20/12; [2012] VSC 205

SUPREME COURT OF VICTORIA

HODGSON v AMCOR LIMITED (No 9)

Vickery J

23 April, 17 May 2012

PRACTICE AND PROCEDURE – JUDGMENT MADE IN CLAIMANT'S FAVOUR – INTEREST ON JUDGMENT SUM – CLAIM BY SUCCESSFUL PLAINTIFF FOR AN ENTITLEMENT TO BE PAID INTEREST UNDER THE *PENALTY INTEREST RATES ACT* 1983 (VIC) – SECTION 58 *SUPREME COURT ACT* 1986 (VIC) – WHETHER "GOOD CAUSE TO THE CONTRARY" FOR NOT AWARDING INTEREST ON THE STATUTORY BASIS – WHETHER RATE OF STATUTORY INTEREST A MATTER OF DISCRETION – ON WHAT SUM IS INTEREST TO BE AWARDED – WHETHER TAX PAYABLE ON JUDGMENT SUM TO BE TAKEN INTO ACCOUNT.

HELD:

1. When H. was given judgment in his favour, he became a judgment creditor and was entitled to a sum certain – the Judgment Sum – by reason of the operation of the *Supreme Court Act* 1986 ('Act'), s58(3).

2. The question in dispute was whether there was any "good cause to the contrary" as to why H. the claimant should not have been entitled to the interest provided for by the statute, or interest at the rate so prescribed. A second question was whether, assuming that H. was entitled to statutory interest under s58 of the Act, the interest so awarded was to be calculated on the full Judgment Sum amounting to $917,695, or some lesser amount, after taking into account and deducting any amount that was properly found due and payable to the ATO.

3. Delays in the litigation on the part of a defendant do not generally constitute good cause. This is because the defendant suffers no disadvantage while continuing to have the use of the money to which the plaintiff has been held entitled.

4. As to the delay submissions generally, such delay as there was did not detract from the fundamental that Amcor had the use of H.'s money since the commencement of the proceeding. Further, and in each case, no calculation or estimate of the delay alleged to have been caused by H. was advanced by Amcor, resulting in the Court being ill-equipped to make an assessment of statutory interest other than on the basis provided for in s58.

5. All of the factual matters relied upon by Amcor in its submissions on the question of statutory interest were matters arising in respect of Amcor's counterclaim, not H.'s claim upon which the Judgment Sum was founded. His entitlement to interest arose because the Court found that as a matter of law he was entitled to a significant sum of money which had been denied to him for a long period. At the same time, Amcor had the use of that money for its own purposes.

6. For these reasons, no good cause to the contrary was demonstrated by Amcor to justify withholding the payment of interest from H. at all or to allow interest on terms which were less onerous to Amcor than those prescribed by s58, namely, the date of commencement of the period for interest.

7. On its proper construction, s58 of the Act requires interest to be allowed on the "sum recovered" by judgment in the proceeding, not some lesser sum paid following payment according to law of sums due to the ATO. The sum recovered in the proceeding, in this case was the Judgment Sum, free of any deductions which might take into account a tax liability.

***Whitlam v IAG Ltd* [2005] NSWSC 200; 214 ALR 703; 52 ACSR 637, followed.**

8. Accordingly, the amount of interest was to be calculated by reference to the Judgment Sum in the amount of $917,695 making a total sum of interest of $771,341.32 and continuing at the rate of $263.99 per day thereafter until the Court pronounced judgment on the question.

VICKERY J:

Introduction

1. In the proceeding before the Court James George Hodgson v Amcor Limited and Amcor Limited & Others (Supreme Court Proceeding No. 9420 of 2004) (the "Hodgson Proceeding"), and following my decision in the proceeding which applied the slip rule, I subsequently heard submissions from the parties on the question of the claim by Mr Hodgson ("Hodgson") for interest payable on the judgment sum. These reasons deal with that claim.[1]

2. Following delivery of the Reasons for Judgment on 20 March 2012 judgment was entered for Hodgson in the sum of $917,695. It is on that judgment debt which Hodgson claims interest pursuant to s58 of the *Supreme Court Act* 1986 (Vic) (the "Supreme Court Act") being the "Judgment Sum".

