IN THE SUPREME COURT OF NEW ZEALAND SC 50/2013

[2014] NZSC Trans 7

BETWEEN **WORLDWIDE NZ LCC**

Appellant

AND **NZ VENUE AND EVENT MANAGEMENT LIMITED**

Respondent

Hearing:	20 March 2014
Coram:	Elias CJ McGrath J William Young J Glazebrook J Arnold J
Appearances:	M J Fisher and L H Hui for the Appellant A C Sorrell and S R Robertson for the Respondent

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CIVIL APPEAL

MR FISHER:

May it please the Court. Counsel's name is Fisher and I appear with Ms Hui.

ELIAS CJ:

Thank you Mr Fisher.

MR SORRELL:

May it please Your Honours. My name is Sorrell and I appear with Ms Robertson.

ELIAS CJ:

Thank you Mr Sorrell. Yes Mr Fisher?

MR FISHER:

As Your Honour pleases. The appellant submits that the High Court Judges' analysis and conclusions were correct and I should like immediately to take Your Honours to two paragraphs in the High Court judgment. At page 103 of the case on appeal, paragraph 273. Of the case on appeal, volume 1, page 103 at para 273 of the decision of the Court. And at 275. In short the submission is that the jurisdiction under section 187 arose because the appellant had a claim for payment of an ascertainable debt, being the fair market value of the shares, and that was the cause of action and it arose upon the respondent exercising its pre-emptive right of purchase. So at that point in time the cause of action arose and if there was any doubt about that it was removed by the decision of the Court of Appeal in April 2008 in this case when the Court determined that the proper construction o the parties' agreement was that there was an obligation to pay the fair market value of the shares.

ELIAS CJ:

Do we have the 2008 decision, I haven't looked at it?

MR FISHER:

Yes we do. It maybe found in volume 1 –

ELIAS CJ:

Of the bundle?

MR FISHER:

Yes.

WILLIAM YOUNG J:

Volume 2.

MR FISHER:

Sorry, volume 2 at 365. The analysis in particular can be found there, or the conclusion, at page 380 of volume 2 of the bundle, paragraph 40 of the decision. It necessarily followed from the Court's determination that there was a cause of action at that point in time. So that there was – the cause of action being an agreement to

pay the fair market value which could be fixed, if necessary, by the Court. So going back to paragraph –

ELIAS CJ:

Sorry, that's on exercise is it? Where does it say that in this, what paragraph?

WILLIAM YOUNG J:

Para 40.

McGRATH J:

And 41.

ELIAS CJ:

But your contention needs something additional added which is the exercise of the right?

MR FISHER:

Yes, which occurred on the 26th of April.

ELIAS CJ:

Yes. And do we have that exercise?

MR FISHER:

There is, I believe, some of the primary documents in volume 1 –

ELIAS CJ:

It's not in contention that it was exercised in accordance with the terms of the agreement.

MR FISHER:

Yes.

ELIAS CJ:

As determined by the Court of Appeal.

MR FISHER:

Yes.

ELIAS CJ:
In 2008.

MR FISHER:
So for the purposes of proceeding it was accepted that there was a legal obligation to purchase the shares and the dispute over the meaning of the contract was resolved by the Court of Appeal in 2008 and it was an agreement to pay for the units and shares at fair market value and the contention put forward by the respondents was not accepted, that QPAM was entitled under the trustee to fix the value of the units and shares.

GLAZEBROOK J:
So what do you say – what was the cause of action in the High Court then?

MR FISHER:
The cause of action was a –

GLAZEBROOK J:
Do we have the pleadings somewhere we can look at?

MR FISHER:
Yes.

GLAZEBROOK J:
They are here somewhere, aren't they?

MR FISHER:
Yes, volume 1.

GLAZEBROOK J:
Well whichever way you wish to tell us about it it's…

MR FISHER:
Well the cause of action was a cause of action seeking to enforce the obligation of the respondent to pay the fair market value of the shares.

ELIAS CJ:

So where do you find that in the pleading? We, of course, have got the amended statement of claim, which is quite a late amendment, isn't it, before the statement of claim.

MR FISHER:

Yes, that was in 2009 and the hearing was July 2010.

ELIAS CJ:

Yes. We don't have the original statement of claim do we?

MR FISHER:

Yes we have the additional pleadings. The former pleadings are in the volume 3 of the case on appeal at page 389, the sort of purple volume. It may be helpful to understand the context of the dispute because the position, when the proceeding initially commenced, was prior to the notification by the respondent of its intention to exercise the pre-emptive right of purchase.

ELIAS CJ:

The proceedings were issued first?

MR FISHER:

Yes and at that point in time the proceedings did not anticipate –

ELIAS CJ:

Oh yes.

MR FISHER:

– anything to do with an exercise of pre-emptive right. The proceeding was brought because of the situation that after the appointment of the receiver to the parent company of the appellant, on the 18th of January 2006, there was discussion between the receiver and QPAM and the Jacobsens about the management of the asset, which was Vector Arena, and ultimately a dispute ensued about what information should be disclosed to the direction which had been appointed by the appellant. So this proceeding, the first statement of claim at that point in time, the relief sought was orders under section 174 of the Companies Act 1993 and orders for the supply of information. You can see the relief sought there at paragraphs – at pages 392 and

393 of volume 3 of the case bundle. And it was subsequent to the exercise of the pre-emptive right on the 26th of April 2006 that the proceeding was amended to essentially, and you'll see that's at 394, on the 9th of May 2006, and in that proceeding there was, at that stage, a challenge to the lawfulness of the exercise of pre-emptive right on the grounds that an estoppel had arisen and the alternative argument advanced was that there were rights in the appellant, in the nature of an unpaid vendor which gave it certain rights to participate as a director on the board or insofar as the supply of information was concerned, pending the determination of the issue over the meaning of the contract and the price.

That claim was advanced at the same time of an application for interim injunction which was refused by Justice Williams on the 30th of May 2006 and an appeal followed to the Court of Appeal which was heard on the 21st of August 2006 and at that point in time the argument about the estoppel wasn't advanced before the Court. The argument advanced before the Court was that there were certain interim rights enjoyed by the appellant insofar as its interest in the units and shares were concerned pending payment and –

ELIAS CJ:
Pay, pending?

MR FISHER:
Payment.

ELIAS CJ:
Payment under the exercise of the –

MR FISHER:
Yes, of the pre-emptive rights.

ELIAS CJ:
And the shares were actually transferred and there was an application for rectification of the share – not transferred, but the share register was altered, wasn't it –

MR FISHER:
Yes.

ELIAS CJ:

– and there is an application for rectification?

MR FISHER:

Yes. There was in the relief sought certain declarations that were in furtherance of the submission that under the principle of the *Musselwhite v C H Musselwhite & Sons Ltd* [1962] Ch 964 line of cases of an unpaid vendor –

ELIAS CJ:

Yes.

MR FISHER:

– an equitable interest in the shares continued beyond the date of the exercise of the pre-emptive right and what the particular prayers for relief sought to do was to a greater or lesser extent reflect the pragmatic realities of what that might mean.

ELIAS CJ:

So is that in this statement of claim or a subsequent one? Where's the relief in this…

MR FISHER:

Well that relief, if I take you to –

ELIAS CJ:

Oh I see it, page 40 –

MR FISHER:

– page 403. And you'll see paragraph A the relief, at that stage there were declarations sought and it was all pending completion and settlement of a lawful valid transfer.

McGRATH J:

So the contention through this period is that you don't have to let the shares go and that you've got rights which your director Gosney is exercising.

MR FISHER:

Yes and –

McGRATH J:

Has the right to exercise?

MR FISHER:

The *Musselwhite* line of cases assert the proposition that as you're a constructive trustee of the purchaser in that role so you have certain limited rights and –

ELIAS CJ:

So did that proceed on the assumption that the pre-emptive right had validly been triggered because –

MR FISHER:

Yes, yes, it did.

ELIAS CJ:

I thought it wasn't until 2008 that that was not in contention.

MR FISHER:

No, that's the submission that my learned friend makes and that's not accepted.

ELIAS CJ:

I see.

GLAZEBROOK J:

Well what you say is well the estoppel argument would have been an argument to say that the pre-emptive rights, but what you say is the second argument was a more limited argument that said until payment –

MR FISHER:

Yes.

GLAZEBROOK J:

– there are certain limited rights that hadn't been accorded and that those rights would cease all together on payment.

MR FISHER:

Yes. If they existed. And that the fundamental concern and preoccupation on the part of the appellant with the need to continue to assert, if it could, a beneficial interest in the shares, and this is in the hearing before the High Court, all the evidence of this, was the concern that the Jacobsens were insolvent and that their empire was crumbling in Australia and as a result there were, right up until a week before the hearing in the High Court, there was an application to seek a freezing order because of evidence that the receiver had about the crumbling nature of the Jacobsen's empire. So that is the reason why throughout the conduct of the proceeding there was the attempt to argue that –

ELIAS CJ:
An equitable interest continued until payment?

MR FISHER:
Yes, but the Judge rejected that argument both in terms of the *Musselwhite* line of cases and in the terms of any other sort of interests and held that the right of action was as an unsecured creditor.

ARNOLD J:
So was there an appeal against that decision?

MR FISHER:
No.

ARNOLD J:
No? Okay.

MR FISHER:
And it's acknowledged, there's a paragraph in the judgment in the Court of Appeal from which this appeal has been brought, that the appellant acknowledges that the finding of the High Court Judge in that regard is accepted, not challenged.

ELIAS CJ:
I missed that. So could you just give me the paragraph reference to the Court of Appeal?

MR FISHER:

Yes. Page 145 of the volume 1 of the bundle at paragraph 50. And just to provide some further context, in case it's not immediately apparent, another event in the dispute which actually resulted in the case –

ELIAS CJ:

Well, sorry, I'm just trying to think, I mean by that stage it was clearly in the appellant's interests to take that view?

MR FISHER:

Not to seek to appeal that…

ELIAS CJ:

Yes. I'm just slightly concerned about any, and it maybe because I don't, and you've helpfully explained some of the background, I'm just slightly concerned about the appellant having blown hot and cold a bit through these proceedings and whether that has any effect on the issue that we have to determine here. But by this stage, this is the judgment under appeal, by that stage you were going for interest?

MR FISHER:

No we were also –

WILLIAM YOUNG J:

Going for interest in the High Court –

MR FISHER:

No we were also, it was an appeal, a cross-appeal brought by the appellant actually seeking for two of the rulings the Judge made on evaluation to be reviewed on appeal which would have meant, if successful, potentially with interest payment of up to a further $900,00 which was beyond, there was no security for the additional amount. So the finding –

ELIAS CJ:

Yes, I'd forgotten about that.

MR FISHER:

– that the Judge made was accepted and no appeal was brought from it at that point and so the acknowledgement made was consistent with that position.

ELIAS CJ:

Yes, thank you.

MR FISHER:

But in any event, Your Honour, just on the point, it's probably trite, but alternative arguments are advanced in civil cases to further a position.

ELIAS CJ:

Yes, yes, but you are talking here about – the issue here is interest which under the statutory provision is discretionary so I'm just interested to understand the full background.

