IN THE SUPREME COURT OF NEW ZEALAND

SC 39/2016
[2017] NZSC 129

BETWEEN	HAMISH MCINTOSH Appellant
AND	JOHN HOWARD ROSS FISK AND DAVID JOHN BRIDGMAN Respondents

Court:	William Young, Glazebrook, Arnold, O'Regan and Ellen France JJ
Counsel:	Appellant in person M G Colson and R L Pinny for Respondents
Judgment:	31 August 2017

JUDGMENT OF THE COURT (AS TO INTEREST)

A The appellant is to pay interest at the rate of five per cent per annum on the sum of $454,047.62 from the date of the liquidators' appointment (17 December 2012).

B There is no order as to costs.

REASONS
(Given by Ellen France J)

Introduction

[1] In our judgment delivered on 26 May 2017, we dismissed the appellant's appeal and the respondents' cross-appeal.[1] The effect of the judgment was that the order made in the High Court that the appellant pay the $454,047.62 he received, as part of the repayment of funds invested in a failed Ponzi scheme, to the liquidators of

[1] *McIntosh v Fisk* [2017] NZSC 78 [*McIntosh* (SC)].

the company, Ross Asset Management Ltd (RAM), was upheld.[2]

[2] We noted in our judgment that the question of interest on the sum outstanding was reserved in the High Court. As the issue was not the subject of full argument we gave the parties the opportunity to file submissions on the point in the event they did not reach agreement.[3] The parties have not been able to agree and submissions have been filed. We now deal with the question of interest.

The issues

[3] In their submissions on this question, the liquidators seek an order that the appellant pay interest on the claw back sum from the date of their appointment (17 December 2012) at the rate set pursuant to s 87(3) of the Judicature Act 1908, that is, five per cent per annum.[4] The liquidators submit the date of appointment is the appropriate date on the basis that is when the relevant cause of action arose.

[4] The appellant accepts the liquidators would normally be entitled to interest on the claw back sum but, for a number of reasons, submits no interest should be payable in this case. Or, if there is an order, the appellant submits that payment should run from the date of the High Court judgment (22 June 2015). Alternatively, if the Court is considering an earlier date then, at the earliest, payment of any interest should run from the date of the liquidators' filing of their application to set aside the payment (17 July 2014). The appellant accepts that, if interest is payable, the rate should reflect the rate set under the Judicature Act.

[5] The primary issue before us is, accordingly, whether there are reasons, either of principle or arising out of the appellant's circumstances, why we should depart

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2 *Fisk v McIntosh* [2015] NZHC 1403, (2015) 11 NZCLC ¶98-033 (MacKenzie J) [*McIntosh* (HC)].

3 *McIntosh* (SC), above n 1, at [200].

4 Judicature (Prescribed Rate of Interest) Order 2011, cl 4.

from the usual approach, which would be to award interest on the sum outstanding.[5] The second issue is the date from which any interest award should run.

Factual background

[6] The facts are set out in our earlier judgment.[6] For present purposes we can take as the starting point April 2007 when the appellant entered into a funds management arrangement with RAM. He paid $500,000 to RAM, having borrowed that money from his bank. RAM operated a Ponzi scheme using its investors' funds. The scale of the fraud was such that investors lost significant sums.

[7] In September 2011, the appellant decided to cash up his portfolio. He sought repayment of the sum RAM's reports to him indicated was now invested, namely, $954,047. The $454,047 in excess of the appellant's original investment was said to have been earned on his portfolio but in fact none of this money derived from the sale of securities.[7] RAM repaid the appellant $954,047 in six tranches in November 2011 (the final payment was made on 23 November 2011).

[8] RAM was placed in receivership in November 2012 and in liquidation in December 2012. The liquidators gave a notice of demand to the appellant in July 2013 seeking repayment of the $954,047. One year later, in July 2014, the liquidators issued proceedings in the High Court. They sought to set aside, either under s 292 of the Companies Act 1993 or under s 348 of the Property Law Act 2007, the sum paid to the appellant.[8] The appellant resisted the claim on the basis he had a defence under s 296(3) of the Companies Act or under s 349 of the Property Law Act.