3. Section 58 is in the following terms:

> 58. Interest to be allowed when debts or sums certain recovered
>
> (1) 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.
>
> (2) Subsection (1) does not authorise the computation of interest on any bill of exchange or promissory note at a higher rate than the rate for the time being fixed under section 2 of the *Penalty Interest Rates Act* 1983 if there has been no defence pleaded.
>
> (3) A debt or sum payable or a date or time is to be taken to be certain if it has become certain.

4. In the present case I am satisfied that Hodgson has, by the judgment pronounced in his favour, become a judgment creditor and is entitled to a sum certain, the Judgment Sum, by reason of the operation of s58(3) Supreme Court Act.

5. The real question in dispute is whether there is any "good cause to the contrary" as to why the claimant should not be entitled to the interest provided for by the statute, or interest at the rate so prescribed. This involves an analysis of the various disqualifying factors advanced by the defendant, Amcor.

6. A second question arises out of the facts earlier found in *Hodgson v Amcor (No. 8)*.[2]

7. The question is whether, assuming that Hodgson is entitled to statutory interest under s58, the interest so awarded is to be calculated on the full Judgment Sum amounting to $917,695, or some lesser amount, after taking into account and deducting any amount that is properly found due and payable to the ATO.

8. Amcor contended that "interest should be calculated on post-tax amounts". This submission raises the issue as to whether, if Hodgson's former employer Amcor is obliged at law to remit part of his Judgment Sum to the ATO in discharge of a tax liability, is the former employee entitled to statutory interest on the Judgment Sum pre-tax or only the net income received from the employer post-tax?

Section 58. - Legal Principles

9. Section 58 and its predecessor sections can be traced back to the *Civil Procedure Act* 1833 ("Lord Tenterden's Act").[3] A detailed history of the provision to the present day is recited in the judgment of Tadgell JA in *Dimos v Willetts*.[4]

10. The operation of the interest provision was analysed in *Clarke v Foodland Stores Pty Ltd* by Fullagar, Marks and JD Phillips JJ.[5] In essence the Full Court considered that there were two elements involved in an interest determination made under s58:

> First: The phrase "unless good cause is shown to the contrary" qualifies the obligation of the Court to grant an award of damages in the nature of interest and indeed, in a rare case, the Court could refuse to allow interest at all or allow interest on terms which are less onerous to the judgment debtor than

those prescribed by the sub-section, namely, the date of commencement of the period for interest. Second: The determination of the appropriate rate of interest is a question of discretion for the court and does not depend upon establishing good cause to the contrary.

See: Gillard J in *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd (No. 3)* at [45].[6]

11. By way of full explanation, the analysis of the Full Court in *Clarke v Foodland Stores Pty Ltd* proceeded as follows:

> As we read s58(1), the general rule is that the court is to allow interest at a rate which is equal to or less than the rate for the time being fixed under s2 of the *Rates Act*. Contrary to the liquidator's submission, that power to fix a lesser rate does not depend upon "good cause [being] shown to the contrary"; it depends upon the simple fact that s58(1) purports to prescribe only a maximum rate. By directing the court to allow interest "at a rate not exceeding" the rate fixed under s2 of the *Rates Act* the court is otherwise left at large and, to that extent, has a discretion in the matter. It is, of course, a discretion to be exercised judicially but, by the same token, such a discretion may not be circumscribed by attempts to define what must or must not be taken into account when the discretion falls to be exercised: see for example, *Leighton Contractors Pty Ltd v Kilpatrick Green Pty Ltd* [1992] VicRp 83; [1992] 2 VR 505, 513. ...
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> It is convenient, at this point, to say something more about the benchmark chosen by s58(1) for the allowance of interest in cases where good cause is not shown to the contrary: that is, "the rate for the time being fixed under s2 of" the *Rates Act*. Section 2, so far as presently relevant, authorises "the Attorney-General, having regard to the advice of the Treasurer of Victoria", to fix a rate at which interest is payable under the provisions of certain statutes, and to do so, "by notice published in the Government Gazette in respect of each quarter year or part thereof commencing on and from 1 October 1983". Thus a rate is fixed for each quarter and it is that to which reference is made in s58(1). The reference in s58(1) is to "the rate for the time being fixed under s2" [...]
> ...
> Because this is not immediately apparent from the wording of the subsection, a moment may be taken to justify it; for in our opinion it is correct. In a case where the period for which interest is being allowed includes more than one quarter (or includes portions of more than one quarter), to allow interest at the rate for the time being fixed under s2 on the date when interest happens to be allowed would produce an adventitious result. Whatever be the purpose of allowing interest (and we say something of that later), there would seem to be no logic at all in taking as relevant the rate of interest which stands as fixed for the time being on the date when interest is awarded - and that is so whether or not the rate so fixed is only a maximum. As the rate fixed under s2 fluctuates, it is preferable to read the reference to "the rate for the time being fixed under s2" as encompassing more than one such rate, where relevant to the period over which interest is being allowed. The singular can be taken to include the plural and the expression "for the time being" should itself be taken to refer, not to the date on which interest is being awarded, but to the period over which it is being allowed. All rates relevant to that period or any part of that period must then be used and so it is appropriate to understand the subsection as authorising reference, in an appropriate case, to the rate fixed under s2 from time to time.[7]