MR FISHER:

Yes. Well it's convenient for me to just focus on that issue because what is clear, and there's a finding by the Judge in the High Court to that effect, is that from the 26th of April 2006 the company QPAM Ltd and Vector Arena, the business which it ran, were under the exclusive control and management of the respondent from that date and the way the case was run was only in the event of default in payment were those additional remedies going to become relevant.

ELIAS CJ:

Yes.

GLAZEBROOK J:

Have you got a paragraph number for that?

MR FISHER:

In the judgment of the High Court at page 119, at para 321, you'll see the third sentence, the fifth line, "In addition the reality of the situation is that since the change of control and the exercise by JVMNZ," which was previously the respondent's name, "of its pre-emptive rights, the business of QPAM has been controlled and managed on an ongoing basis to the exclusion of the appellant."

GLAZEBROOK J:

And I think you were going to tell us another event?

MR FISHER:

The other event which needs to be taken into account in understanding the background context to the dispute in the way its pleaded was that in June 30 2006 the respondent and QPAM applied for summary judgment as defendants and to strike out the claim and that put, really, the whole claim in the air. It was that issue which was the reason we found ourselves in the Court of Appeal on the 16th of April 2008 to deal with the refusal to enter summary judgment to strike out by Justice Winkelmann in her judgment in December 2006 so –

ELIAS CJ:

So this is defendant, the summary judgment?

MR FISHER:

Yes.

ELIAS CJ:

Yes.

MR FISHER:

Yes and so the whole case sort of came to a grinding halt and then just before the hearing in the Court of Appeal in 2008 QPAM brought a proceeding under the Trustee Act 1956 seeking to get the Court's sanction to orders that it was the party entitled to fix the value of the units and shares. So if there's an explanation as to why we don't see any great progress in the meantime, in relation to the determination and payment of the valued units and shares, it was those, if you like, litigation strategies adopted by the respondent and QPAM.

ARNOLD J:

So what was the date of that action again, that QPAM action?

MR FISHER:

QPAM and the respondent brought the application for summary judgment and to strike out on 30 June 2006.

ARNOLD J:

Right.

MR FISHER:

And that was determined by Justice Winkelmann in the judgment delivered in December 2006 and an appeal was brought by QPAM and the respondent from that decision and that appeal was heard in the Court of Appeal in April 2008.

ARNOLD J:

And was it in that proceeding that it asserted it had the right to fix the value or was that –

MR FISHER:

It argued that point, before the Court of Appeal in that proceeding but it had issued immediately before the hearing in the Court of Appeal, a separate set of proceedings under the Trustee Act.

ARNOLD J:

Right so that is the date I wanted to – so that was sometime in 2008?

MR FISHER:

Yes 2008.

ELIAS CJ:

I suppose it is in the chronology is it?

MR FISHER:

I can't remember. That particular date isn't in the chronology.

ELIAS CJ:

So that trustee claim, was that seeking a determination that QPAM could determine the value.

MR FISHER:

Fix the value.

ELIAS CJ:

And when was that brought?

MR FISHER:

That was brought in February 2008.

ELIAS CJ:
And that was determined by who, was that appealed too?

MR FISHER:
Well effectively, once the Court of Appeal had construed the meaning of the unit trust deed to the effect that –

ELIAS CJ:
In the 2008 decision.

MR FISHER:
Then it necessarily rendered the outcome of that earlier action as inevitable.

ELIAS CJ:
Yes. Thank you very much for that, that is helpful.

MR FISHER:
Just pausing Your Honour just for a moment to take you to a paragraph in the decision of the Court of Appeal of 16 April 2008 where there is the discussion about the new proceedings, just so you have a record of it.

ELIAS CJ:
Yes. Volume 2, is it?

MR FISHER:
Yes. It's volume 2 and the decision can be found at page 365. I am aware of a discussion in the proceeding in the judgment.

ARNOLD J:
Paragraph 26.

MR FISHER:
Just staying with the pleading point so we can see the chronology, Your Honour, in the purple volume, volume 3, the next amended pleading that we find is after the second amended statement of claim is the third amended statement of claim filed

three or four months later at page 424 of that volume. We find at 436, at that point, the relief sought was a determination by the High Court of the fair market value, and pending receipt of payment, paragraph (a), declarations, and then paragraph (b), we see an order rectifying the register. That was something to which Your Honour referred earlier. And (c) is mandatory injunction and then (d), orders requiring QPAM to comply with obligations under sections 191 and 216 of the Act concerning the provision of information.

Of course, in the meantime the parties are sort of in a limbo in a substantive proceeding awaiting the outcome of the appeal from Justice Winkelmann's decision. The next relevant document is the –

GLAZEBROOK J:
Where are the prayers for relief?

MR FISHER:
In the third amended statement of claim at 436. And again, I make the point that at this point in time the background is there's no great progress been made in the resolution of the fundamental objective for the receiver, which was to recover the money and there was a concern in the background about the solvency of the Jacobsen interests.

WILLIAM YOUNG J:
I can't remember, but the summary disposition of the case in the Court of Appeal must have been at the request of the parties because a final ruling was given in what were really interlocutory proceedings, weren't they?

MR FISHER:
Yes, but because the Court of Appeal, and I think it's expressed in the judgment, said that it had reached a clear view as to the meaning of the clauses –

WILLIAM YOUNG J:
Rather than simply that one view was arguable?

MR FISHER:
Yes, and the consent of the parties was sought as to whether or not they were happy for the Court to –

WILLIAM YOUNG J:
To give a definitive ruling?

MR FISHER:
Yes, on the meaning of the contract and both parties consented.

ELIAS CJ:
Thank you.

At that stage – I'm sorry to be slow but that was in the summary judgment appeal and strikeout appeal?

MR FISHER:
Yes.

ELIAS CJ:
Yes, I see.

MR FISHER:
The Court had reached – after a day and a half's argument the Court came back to the parties and said it had reached a clear view as to the meaning of the contract and would it assist them if it pronounced that view and both parties agreed that it would.

ELIAS CJ:
Right, thank you.

MR FISHER:
So the – something that also isn't apparent is that there was a great deal of, if you like, interlocutory warfare in the case after the determination of the meaning of the contract by the Court of Appeal in April 2008 around the nature and extent of the information that should be available to the Court for it to reach a view as to the fair value of the units and shares, and at one stage there was a fixture for the hearing of the case set down in early 2010 and it had to be adjourned because some recent information was forthcoming through some documentation relied on by the respondent's valuers. But in any event, the final position as to its claim is that in the fourth amended statement of claim.

The relief sought in that claim may be found at page 15 of volume 1 of the case on appeal. You'll see where the plaintiff claims against the defendant an assessment and termination of the sum payable and interest on the sum payable, and then declarations as to the place of payment and as to the time of payment, and again, (c)(2) has to be understood in the context that in the event payment weren't made there was the – and in the event the Court accepted that there were some residual benefits rights enjoyed by the appellant that it would be able to move swiftly but, as it happened, payment was made and the rights of the parties have been secured pending determination of the appeal process.

Now, in the judgment of the High Court, although the Judge correctly set out the prayer for relief, the Judge did actually make a declaration about the payment of interest even though that wasn't expressly sought in the pleading. It may be that – if you turn to page 120 of the case on appeal – you'll see the Judge makes the orders she did. But be that as it may, the submission for the appellant is that this was a claim seeking to enforce the contractual obligation to pay the fair market value of the units and shares, and that was an ascertainable debt.

WILLIAM YOUNG J:
I know in Lord Brandon's speech you referred to quantum meruit. A quantum meruit is, in some ways, a claim like this. Services have been provided. There's been no agreement as to how much is to be paid. If the parties can't agree, it's got to be fixed by the Court retrospectively. It's always been my understanding that in that sort of situation interest would be awarded. Is there any authority directly on point? I mean, it's always open to the person who's being sued to say, "Okay, well, here's what I think I owe you and you can have it now and litigate the rest." So the person is in the respondent's position, he can always put up the money on what they say is owing, but is there authority directly on it other than what Lord Brandon said?

MR FISHER:
There is discussion of the point by the Judge at first instance, dealing with the quantum meruit issue, and there's a High Court decision in Australia where the issues are discussed along those lines and I can't remember precisely.

WILLIAM YOUNG J:
Don't worry. I'm sure we can find it later.

MR FISHER:

But I think the answer to Your Honour's proposition – and my learned junior will find it – is that in quantum meruit claims, interest is payable, can be payable from when the cause of action accrued, which will obviously be earlier than when the amount is ascertained.

Just on that point, Your Honour, the – given that our statutory amendment in 1952 is based wholly on the English provision, and the English provision was the product of the Law Revision Committees report, what's clear in that report is that there is the idea that any debts or damages can be payable from when the cause of action accrues and all the other issues about fairness et cetera fall within the discretion of the Court. That approach to the construction of section 87 really is more compensatory than the sense you would get from the use of the word "wrongful withholding", and we see the reference to the idea that in a judgment of *Chatham and Dover Railway Company v South Eastern Railway Company* (1892) 1 Ch 120 where he talks there about how unjust it would be for someone who's wrongfully withholding repayment not to pay interest but the common law is the common law, and when it came to the Law Revision Committee's report it's quite clear that they acknowledged the views of the eminent lawyers and Lord Herschel would say expressly cited, but it's apparent when you read on in the short report, paragraphs 8 and 9, that the real concern was to say, well, and this is to your point, Justice Young, you know there's an amount to be paid. You can work it out. You should tender a proper sum. The Law Revision Committee even went in to say that that's an appropriate approach for cases in libel.

ELIAS CJ:

So is what you're saying is that the approach that was adopted in the legislation was wider than a wrongful withholding rationale.

MR FISHER:

Yes.

WILLIAM YOUNG J:

What they say is in practically every case a judgment against a defendant means that he should have admitted the claim when it was made and paid the appropriate sum for damages.

MR FISHER:

Yes.

WILLIAM YOUNG J:

Well, that could be said of quantum meruit.

MR FISHER:

Yes.

WILLIAM YOUNG J:

It could be said here.

MR FISHER:

Yes. Well, we say that's right here and that's what the Judge thought.

ELIAS CJ:

If it is looked at on a sort of quantum meruit basis, though, in quantum meruit it would be when the goods are supplied or the – am I right in that – rather than when the obligation is entered into? I'm not sure, actually. But the question I had was really one of fact, which is, well, what is the event that triggers it here? It is really right to say that it's the exercise of the pre-emption because at that stage in the normal course of events where your client would have had to transfer the shares, but this was done by the company changing its share register, wasn't it? What date was that?

MR FISHER:

That happened, I think, by the 5th of May 2006, but my submission in response, Your Honour, is to say that the argument that the respondent advanced was because the change of control was by the deed deemed to be a default that that gave right to their right immediately to – once they'd exercised the pre-emptive right of purchase to transfer the units and shares to the Jacobsens and to exclude Worldwide NZ thereafter, so there's nothing unfair in the suggestion that at that point in time they enjoyed all the rights incidental to ownership of the units and shares to the exclusion of Worldwide NZ, and that thereby the cause of action accrued, and thereafter these other issues about what's fair and what's not fair just fall within the discretion of the Court.

ELIAS CJ:

Yes. So you're saying that the form of the obligation permitted this to take effect without any action by your client – sorry, the transfer of shares, effectively?

