



Local Court New South Wales

Citation: Supit v White [2013] NSWLC

Hearing Date(s): 28 August 2013

Decision Date: 10 September 2013

Jurisdiction: Civil - Small Claims Division

Before: Assessor Olischlager

Decision: 1. Pre-judgment interest allowed pursuant to section 100 of the Civil Procedure Act 2005 from 30 November 2012 to 10 September 2013 in the sum of \$427.07.

Catchwords: Pre judgment interest, Assessment of Damages, Loss of Use

Legislation Cited: Civil Procedure Act 2005 s.100

Cases Cited: *Anthanasopolous v Moseley* [2001]52 NSWLR 262
Screenco Pty Limited v R L Dew Pty Limited & Anor [2003]NSWCA 319
Harb v Marchbank [20011] NSWLC9
Fang v Koumoukelis [2013] NSWLC 5
Masrour v Danzey (unreported Local Court decision dated 12 April 2013 file 2012/128560)
Bunnings Group Limited v CHEP Australia Limited [2011] NSWCA 342
Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd [1952] 2 QB 246
Haines v Bendall (1991) 172 CLR 60
The Owners Strata Plan 57504 v Building Insurers' Guarantee Corporation [2008] NSWSC1285
The Northumbria (19869) LR3Ad&Ec 6, 12
Stanilite Pacific Ltd (In Liq) & Anor v Seaton

and Ors (No2)[2005] NSWCA 412
Grincelis v House [2000] HCA 42

Texts Cited:

Category: Interest

Parties: Karl Supit (Plaintiff)
Chris White (Defendant)

Legal Representation: Mr D'Arcy (for Plaintiff)
Mr Fernie (for Defendant)

File number(s): 2013/00128738

Place of Hearing: Downing Centre Sydney

Publication Restriction: Nil

JUDGMENT

- 1 The Court awarded judgment in favour of the plaintiff, Mr Supit, on 28 August 2013 in the sum of \$7,823.93. The judgment relates to a claim for general damages for loss of use of a motor vehicle arising from a collision that occurred on 29 October 2012. General damages were assessed on the basis of the "*market rate for supplying a replacement vehicle*" following the principles referred to in *Anthanasopoulos v Moseley [2001] 52NSWLR 262 (at 276-277)*.
- 2 The only issue to be determined in the proceedings is a claim by the plaintiff for an award of interest on the judgment amount pursuant to section 100 of the Civil Procedure Act 2005. In numerous earlier decisions involving similar claims for loss of use of a motor vehicle where the plaintiff obtained a replacement vehicle through a credit hire car

arrangement and had not been subject to a liability to pay hire car charges this Court had declined to award pre judgment interest (see, for example, *Harb v Marchbank* [2011] NSWLC 9 *Fang v Koumoukelis* [2013] NSWLC 5 and *Masrouf v Danzey* (unreported Local Court decision dated 12 April 2013 file 2012/128560)). The plaintiff invites the Court to reconsider its approach.

- 3 In *Harb v Marchbank* [2011] NSWLC9 the Court declined to allow prejudgment interest pursuant to section 100 of the Civil Procedure Act 2005 on the basis that the Court was satisfied that the plaintiff was not under any liability to pay the car hire charges and had not been kept out of his money. In that case the hire arrangement provided a credit hire period of a minimum of 180 days after which an invoice requiring payment may be issued. No invoice was issued after the credit period. The approach taken in *Harb v Marchbank* relied on the earlier decision of *Screenco Pty Limited v R L Dew Pty Ltd & Anor* [2003] NSWCA 319.
- 4 The credit hire arrangements entered into by Mr Supit differ from the arrangements in *Harb v Marchbank*. Mr Supit hired a replacement vehicle through Compass Corp Pty Ltd trading as 1Car1 car and van rentals on 13 November 2012. Paragraph 3 of the rental agreement provides that the hirer is responsible for all hire charges referred to in the agreement. On 13 November 2012 the plaintiff also signed a document titled "*Mandate and Authority to Act*" that authorised Compass Corp Pty Ltd to recover the hire car charges from the defendant on the plaintiff's behalf. Clause 4 of the "*Mandate and Authority to Act*" provide that Compass will hire the vehicle on credit for a period of up to 90 days calculated from the date of the hire invoice after which time the hire costs become due and payable without further demand. An invoice issued by Compass to Mr Supit on 14 December 2012 for the total of \$7,823.93. Although there is no evidence to suggest this invoice has been paid there is at least a potential liability

on the part of Mr Supit to pay the hire charges together with interest as from 15 March 2013.