12. In *Hosking v Ipex Software Service Pty Ltd* (No. 2)[8], Habersberger J said that the purposes of the statutory power to award interest were recognised as twofold:

> (a) 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: see too *Marsh v Ruby*[9] per Gowans J (in relation to the direct predecessor of s58, s78 of the *Supreme Court Act 1958* (Vic)); *Clarke v Foodland Stores Pty Ltd*[10] and *Batchelor v Burke;*[11] and
>
> (b) to encourage the early resolution of litigation.[12]

13. The judgment of Gowans J in *Marsh v Ruby*[13] was upheld in the High Court, where Barwick CJ described the Court's power to award interest in terms which heralded the observations of Habersberger J in *Hosking v Ipex Software Service*:

> The purpose of giving courts the power to award interest on damage is to my mind twofold, and neither aspect of the purpose should be lost sight of. In the first place, the successful plaintiff, who by the verdict has been turned into an investor by the award of a capital sum, and whose claim in the writ has been justified to the extent of a verdict returned, ought in justice to be placed in the position in which he would have been had the amount of the verdict been paid to him at the date of the commencement of the action. In the second place, the power to award interest on the verdict from the date of the writ is to provide a discouragement to defendants, who in the greater number

> of actions for damages for personal injuries are insured, from delaying settlement of the claim or an early conclusion of the proceedings so as to have over a longer period of time the profitable use of the money which ultimately the defendant agrees or is called upon by judgment to pay. [14]

14. The purpose of an award of interest is not to punish the defendant for having been dilatory in settling the plaintiff's claim or for any other conduct.[15] In *Marsh v Ruby* Gowans J said (in relation to the direct predecessor of s58, s78 of the *Supreme Court Act* 1958): "As I see it, such discretion as is conferred is not intended to be directed to penalising the plaintiff but to alleviating the defendant in the proper case".[16]

Whether "Good cause to the Contrary"?

15. It is for the defendant to show good cause.[17] Good cause must be referable to the statutory power, it is not a discretion at large. As Habersberger J said in *Hosking v Ipex Software Services Pty Ltd (No. 2)*: "good cause has to be measured against the purposes of the statutory power to award interest".[18]

16. Delays in the litigation on the part of a defendant do not generally constitute good cause: *Marsh v Ruby*[19] and *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd (No.3)*.[20] This is because the defendant suffers no disadvantage while continuing to have the use of the money to which the plaintiff has been held entitled. As Gillard J said in *Johnson Tiles*: "… delay is rarely a justifiable basis for refusing interest for any period, because of the self-evident observation that the defendants have had the use of the money since the commencement of the proceeding".[21]

17. Amcor submitted that in the present case there are six factors which militate against any award of interest. In the alternative, it submitted that interest should be paid at a lesser rate and for an abridged period of time.

18. A number of the grounds relied upon by Amcor centred on an allegation of delay said to have been caused by Hodgson by reason of his conduct of the proceeding (the "delay submissions").