MR FISHER:

Well, that's what happened. Yes.

ELIAS CJ:

I see, okay.

MR FISHER:

Yes. The practical reality was that they did exercise all the rights of control and management and enjoyed all the benefits incidental to ownership. The only one stricture was that if the Jacobsens – and it was a stricture that arose out of the undertaking that they gave to the Court of Appeal on the 21st of August 2006, and that was in the appeal by the appellant here from the decision of Justice Williams, and the undertakings that were given were to the effect that if they were to sell the shares, they would first have to put a sum equivalent to the amount that Worldwide had initially paid for the units and shares into a trust account. That was the only restriction that existed.

ELIAS CJ:

A sum equivalent to …

MR FISHER:

What Worldwide had initially paid for the units and shares, which was 4.125 million. But that was the only restriction that existed.

I should add or if they wanted to charge the shares or sell them, in either case, that's what they had to do.

ELIAS CJ:

What's your response to the suggestion that we don't have the facts about – which might bear on discretion – benefits? This was a development project, was it?

MR FISHER:

This was the construction and operation of Vector Arena for 40 years.

ELIAS CJ:

But in the period that we're talking about, maybe you'll tell me it's irrelevant, but was there any benefit?

MR FISHER:

Oh, yes. Vector Arena started operating, I think, in April 2007.

MR SORRELL:

It may assist Your Honours to know that our position, in fact, that there is no evidence that the Court can deal with on that point.

ELIAS CJ:

No, I understand that that's your position. I was just wanting to know what the response is on that. Presumably your response is that it's irrelevant.

MR FISHER:

Well, it's irrelevant under the Act for – the point about interest under section 87 is it does away with any need to prove loss and, in fact, there's a comment to that effect by the Court of Appeal in another case.

WILLIAM YOUNG J:

I don't think I've ever heard of people in support of a judicature Act claiming for interest being required to prove what the rate of interest was, what they would have done with the money. I've never heard of anybody being required to prove …

GLAZEBROOK J:

But this argument is something else. This says, "I didn't get any benefit from the shares even though I was holding on to the money and presumably getting benefit from holding on to the money." So that's going even further, not saying that you have to prove loss but saying, well, you have to prove benefit from the holding on the shares, even though there's a clear benefit in holding on to the money. So it seems an even odder argument, which is not – I'm not asking for a response but it's probably a response for Mr Sorrell. Although I have to say it's probably tit for tat for saying that there was the benefit of the shares that had been provided.

MR FISHER:

For completeness' sake, in that decision *Westpac New Zealand Ltd v MAP & Associates Ltd* [2011] 2 NZLR 90 of the Court of Appeal which is in the bundle at tab 15 at paragraph 69, there was a very brief reference to section 87 as one reference with which I would agree and one that I wouldn't. Page 111 tab 14. At paragraph 69, you'll see there it says, "The philosophy underlying section 87 is that a party who has wrongful use of another's money should pay interest on it," and I, for reasons I've already expressed, think that that perhaps is, might lead one to conclude wrongfulness and you need some breach, some default.

WILLIAM YOUNG J:

You mean you owe money and you don't pay it?

MR FISHER:

Yes.

WILLIAM YOUNG J:

Or you don't pay a reasonable pre-estimate of it?

MR FISHER:

Yes. That view I accept. The second paragraph, this does not depend on proof of the wrongdoer's gain or victim's loss.

ELIAS CJ:

Yes, I think Justice Glazebrook does put her finger on it when she says it's the assertion that they had the benefit of retention of the shares that leads on to the question, well, what was that benefit? But really, your response is, well, that's irrelevant.

GLAZEBROOK J:

Because the benefit is the holding on of the money, not the holding on of the shares.

MR FISHER:

That might help me to assist the Court to get a context to what happened in the Court of Appeal. The argument that the respondent advanced in the Court of Appeal was around the *Glaister v Amalgamated Dairies Ltd* [2003] 1 NZLR 829 case, which was a case seeking interest on various grounds, but principally on the *Birch v Joy* (1852)

3 HL Cas 565; 10 ER 222 and in that case and in those sort of cases where interest is awarded in equity the issue as to whether or not a vendor's – a purchaser's in possession or not and suchlike became relevant, and perhaps in hindsight, unfortunately, the appellant in the Court of Appeal got drawn into arguing – well, *Glaister v Amalgamated Dairies Ltd* doesn't apply. You can distinguish it because in this case they did have all the benefits incidental to ownership, et cetera, but the fundamental position that the appellants take is that section 87 doesn't require any of that and the *Glaister v Amalgamated Dairies Ltd* case wasn't a section 87 case. It was a *Birch v Joy* case.

We have covered some of the ground that I was intending to cover.

ELIAS CJ:
Yes, and we have read your submissions, of course, so you can proceed on that basis.

MR FISHER:
It may be helpful, Your Honours, if I focus particularly on some of the submissions made by the respondents to highlight the differences between the parties. Immediately if one turns to page 1 of the respondent's synopsis, you'll see where there is a difference between the positions of the parties. At paragraph 2.1 you'll see the submission there made that for section 87 to apply there must be a debt that is sufficiently ascertainable. Of course, the word "sufficiently" doesn't appear in the statute. The words of the statute are "any debt" and we know from the judgment of Lord Brandon subsequently adopted by the House of Lords that any debt is very wide and can extend to any claim, whether liquidated or unliquidated. So that is an obvious point of difference and the second point advanced, 2.2, payable on a due date which is present or past. Well, the answer to that is to say, for the purpose of section 87, is that there was a cause of action for the payment of a debt and it arose on the exercise of the pre-emptive right and it was always open for the respondent at any time to tender a proper sum.

WILLIAM YOUNG J:
What did the respondent argue that the value was?

MR FISHER:

Initially they argued 1.3 million but by the time of the close of submissions I think their position was 1.8 million.

GLAZEBROOK J:
When you say time of close of submissions …

MR FISHER:
At the end of the High Court trial.

GLAZEBROOK J:
Right. When did they argue the value of 1.3?

MR FISHER:
When they provided their evidence to the Court at about –

GLAZEBROOK J:
The question was really directed at whether that was – whether it had been provided at the time or later. Was there nothing said before the High Court case?

MR FISHER:
There was an exchange of without prejudice savings to costs where there was communications where there was offers and counteroffers on certain terms that were not necessarily limited to price which weren't accepted, but that was the first – I think April or May 2010 was the first time that there was an attempt, in an open way, at least, by the respondent to put a price on it.

ARNOLD J:
So just to be clear about that, when the respondent took the view that it had the power to set the fair value, it asserted that position but it never indicated what it thought the fair value was?

MR FISHER:
No.

GLAZEBROOK J:
Other than in these without prejudice discussions.

MR FISHER:
Yes.

There were one or two factual points that I should like to make or points in issue between the parties. By reference to the synopsis of the respondents, at paragraph 8 it's suggested that it was not until April 2008 that the appellant accepted the right of the Jacobsens to acquire the "B" units and shares. Well, as we've seen, that's not correct. Certainly the –

ELIAS CJ:
You say that it was trying to protect its position until payment?

MR FISHER:
Yes, and certainly by the second amended statement of claim of 22 March 2007 it was clear that legitimacy of the pre-emptive right contract was accepted, and that was the basis for the claim thereafter.

GLAZEBROOK J:
When was the estoppel argument dropped? Was that still in that second amended statement of claim?

MR FISHER:
No, it was not pressed in the second amended statement of claims.

GLAZEBROOK J:
It was not pressed or it was not there?

MR FISHER:
It was dropped. It did not form part of the claim after – when it was amended.

GLAZEBROOK J:
I was just checking. I couldn't remember the sequence.

MR FISHER:
But the process of abandoning it had already started in the sense that before the Court of Appeal in 2006 that wasn't advanced as a ground for the injunction, and the point was made, and it's acknowledged in the judgment, that the concern of the

Jacobsens was – sorry, the concern of the appellant was for the financial position of the Jacobsens and their ability to pay.

Paragraph 13, I should like Your Honours to turn to there because an important difference, albeit it a subtle nuance, should be recognised there in the way in which the respondents advancing its argument and the position that the appellant makes is that the correct analysis is that having exercised the pre-emptive right of purchase the respondent became bound to pay the appellant the fair market value of the units and shares, whether by agreement or as fixed by the Court. So there wasn't an obligation to sell the shares as such.

ELIAS CJ:
Do you need to just give us a reference either to the paragraph in the Court of Appeal determination or to the terms of the trustee for that?

MR FISHER:
I'll see which is the most convenient reference for Your Honours.

ELIAS CJ:
You're saying it wasn't an obligation to sell. It was an obligation to pay?

MR FISHER:
Once it had exercised its pre-emptive right. There was a – by virtue of the trust deed, the change of control gave rise to a pre-emptive right of purchase, like an option was triggered. That's the position. There was no obligation thereafter between the parties until there was an election to exercise the pre-emptive right so to characterise the contractors to say the exercise of the pre-emptive right gave rise to the obligation on the respondent to pay.

McGRATH J:
So there was no sale transaction envisaged? There was a bare obligation to play because the transaction had been completed by pre-emption?

MR FISHER:
Once they'd exercised the pre-emptive right, the contract was formed.

WILLIAM YOUNG J:

Didn't the Court of Appeal talk about an executory contract?

MR FISHER:
Yes.

WILLIAM YOUNG J:
But it's not, is it?

MR FISHER:
But the Court of Appeal went down that road because in the pleadings there was an argument to try and advance the argument of the unpaid vendor. It was the appellant had argued that it was an executory contract. That argument was advanced as part of its attempt to say there was an equitable interest in the shares pending payment.

GLAZEBROOK J:
But that was argued at High Court level, not at the Court of Appeal level because by that stage there was …

MR FISHER:
Yes, and the Court of Appeal has accepted that no such right existed.

WILLIAM YOUNG J:
Right. So what did the Court of Appeal mean by saying there was an executory contract?

MR FISHER:
Well, it's going back to the –

WILLIAM YOUNG J:
They say presumably part of the contract is the ascertainment of price. Until the ascertainment of price is complete it's still at large.

MR FISHER:
With respect, I think all the Court of Appeal was doing was saying that this was the pleaded claim and it's inconsistent with the idea that the respondent had the benefit of ownership.

ELIAS CJ:

Well, you say that that had been overtaken in the sense that the appellants had abandoned that contention in the Court of Appeal, so the Court of Appeal's reference back to the pleading is an error. Is that what you're saying?

WILLIAM YOUNG J:

It's an explanation. It's an answerable question for me, but I can't find it. I recall the Court of Appeal saying that it was like an executory contract, yes.

GLAZEBROOK J:

I was just wondering, do we know where they said that?

MR FISHER:

Yes, we do. I'll take you to it in a moment.

ARNOLD J:

If we look at – is it 143 at the end of paragraph 43? "Thus, the claim is most accurately described as proceeding seeking of the clarity judgments the amount payable under an executive contract."

WILLIAM YOUNG J:

Yes, that's the bit I had in mind.