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5 See *Westpac Banking Corp v Nangeela Properties Ltd (in liq)* [1986] 2 NZLR 1 (CA) at 7 per Richardson J, at 9 per McMullin J and at 11 per Somers J; applying *Re FP & CH Matthews Ltd (in liq)* [1982] Ch 257 (CA). See also *Worldwide NZ LLC v NZ Venue and Event Management Ltd* [2014] NZSC 108, [2015] 1 NZLR 1 at [37] and [56]. For further discussion, see Andrew Beck and others *Morison's Company Law* (online looseleaf ed, LexisNexis) at [63.6]; Paul Heath and Michael Whale (eds) *Heath and Whale on Insolvency* (looseleaf ed, LexisNexis) at [24.122]; and Lynne Taylor and Grant Slevin *The Law of Insolvency in New Zealand* (Thomson Reuters, Wellington, 2016) at [26.5.4].

6 *McIntosh* (SC), above n 1, at [2]–[8].

7 The precise amounts were $954,047.62 and $454,047.62 respectively, but we have rounded the figures down for simplicity.

8 An order under s 297 of the Companies Act 1993 to recoup the amount by which the payment the appellant received from RAM exceeded the value the appellant gave was also sought.

[9] In the High Court, MacKenzie J found the appellant had a defence in respect of the $500,000 initially invested with RAM but not in relation to the fictitious profits of $454,047.[9] The appellant was ordered to pay $454,047 to the liquidators. The appellant's appeal and the liquidators' cross-appeal to the Court of Appeal were both dismissed and the decision of the High Court upheld.[10] This Court gave leave to appeal and cross-appeal on whether the order should have been made setting aside the payments made by RAM to the appellant and, if so, whether the order should have been to set aside all of the sums paid to the appellant ($954,047) or $454,047, being the difference between the initial sum invested and the sums repaid.[11]

[10] As we have noted, this Court, by a majority (Glazebrook J dissenting) upheld the decision of the Courts below dismissing the appeal and cross-appeal.

Should the appellant pay interest?

[11] There is no dispute that the Court has jurisdiction to order the payment of interest. The parties identified three possible sources of the Court's powers. The first of these is s 87 of the Judicature Act.[12] Section 87(1) provides that in a proceeding for the recovery of any debt or damages, the Court may order that the sum for which judgment is given include interest, not exceeding the prescribed rate:

> … on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:

[12] The second possible source of the Court's jurisdiction to order the payment of interest is s 295(c) of the Companies Act. That section provides that where a transaction is set aside under s 294 (the procedure for setting aside voidable transactions) the Court may make an order:

> … that a person pay to the company an amount that, in the court's opinion, fairly represents some or all of the benefits that the person has received because of the transaction:

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9 *McIntosh* (HC), above n 2.

10 *McIntosh v Fisk* [2016] NZCA 74, [2016] 2 NZLR 783 (Harrison, French and Miller JJ).

11 *McIntosh v Fisk* [2016] NZSC 58.

12 Section 87 of the Judicature Act 1908 is to be repealed, as from 1 January 2018, by s 182(4) of the Senior Courts Act 2016. See s 2(2)(b) of the Senior Courts Act for the provision relating to the commencement of s 182(4). The Interest on Money Claims Act 2016 will come into force on 1 January 2018, subject to the transitional provisions of that Act: see ss 2 and 7 and sch 1.

[13] Finally, in terms of the claim under the Property Law Act, s 348(2) provides that an order setting aside a disposition of property must either vest the property in the specified person or:

> (b) require a person who acquired or received property through the disposition to pay, in respect of that property, reasonable compensation to the person …

[14] We accept the liquidators' submission that the policy considerations underlying s 87(1) of the Judicature Act should be applied equally to the award of interest under either s 295(c) or s 348(2)(b): that is, the award is a means of providing compensation for the fact the applicant has not had the use of the money for the relevant period.[13] That is apparent on the face of the language used in s 295(c) and that in s 348(2)(b). This Court described the policy considerations underlying s 87(1) in this way in *Worldwide NZ LLC v NZ Venue and Event Management Ltd*:[14]

> [23] The rationale under s 87(1) for the awarding of interest is that the defendant has had the use of money which should have been available to the plaintiff for that period and that the plaintiff should be compensated for that. As the United Kingdom Law Revision Committee Report explained, this same rationale applies to general damages in that the defendant should have "admitted the claim when made and have offered a proper sum by way of damages".

[15] Further, the Court said that the purpose of s 87(1) was that it gave the court a:[15]

> … discretion to compensate a party in the position of [the appellant] for not having had the use of its money from the date payment was due or when the claim for damages arose.