19. As to the delay submissions generally, I find that such delay as there was does not detract from the fundamental that Amcor has had the use of Hodgson's money since the commencement of the proceeding. Further, and in each case, no calculation or estimate of the delay alleged to have been caused by Hodgson was advanced by Amcor, resulting in the Court being ill-equipped to make an assessment of statutory interest other than on the basis provided for in s58.

20. The first specific ground relied upon by Amcor was that the Judgment Sum was withheld by it while Amcor investigated and ultimately established that Hodgson was involved in a serious breach of his duties as a member of Amcor's senior management.

21. I do not regard this as a relevant ground to establish that good cause has been shown to justify withholding the payment of interest from Hodgson at all or to allow interest on terms which are less onerous to Amcor than those prescribed by the sub-section, namely, the date of commencement of the period for interest. If there was delay caused, the direct and immediate cause of the delay was that caused by Amcor in investigating and ultimately establishing that Hodgson was involved in a serious breach of his duties. Amcor did not establish, however, that the conduct of Hodgson caused it any loss, and took the risk that it could not make out its cause of action in that respect. Further, to withhold the payment of interest from Hodgson or to allow interest on terms which are less onerous to Amcor on the stated ground would amount to penalising Hodgson for his activities. This is not a permissible basis for altering Hodgson's statutory entitlement to interest which would otherwise be payable to him.

22. Second, it was alleged by Amcor that the delay in the prosecution of its counterclaim has been predominately contributed by: (a) the inability of Amcor to obtain relevant documents in a timely manner because of Hodgson's failure to discover relevant documents, and also his resistance to those documents being accessible to Amcor, giving rise to some delay; and (b) the need as a matter of law to have all of the alleged "miscreants" before the Court to properly prosecute a claim alleging breach of duties and breach of trust, again giving rise to some delay.

23. For the reasons set out in relation to the delay submissions generally, I do not regard this as a relevant basis to establish that good cause has been shown to justify withholding the

payment of interest from Hodgson at all or to allow interest on terms which are less onerous to Amcor than those prescribed by the sub-section, namely, the date of commencement of the period for interest.

24. Amcor's third ground relied upon was that Hodgson gave false undertakings to the Federal Court in order to achieve a settlement of those proceedings, and then went about concealing that conduct and the conduct the subject of the undertakings for an extended period of time.

25. Hodgson's conduct in the proceeding in the Federal Court is not to be condoned. Far from it. Breach of an undertaking given to any court is a very serious matter. However, I see no basis to penalise Hodgson in his claim for statutory interest arising from these activities, even if they did amount to a breach of his undertakings to the Federal Court.

26. Fourth, during the time that Hodgson was, "out of his money", Hodgson received substantial sums from alternate sources in lieu of those funds, that are now the subject of the Judgment Sum. Moreover, the arrangements that were made with third parties included a facility for interest in relation to payment of those sums.

27. However, again I do not regard this as a relevant ground to establish that good cause has been shown to justify withholding the payment of interest from Hodgson at all or to allow interest on terms which are less onerous to Amcor than those prescribed by the sub-section, namely, the date of commencement of the period for interest. Further, as found in the principal judgment, the Court was not satisfied that any such payment received by Hodgson from any third party was referable to any work undertaken by Hodgson prior to the termination of his employment with Amcor on 1 October 2004, whereas the Judgment Sum comprised amounts due to Hodgson arising from his employment prior to termination.[22] There was therefore no "doubling up" of any payment or interest thereon, which is the essence of this fourth ground.

28. Fifth, it was put by Amcor that Hodgson chose to deliberately conceal payments from these alternate sources. There was one document that was discovered ultimately which showed a payment of $520,000 from a third party. The concealment of the document, it was put, was calculated to create the illusion that Hodgson was, "out of his money" without any alternate source of income.

29. Breach of the discovery obligations of a party in the course of litigation is also a very serious matter. Nevertheless, I do not view this as a basis to penalise Hodgson in relation to his statutory entitlement to interest. In any event, as found in the principal judgment, the payment of the sum of $520,000 to Hodgson was referable to his activities subsequent to the termination of his employment with Amcor.[23]

30. Sixth, Amcor submitted that Hodgson maintained unmeritorious defences including, recently invented offences in collaboration with some of the other defendants in the proceedings, which greatly increased the complexity and length of the trial.