MR FISHER:

That's by reference to the pleading. It starts at paragraph 43 over the page analysing the pleading. 142, you'll see paragraph 43, the Court starts the discussion by reference to the pleading and concludes that the claim is more accurately described. My submission in response to that, well, there was alternative arguments advanced as to the nature of the relationship. The executory contract argument was rejected and any other rights other than being a bare creditor were rejected, so the position is that the claim for the payment of units and shares was a contract for the payment of a debt. That was the conclusion of the High Court Judge and it was not challenged. Does Your Honour want me to take you to the trustee?

ELIAS CJ:

Or to the Court of Appeal. That's probably sufficient, just on that.

MR FISHER:

The reference by my learned friend to the Court of Appeal judgment is at page 379 and 380 of the green bundle, volume 2, at paragraph 34 and then at paragraphs 40 to 41.

ELIAS CJ:

Actually, I would like to see the clauses, if they're – or at least have a reference to them. It's a bit hard to follow without looking at them.

MR FISHER:

In volume 2 of the case on appeal, clause 10 is to be found at pages 164 and 165.

ELIAS CJ:

And it's 10.5.1, is it?

WILLIAM YOUNG J:

That was relied on as entitling the Jacobsens to fix the price.

MR FISHER:

Yes.

ELIAS CJ:

Yes, thank you.

MR FISHER:

Paragraph 14, a difference between the positions of the parties. There it says, "There was necessarily a delay from the time a unit holder became entitled to buy the shares at fair market value to the time that the value was fixed. This is the same period for which the appellant claims interest." That's not quite right. The correct position, if that first sentence is to be accurate, is that the right to acquire the shares arose on the 18th of January 2006 when the change of control occurred. But the interest period is actually sought from when it was exercised, which was 26 April 2006.

GLAZEBROOK J:

There'd be an issue about a reasonable time for getting a valuation and agreement in terms of the timing of interest.

MR FISHER:

Yes. That would be – one would anticipate that payment might not occur on the 26th of April 2006, although I haven't said that there was a period between 18 January 2006 and 26 April 2006 when some assessment must have been done, you'd expect might have been made. But in any event, those issues are issues for the discretion of the trial Judge as to whether the trial Judge should decide to award interest from when the cause of action accrued or at some subsequent time.

ELIAS CJ:

Was there any indication in the judgment of consideration of that?

MR FISHER:

There was some indication of that, of the sorts of issues that were operating in the Judge's mind. You can see at page 104 of the case on appeal at paragraph 274, the Judge turning her mind to some of the issues in the background.

ELIAS CJ:

But it's not used in the …

MR FISHER:

It's in the context of dealing with the interest argument.

ELIAS CJ:

I see.

GLAZEBROOK J:

I suppose you'd say this was totally in their control and presumably in deciding whether to exercise it they must have had a figure in mind, because they couldn't have thought, well, let's just exercise it, whatever the cost, we don't care. Is that the submission?

MR FISHER:

That's right. There's no unfairness in the sense that the value is fair market value, and that's an objectively ascertainable value and it was up to them if they wished to work out what they thought that sum might be and to tender payment for it, and to otherwise protect their position in the meantime concerning having to pay more or

less if that wasn't accepted, but in that way they wouldn't continue to have the use of all the money, and the appellant, on the other hand, wouldn't be deprived of the use of the money.

Just another point. We may have covered it, but at paragraph 15 the arguments advanced the appellant doesn't enjoy the same rights as a non-defaulting unpaid vendor. The position the appellant takes is that those arguments are irrelevant for the purpose of section 87 and that the real question is simply this, that the deemed default gave rise to the pre-emptive right, and once that was exercised, the contract arose, a cause of action arose on 26 April for the purpose of section 87, and thereafter the relevant issues are simply ones for the discretion of the Judge.

At paragraph 17 of the respondent's submissions, there is the submission that the Court of Appeal held that in respect of any claim for equitable interest such a claim had not been pleaded. I mean, the point is it was not part of – it never has been part of the appellant's case that it was entitled to anything other than interest under section 87.

ELIAS CJ:
Mr Fisher, you'll have a right of reply. It would help us if you would identify anything that you particularly take issue with so that the respondents are aware of them but you can probably …

MR FISHER:
I'll try and identify just the main points, if I may have a moment.

ELIAS CJ:
Yes, yes.

MR FISHER:
Paragraph 22 of the submission, there's the point made there has been a loss due to non-payment. The submission of the appellants is just simply this, that a loss is that which is presumed by section 87 to arise – and that is the loss of the use of money. That's the only submission the appellant makes. So it's a re-emphasis of the compensatory philosophy and rationale behind section 87 rather than establishing loss.

In terms of the compensatory purpose of the provision, I have relied on the *Day v Mead* [1987] 2 NZLR 443 (CA) case, in particular, Justice Somers' judgment, and the relevant passages there are at page – it's in tab 13 but at page 463 lines 12 to 19, if Your Honours wish to go there.

The final aspect of the decision, dealing with that issue, it starts at the very bottom of that page 463, just the one word, a defendant, over the page, has opportunities of bringing the case to trial. The awarded interest is compensatory, et cetera.

GLAZEBROOK J:
The point is made there that the maximum rate of interest bears little relation to commercial rates, but even if it did it's not compounding, so …

MR FISHER:
Yes, and the Judge actually didn't award throughout the relevant period the maximum rate. There was a period when 8.25 percent, I think, was the statutory prescribed period and Her Honour just settled for 7.5 percent.

GLAZEBROOK J:
That's what was asked for, I suppose, but it would be usually be …

MR FISHER:
Yes, in the pleading but I think in my closing submission I tried to improve it, unsuccessfully.

There is also another discussion of that point to that effect to which I wish to take Your Honours in the decision of *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1983] 1 A.C. 352. It's at page 359. It's not actually any part of the judgment. It's a point made in the headnote as a summary of counsel's submissions but because it's put so elegantly it's a submission I wish to advance. I wish to refer Your Honours to it. In the right-hand column you'll see there's a summary of the submissions advanced then by counsel and the point there is made, "In contrast with the sort of contract in the commercial cases where it is intelligible to award interest on damages which can be assessed in firm monetary terms by reference to market value as the date of the breach or tort. My submission is that that just applies equally to the nature of the claim here, which was one for an ascertainable debt that requires the Court's determination.

The respondents rely on – at paragraph 34 – the decision of the English Court of Appeal in *K v K (Divorce Costs: Interest)* [1977] Fam 39 and in particular on a passage from the judgment of Lord Denning. When the sum is unascertained, the debtor cannot be expected to pay it until it is quantified. He cannot make a tender until he knows how much it is. Cannot be said to be wrongfully withholding the money. Well, the first point to be made is *K v K* was a Family Court case concerning whether interest was payable on an award of costs, and the two options were it could either be payable on the date that the order was made or alternatively when costs were taxed by the taxing master. There was a practice in England for a while based on a Supreme Court Practice Note that the interest would be payable after taxation. There was a change in the procedure by Practice Note to say that interest on costs should be payable from when the order was made and that was the context of this case. It's not a case, really, of any value as to the question before this Court as to whether any debt includes an ascertainable debt. The concerns that Lord Denning expressed are ones that go to the exercise of the discretion in our statute, and in any event, for reasons that I've already covered, the issue – the appellant takes issue with the idea that the wrongfulness entails some breach of some obligation. That is actually not the philosophy of the Act.

ARNOLD J:

Isn't your strongest point here that the respondent was asserting the shares had to be transferred at fair value, the respondent was asserting its set fair value right from the beginning, that was its position, so it was in its hands, it didn't come up with a number, so I mean ultimately things turned out differently but in the sense that the Court set the number, but it did have the ability to fix the number on its view the way the contractual document worked but it made no effort to do that.

MR FISHER:

That's right. But I say that goes to the exercise of the Judge's discretion. It's not a matter of jurisdiction, and what Lord Denning in this *K v K* case is seeking to say that as a matter of rule if a debt is not ascertainable you can't make someone pay interest until after it's ascertained, and I'm saying, well, that's not actually consistent with the object or purpose of the legislation or, indeed, with the speeches of the various Judges in the House of Lords.

WILLIAM YOUNG J:

Well, it's all a bit odd anyway, because section 87 includes – provides for interest to be payable on damages, which aren't ascertained, so any debt or damages suggests that ascertainment isn't fundamental to the jurisdiction.

MR FISHER:
Yes, Sir, I accept that.

WILLIAM YOUNG J:
I thought you might.

MR FISHER:
Well, there is – I did pause to deal with the *K v K* case simply because it's relied on by my learned friends, but in any event there was no justice in that case because the – one of the parties in that case was seeking to pay interest on costs for legal advisors and professional accountants when she hadn't, in fact, incurred the cost herself. But that was a matter of fact.

ELIAS CJ:
Well, I'm not sure what other Members of the Court think, but for my part I'm not troubled subject to what is said by the respondents on the ascertainable point and think you could return to that in reply if necessary.

MR FISHER:
Yes.

ELIAS CJ:
It's time for the morning adjournment. You're nearly concluded, Mr Fisher, aren't you?

MR FISHER:
Yes, I am.

ELIAS CJ:
Well, we'll take the adjournment now and perhaps you can finish it off afterwards.

COURT ADJOURNS **11.32 AM**
COURT RESUMES **11.49 AM**

ELIAS CJ:
Yes, Mr Fisher.

MR FISHER:
Thank you, Your Honour. Just one final point. It's been touched upon earlier but it's in response to paragraph 60 to 63 of the respondent's submission and the proposition is for the appellants that they do not accept that the Court of Appeal correctly analysed the appellant's claim as a proceeding seeking a declaratory judgment as to the amount payable under an executory contract, and we have covered that but I just – so that concludes the submissions that I make to this point on those issues relating to whether the debt was an ascertainable debt and whether the jurisdiction existed under section 87 for the Court to entertain an award of interest from when the cause of action accrued.

That leaves the cross-appeal and the appellant's submission in relation to the cross-appeal is that what is required is to, as we all know, to challenge the Judge's exercises of her discretion is some failure to follow principle or she has to be plainly wrong or there's some relevant consideration not taken into account or an irrelevant consideration taken into account. In my submission, there is nothing in the submissions advanced by the respondents to suggest that the Judge exercised her discretion erroneously and when one reads through that section of the judgment dealing with interest she covers all of the relevant issues bearing on the reasons which moved her to exercise her discretion towards interest from the 26th of April 2006.

Unless I can help Your Honours any further than that …

ELIAS CJ:
No, thank you, Mr Fisher. Yes, Mr Sorrell.

MR SORRELL:
May it please the Court, I've prepared some notes which represented my estimate of what I might be required to address Your Honours on. It might be helpful it I just start by introducing the parties to Your Honours. The party for whom I appear, the respondent, was a Jacobsen company in which the shares changed hands to my clients. That owned the shares in QPAM Limited. QPAM Limited, throughout the

relevant period, was run by the issues between it and the appellant were controlled by independent directors. The assertion as to the right to set value was made by QPAM, not the Jacobsens and not the respondent. Both the appellant and QPAM asserted that they had the right to set values. That was not finally resolved until the Court of Appeal said the Court had that right.

GLAZEBROOK J:
Sorry, what do you mean by the appellant?

MR SORRELL:
I mean Worldwide NZ LLC. It asserted it had the right to set the value, as did QPAM. QPAM is trustee under the unit trust.

