Court Act 1986* ('Act'), provides that there is a statutory entitlement to interest from the date of commencement of the proceeding unless good cause is shown to the contrary. What constitutes good cause in any given case will depend on the particular facts and circumstances and, at the end of the day, a judicial officer has to be satisfied that there is good reason not to apply the general rule in favour of awarding interest to the plaintiff.

2. The good cause requirement has to be measured against the purposes of the statutory power to award interest. They have been recognised to be twofold. First to compensate a plaintiff for the loss or detriment which he or she has suffered by being kept out of his or her money and deprived of its use during the relevant period and secondly to encourage the early resolution of litigation.

Ruby v Marsh [1975] HCA 32; (1975) 132 CLR 642; 6 ALR 385; 49 ALJR 320, applied.

3. The plaintiffs delay in formulating the cause of action was not a good cause for no award of interest in the nature of damages as the plaintiff was successful in part on the case as originally formulated. Secondly, in relation to the question of whether interest at the rate of 9% or the rate for the time being fixed under the *Penalty Interest Rates Act 1983* should be allowed, the assessment of damages was done on the basis of the loan moneys outstanding at the time of judgment including interest. In those circumstances the fact that an amount of 9% was the interest rate payable on the loan moneys did not of itself justify confining the rate of interest payable under s60 of the Act.

DAVIES J:

1. On 26 March 2007 the plaintiff instituted these proceedings. The proceedings came on for hearing on 21, 22, 24, 27 and 28 April and 4 May 2009. On 3 July 2009 I published my reasons and gave judgment in favour of the plaintiff and awarded damages in the sum of \$222,609.32. I also ordered that the defendants pay the plaintiff's costs in the proceeding. I made no order as to the award of interest pursuant to s60 of the *Supreme Court Act 1986*. In fact the prayer for relief had included a claim for interest pursuant to statute.

2. On 18 August 2009, the plaintiff's solicitor by correspondence with the Court, sought a direction on the issue of statutory interest and whether it could be dealt with pursuant to the slip rule. On 21 August 2009, I amended the orders made on 3 July 2009 pursuant to the slip rule to include damages in the nature of interest, in response to that request. Subsequently the defendants' solicitor informed the court that the defendants had not been given an opportunity to make any submissions with respect to the order as to interest.

3. In view of the fact that I made the order on 21 August 2009 under the misapprehension that the parties were in agreement, I considered that it was inappropriate to amend the orders under the slip rule. I invited the parties to put submissions before me in court as to whether an order for interest under s60 should be made.

4. That invitation was taken up and both parties filed written submissions and made oral submissions to the Court. I should indicate that I propose to vacate the order that I made on 21 August 2009 awarding damages in the nature of interest under the slip rule. In the circumstances it clearly was inappropriate for any amendment to be made on that basis without the defendants being given an opportunity to be heard.

5. The question before me is whether the defendants have shown good cause as to why

damages in the nature of interest should not be ordered under s60. Section 60 is in the following terms:

The Court, on application in any proceeding for the recovery of debt or damages, must, unless good cause is shown to the contrary, give damages in the nature of interest at such rate not exceeding the rate for the time being fixed under section 2 of the *Penalty Interest Rates Act 1983* as it thinks fit from the commencement of the proceeding to the date of the judgment over and above the debt or damages awarded.

6. On the language of the section, there is a statutory entitlement to interest from the date of commencement of the proceeding unless good cause is shown to the contrary. What constitutes good cause in any given case will depend on the particular facts and circumstances and, at the end of the day, I have to be satisfied on the material before me that there is good reason not to apply the general rule in favour of awarding interest to the plaintiff.

7. The good cause requirement has to be measured against the purposes of the statutory power to award interest. They have been recognised to be twofold. First to compensate a plaintiff for the loss or detriment which he or she has suffered by being kept out of his or her money and deprived of its use during the relevant period and secondly to encourage the early resolution of litigation.^[1]

8. It was submitted on behalf of the defendants that good cause has been shown in two respects. The first is the plaintiff's delay in formulating the cause of action on which she ultimately relied at the trial, and on which she was successful. The second is that the penalty interest rate applicable from the period from the date of issue of the writ to the date of judgment is higher than the rate of interest that was payable to the plaintiff on the monies which she loaned, which were the subject of these proceedings. The amount of those loan monies outstanding as at the date of judgment, excluding interest, was the award of damages that I made in this case.

9. It was accepted by Ms Cappellotto for the defendants that the plaintiff's delay in formulating the case on which she finally relied did not, by itself, provide good cause for no award of interest in the nature of damages to be made, as although it was necessary for the plaintiff to reformulate part of her case at the hearing of the proceeding, the plaintiff nonetheless was successful in part on the case as originally formulated. In my opinion no good cause has been shown as to why the general rule should not apply.

10. The real dispute between the parties comes down to whether interest at the rate of nine per cent should be ordered in lieu of the penalty rate of interest. Section 60 does provide me with a discretion about the rate of interest that should apply.

11. I have concluded that the appropriate rate should be the rate for the time being fixed under the *Penalty Interest Rates Act 1983*. I am cognisant of the fact that the moneys lent by the plaintiff attracted a rate of 9 per cent only. However, the assessment of damages was done on the basis of the loan moneys outstanding at the time of judgment excluding interest. The reason for that was the difficulty which the plaintiff anticipated in identifying how much interest had accrued on the loan funds from time to time as and when the loans were made and as and when repayments were made. The evidence in the proceeding bore out that difficulty. In the circumstances, the fact that an amount of 9 per cent was the interest rate payable on those loan moneys does not of itself justify confining the rate of interest payable under s60. Furthermore, the compensation to which s 60 is directed is for loss or detriment by reason of being kept out of the use of the funds awarded as from the institution of the proceedings.

12. In the circumstances the order that I will make will be that the defendants pay the plaintiff interest in the nature of damages under s60 fixed in the amount of \$59,765.01.

[1] *Ruby v Marsh* [1975] HCA 32; (1975) 132 CLR 642, 652; 6 ALR 385; 49 ALJR 320 (Barwick CJ) concerning s79A, the predecessor to s60; *Johnston Tiles Pty Ltd v Ezzo Australia Pty Ltd (No 3)* [2003] VSC 244 (Unreported, Gillard J, 3 July 2003) [62].

APPEARANCES: For the plaintiff Cameron: Mr T Best, counsel. Frank Randle Lawyer. For the defendants McMahon and others: Ms K Capellotto (solicitor). DLA Phillips Fox, solicitors.