[16] In support of his submission that the Court should not award interest, the appellant submits that the effect of this Court's earlier decision in this case is that he

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13 A number of decisions in the High Court indicate that the purpose of an order under s 295 is to return the parties to their initial position, eliminating any element of preference benefiting a creditor: see, for example, *Farrell v E & E APS* [2012] NZHC 417, (2012) 11 NZCLC ¶98-004 at [35]; *Grant v Lotus Gardens Ltd* [2013] NZHC 1135, [2013] NZCCLR 16 at [25] (overturned on appeal, but not on this point: *Grant v Lotus Gardens Ltd* [2014] NZCA 127, [2014] 2 NZLR 726); and *Farrell v Max Birt Sawmills Ltd* [2014] NZHC 3391 at [43]. In *Reynolds v HSE Holdings Ltd* HC Whangarei CIV-2009-488-738, 17 September 2010 at [28], it was also noted that the purpose of s 295 was not punitive.

14 *Worldwide NZ LLC*, above n 5 (footnotes omitted).

15 At [57].

has not received any benefits. He says that without the fraud the money could not have been the subject of a claw back on RAM's insolvency and, further, that he received the money without knowledge of the fraud that led to the ability for the money to be the subject of a claw back. In addition, the appellant submits that he only received the money as the sum of equitable damages he would otherwise have been entitled to and for which he would have a claim in the liquidation.

[17] The submission is also made that if the appellant had received a benefit, that was off-set by his corresponding loss. The appellant refers in this respect to the Court's rejection of his defence that RAM's possession of his initial investment comprised "value". Further, the appellant submits there was no matching deprivation on the part of either RAM or the unpaid creditors.

[18] Finally, the appellant relies on the Court's determination that the use by RAM of his initial $500,000 investment was not "value given" by him. In developing this submission, the appellant says first that the unpaid investors should not be in a better position now as regards interest. And second, the appellant contends that it is inconsistent to say he had no use of money value because of the Ponzi fraud but his receipt of the money does have a use of money value for the purposes of interest.

[19] We agree with the liquidators that the appellant's submission he received no benefits cannot stand given this Court's earlier judgment in this matter. It has been decided that value was not provided to RAM for the use of the initial $500,000 investment.[16] The appellant's other submissions do not take account of the purpose of an award of interest in this situation. The factual reality is that the appellant has had the use of the money since he was repaid the sums in November 2011 and the company as a result has been deprived of the use of that money.[17] There is no inconsistency between an award of interest and the earlier determination. In this

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16 *McIntosh* (SC), above n 1, at [117]–[118].

17 The Court of Appeal in *Westpac New Zealand Ltd v MAP & Associates Ltd* [2010] NZCA 404, [2011] 2 NZLR 90 at [69] said: "The philosophy underlying s 87 is that a party who has the wrongful use of another's money should pay interest on it. This is not dependent on proof of the wrongdoer's gain or victim's loss. Rather, it assumes those."

respect, the approach taken in the United States endorsing the award of interest in cases involving Ponzi schemes is helpful.[18]

[20] In *Donell v Kowell* the United States Court of Appeals (9th Cir) approved the observation that interest in these circumstances is "not to be thought of as a windfall" but, rather, is "simply an ingredient of full compensation that corrects judgments for the time value of money".[19]

[21] In *Wiand v Lee*, the United States Court of Appeals (11th Cir) rejected the approach of the magistrate judge that an award of interest would have been inequitable because the bona fide investors had "suffered enough".[20] The Court said this was not an equitable factor but a necessary consequence of the concept of pre-judgment interest as ensuring full compensation.

[22] We should also respond to the suggestion from the appellant that, in this Court's earlier judgment, in dealing with the value defences the Court has made a "fraud or Ponzi exception" to the way in which those defences are interpreted and made a "financial transactions" exception to the commercial certainty principle identified in *Allied Concrete Ltd v Meltzer*.[21] That submission is not correct. Rather, the approach of the majority in this Court's earlier decision was simply an application of *Allied*.[22]

[23] Accordingly, in our view there is no reason in principle not to award interest in the present case. We need to consider then the other factors relied on by the appellant which he says arise out of the circumstances of his case.

[24] The appellant says this was a test case which he had no real choice but to defend. The fact that he was the first defendant was a matter of chance and there was a genuine legal issue about the extent of his obligation. The appellant also

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18 See Kathy Bazoian Phelps and Steven Rhodes *The Ponzi Book: A Legal Resource for Unravelling Ponzi Schemes* (LexisNexis, New Providence (NJ), 2012) at §2.08[1].

19 *Donell v Kowell* 533 F 3d 762 (9th Cir 2008) at 772, citing *Re PA Bergner & Co* 140 F 3d 1111 (7th Cir 1998) at 1123.