GLAZEBROOK J:
Where do you get the assertion from? QPAM or Worldwide?

MR SORRELL:
The assertion from Worldwide from the pleadings, Your Honour. I'll have my junior find the passage for you.

So I'd like to start, if I may, with just – the first limb of the submissions on interest in the respondent's submissions is that there's no jurisdiction to award interest. There is neither a debt nor a proceeding for the recovery of a debt or damages. There's been a fair bit of discussion this morning around the debt point, but none in relation to the proceeding.

WILLIAM YOUNG J:
The claim for interest under section 87 presupposes or implies an associated claim for judgment for the amount ultimately to be awarded and wouldn't it have been open, anyway, to the Judge if troubled by this point simply meant for the pleading to have entered judgment, which he really did, anyway, practically.

MR SORRELL:
I'm sorry, I didn't catch that last bit.

WILLIAM YOUNG J:

Well, she made a declaration that the money was to be paid. It would have been perfectly open to her, having fixed the amount to be paid, to have entered judgment for that sum.

MR SORRELL:

That didn't happen, though, Your Honour.

WILLIAM YOUNG J:

No, but this is such a technical point it could happen now, couldn't it?

MR SORRELL:

Well, I wasn't counsel in the High Court for the respondent and the respondent's counsel manifestly took the view that it had to deal with what was pleaded and it could only – it was only entitled to lead evidence on relevant matters. So there was no evidence in relation to the exercise of a discretion in relation to it.

WILLIAM YOUNG J:

In relation to this discretion?

MR SORRELL:

Often during a course of a trial and in closing, there will be arguments about whether or not there was this delay or that delay or whether there was a loss.

WILLIAM YOUNG J:

Hardly ever.

MR SORRELL:

Well, in this case there was none.

GLAZEBROOK J:

But there was a claim for interest, so if it had been – well, if it had been thought those matters were relevant then they could be led.

MR SORRELL:

If it was thought that were so, but the claim that was before the Court was for declarations.

GLAZEBROOK J:

Well, it wasn't in respect of interest because we've been taken to that. The claim was for interest on the sum payable, so if you look at page 15 of volume 1, which I understand was the operative statement of claim –

MR SORRELL:

The amended statement of claim, yes, Your Honour.

GLAZEBROOK J:

Well, the operative – that was the operative statement of claim for the High Court proceedings, is that right?

MR SORRELL:

At the point where judgment was given, yes.

GLAZEBROOK J:

Sorry – was this statement of claim the statement of claim that was the operative statement of claim at the time of the High Court hearing?

MR SORRELL:

Correct.

GLAZEBROOK J:

All right. So in that at page 15B there's not a declaration was not sought as to interest. Interest was sought.

MR SORRELL:

Interest in relation to –

GLAZEBROOK J:

The sum payable from 26 April 2006, so there was a prayer for relief was an assessment and determination of the fair market value, the sum payable, and then interest on the sum payable was sought.

WILLIAM YOUNG J:

They're just an ellipsis. The pleader should have added "judgment for the sum payable, together with interest". Isn't that so obvious that it really went without saying?

MR SORRELL:

That wasn't the view that the Court of Appeal took and the task is to decide whether that's wrong, I suppose.

GLAZEBROOK J:

Well, if you look at it there is an absolute – while a Judge gave a declaration on interest, that's not the way it's pleaded. It's pleaded as interest. If declarations in (c) –

MR SORRELL:

Yes, and if you read that statement of claim together, as I suppose one should, the declaration is prospective as to when a sum would be payable. It's retrospective only as to the valuation date, so we are looking forward to the payment to be made within 14 days of the judgment, and we've heard from my learned friend earlier today that they sought a point at which the sum would become payable and at which they could enforce their rights as an unpaid – as a creditor. That, at all points, was prospective, not retrospective. So we have a claim for a declaration. There's authority which I've referred to in my outline and in my submissions that says a declaration gives rise to no enforceable legal rights, so we have a declaration which expounds the rights, and that's the declaration as Her Honour sees the invitation. She made a declaration as to the value, she made a declaration as to the interest payable, and she made a declaration as to when the sum would be payable.

ELIAS CJ:

But the effect of that must be that it's a requirement to pay. It's not – I mean, it may have been pleaded in slightly better terms but it's quite clear what the sense is.

MR SORRELL:

And as at the date that Her Honour selected, there was a sum payable and it was paid. So here we have a process where parties are co-operating in a sense towards the resolution of an imperfect contract. Everyone says, "At some stage, I've got to pay something." QPAM says, "We'll set it." Worldwide says, "We'll set it," and they argue backwards and forwards about that until they get to the Court of Appeal and to

an extent one would think that a degree of focus would occur there. In fact, it didn't and the pleadings stayed relatively unamended right through to the judgment of Justice Potter, and they were all looking for a number and a date.

WILLIAM YOUNG J:

But your client could easily have said, "Okay, we haven't got a qualification but it's not fair that we've got the money and you haven't, so we think it's worth two and a half million dollars. Here it is. If you want to litigate over the rest, we will." But, I mean, the answer to all of this was in your client's hands. Your clients were perfectly able to pay the money before it was quantified. They could give the – pay it on the basis of their best estimate and without prejudice to the ongoing litigation.

MR SORRELL:

I can't disagree with that, Your Honour. Strangely, both the appellant and QPAM both asserted the right to set the value.

GLAZEBROOK J:

You say that. Have we found the passage?

MR SORRELL:

Yes. If we have a look at volume 3, Your Honour, that's the purple, lavender one, if you go to page 422 and you read paragraph 27(i), do you have that, Your Honour?

GLAZEBROOK J:

Mhm.

MR SORRELL:

And if you go to page 442, the same volume, paragraph 27(a), what I was about to say was the QPAM asserted a right or an obligation as trustee to set the value. They sought the agreement of the parties that that was correct. They applied under the Trustee Act for directions when they couldn't and that proceeding disappeared as a result of the Court of Appeal judgment saying the Court could set the value.

Worldwide has made the assertions I've just taken Your Honours to, and significantly none of the parties asserted a value.

GLAZEBROOK J:

Well, Worldwide would say in accordance with the pleadings it couldn't assert a value until it had the information, which means that it must be accepting that it could only assert a value on the basis of proper information rather than an ability to assert any old value which, of course, I don't think was the assertion of the respondents, either. They could set any old value.

MR SORRELL:

That's correct. It's the respondent's submission, recognise the bargain was one, whereby on the fault by the appellant there was a right to acquire. There was a process which was evolved and determined by the Court of Appeal to set the value and there was to be a subsequent settlement by payment, and that was the process.

We say that the proceeding acknowledging, with respect, the question that His Honour Justice Young raised, we say the claim nonetheless was for declarations. When it was made, there was a legal entitlement to be paid at the day appointed by Her Honour. That was the parties' expectations. That was the proceeding. And the –

GLAZEBROOK J:

What do you mean by the date set by Her Honour? You mean in accordance with the declarations sought at page 15 of the statement of claim, ie payment 14 days out?

MR SORRELL:

Well, she didn't choose 14 days.

GLAZEBROOK J:

I know that's right. I know there's a different …

MR SORRELL:

Yes.

GLAZEBROOK J:

That's the submission, is it?

MR SORRELL:

Yes.

GLAZEBROOK J:
Right.

WILLIAM YOUNG J:
Well, she presumably didn't expect or want the plaintiff, Worldwide, to restrain on assets or enter possession or take some embarrassing and drastic action on the basis of a judgment was outstanding for six hours or 12 hours or something.

MR SORRELL:
Yes. No one did.

WILLIAM YOUNG J:
I mean, in practical terms she's deferred the enforceability of the judgment.

MR SORRELL:
She adopted the plaintiff's application for that, and in practical terms she did that but the reason she did it was that the plaintiff asked her to do it. The plaintiff did not expect, did not assert until default up until that point, so we have –

WILLIAM YOUNG J:
But the plaintiff could have sought judgment for it. I know you're going to say they didn't, but the plaintiff could have sought a qualification by the Court of – could have sought judgment for the market value of the shares as quantified by the Court.

MR SORRELL:
I can't argue with that. If one looks at the Court of Appeal's judgment they took a fairly straightforward approach to a piece of legislation which said that to have jurisdiction to make an interest award, one needed to be dealing with an action to recover a debt or damages and so the enquiry the Court of Appeal made was, is this an action of that type? The answer they came up with was no. That doesn't seem plainly wrong. Is it a debt? We haven't discussed that yet but I'm hoping to persuade Your Honours that it also fails on that point, as well.

WILLIAM YOUNG J:
Just tell me this. A claim for quantum meruit, because you're probably about to get on to this, why is that differed essentially – for a start, would you accept, on a claim

for quantum meruit, the Court could award interest back to the date when services were rendered?

MR SORRELL:

Yes, Your Honour, and that's an area of legal scholarship derived from the English authorities, and through that we got the current piece of New Zealand legislation. But it's particularly helpful if the discussion, for example, in *BP* which, in the privacy of this room, Your Honours and the Court of Appeal perhaps didn't get the facts quite right, but that was a case where they said whether this is a claim for the seizure of the Libyan oilfields by Gaddafi and they said, "Well, in terms of the particular legislative right that we are dealing with, Fived," either way that fits within the historic count of indebitatus assumpsit, and the reason for that was that there was an immediate undischarged obligation which gave rise and arose at that point in time.

WILLIAM YOUNG J:

But to pay a sum that must later be fixed.

MR SORRELL:

Yes and in this case we say there is no immediate obligation to pay that because the parties engaged on the basis that there was a deferred obligation to pay that as the Court of Appeal determined, it was deferred until the point after which the Court determined the value.

GLAZEBROOK J:

And that can only be based on the pleadings because it couldn't possibly be based on the trust deed because the trust deed, there must be an immediate obligation to pay.

MR SORRELL:

Despite many hundreds of thousands of dollars expenditure in drafting that trust deed with, I hasten to add Australian solicitors, that was unresolved and required the intervention of the Court of Appeal so I suppose in a sense it was imputed to the trust deed by the Court of Appeal but it was a gap you could drive a truck through.

GLAZEBROOK J:

But it has been held that as soon as the rights were exercised, then there was an obligation to pay. Now it may that it was deferred for a few weeks while you got an

immediate valuation but as an immediate obligation to pay under the trust deed, so the argument must only be based on the statement of claim and the statement of claim says that it is an implied obligation to pay as soon as it is ascertained. At paragraph 19 it does sort of oddly go on in paragraph 20(a) to add this reasonable time – that is page 12 and 13. But it does say that as soon as you have a change of control you are entitled to be paid, as soon as the options is exercised, you are entitled to be paid. And then 20(a) has got a rather odd indication there, but that can only be – so the argument must be there that somehow the way it is pleaded actually changes the obligation under the trust deed which is slightly odd bar an estoppel argument.

MR SORRELL:

I wonder whether I could just scroll back a little bit Your Honour and just moving on from the old counts that it is suggested this legislation picks up and my learned friend has very helpfully included the parliamentary debates as to the adoption of this particular piece of legislation and we are slightly well placed in an historic point to look at this when we have got a pending clarification of that legislation before Parliament at present.

