16/11; [2011] VSC 209

SUPREME COURT OF VICTORIA

HEALTHSCOPE (TASMANIA) PTY LTD & ANOR v AUSTRALIAN HOSPITAL CARE PTY LTD & ANOR (No 2)

Sifris J

11 April, 19 May 2011

Section 58(1) of the *Supreme Court Act* 1986 (the "Act") provides:

> "If in a proceeding a debt or sum certain is recovered, the Court must on application, unless good cause is shown to the contrary, allow interest to the creditor on the debt or sum at a rate not exceeding the rate for the time being fixed under section 2 of the *Penalty Interest Rates Act* 1983 or, in respect of any bill of exchange or promissory note, at 2% per annum more than that rate from the time when the debt or sum was payable (if payable by virtue of some written instrument and at a date or time certain) or, if payable otherwise, then from the time when demand of payment was made."

Where interest is payable from the time when a valid demand of payment was made, and a date in 2005 was said to be sufficient, the applicant must show good cause why interest should not run from that date. Good cause may arise out of a substantial delay between the date of the demand (February 2005) and the commencement of proceedings in 2008. The period between February 2005 and the commencement of proceedings in 2008 was too long and the delay unexplained and unreasonable. Accordingly it was just and reasonable to allow interest from the date of the commencement of proceedings and not earlier.

SIFRIS J:

1. On 7 April 2011 I published my reasons for decision.[1] The first plaintiff ("AHC(HPH)") succeeded against the first defendant ("AHC"). The second plaintiff ("Healthscope") failed in its claim against the second defendant ("Mayne").

A. AHC(HPH) v AHC

Costs

2. AHC does not resist an order in favour of AHC(HPH) for party and party costs and an order will be made in due course.

Interest

3. There is a dispute between the parties as to the amount of interest that AHC(HPH) should be ordered to pay. Section 58(1) of the *Supreme Court Act* 1986 (Vic) (the "Act") (which both parties agree is applicable) provides:

> "If in a proceeding a debt or sum certain is recovered, the Court must on application, unless good cause is shown to the contrary, allow interest to the creditor on the debt or sum at a rate not exceeding the rate for the time being fixed under section 2 of the Penalty Interest Rates Act 1983 or, in respect of any bill of exchange or promissory note, at 2% per annum more than that rate from the time when the debt or sum was payable (if payable by virtue of some written instrument and at a date or time certain) or, if payable otherwise, then from the time when demand of payment was made."

4. Mr Evans of counsel, who appeared on behalf of AHC, submitted that the first part of s58(1) has no application to this proceeding as clause 2.3 of the Novation and Amending Deed does not provide a sum certain payable, nor does it provide any reference to the date or time any such sum is payable. I accept this submission. Consequently, interest is payable from the time when a valid demand was made.

5. Mr Evans submitted that interest should only commence from 12 September 2008. This was the deadline for payment following the first proper demand made on AHC, namely the demand in writing dated 14 August 2008, which through an extension letter dated 28 August 2008, required payment by 12 September 2008.

6. Mr Evans properly conceded that the demand by letter dated 14 August 2008 was a proper demand.

7. Accordingly, there is no dispute that interest should run from at least 12 September 2008.

8. However, Mr Osborne of counsel for AHC(HPH) submitted that interest should run from an earlier date. In his written submissions, he proposed four earlier dates:

> (a) 13 April 2003, being the date of the Novation Deed;
> (b) August 2003, being the date of a demand made to Robert Cooke of Mayne at a time when Maybe was the ultimate holding company of AHC;
> (c) 2 February 2005, being the date of a letter to Robert Cooke of Affinity Health Limited at a time when it was the ultimate holding company of AHC; or
> (d) 14 August 2008, being the date of the letter of demand to AHC.

9. Notwithstanding his written submissions to the contrary, Mr Osborne conceded in oral submissions, correctly in my view, that interest could not properly run from a date prior to the date of payment of the debt incurred by AHC(HPH) (but paid by Healthscope), namely 17 February 2005.

10. However, Mr Osborne submitted that his client incurred a liability from the date of payment and that AHC had the use of the money that it ought to have paid.

11. Further, in response to a submission put by Mr Evans in relation to delay, Mr Osborne submitted that during the period February 2005 to September 2008 and particularly in 2006, there was relevant correspondence and that his client "did not go to sleep".

12. I do not propose to deal with the period prior to February 2005. No party, other than the original creditor, the State of Tasmania, was out of pocket.

13. Consequently, the first relevant period referred to by Mr Osborne was the written demand made on 2 February 2005. The demand was made not to AHC, but to Robert Cooke of Affinity Health Limited (the ultimate holding company of AHC at the time).

14. AHC submits that the 2 February 2005 demand is ineffective because it makes no demand of AHC, but rather its ultimate holding company. AHC(HPH) submits that as a matter of content and substance the demand is sufficient.

15. Irrespective of whether or not the 2 February 2005 demand is sufficient, Mr Evans submits further that his client has shown good cause as to why interest should not run from that date, but from 12 September 2008. The good cause he points to arises out of the substantial delay between the demand and the commencement of proceedings, and the fact that interest was not demanded in either the 2 February 2005 demand or indeed the 14 August 2008 letter or 28 August 2008 extension.