20 *Wiand v Lee* 753 F 3d 1194 (11th Cir 2014) at 1205.

21 *Allied Concrete Ltd v Meltzer* [2015] NZSC 7, [2016] 1 NZLR 141.

22 By contrast, if the view of Glazebrook J (dissenting) in *McIntosh* (SC) had prevailed, the effect of that would have been to create an exception to the interpretation for Ponzi schemes.

submits that the case has assisted others, including the liquidators, in their claims. The case has given guidance to all RAM investors but the appellant emphasises that he alone has borne the cost of that. The appellant also points to the significant personal cost which he has had to bear. In that respect, because no other RAM investors wanted to be identified, there were no investors willing to support him.

[25] We do not see these factors as relevant to interest given that the purpose of interest is to compensate for the loss of use of the money in circumstances where the appellant has had the benefit of that use. We accept that these factors may be relevant to costs and, although these considerations have not carried the day thus far in terms of any costs award, we will recognise them to a limited extent by not making any award of costs in relation to the present application.

[26] It follows that there is no basis not to award interest in this case. There is no dispute that the Judicature Act rate of five per cent per annum is appropriate. The only issue that remains for consideration is the date from which interest should be paid. We turn now to address that issue.

Date of payment

[27] It is common ground that the earliest date from which any interest award should run is the date the liquidators were appointed.

[28] Under s 87(1) of the Judicature Act interest may run from the date when the cause of action arose. There may be different dates for the different causes of action. With respect to the claim brought under the Companies Act, the cause of action is treated as arising at the date the liquidators were appointed.[23] The date when the cause of action under the Property Law Act arose is more difficult. We do not need

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[23] *Levin v Titan Cranes Ltd* [2013] NZHC 2628 at [86]–[92] (in the context of a limitation question); *Levin v Shot Blast Services (Auck) Ltd* HC Auckland CIV-2012-404-433, 22 July 2013 at [23] (Minute of Associate Judge Abbott), recalling and reissuing *Levin v Shot Blast Services (Auck) Ltd* [2013] NZHC 1656; *Fisk v Galvanising (HB) Ltd* [2013] NZHC 3543 at [181]; and *Porter Hire Ltd v Blanchett* HC Auckland CIV-2005-404-3056, 24 July 2006 at [24]–[28] and [41]. See also: *Westpac Banking*, above n 5, where McMullin and Somers JJ concluded that the statutory predecessor to s 295, s 311(4) of the Companies Act 1955, allowed for payment of interest from the date of liquidation: at 9 per McMullin J and at 11 per Somers J. The reasoning of the Court in *Westpac Baking* was noted by this Court in *Worldwide NZ LLC*, above n 5, at [56] and see [37].

to finally resolve that question because interest in this case can be awarded under either s 87(1) or s 295.

[29] The appellant says that a later date than the appointment of the liquidators should be adopted. That is because he says he did not know when the liquidators were appointed, or until a letter of demand was received, whether the Ponzi fraud included his portfolio. Further, the appellant says that after the demand from the liquidators, which invited reliance on the defence, he acted properly and should not have to wear the consequences of the liquidators' one year delay from the date of the letter of demand to the filing of the application to set aside.

[30] Because of the purpose of the award of interest, these matters are not relevant to our consideration. Further, the award of interest is not a punitive measure. To the extent that the appellant submits that in this way he is being censured, that submission is based on a misconception. Accordingly, we see no basis not to award interest from the date on which the liquidators were appointed.[24]

Result

[31] For these reasons, we make an order that the appellant is to pay interest at the rate of five per cent per annum on the sum of $454,047.62 from the date of the liquidators' appointment (17 December 2012). As foreshadowed above, we make no order as to costs.

Solicitors:
Bell Gully, Wellington for Respondents

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[24] The appellant relies on two cases which adopted a later date, the date of filing of the application to set aside, namely, *Blanchett v Te Kopua Investments Ltd* [2013] NZHC 2130 at [22]; and *Levin v Timberworld Ltd* [2013] NZHC 3180 at [79]. Neither case discusses the reason for the approach to the date. Reference should also be made to *Graham v Pharmacy Wholesalers (Wellington) Ltd* CA37/04, 17 December 2004 in which the Court of Appeal ordered at [81] that Judicature Act interest was payable from the date the respective payments (set aside under s 292(2) of the Companies Act) were made. The focus in that case was primarily on whether the payments were made in the ordinary course of business and on the availability of a defence under s 296(3).