ELIAS CJ:

Well it is hardly a clarification is it?

MR SORREL:

Yes Your Honour.

ELIAS CJ:

Well that is your argument, yes.

MR SORRELL:

I do anticipate that Your Honour hasn't fully agreed with that submission yet. Perhaps before we get to that point I can just take you to tab 6 of the parliamentary debates.

GLAZEBROOK J:

Is that of you – in your –

MR SORRELL:

No that is my learned friend ‘s bundle, volume 1, white cover. Now at the very left-hand column there, about two-thirds of the way down or perhaps with the paragraph beginning, “But the most interesting part of the bill deals with” if I can just invite Your Honours to run your eye down that.

McGRATH J:
Sorry, what page are you on?

MR SORRELL:
I am on page 584, left-hand column Your Honour. The second main paragraph. So that’s how the Honourable Mr Webb characterised the rights that were –

WILLIAM YOUNG J:
Substituting section 28 of the 1833 Civil Procedure Act.

MR SORRELL:
Yes Your Honour.

WILLIAM YOUNG J:
Which included the words “any debt or sum certain”.

MR SORRELL:
Yes Your Honour.

WILLIAM YOUNG J:
And the words “sum certain” are eliminated from – don’t appear in what’s now section 87?

MR SORRELL:
Yes Your Honour and that would be consistent with the use of the money hadn’t received remedies in the quantum meruit in that characterisation perhaps. So we have debt or damages and the legislation adopted that particular wording so the respondent doesn’t concede there’s ambiguity in those words. If there were –

WILLIAM YOUNG J:

If you go from debt or sum certain to any debt or damages then you do get the feeling that requirements for this money to be liquidated or ascertained or something of that sort have gone, don't you?

MR SORRELL:

Well in this case we have neither of those things. We have a contractual arrangement between the parties and as the Court of Appeal said the parties are free to engage as they wish – not the Court of Appeal in the judgment under appeal but the earlier Court of Appeal judgment. And draft their bargains as they see fit. They are, of course, the best judges of what their bargain should be and they chose to enter into an arrangement which inherently had substantial delay as it, as determined by the Court of Appeal, that was going to be a long process.

GLAZEBROOK J:

However does he inherently have to lay in it? It's quite clear under the trust deed, isn't it, that it was supposed to be market value. The question was who had the right to decide what was market value or not. It wasn't a case where somebody could say I'm going to pay you a dollar and that's what I've decided, because that would be challengeable wouldn't it? So it only had delay because the parties could agree on a market value.

MR SORRELL:

They couldn't agree on the process by which market value was –

ELIAS CJ:

Well they could have agreed.

MR SORRELL:

– was obtained.

GLAZEBROOK J:

They could easily have agreed in it so it doesn't inherently have difficulty in it. If it's market value then there's usually a fairly easy way of ascertaining it. Not many people have to go to Court to ascertain market value. This was probably a slightly more difficult exercise, I can see.

MR SORRELL:

Yes, because as the Chief Justice enquired earlier, it was a project that was only partly –

GLAZEBROOK J:
Yes, exactly.

MR SORRELL:
– helped at that stage and hadn't traded so they had that difficult task to embark on. So if I could just move back to my outline at that stage. There is a minor dispute about the facts in terms of the beneficial rights and holding all that. I've dealt with that in the submissions and I've traversed that under the heading "Facts" paragraphs 5 through to 10. They are the facts in relation to the respondent's position on the appeal – or perhaps it would be more convenient if I came back to this and brought in other grounds after I've dealt with the interest points. So we've discussed –

ARNOLD J:
Can I just enquire one thing? At point 8 of those facts you say the option to purchase was exercised on 26 June. I thought we were told 26 April but it's June is it? It doesn't matter…

WILLIAM YOUNG J:
I don't know that it really matters because there wasn't, the 26 April valuation date is an agreed date.

MR SORRELL:
Yes. I think that's an error Your Honour.

ARNOLD J:
Right.

MR SORRELL:
Just a naked error. In relation to paragraph 8, not in relation to paragraph 6.

ARNOLD J:
Right.

MR SORRELL:

I apologise for that. So turning to the interest argument we've got at paragraph 26 I identify that it's a three limb argument and we've had a fair bit of discussion already about these points and I draw Your Honour's attention to the Law Commission's paper of November – it's a preliminary paper, 17 November 1991, and report number 28 of May 1994, both of which identify problems with the deferred receipted money to which a party is entitled. They regarded the Body Corp cases representing the law at that time –

GLAZEBROOK J:
So are you referring us to particular passages so should we have – so just asking, should we have it in front of us?

MR SORRELL:
Yes in the supplementary – in the papers, memorandum of counsel for respondent producing additional materials.

GLAZEBROOK J:
Yes.

MR SORRELL:
There is the Law Commission's report number 28 "Aspect of Damages: The Award of Interest on Money Claims." It's quite a substantial document so it's not all placed before Your Honours. I do have an original here. Paragraph 77 is the paragraph that I refer to.

ELIAS CJ:
Sorry what are we looking at?

GLAZEBROOK J:
The additional material.

McGRATH J:
Did you say page 22?

MR SORRELL:
Yes I did Your Honour.

ELIAS CJ:

So what are we being taken to this for? What's the submission?

MR SORRELL:

It's paragraph 27 of the outline I've just handed up Your Honour.

WILLIAM YOUNG J:

But which page in the material because you've been talking about page 22 but we don't have – my page 22 is a bit of the statute.

MR SORRELL:

It's page 22 of report number 28 which is just coming to Your Honours. I'm sorry, we've handed up the wrong piece. So at the outline, we've now handed up both pieces of paper that I refer to at paragraph 27, I apologise for the confusion. So Your Honours should have part of the preliminary paper and now part of report 28. So the preliminary paper was circulated and consulted on and that produced the report.

GLAZEBROOK J:

That case is distinguished, of course, by your friends so presumably you're going to deal with that later if it's relevant to your argument?

MR SORRELL:

Yes. Well, yes I will Your Honour. My point really there is that the Law Commission regarded it as the state of the law at that stage and the Court of Appeal in the judgment under appeal regarded it as pertinent and representing a state of the law.

GLAZEBROOK J:

Well they're referring to, in relation to rent reviews, and it certainly was the state of the law in relation to rent reviews. Are they taking it wider than that?

MR SORRELL:

The Law Commission dealing with the desirability of – the difficulty of dealing with ascertained and unascertained amounts in relation to the payment of interest and identify that as the – a case that illustrates what the issue is. So they are taking it wider than that Your Honour.

GLAZEBROOK J:
Well in 76 they're talking about rent reviews.

MR SORRELL:
Yes.

GLAZEBROOK J:
So you say in 77 they've taken it wider?

MR SORRELL:
Yes Your Honour. In 78 they carry on there.

McGRATH J:
Are they talking more generally about arbitral awards and not just awards in relation to rent reviews?

MR SORRELL:
Correct.

GLAZEBROOK J:
In 79 they come back to rent reviews again.

MR SORRELL:
Yes Your Honour and these reports led to their drafted Interest on Money Claims Act which was attached to that report and the Judicature Modernisation Bill includes the latest version of that draft hence that's why I've – the process by which we got to the point we're at is interesting but the crunch is probably in the Judicature Modernisation Bill which is in that –

GLAZEBROOK J:
Are you suggesting that later legislation can be used to interpret prior legislation? What's the submission?

MR SORRELL:
Ah, no, I'm perhaps saying that there's no general problem to be fixed here. That we can just deal with the case before us and that there was a straightforward statutory

interpretation task which the Court of Appeal engaged in and we submit that they didn't get it wrong.

ELIAS CJ:
Well I just don't see how the Bill really adds anything to that argument because it is changing a law –

MR SORRELL:
Yes.

ELIAS CJ:
– it is making it not a matter of discretion but a mandatory requirement.

MR SORRELL:
Yes and has regard, it picks up on the Commission's view that the identification of an amount payable is the trigger point and that's now dealt with in the Bill.

ELIAS CJ:
But how does that help us with our interpretation?

MR SORRELL:
Well we thought it was proper that you should have your attention drawn to the fact that there is that legislation pending in case there was a concern of a more general issue arising from this particular set of facts and these very focused set of pleadings that we're dealing with here today.

ELIAS CJ:
I'm not sure that I really follow that but are you saying it should provide some reassurance that we wouldn't be doing anything extraordinary in affirming the Court of Appeal?

MR SORRELL:
Yes Your Honour.

ELIAS CJ:
Yes. Does it go further than that, is there an argument I'm missing?

MR SORRELL:

No.

ELIAS CJ:

No. Thanks.

MR SORRELL:

So I'm now at paragraph 30 of my outline where it's submitted that what existed prior to the declarations was an inchoate liability. There was no wrongful use of money. There was no sum certain. It was not ascertained nor readily ascertainable. There was no due date for payment even asserted. I'll give the references for the submissions there. Neither due nor owing. And it's submitted that the restitution authorities are distinguishable. I've dealt with *BP* and if Your Honours would be assisted I can deal with *The Aldora* [1975] 1 QB 748 which in essence the submission says is an admiralty case where the intervention to save life or property at sea gave rise to an immediate right to compensation and as Lord Brandon said in that judgment, those people in that circumstance have always been treated generously in the law.

McGRATH J:

I certainly would like you to take us to that part of Lord Brandon's judgment, and reading it in the context in which he said he made that observation.

MR SORRELL:

Certainly Your Honour. So the respondent's submissions at paragraph 52, page 12, deal with that and *The Aldora* is to be found at volume 1 of the appellant's authorities at tab 10. It's submitted for the respondent a uniform rule long existed in the admiralty jurisdiction, and the exercise of an equitable jurisdiction with interest was awarded in the case of a total destruction of a ship, a collision or otherwise, and –

McGRATH J:

So which part of the – what page of *The Aldora*?

MR SORRELL:

So that's just the submission I'm referring to.

McGRATH J:

Okay, sorry.

MR SORRELL:
And at page 751, line E, of *The Aldora*, the quote that I've adopted in the submission is to be found, "Those words are, as it seems to me, apt to cover sums, whether liquidated or unliquidated, which a person is obliged to pay either under a contract, express or implied, or under statute. They would, therefore, cover a common law claim on a quantum meruit, or a statutory claim for a sum recoverable as a debt, for instance a claim for damage done to harbour works under section 74 of the Harbours, Docks and Piers Clauses Act 1847."

Then if you go down to – well line G, "In other cases, where salvors render services without any special contract having been made, their claim for remuneration is not a claim for a sum payable under a contract. It is then a claim of a separate nature, arising under maritime law independently of either contract or state. It is founded on a right, conferred by law on those who have rendered successful services to property in peril at sea, to be paid a proper sum by way of remuneration out of the property salved." It quotes *The Hestia* there. "It is on this right, and not on any contractual right, that the claims of the plaintiffs in the present case are founded."

WILLIAM YOUNG J:
But hasn't he made it clear, in the first bit you cited to us, that a claim on a quantum meruit is a claim for a debt –

MR SORRELL:
Yes.

WILLIAM YOUNG J:
– for the purposes.

GLAZEBROOK J:
And a claim under a contract is a claim for a debt.