5 The plaintiff also relies on the Court of Appeal decision in *Bunnings Group Limited v CHEP Australia Limited* [2011] NSWCA 342. In this case CHEP was the owner of storage pallets that were hired out to various clients who supplied goods to Bunnings. Bunnings wrongfully retained the pallets. Damages were awarded to CHEP based on the hire cost of the pallets, notwithstanding that there was no evidence that CHEP had suffered a loss through not being able to hire out the pallets to other clients. The Court followed the principles referred to in *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246 (the Strand Electric principle) that “*the measure of damages was the sum the user would have paid if the possession was lawful.*”

6 Bunnings argued that pre-judgment interest should not be awarded as CHEP had not been required to establish an actual loss. The Court distinguished the decision of *Screenco* and awarded pre-judgment interest. Allsop P at [190]-[191] stated:

“[190] The nature of the award of damages based on Strand Electric does not deny the compensatory character of interest that is awarded upon it. The owner, here Chep, has been held out of moneys that it was entitled to as a proper reflection of the use of its property. Notwithstanding or subject to the views earlier expressed on the compensatory nature of the award of damages under Strand Electric, even if there may be seen to be a restitutionary element in that calculation, it is one that is taken as the proper assessment of the loss of the proprietary character which I have discussed.”

[191] *In my view, interest is properly to be awarded on the damages calculated by reference to Strand Electric and Gaba Formwork*”.

7 The defendant submits that pre-judgment interest should not be awarded on the basis that there is no evidence that the plaintiff has incurred the cost of hire through Compass and that the Court should adhere to the approach taken in earlier decisions such as *Harb v Marchbank*.

8 For the reasons which follow I am satisfied that the Court that the plaintiff is entitled to an award pre-judgment interest.

9 The power to award pre-judgment interest is contained in section 100 of the Civil Procedure Act 2005:

“(1) In proceedings for the recovery of money (including any debt or damages or the value of any goods), the court may include interest in the amount for which judgment is given, the interest to be calculated at such rate the court thinks fit:

(a) on the whole or any part of the money, and

(b) for the whole or any part of the period from the time the cause of action arose until the time the judgment takes effect.”

10 The power to award pre-judgment interest is discretionary although the exercise of the power should be consistent with relevant principles.

11 The purpose of an award of interest is compensatory. In *Haines v Bendall* (1991) 172 CLR 60 at 66-67 Mason CJ, Dawson, Toohey and Gaudron JJ stated at [9]:

“An award of interest up to the date of judgment is an award of interest in the nature of damages: Fire and All Risks Insurance Co Ltd, at p431. This statement acknowledges that the award of interest is an integral element

in the attainment of the object of damages, namely to compensate a plaintiff for injury sustained. Hence the award of interest is compensatory in character. While “[I]nterest should not be awarded as compensation for the damage done” (Jefford v Gee(1970)2 QB 130 at p146), the award of interest is nevertheless an essential element in the achievement of true compensation for that damage. In Thompson v Faraonio(1979)54 ALJR 231 at p233, the Privy Council states that “[t]he reason for awarding interest is to compensate the plaintiff for having been kept out of money which theoretically was due to him at the date of his accident” : see also Batchelor v Burke, per Gibbs CJ at 455; MBP (SA) Pty Ltd v Gogic; at p205; p196 of ALR; cf. Ruby v Marsh [1975]HCA32, per Barwick CJ. The award of interest for the period of delay in payment between the date of accrual of the cause of action and judgment affords the fair legal measure of compensation: Pheeney v Doolan (1977)1 NSWLR 601, per Reynolds JA. Thus, it is the award of damages and, where appropriate, interest awarded on damages for the period up until the judgment takes effect which allows the plaintiff to be placed in or restored to the situation, as far as money can do, in which he or she would have been but for the defendant’s negligence.”

- 12 In *Screenco* the plaintiff sought pre-judgment interest on the value of screens that were negligently damaged by the defendant. The Court of Appeal upheld the trial judge’s refusal to award pre-judgment interest on the value of the asset. Handley JA said at 14 that the plaintiff “*had lost the screen, and the use of the screen, but in a real and practical sense had not lost its money because it had not paid for the screen*”. It was also relevant to His Honour that an award had been made by the trial court for loss of revenue. Handley JA referred to the principle in *The Northumbria* (19869) LR3Ad&Ec 6, 12 that a plaintiff could not recover both revenue lost as a result of being deprived of an asset as well as interest on that asset as that would doubly compensate the plaintiff.