16. In support of his submission in relation to good cause and delay, Mr Evans referred to the case of *David Leahey (Aust) Pty Ltd v McPherson's Ltd.*[2] In that case, the court declined to allow 11½ months of interest – the period between demand and commencement of proceedings – but allowed 9 months "taking a broad brush" approach.[3]

17. In my view, it would be unreasonable and inappropriate to allow interest for the entire period from 2 February 2005 to the commencement of proceedings in 2008, assuming of course the validity of the 2 February 2005 demand. The period is too long and the delay unexplained and unreasonable.

18. In *Clarke v Foodland Stores Pty Ltd,*[4] the Full Court declined to set aside the decision of the trial judge to deny a liquidator interest for the full period from demand to the commencement of proceedings. The trial judge took into account substantial delay. In that case, demand was made on 24 December 1986 (requiring payment by 7 January 1987) and proceedings commenced in May 1989. Judgment was delivered on 14 May 1991. Interest was allowed for a period of two and a half years and not the period of about 4 years and 5 months from demand to judgment.

19. In the joint judgment of the Full Court,[5] the Court held that good cause depends "upon the particular facts and circumstances and it would be unwise to attempt to put any gloss on the expression."[6] The Full Court specifically rejected a submission that delay by a plaintiff was not relevant and could not constitute good cause.[7] In particular, the following passage is relevant: "Nothing put by counsel served to persuade us that delay on the part of a plaintiff, subsequent to the date from which interest might be allowed under s58, is always irrelevant in allowing interest under that section. If, as we have said, interest is to be awarded, not to punish the defendant, but to compensate the plaintiff for being deprived of his money and the discretion arising out of the words 'unless good cause is shown to the contrary' is to be seen as existing in order to relieve against injustice to the defendant, the question will be whether the plaintiff's delay, such as it is in a given case, is seen as working such injustice, were the plaintiff to be allowed interest for the whole of the period available under s58. On that issue, each case must turn upon its own facts and circumstances."[8]

20. In my opinion, AHC(HPH)'s delay does constitute some injustice to AHC. Further and perhaps more relevantly, it cannot be said in the circumstances of this case that AHC(HPH) has been kept out of its money.

21. Accordingly, in my opinion it is just and reasonable to permit interest from 12 September 2008 and not earlier. In any event, so far as may be relevant, I have concerns over the effectiveness of the 2 February 2005 demand. Given the frequent sale of assets it would have been preferable to send the letter directly to AHC.

B. Healthscope v Mayne

22. In relation to the claim by Healthscope against Mayne, Healthscope does not resist an order that it pay Mayne's costs on a party and party basis. However, Mr Osborne submitted that the costs should not include " ... the costs of proving the facts specified in the notice to admit dated 27 September 2010" and that Mayne should pay Healthscope's costs in relation to that issue.

23. The facts stated in the notice to admit dated 27 September 2010 (and in respect of which admission was sought) related to the individual tax invoices and more particularly, that the amounts incurred and each expense referred to therein "was an expense or outgoing normally apportioned on the purchase of a business similar to the Business".

24. Mr Panna SC, counsel for Mayne, submitted that the expert evidence (in respect of which objection was taken) was irrelevant to a resolution of the dispute, which was essentially a dispute about the construction of clause 7.2 of the Share Sale Agreement. So much is true, as I have found, but that does not necessarily mean that the admission should not have been made. It was and remained until judgment one of the issues, or at the very least, a contested and potential issue in the case.

25. However, I am not satisfied that Mayne should, in the circumstances of this case, pay such costs. It was entitled to maintain its position that evidence as to what expenses or outgoings were normally apportioned on the purchase of a business similar to the Business was irrelevant and as a consequence, it was not required to make an unnecessary or irrelevant admission.

26. Accordingly, the usual costs order should be made.

Orders

27. The following orders will be made.

(1) Judgment for the first plaintiff against the first defendant in the sum of $311,687.80, together with interest from 12 September 2008 to 19 May 2011, calculated at the rate fixed from time to time under s2 of the *Penalty Interest Rates Act* 1983 (Vic).

(2) The first defendant pay the first plaintiff's costs of the proceeding including costs reserved.

(3) The second plaintiff pay the second defendant's costs of the proceeding including costs reserved.

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[1] *Healthscope (Tasmania) Pty Ltd & Anor v Australian Hospital Care Pty Ltd & Anor* [2011] VSC 132.
[2] [1991] VicRp 77; [1991] 2 VR 367.
[3] [1991] VicRp 77; [1991] 2 VR 367, 382.
[4] [1993] VicRp 81; [1993] 2 VR 382.
[5] Per Fullagar, Marks and J D Phillips JJ.

[6] Ibid, 394.
[7] Ibid, 398-400.
[8] Ibid, 400.

APPEARANCES: For the plaintiffs Healthscope: Mr M Osborne, counsel. B2B Lawyers. For the first defendant Australian Hospital Care: Mr N Evans, counsel. Blake Dawson, solicitors. For the second defendant: Mr AK Panna SC, counsel. Herbert Geer, solicitors.