31. Again this is in essence a "delay" basis for denying Hodgson his full statutory entitlement to interest. For the reasons set out in relation to the delay submissions generally, this ground must also be rejected.

32. Finally, all of the factual matters relied upon by Amcor in its submissions on the question of statutory interest are matters arising in respect of Amcor's counterclaim, not Hodgson's claim upon which the Judgment Sum is founded. His entitlement to interest arises because the Court has found that as a matter of law he is entitled to a significant sum of money which has been denied to him for a long period. At the same time, Amcor has had the use of that money for its own purposes.

33. For these reasons, I do not accept that good cause to the contrary has been demonstrated by Amcor to justify withholding the payment of interest from Hodgson at all or to allow interest on terms which are less onerous to Amcor than those prescribed by s58, namely, the date of commencement of the period for interest.

34. The causes to the contrary relied upon by Amcor are not factors which are relevant to or which serve the purposes of the statutory power to award interest.

Discretion to Allow Interest at a Rate Less Than the Maximum Prescribed by s58 of the* Supreme Court Act *1983 (Vic)

35. The rate provided for by the statute under s58 is a maximum rate. It cannot be doubted that the Court's discretion does extend to fixing a lower rate of interest than that prescribed by the *Penalty Interest Rates Act* 1983 (the "Penalty Interest Rates Act"): see *Clarke v Foodland Stores*.[24]

36. However, the settled practice in Victoria is that, unless good cause to the contrary is shown, the statutory maximum rate is used. In *Hartley Poynton Ltd v Ali* Ormiston JA reasoned: "The pattern in Victoria has been that, unless good cause be shown, successful plaintiffs are ordinarily awarded interest at the rate prescribed under the Penalty Act without too fine a regard for these distinctions".[25] In Johnson Tiles Gillard J likewise observed: "The practice has evolved in this State to apply as a general rule the rate fixed pursuant to the *Penalty Interest Rates Act* ...".[26] The statutory rate was described as a "benchmark" by Fullagar, Marks and JD Phillips JJ in *Clarke v Foodland Stores Pty Ltd*[27] and in *Kalenik v Apostolidis (No. 2)* Hargrave J said to like effect: "As a general rule, the starting point is the penalty rate ... the penalty rate is routinely awarded by the Court".[28]

37. A similar approach was adopted by Hedigan J in *Bank of China v Permanent Nominees Aust Ltd* where the Court was called upon to decide whether or not the successful plaintiff was entitled to interest pursuant to s58 at the rates provided by the Penalty Interest Rates Act or whether it was entitled to interest payable at a lesser rate.[29] His Honour observed:

> The language of s58 would suggest that there is a discretion as to the interest rate so long as it does not exceed the rate fixed by the *Penalty Interest Rates Act* ("the Act"). The burden is thus thrown on the defendant to raise and justify matters which would amount to the showing of good cause not to make the interest allowance that the statute contemplates. My own experience is that unless circumstances were established to that amounted to the showing of "good cause to the contrary", almost inevitably there is allowed interest at the rates fixed by the Act. As a general practice, the exercise of discretion did not penetrate into the rate of interest applied. It is not surprising that this should be the case as the relative certainty of the prevailing rate of interest likely to be achieved upon judgment for the successful plaintiff will ordinarily be a relevant matter affecting offers of settlement or offers of compromise in accordance with the *Rules*.[30]

38. It is to be noted that in *Clarke's Case* the trial judge fixed the rate provided by the Penalty Interest Rates Act as the basis for his calculations. See also *Farrow Finance Company Ltd (In Liq) v Farrow Properties Pty Ltd (In Liq) and Others* where Hansen J (as he then was) took the same approach.[31]

39. I take into account the evidence put on by Amcor to the effect that the 90 day bank accepted bill rates (high and low) for each of the calendar years from January 2004 to March 2012 inclusive, which appear to have averaged about 5.27%, were considerably lower than the maximum statutory rate under s58 which varied from 12% to 10% over the same period.

