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SUPREME COURT OF VICTORIA

BURONGA TRUCK SALES & SERVICE PTY LTD v CALLIPARI

Crockett J

16 August 1983 — [1984] VicRp 6; [1984] VR 59

PROCEDURE – CIVIL JURISDICTION – ORDER FOR SUM SOUGHT PLUS COSTS – WHETHER COURT CAN AWARD INTEREST: *SUPREME COURT ACT* 1958, SS60, 77-79B; *MAGISTRATES' COURTS ACT* 1971, S50.

The complainant sought to recover by way of default summons, money for work done and materials supplied. The claim was successful but when the complainant's solicitor asked for interest under s78 of the *Supreme Court Act* 1958, the Magistrate refused the application on the ground that that section did not apply to Magistrates' Courts. Upon order nisi to review—

HELD: Order absolute.
Save for the limited class of cases referred to in s50(1)(d) of the *Magistrates' Court Act* 1971, whereby a ceiling rate of 12 per centum per annum interest is imposed, s60 of the *Supreme Court Act* 1958 operates to allow a Magistrates' Court to order interest on moneys or by way of damages in respect of those cases cognisable by Magistrates' Courts.

CROCKETT J: *[After setting out the facts, the grounds of the order nisi and the provisions of s78 of the* Supreme Court Act *1958 and its ancestor, His Honour continued:]* ... **[3]** The provision when introduced in Victoria by the *Common Law Procedure Statute* 1865 was different from the **[4]** English counterpart at least to this extent that, in recognition that not all claims were tried with a jury, the power to allow interest was vested in "the Court at the hearing" as well as "the jury on the trial of any issue or on an assessment of any damages." The section remained in unchanged form through successive consolidations of the Statutes until its replacement by s2 of Act No 6874 with the section in the terms which (with one exception) I have set out. That exception, (which is immaterial to the issue now requiring resolution) is that by Act No 9633 of 1981 the statutorily fixed minimum interest rates were replaced with a defined formula for ascertaining the current ceiling rate.

It would not, I think, be untrue to say that the primary purpose for the enactment of Act No. 6874 was to introduce s79A into the *Supreme Court Act* 1958. The purpose of that section is to extend the power to grant interest to actions for damages. Section 79A bestows the power to assess damages in the nature of interest upon "the Judge" and it is plain that the legislation was concerned to deny the jury any part in assessment of such damages. However occasion was taken at the same time to replace s78 and 79. Among the changes introduced by the substituted sections was the grant of the power to assess and allow interest to "the Judge" instead of "the Court ... or the jury." Plainly it was intended that all matters of interest on moneys or by way of damages should be within the jurisdiction of the presiding judicial officer in the sense that the jury should no longer have any part to play in relation to awards of interest.

[5] The respondent neither appeared nor was he represented at the hearing before me but it appears that the Stipendiary Magistrate took the view that the legislative use of the expression "the Judge" was to be construed as intending to deny jurisdiction to Stipendiary Magistrates. Section 60 of the *Supreme Court Act* 1958 (which has its origin in the *Judicature Act* 1883, s58) provides that -

> "The several rules of law enacted by Part VII of this Act shall unless express provision is otherwise made be in force and receive effect in all Courts whatsoever so far as the matters to which such rules relate shall be respectively cognisable by such Courts."

Thus it is plain that in Magistrates' Courts the provisions as to interest are to be in force and receive effect unless there is express provision to the contrary. I do not consider that the

amendment so as to replace the expression "the Court... or the jury" with the term "the Judge" amounts to any such express provision. There can be no doubt that prior to 1962 ss78 and 79 were to be given force and effect in the Magistrates' Courts. If the intention was to deprive those courts of that jurisdiction one would expect the intention to be disclosed by plain language. The purpose intended to be served by the amendments to which I have referred is tolerably plain. It was to remove from a jury the jurisdiction in relation to assessment of interest that it previously enjoyed.

See also the observation of McInerney J in *The City Mutual Life Assurance Society Ltd v Giannarelli* [1977] VicRp 53; (1977) VR 463 at 467. It would – or might – not have been sufficient simply to bestow the power upon "the Court". The Court can be said – where there is a jury – **[6]** to consist of the Judge and jury. To put the matter beyond any doubt the expression employed was "the Judge". That, I consider, having regard to the history of the legislation, means the presiding judicial officer as distinct from the jury. The term "Judge" is not intended to carry its literal meaning. Otherwise the Masters of the Court would not have the power when entering final judgment or default judgment to allow interest under Division 6.