McGRATH J:
Yes.

WILLIAM YOUNG J:

And that it follows that the unascertained nature of the claim doesn't matter. That can't be a disqualifying factor in itself?

MR SORRELL:
In a claim for quantum meruit that's accepted Your Honour and in a claim for damages –

WILLIAM YOUNG J:
All right, what about –

MR SORRELL:
– that's correct.

WILLIAM YOUNG J:
– a claim on a contract to recover the market value of something that's been sold? I sell you my car. Give it to you on your promise to pay me the market value. Wouldn't that be carrier – wouldn't that carry interest back to the date of the transaction under section 87 if I were to sue?

MR SORRELL:
Well, the respondent's case is that one needs to look at the cause of action before the Court, because the legislation is intended to create a particular circumstance that is straightforward for the parties to deal with and they know what they are facing, and that is in any claim for debt or damages.

WILLIAM YOUNG J:
Just come back to my question. It's a slightly odd transaction but the deal is I will sell you something and you will pay me its market value.

MR SORRELL:
Yes. That would give rise to a cause of action if brought. That might trigger that right to interest. I agree with that, Your Honour.

WILLIAM YOUNG J:
Well, how is that different from here?

MR SORRELL:

Because that's not the cause of action that was before the Court. It's not a claim for –

WILLIAM YOUNG J:
Okay. Well, if the claim had been, "We seek judgment for the market value of the shares in a figure to be ascertained by the Court," that would have made all the difference to you on your argument.

MR SORRELL:
Yes, Your Honour.

WILLIAM YOUNG J:
We wouldn't be here because – so the case really comes down to a pleading point.

MR SORRELL:
It comes down to a statutory interpretation point.

WILLIAM YOUNG J:
Yes, but it comes down to, on your approach, the critical thing is the infelicitous way the statement of claim was pleaded.

MR SORRELL:
It's submitted for the respondent, Your Honour, that the statement of claim as it's pleaded represents the bargain that the parties made, and as it was perceived by, in this instance, the appellant.

WILLIAM YOUNG J:
Well, maybe. But I thought you accepted that besides your argument wouldn't fly if the statement of claim had sought judgment for the assessed market value of the shares.

MR SORRELL:
The parties would have dealt with a different engagement in the Court.

WILLIAM YOUNG J:
I'm sure you want to get this clear. If it was pleaded that way, do you accept your argument doesn't work?

MR SORRELL:
Yes, Your Honour.

WILLIAM YOUNG J:
And then is the question really for us, then, whether in substance that was what was sought?

MR SORRELL:
Yes. Well, not necessarily. I wouldn't go so far, Your Honour, with respect, as the "in substance" part. What was sought was explicitly the benefit of a statutory provision with plain words and the defendant to that claim reacted to that claim and the judgment of the Court of Appeal was the end result.

GLAZEBROOK J:
How did they react to that claim?

MR SORRELL:
By arguing that there was no jurisdiction to make an award under section 87(1).

WILLIAM YOUNG J:
Well, you advanced that submission in the High Court, didn't you?

MR SORRELL:
No.

WILLIAM YOUNG J:
I'm looking at page – well, the general jurisdiction argument was advanced. It's referred to by the Judge at page 100 paragraph 263.

MR SORRELL:
Sorry, Your Honour. I didn't appear for this party in the High Court, so when I said I didn't advance it …

WILLIAM YOUNG J:
You were appearing for QPAM?

MR SORRELL:

Yes.

WILLIAM YOUNG J:

Okay. This argument was advanced, or a variant of it was advanced to Justice Potter.

MR SORRELL:

Correct.

WILLIAM YOUNG J:

And she's referred to it at paragraph 263, but did it come down to a pleading point as advanced? Because there's no real hint of that in her judgment as I can see.

MR SORRELL:

As Your Honour characterises it now, it probably did. The argument was there is no claim for a debt and therefore Your Honour doesn't have jurisdiction to award interest. Her Honour Justice Potter rejected that and the Court of Appeal disagreed with her.

WILLIAM YOUNG J:

But, you see, if the point had been taken as a pleading point, then the obvious answer would have been, "I want to amend the statement of claim so that I'm seeking judgment for the market value at a sum to be assessed," and that would have been – perhaps it's a pity that it wasn't pleaded that way in the first place.

MR SORRELL:

Well, we went to the Court of Appeal expecting an application to amend there and had argument in our submissions to deal with that.

ELIAS CJ:

Well, you could face an application for amendment here, I suppose. It does seem very unattractive if it comes down simply to the infelicity of the pleading.

MR SORRELL:

And that's why, Your Honour, I've taken some care to emphasise that it's – that's sort of looking at one end of the pipe, if I might say. At the other end of the pipe there is a

bargain which was interpreted by the Court of Appeal, which the parties engaged in and reached the – eventually reached the point where a price was struck. My learned friend wanted a date so that he could identify a time of default and consistently in their pleadings throughout, irrespective of what the Court of Appeal said, they maintained they should be in the chair in the company as a shareholder with a director in control. So it was – that's the bargain that the parties were litigating.

GLAZEBROOK J:

What they said was, "Until we're paid for the shares," that was clear from the pleadings right from the start. "Until we've paid for the shares before the High Court," they were saying, "We have these rights of an unpaid vendor," and it was held they didn't, but …

MR SORRELL:

Yes, it was held they didn't and right into the substantive hearing they maintained they did, and –

GLAZEBROOK J:

Well, as an unpaid vendor.

MR SORRELL:

Neither party, nor QPAM nor the appellant, stipulated a dollar value that should be paid.

McGRATH J:

Mr Sorrell, were you proposing to go on over the page?

MR SORRELL:

I was.

McGRATH J:

In that case, I'll wait to see what you say, because this is your paragraph 55 of your main submission.

MR SORRELL:

So I'm turning over the page 752 of tab 10 of the old order where His Honour continues, "Paid remuneration for salvage under the rule of maritime law to which I've referred which would not be classified as a claim for debt. For the purpose of section 3(1) of the Act of 1934, however, I am of the opinion that such a claim can and should be regarded as a claim for debt. I can see no difference in principle from those purposes between a sum payable under a contract or under a statute or under an independent rule of law. To hold otherwise would involve saying that when Parliament, in 1934, at last abolished the common law rules about interest which had long worked injustice to the persons with monetary claims, it did so for the benefit of all such persons except only salvagers claiming otherwise than under a contract. For reasons of public policy which are well known with special consideration and generosity," and that's the point I was making earlier, "I cannot think it would be right to attribute such an unreasonable intention for legislature at that time." Then he goes on –

McGRATH J:
I'll just ask you to pause a moment there. So what it's saying is that the special features of salvage can't take a salvage claim out of the general approach of the Court to a sum payable under a contract, or a claim for debt or a sum payable for a contract. The special features of salvage really aren't distinguishing, that's what he's saying, isn't it?

MR SORRELL:
Yes, Your Honour.

McGRATH J:
Is that consistent with what you say at paragraph 55 of your submissions, or perhaps at the last sentence of 54 and then 55 where it seems to me you're suggesting that special features of salvage were part of the reason why in *The Aldora* it was regarded as a claim for debt?

MR SORRELL:
That's correct. That was my submission, Your Honour.

McGRATH J:
I'm just having a bit of difficulty reconciling these two.

MR SORRELL:

I have to agree, Your Honour. I hadn't read it that way. I read it the other way around.

McGRATH J:

Thank you, Mr Sorrell.

MR SORRELL:

He deals, at line C2, "It's not in doubt that the Admiralty Court has always had the power to award interest on damages and damage actions," and quotes Sir Robert Phillimore at line E1, "The principle adopted by the Admiralty Court has been that of the civil law. That interest was always due to the obligee when payment was not made ex mora of the obligor, and that whether the obligation arose ex contractual or ex delicto," so ex mora the obligor is, in the respondent's submission, important to remember because the respondent's submission is that there is no such circumstance in this case until the price was fixed and a date for payment appointed, there could be no such thing. He agrees that the Admiralty Court, or he says that the Admiralty Court has, in the past, applied the principles on which the awarded interest in damage actions to salvage actions, and at page 753, last paragraph, he pulls it together and says, one way or the other, interest can be awarded.

So that's the case that led His Honour to pretty much lead the charge in the *BP* judgment bringing forward his –

McGRATH J:

Thank you. That's brought out all I really wanted to clarify with you in relation to *The Aldora*. I don't need you to go further into either of the cases, myself.

MR SORRELL:

Thank you, Your Honour, for that indication.

Perhaps it would be a convenient time to take Your Honours to the Victorian *Workcover Authority and Anor v Esso Australia Ltd* (2001) 182 ALR 321 judgment, then. This is in the respondent's bundle of authorities with a lemon-coloured cover at tab 10. Now, there's a few typographical errors. Sometimes it's described in the submissions just as *Workcover Authority* and sometimes it's Victorian. Anyway, this is a judgment of the High Court of Australia which was referred to Your Honours in

the course of the leave hearing and is dealt with in the submissions of the respondent at paragraph 57 page 13 of the respondent's submissions. Now, in this judgment, the High Court discusses the meaning of "any proceeding for the recovery of debt or damages" as used in section 61 of the Supreme Court Act" and we also, the case contains a reference to the passage of the Federal Court of Australia Act which I've set out. It's similar wording. At paragraph 59 of the submission, it identifies that the phrases "proceedings for the recovery of any money" in the Federal Court of Australia Act. Now, at paragraph 41 page 334 of the judgment is the passage that's quoted in the submission about – beginning about half way down. It may be of assistance if Your Honours read that whole paragraph.

WILLIAM YOUNG J:
Is this the pleading point with its – in a slightly different iteration? "Because there was a declaration sought there's no claim for money"?

MR SORRELL:
Yes.

WILLIAM YOUNG J:
Was this case cited to Justice Potter in this proposition?

MR SORRELL:
No, it wasn't, Your Honour, and it wasn't cited to the Court of Appeal either.

GLAZEBROOK J:
It's against you on an ascertained sum, though, isn't it, this case? If you look at paragraph 40, it's not a fixed and certain sum action.

MR SORRELL:
No. That's right.

GLAZEBROOK J:
Although you might say it's a general recovery of money which is not the case for section 87.

MR SORRELL:

Yes, Your Honour. So that represents the judgment of the Chief Justice and Justices Gummow, Hayne and Callinan.

ELIAS CJ:

But the point against you here is that what is being said is that the pleading properly construed wasn't a claim for a mere declaration as is suggested here, but a claim for a coercive order to pay.

MR SORRELL:

And if that was the finding of this Court that would produce – yes, I understand that, Your Honour. The respondent sits on its submission that that's not the correct reading with respect of the statement of claim as it stands, and nor was it the reading that the Court of Appeal reasonably took and gave judgment in relation to it. So Justice Kirby, he gave a separate judgment and that is at – the relevant part is at paragraph 105 at page 350. His Honour went on to discuss some of those English authorities that we've discussed and I'm at paragraph 62 of the respondent's submissions there. He considered that precedent in Australia and England led to proceeding for the recovery of debt or damages being given a broad construction as expressing a composite idea. Adopting that explanation, he found the particular claim was within it and this claim that was before the Court was a claim based on a statutory right.