40. However, the settled practice was maintained in Victoria during this period in spite of the apparent disparity in the rates, and I see no reason in this case to depart from it.

41. The causes to the contrary relied upon by Amcor are not relevant causes for the purposes of exercising the statutory discretion to award interest at a lesser rate than the maximum prescribed.

42. I am of the view that Amcor has not made out good cause to the contrary as to why Hodgson should not have the benefit of the exercise of the Court's discretion to order interest at the *Penalty Interest Rates Act* level. In my judgment, this is the proper order to make.

43. The interest to be awarded Hodgson in this case should be awarded at no lesser rate than the maximum provided for in s58.

Interest Payable on Pre-tax or Post-tax Judgment Sum?

44. Arising from Amcor's submissions, a question arose as to whether the statutory interest payable to Hodgson pursuant to s58 is to be calculated on the Judgment Sum on a pre-tax or post-tax basis.

45. In *Atlas Tiles Ltd v Briers*[32] Barwick CJ, in common with Jacobs[33] and Murphy JJ,[34] pointed to the limited capacity of courts to assess or even estimate liability for tax in advance of it being assessed as due and payable by the Commissioner, saying:

> Tribunals of fact, whether composed of a lay jury or of a judge sitting alone, are clearly not equipped not merely to assess but even to estimate liability for tax ... judges who customarily sit to try cases at common law are themselves as a rule unfamiliar with the intricacies of the law of taxation and, in any case, whatever their experience in professional practice, cannot be expected to keep themselves abreast of the frequently changing provisions of the law. Further, the trial of an action for damages is scarcely a suitable vehicle for the examination of a party's affairs in relation to liability to taxation.[35]

46. The precise point in issue arose for determination by Einstein J in *Whitlam v IAG Ltd.*[36] As his Honour said:

> 39. I accept that the obligation to withhold tax is not occasioned by the creation of an obligation to pay the Eligible Termination Payment but is only occasioned upon its actual payment.
>
> 40. In truth the money is and always was owed to Mr Whitlam in the amount of $207,006.97 and hence Mr Whitlam is entitled to interest on that amount. That amount was withheld by IAG
>
> 41. The entry of judgment for the full amount recognises Mr Whitlam's entitlement to elect to roll over the ETP part of the judgment into a super fund. If the roll-over option is taken, no deduction is required under the TAA because there will not have been a payment to Mr Whitlam at that time. Different withholding provisions would apply to the payment out of the fund at a later date.
>
> 42. In short, IAG's suggested form of orders on the interest issue gives rise to taxation issues which may be insuperable at worst and at best involve complex analysis of provisions and potentially debate with the Commissioner.[37]

47. The *Whitlam case* concerning interest and costs was decided by Einstein J on 11 March 2005. It was the second of two judgments. The first (the substantive judgment, concerning damages (2005) 52 ACSR 470, [2005] NSWSC 83) was delivered on 23 February 2005.

48. On 11 March 2005 the question of interest upon judgments in NSW was governed by s94 of the Supreme Court Act 1970 (NSW). Section 94, as in force on 11 March 2005 when the *Whitlam case* was decided, was in the following terms:

> 94(1) In any proceedings for the recovery of any money (including any debt or damages or the value of any goods), the Court may order that there shall be included, in the sum for which judgment is given, interest at such rate as it thinks fit on the whole or any part of the money for the whole or any part of the period between the date when the cause of action arose and the date when the judgment takes effect.

49. Thus, it can be seen that on 11 March 2005, although the NSW regime was discretionary ("the Court may order..."), whereas s58 of the *Supreme Court Act* 1986 (Vic) is mandatory ("the Court must on application, unless good cause is shown to the contrary..."), interest awarded in New South Wales could be included "in the sum for which judgment is given", as was the case in Whitlam.

50. In Victoria interest if awarded under s58 is payable on the debt or sum certain "recovered". Nevertheless, the reasoning in Whitlam as to whether the interest should be calculated on a pre-tax or post-tax basis, and the rationale for approaching the issue in the manner described by Einstein J, in my opinion is equally applicable to the Victorian regime.