- 13 Tobias JA at 116 the plaintiff *“had not suffered any “real” or “practical” loss by the delay in the payment of that part of the damages represented by the value of the screen. It was so held on the ground that it had never been required to pay the purchase price thereof to its parent (company) and there was no evidence that the parent was seeking, or would in the future seek, the payment of interest on that unpaid purchase price. Accordingly, the appellant was never out of pocket with respect to the value of the screen and therefore had not been “kept out of its money” in the relevant sense”.*
- 14 The decision in *Screenco* is one based on the peculiar facts of the case. While the Court of Appeal found that the plaintiff suffered no detriment to be compensated by an award of interest, a degree of caution should be exercised when applying this principle more broadly. A number of subsequent cases have distinguished the decision. In *The Owners Strata Plan 57504 v Building Insurers’ Guarantee Corporation [2008] NSWSC1285* McDougall J held that pre-judgment interest was payable on the basis that the plaintiff had been entitled to the judgment amount for eight months prior to judgment. Even though the Owners Corporation had not spent money interest was allowed on the basis that *“[t]he Guarantee Corporation has continued to have the use of the money. The Owners Corporation has not had the use of the money.”* In *Stanilite Pacific Ltd (In Liq) & Anor v Seaton and Ors (No2)[2005] NSWCA 412* Hodgson JA stated *“[i]n my opinion, Screenco does not support the proposition that there is an onus on a plaintiff claiming interest to prove loss arising from not having the money from the time when it was entitled to have it.”*
- 15 The decision in *Bunnings v Chep* demonstrates the preparedness of the Court to allow pre judgment interest in circumstances where there is no pecuniary loss established. The award of pre judgment interest

compensated Chep for the period of time it was deprived of the judgment amount to which it was entitled.

- 16 The approach is further illustrated in the High Court decision of *Grincelis v House* [2000] HCA 42. That case involved the question as to whether pre judgment interest should be allowed on damages (allowed under the *Griffiths v Kirkemeyer* principle) for an injured plaintiff whose needs had been met by the provision of gratuitous services by the plaintiff's parents. Clearly the plaintiff did not rely on any pecuniary loss. Furthermore, the award of damages had regard to the costs prevailing from time to time during the period between the cause of action accruing and judgment. Notwithstanding this, the High Court held that an award of pre-judgment interest should be allowed. The majority of Court (Gleeson CJ, Gaudron, McHugh Gummow and Hayne JJ) at [19] – [20] allowed interest on the basis that “*the appellant has been kept out of money amounts which were calculated by reference to the purchasing power of money in the past....Where, as in the present case, damages are assessed by reference to costs prevailing form time to time, the interest calculation must be made in a way that reflects the fact that damages comprise amounts accruing over time, not a simple lump sum.*”
- 17 Returning to the present case, Mr Supit is under a potential liability in respect of the hire charges and for interest on those hire charges. This alone distinguishes the case from *Harb v Marchbank*. It is not a case where there is an absence of detriment as referred to in *Screenco*. Even if Mr Supit was not required to pay hire charges and interest to the hire car company, that does not preclude an award of pre-judgment interest.
- 18 The award of pre-judgment interest in favour of Mr Supit ensures that the assessment of damages is adjusted in real terms to reflect the loss as at the time of trial. Damages are ordinarily assessed as at the date of the wrong: see *Wenham v. Ella* [1972] HCA 43; (1972) 127 CLR 454, per

Gibbs J. at p 473. Although there are exceptions to this principle the present case is not one of those exceptions. Whenever, the court is assessing damages by reference to the market rate of a replacement vehicle it is guided by evidence of market rates existing at the time that the loss is suffered. An award of pre-judgment interest ensures that assessment of the value of the loss of use of the plaintiff's vehicle is not diminished by the delay between the cause of action and trial.

- 19 The award of pre-judgment interest to the plaintiff is compensatory. The plaintiff was entitled to the judgment money from the time that the cause of action arose. The plaintiff has been deprived of that money while the defendant has had the benefit of retaining that money. Not allowing pre-judgment interest would be likely to forestall early settlement of these matters as the defendant continues to have the benefit of that money the longer that the proceedings continue.

- 20 The Court is satisfied that interest pursuant to section 100 should be allowed from 30 November 2012 being the date when the plaintiff's motor vehicle was returned to the plaintiff after repair. Interest is to be allowed at the rate referred to under Part H of the Chief Magistrate's Civil Practice Note Civ 1. Interest has been calculated as at today in the sum of \$427.07.

Assessor Olischlager
Local Court