A similar point to that arising for decision in this case was taken in *Giannarelli's case*. At p468 in his reported reasons for judgment McInerney J stated the appellant's contention and the respondent's answer in these words -

> "It was objected that the words in s78 that 'the Judge at the hearing shall upon application... allow interest ...' precluded the Prothonotary from allowing interest when judgment is entered in default of an appearance under O13, r5. It was contended that though the power to allow interest under s78 was expressed to be exercisable by a judge at the hearing, nevertheless, the Prothonotary, in entering judgment in default of appearance was to be regarded as exercising, as an officer of the Court, the function of a judge at the hearing."

After discussing the relationship of the Prothonotary to the Court, His Honour said (at p469):

> "In my opinion, the entry of judgment in default of appearance is an act of a merely ministerial character, even though O41, r6, taken in conjunction with O13, r2, casts on the officer entering the judgment the duty of examining the affidavit of service and the form of judgment produced to see if the same be regular and contain all that is by law required. But once he has satisfied himself on that point he is bound to – 'he shall' – enter judgment accordingly.
>
> The Prothonotary, or the clerk in his office, (as the case may be) who performs the **[7]** ministerial act of entering judgment in default of appearance, cannot be regarded as being or as being equivalent to a judge in the exercise of powers committed to him in relation to the trial.
>
> The power conferred by s78 to award interest to the Judgment creditor is by that section vested in 'the Judge at the hearing' and is not expressed to be vested in any officer of the Court. The rules contain no provision authorizing the Prothonotary or a Master or any other officer of the Court to exercise the powers conferred by s78 on the judge at the hearing.
>
> In this connexion, it is worth remarking that under O54, r14, the Masters are authorized to exercise powers conferred on the Court or on a judge under a number of sections of Acts of Parliament: no such powers are conferred by O60 and O61.
>
> I conclude, therefore, that the act of the Prothonotary, or of an officer on his staff, in entering judgment in default of appearance is not comprehended by the words 'the Judge at the hearing' occurring in s78."

It will be seen that McInerney J concluded that the Prothonotary (and for that matter a Master) was without jurisdiction to award interest – not because he is not a "Judge" within the meaning of the sections in Division 6, but because the jurisdiction is exercisable by such an officer of the Court only if it has been expressly conferred by Act or rule of court – and, of course, only when the award made can be properly described as made "at the hearing".

However, in *Melbourne & Metropolitan Board of Works v Bevelon Investments Pty Ltd* [1977] VicRp 54; (1977) VR 473 Anderson J held that the hearing by a Master on the return of a summons for final judgment under O14, not only is a "hearing" as is referred to in the phrase "Judge at the

hearing", but that the Master on such a hearing is empowered by reason of his office as a Master to allow interest upon a debt or liquidated amount pursuant to s78. As to this latter **[8]** question His honour said (at p478):

> "The further question is, has the Master power under s78 to grant liberty to enter judgment since the section refers to a judge making such an order, and s78 is not one of the enactments enumerated in O54, r14, in relation to which a Master is authorized to exercise the powers of the court or judge. Order 54, r14, authorizes a Master 'to hear and determine all applications and may exercise any of the powers conferred on the Court or on a Judge – (a) under ... Order(s) ... 14', and in my opinion a Master upon the hearing of an O14 summons is empowered to give leave to enter judgment for interest under s78 in the same way as a judge is empowered."

This passage sets out quite clearly the reasons that Anderson J considered a Master had power to award interest under s78 on the return of an O14 summons. I am, however, disposed to think that the conclusion to which those reasons led Anderson J is in conflict with the view expressed by McInerney J to which I have referred.

Moreover, with respect, I am inclined to the view that the power of a judge under O14 does not incorporate that of "the Judge" in s78 so that the conferring of the former power on a Master necessarily involves conferring on him the latter. That is to say, I think that McInerney J is correct in holding the Masters' power to award interest under s78 could be derivable only from a rule expressly conferring such power.

Accordingly, as I understand that on the authority of the *Bevelon Investments Case* Masters are regularly exercising the power of a Judge under s78, it would appear that O54, r14, should be amended so as to grant the power – particularly as it would seem unlikely that it would be suggested it was not a power that Masters should exercise.

[9] However, for the purposes of the disposition of the present matter what emerges from those two cases is the judicial expression of opinion (in the case of McInerney J, if the power so to act is specifically bestowed by rule) that Masters are for the purpose of s78 to be treated as a "Judge".