51. In the course of his reasoning, Einstein J in *Whitlam v IAG Ltd*[38] also referred to the observations of the Court of Appeal (NSW) in *Daniels v Anderson*[39] which are pertinent:

> In most cases if damages to be awarded to a plaintiff are taxable, taxation should not be taken into account in their assessment. There may be exceptions, but this case is not one.

52. This reasoning also accords with the observations of Stephen J in *Ruby v Marsh* where his Honour said:

> In all actions for the recovery of debt or damages, absent good cause to the contrary, damages in the nature of interest should be given from the commencement of the action until the entry of judgment, **thus applied to the whole award of damages.** [Emphasis added][40]

53. It would be undesirable for the Court to become enmeshed in potentially complex and uncertain issues of taxation law in the award of statutory interest under s58.

54. On its proper construction, in my opinion, s58 requires interest to be allowed on the "sum recovered" by judgment in the proceeding, not some lesser sum paid following payment according to law of sums due to the ATO. The sum recovered in the proceeding, in this case is the Judgment Sum, free of any deductions which take into account a tax liability.

55. Accordingly, the amount of interest should be calculated by reference to the Judgment Sum in the amount of $917,695.

Conclusion

56 I am satisfied on the evidence that the amount of interest to which Hodgson is entitled, calculated from 1 October 2004 to 1 May 2012, is $771,341.32 and is continuing at the rate $263.99 per day thereafter until the Court pronounces judgment on this question.

57. Thereafter interest accrues and is payable on the total judgment sum comprising principal and interest, pursuant to s101 of the Supreme Court Act, without the need for any further order.

58. I will make orders in accordance with these reasons and hear the parties on the costs of the application.

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[1] *Hodgson v Amcor Limited (No 8)* [2012] VSC 162 (27 April 2012).
[2] *Hodgson v Amcor Limited (No 8)* [2012] VSC 162 at [31]-[32].
[3] *Civil Procedure Act* 1833 3 & 4 Will 4, c 42.
[4] *Dimos v Willetts* [2000] VSCA 154; (2000) 2 VR 170, [6]-[10].
[5] *Clarke v Foodland Stores Pty Ltd* [1993] VicRp 81;(1993) 2 VR 382, 389, 394 (Fullagar, Marks & JD Phillips JJ).
[6] *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd (No.3)* [2003] VSC 244 (Gillard J), [45].
[7] *Clarke v Foodland Stores Pty Ltd* [1993] VicRp 81; (1993) 2 VR 389-390.
[8] *Hosking v Ipex Software Service Pty Ltd (No. 2)* [2004] VSC 343 and *Johnson Tiles* at [61].
[9] *Marsh v Ruby* [1975] VicRp 20; [1975] VR 191, 193 (Gowans J).
[10] *Clarke v Foodland Stores Pty Ltd* [1993] VicRp 81; [1993] 2 VR 382, 396.
[11] *Batchelor v Burke* [1981] HCA 30; (1981) 148 CLR 448; (1981) 35 ALR 15; 55 ALJR 494.
[12] *Ruby v Marsh* [1975] HCA 32; (1975) 132 CLR 642, 652-653 (Barwick CJ) 6 ALR 385; 49 ALJR 320; *Clarke v Foodland Stores Pty Ltd* [1993] VicRp 81; [1993] 2 VR 382, 396 (Fullagar, Marks and JD Phillips JJ); *MBP (SA) Pty Ltd v Gogic* [1991] HCA 3; (1991) 171 CLR 657, 663 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ); (1991) 98 ALR 193; (1991) 65 ALJR 203; [1991] Aust Torts Reports 81-082; (1991) 6 ANZ Insurance Cases 61-037; *Grincelis v House* [2000] HCA 42; (2000) 201 CLR 321, [16] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ) and [29] (Kirby J); (2000) 173 ALR 564; (2000) 21 Leg Rep 13; *Victorian Workcover Authority v Esso Australia Limited* [2001] HCA 53; (2001) 207 CLR 520, [69], [92], [109] (Kirby J); (2001) 182 ALR 321; (2001) 75 ALJR 1513; (2001) 8 CA 53; *GEC Marconi Systems Pty Limited v BHP Information Technology Pty Limited* [2003] FCA 688; (2003) 201 ALR 55, 60; *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* (No.3) [2003] VSC 244, [61].
[13] *Marsh v Ruby* [1975] VicRp 20; [1975] VR 191.
[14] *Ruby v Marsh* [1975] HCA 32; (1975) 132 CLR 642, 652; 6 ALR 385; 49 ALJR 320.
[15] *Batchelor v Burke* [1981] HCA 30; (1981) 148 CLR 448; (1981) 35 ALR 15; 55 ALJR 494; *Neuchatel Swiss General Insurance Company Ltd v Vlasons Shipping Inc* [2001] VSCA 25, [60]-[63] (Ormiston JA).
[16] *Marsh v Ruby* [1975] VicRp 20; [1975] VR 191, 193 (Gowans J).
[17] *Brew v Whitlock (No. 3)* [1968] VicRp 63; [1968] VR 504; *Williams v Volta* [1982] VicRp 74; [1982] VR 739, 742.
[18] *Hosking v Ipex Software Service Pty Ltd (No. 2)* [2004] VSC 343 and *Johnson Tiles* at [61].
[19] Ibid, 193-4 (Gowans J).
[20] Ibid, [50]-[53], [62] (Gillard J).
[21] Ibid, [51].
[22] *Hodgson v Amcor* [2012] VSC 94, [1498(a)], [1503].
[23] Ibid, [1498(a)].
[24] *Clarke v Foodland Stores Pty Ltd* [1993] VicRp 81; [1993] 2 VR 382, 394, 396-7.
[25] *Hartley Poynton Ltd v Ali* [2005] VSCA 53, [106] The statutory rate is a "*benchmark*" (Fullagar, Marks