These observations lose none of the persuasion, indeed, they are fortified, by regarding Masters, although they are not members of the Court, as officers of the Court by whom certain of the jurisdiction and powers of the Court are normally exercised and "as part of the organisation through which the powers and jurisdiction of the Court are exercised". See *Commonwealth of Australia v The Hospital Contributions Fund of Australia* [1982] HCA 13; (1982) 150 CLR 49; (1982) 40 ALR 673; (1982) 56 ALJR 588 per Gibbs CJ, at 592.

Another argument may be relied upon to support the contention that express provision has been otherwise made. Section 50(1) of the *Magistrates' Courts Act* 1971 provides that:

> "In addition to any other jurisdiction every Magistrates' Court shall have jurisdiction in the following cases— ...
> (d) Where the amount claimed does not exceed $3,000 it may hear and determine any cause of action—
> (i) for a debt or liquidated demand whether on balance of account or otherwise and make the necessary order therein together with an order for the payment of interest not exceeding 12 per centum per annum upon any claim for money lent or for money due upon a bill of exchange promissory note or cheque."

The section identifies a number of areas of jurisdiction **[10]** including causes of action arising out of contract and in tort where the damages claimed are not more than $3,000, but it is only in the sub-section that I have set out that any reference to a power to award interest appears. I do not consider that, in selecting from among the diverse jurisdictions in civil matters conferred upon Magistrates' Courts a cause of action upon a claim for a liquidated sum or for money due on a negotiable instrument as those alone in respect of which an express statutory power to award interest, the legislature is thereby to he taken to be making express provision otherwise than as is provided by Division 6 of Part VII of the *Supreme Court Act*.

I would construe s50(1)(d) of the *Magistrates' Courts' Act* as doing no more than imposing

a ceiling rate of interest of 12 per centum per annum in relation to the limited class of cases to which it applies leaving s60 or the *Supreme Court Act* to operate to allow a ceiling as provided by Division 6 to the remaining cases with respect to which Magistrates' Courts are cognisable. That rate is now (see Act No. 9633) fixed as being not more than "the maximum rate approved by the Australian Loan Council at the time the Judgment is entered or the order made for long term borrowing for new public securities issued by semi-government authorities."

Indeed, the use or the words "judgment is entered or the order made" strongly suggests that, as a matter of familiar terminology "a judgment" is entered in an action in the Supreme Court and County Courts but "an order" is made in a Magistrates' Court, the draftsman of the amendments introduced by Act No 9633 considered that **[11]** Division 6 was applicable to Magistrates' Courts notwithstanding the use of the expression "the Judge" or the provisions of s50(1)(d) of the *Magistrates' Courts Act*. Such a result is scarcely surprising for, whilst doubtless many sums recovered in Magistrates' Courts are small, the jurisdictional limit of $3,000 and the substantial delays I was told that can now attend disposal of defended claims mean that the interest awarded on awards in the higher bracket of claims can be significant sums especially when interest rates are at a high level.

In my view, therefore, the order nisi should be made absolute. There is material to permit me to calculate an appropriate award of interest and, as the amount involved is insufficient to justify remission of the matter I propose to dispose of the claim finally. The debt was not payable by virtue of some written instrument but it has been established that a demand for payment was made. I fix the interest from that date to the date of the making of the order having regard to the relevant maximum rate at $100.

NOTES: (1) Interest pursuant to ss78, 79 and 79A of the *Supreme Court Act* 1958 need not be claimed in the summons, as the award of such interest is a matter of the exercise of judicial discretion on application made at the hearing: see *Murphy v Murphy* [1963] VicRp 83; (1963) VR 610; *Brew v Whitlock (No 3)* [1968] VicRp 63; (1968) VR 504.

(2) On 18 August 1983, the *Penalty Interest Rate Bill* was read a second time in the Legislative Assembly of Victoria. This Bill seeks to amend, *inter alia*, ss77, 78 and 79A of the *Supreme Court Act* 1958 by substituting the expression "the rate for the time being fixed under section 2 of the *Penalty Interest Rates Act* 1983" for the words "maximum rate approved by the Australian Loan Council at the time judgment is entered or an order made for long-term borrowing for new public securities issued by semi-government authorities." Cl 2 provides that until 30 September 1983, the rate of interest payable shall be 15.8% p.a. and thereafter at such rate as is fixed by the Attorney-General, by notice published quarterly in the *Government Gazette*. Debate on the Bill was scheduled to resume on 6 September 1983. Ed.