and JD Phillips JJ in *Clarke v Foodland Stores Pty Ltd* [1993] VicRp 81; (1993) 2 VR 382, 389, 391) and "*As a general rule, the starting point is the penalty rate ... the penalty rate is routinely awarded by the Court*" (Hargrave J in *Kalenik v Apostolidis (No 2)* [2009] VSC 410, [78]).

[26] *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd (No.3)* [2003] VSC 244 at [46].

[27] *Clarke v Foodland Stores Pty Ltd* [1993] VicRp 81; (1993) 2 VR 382, 389, 391.

[28] *Kalenik v Apostolidis (No. 2)* [2009] VSC 410, [78].

[29] *Bank of China v Permanent Nominees Aust Ltd* [1999] VSC 77.

[30] Ibid, [5].

[31] *Farrow Finance Company Ltd (In Liq) v Farrow Properties Pty Ltd (In Liq) and Others* Hansen J, (1997) 26 ACSR 544; 16 ACLC 897, (16 April 1998).

[32] *Atlas Tiles Ltd v Briers* [1978] HCA 37; (1978) 144 CLR 202, 218-219; (1978) 21 ALR 129; (1978) 52 ALJR 707; 9 ATR 142; see too *Davinski Nominees Pty Ltd v I & A Bowler Holdings Pty Ltd* [2011] VSC 220 (Kaye J), [46], [61]; *Daniels v Anderson* 118 FLR 248; (1995) 37 NSWLR 438, 586; (1995) 16 ACSR 607; (1995) 13 ACLC 614 (Clarke JA and Sheller J); (Powell JA), 586.

[33] Ibid, 244 (Jacobs J).

[34] Ibid, 247 (Murphy J).

[35] Ibid, 212-213 (Barwick CJ).

[36] *Whitlam v IAG Ltd* [2005] NSWSC 200, [34]-[43]; 214 ALR 703; 52 ACSR 637 (Einstein J).

[37] *Whitlam v IAG Ltd* [2005] NSWSC 200, [39]-[42]; 214 ALR 703; 52 ACSR 637.

[38] Ibid, [37].

[39] *Daniels v Anderson* 118 FLR 248; (1995) 37 NSWLR 438. 586; (1995) 16 ACSR 607; (1995) 13 ACLC 614.

[40] *Marsh v Ruby* [1975] HCA 32; (1975) 132 CLR 642, 661; 6 ALR 385; 49 ALJR 320.

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