WILLIAM YOUNG J:

I actually read this rather in favour of the appellants, again. He's applying English cases dealing with exactly the same phraseology as our Judicature Act provision, and then he goes on to say following those cases that the word proceeding to the recovery of debt or damages are to be given a broad construction and to be viewed as expressing a composite idea.

MR SORRELL:

Yes, and the respondent took the view that this case needed to be before Your Honours and though it wasn't cited in either of those two –

McGRATH J:

That's what I understood you to be doing.

MR SORRELL:

I wanted Your Honours to be familiar with both parts of his judgment. One is Justice Kirby is inclined to the view that they weren't such a proceeding, and he talks about the reasons, and he talks about, at line 24, the application by the applicant for interest on their recovery under section 138 of the Accident Compensation Act fell within the Supreme Court Act. Now, that's a statutory right immediately arising. There's no – I don't know what the correct word for it is but there's no postponement or element there. It's an immediate right similar to money had and received, similar to a quantum meruit. It's an immediate right, whereas, at the risk of –

GLAZEBROOK J:

Well, he actually doesn't say so. He says they were evaluative decisions to be made. Well, isn't that just the same as here they were evaluative decisions to be made as to the market value, although I wouldn't call them evaluative decisions. Market value is market value so I know we pretend that it is anyway even though there can be differences of opinion on it.

MR SORRELL:

Well in this case massive differences of opinion –

GLAZEBROOK J:

Yes obviously.

MR SORRELL:

– occurred and –

GLAZEBROOK J:

But we pretend, once it's ascertained, that that was always the market value and it was absolutely clear from whoa/go, don't we?

MR SORRELL:

Yes, I suppose –

GLAZEBROOK J:

And we have to do so because… and once parties have agreed on a value then that's the market value isn't it?

MR SORRELL:

Well even then necessarily the body doesn't lie down. It might be special circumstances that lead to acceptance of that value.

GLAZEBROOK J:

Well, no, exactly, but we pretend that that was because it was agreed to be the market value, the market value except in proceedings such as taxation matters where it might be of importance.

MR SORRELL:

Yes and the point I suppose I'm trying to make there is number 1, he didn't think, Justice Kirby didn't think it was that kind of case and secondly the immediate liability element of the statute, which is consistent with the money had and received type circumstance, damages, it's a consistent feature of what, if I might be colloquial Your Honours, we've had – there's a history going back to 1690, or thereabouts, of difficulties with people getting excluded from interest, where various techniques have been used to shift facts into interest eligible places and what has happened here is that the Judge, Her Honour, felt that interest was – should be paid because there was a cause of action. She didn't analyse the circumstance against the statute that was relied on by the plaintiff. The Court of Appeal looked at that and said, "That's wrong," and gave their judgment and in this Court is it a circumstance that this Court should intervene in. There was, in the respondent's submission, no immediate obligation that accrued.

GLAZEBROOK J:

And why do you say that, just because it wasn't ascertained, or is there some other reason? In terms of the contract, not the pleading.

MR SORRELL:

In terms of the contract the appellant was dispossessed, if I might call it that, by its insolvency and the appointment, its loss of control of its own situation.

GLAZEBROOK J:

Well it wasn't immediately dispossessed because there was an option that had to be exercised, is that right?

MR SORRELL:

Well that's never been closely examined by any Court. The parties decided as a matter of convenience that that date when, when the respondent said, "We'll take those shares," that should be the date, that was a matter of consent before the Court of Appeal, that conundrum that exists between a finding that there is a dispossession as at an earlier date by the act of insolvency and the loss of control of the company, and then some later notice, the exact status of that notice has never been discussed –

GLAZEBROOK J:
But at the moment, for our purposes, it's been accepted that the date of notice was the date of dispossession, if you like, and that that was in accordance with the contract for the trustee.

MR SORRELL:
It's been accepted

GLAZEBROOK J:

Is that right?

MR SORRELL:
– that that's the date of valuation.

GLAZEBROOK J:
Except – well at least that that's the date of valuation.

MR SORRELL:
Yes, it was agreed that that was the date of valuation and the parties didn't scrutinise beyond that because they had a date of valuation, they were then able embark in what was contractually expected, which is the identification of the value.

GLAZEBROOK J:
All right so – but why was – well then why did no immediate obligation arise on the date of valuation under the contract?

MR SORRELL:
Because there was no value.

GLAZEBROOK J:

Well there was a value. You mean the value hadn't been ascertained at –

MR SORRELL:

Yes.

GLAZEBROOK J:

– that moment, so you're asserting, despite what's been said in the cases you've taken us to, that there has to be an ascertained debt for section 87 to apply?

MR SORRELL:

Or – and we say an obligation to pay. A present obligation to pay.

GLAZEBROOK J:

Well why isn't there a present obligation to pay on the date of valuation in terms of the deed?

MR SORRELL:

Because neither party knows what needs to be done to perform that obligation. There is no default.

ARNOLD J:

But on the quantum meruit there's a clear obligation to pay, isn't there, even though the amount hasn't been fixed?

MR SORRELL:

Yes and –

ARNOLD J:

So I don't understand the difference here.

MR SORRELL:

Well reading the history of the quantum meruit claims in preparation for today to try and fix what the nature of the quantum meruit claim is, it seems to have evolved from innkeepers and people like that having an obligation to supply and the recipient not being entitled to take without incurring an assumpsit.

WILLIAM YOUNG J:

Being indebted he promised, is what it stands for, and it was initially a legal fiction but the common counts were money hadn't received, money paid for use of, quantum meruit, and a fourth which I can't remember, perhaps goods were transferred perhaps, but in the end –

MR SORRELL:

Account, I think.

WILLIAM YOUNG J:

In the end, at least in the case of a quantum meruit, the sum was not ascertained at the time the services were provided.

MR SORRELL:

Yes but the goods were taken.

WILLIAM YOUNG J:

Yes. Or the services received, yes.

MR SORRELL:

Yes so –

GLAZEBROOK J:

I hear the shares were taken,

ARNOLD J:

Weren't we told –

GLAZEBROOK J:

– on the basis of market value.

ARNOLD J:

Yes.

GLAZEBROOK J:

So the shares were taken on the basis of a payment of market value. Why is there no obligation to pay for them, even just on ordinary principles?

MR SORRELL:
Well there was a deemed disposal Your Honour rather than the shares being taken. There was a deemed disposal as a result of the insolvency.

GLAZEBROOK J:
Well I think we've agreed that the date of the option being exercised is the date of valuation which is why I'm loosely using the words "taken" ie the option was taken up to take the shares.

ARNOLD J:
Weren't we told the transfers took effect in May. Is that not right?

MR SORRELL:
QPAM Limited altered its share register.

ARNOLD J:
Right.

MR SORRELL:
To reflect a change in shareholding, yes.

ELIAS CJ:
We should take the adjournment now Mr Sorrell. How much longer do you expect to be? One would have thought not very long in the sense that you seem to have covered everything.

MR SORRELL:
I hear Your Honour.

ELIAS CJ:
No, I'm not trying to constrain you.

MR SORRELL:

I'm pretty much up to page 4 of my written outline and I'll move through that reasonably quickly so I wouldn't think that I'll be more than half an hour but I'm really largely in Your Honour's hands. I'm attempting to answer your questions.

ELIAS CJ:
Yes, I understand that. Thank you. We'll take the adjournment now.

COURT ADJOURNS: 1.05 PM
COURT RESUMES: 2.18 PM

ELIAS CJ:
Thank you.

MR SORRELL:
May it please Your Honours. If I might I might address Her Honour Justice Glazebrook's request to deal with *Body Corporate No 95035 v Auckland Regional Council* 6 PRNZ 559 (CA. This is a case to be found in the appellant's bundle of authorities, volume 2, and it's at tab 20. It's a useful case because it has got a lot of points of similarity with the present. In both instances the parties sought to be charged were in possession by agreement. Both have an obligation to pay an amount to be fixed by agreement or adjudication. Neither has the ability to discard their obligation. It cannot be paid until quantified, it's submitted. The cause of action in debt did not arise until the amount payable is known. Again that's a submission but that's the outcome of this case. The question of jurisdiction, whether section 87 applied, arose in both cases and the finding was that prior to the determination of the amount payable the liability is inchoate.

If I could refer you in particular to page 564 which in my copy is the last full page with two pages there, you can't quite see the number on my copy, and the discussion there was when the cause of action arose, and His Honour Justice Hardie Boys giving the judgment for the Court comprising Justices Casey and Gault and Justice Hardie Boys, referred to cause of action as described in *Halsbury* and then sets out the relevant passage beginning whichever, if I could just pause there and ask Your Honours to read that.

In this case, Your Honour, the form of pleadings was for the appellant and I just take you back to volume 1 of the case on appeal, the white volume, and if I could take you

to page 13. I suppose the respondent's submission is that it is a pleading point, but not a mere pleading point, if I could make that distinction. If we look at page 13, this is what Her Honour Justice Glazebrook described as the operative statement of claim, if I could just emphasise paragraph 20A, which is what, the contract that was asserted, "It would be required to pay for the B units within a reasonable period of time after the fixing or determination of their fair market value. A period of 14 days after determination is a reasonable period of time in the circumstances." And that is to be read in the – that gives context to paragraph 22(b) at the foot of the page, which is where there was a default.

ELIAS CJ:

So the submission you're making is that the pleadings envisage that default is something that will occur after, within a reasonable period after the value is established?

MR SORRELL:

Yes.

ELIAS CJ:

And, yes.

MR SORRELL:

Because in the discussion we've had today there has been some mention of there being a contract at – let's just take the 26th of June. What we may not have grappled with completely is what were the terms of that contract as at that date and Justice –

GLAZEBROOK J:

Do you mean 26th of April?

MR SORRELL:

April. I'm stuck in that June date for some reason. 26th – the valuation date, shall I call it that.

GLAZEBROOK J:

Yes. I'm just checking that I haven't missed another date.

MR SORRELL:

Every now and then you get things like that that stick with you. And this is not an unusual element, it is submitted, in the contract. Agreements for sale and purchase typically specify a future date for performance of the contract and questions of interest are don't arise until there's a default and it's submitted that this is the contract that the parties, how they saw it, this is the contract and the litigation that occurred, this is the claim.

ELIAS CJ:
So you say that the claim for interest has to be read in the light of 20(a) and 22(b)?

MR SORRELL:
Correct and that there was a cause of action for a declaration not a claim in debt. All that has to be read in that context.

WILLIAM YOUNG J:
Doesn't it also have to be construed in light of the claim for relief though?

MR SORRELL:
Yes the whole claim for relief, Your Honour. I agree.

GLAZEBROOK J:
And does the pleading over-ride the actual contract?

MR SORRELL:
I wouldn't contend that Your Honour.

ELIAS CJ:
It is not an over-riding of the contract, it is what is claimed you say?

MR SORRELL:
Yes, what is claimed. And if I could move to a slightly different point Your Honours. At my outline at page 4 paragraph 46 about the denial of the respondent's beneficial interest. If you could just keep that statement of claim open where you have turned to, page 14 of the volume 1. We can delete paragraph 46 of my outline because my learned friend has made it explicit that it is not seeking equitable interest although I would just make the point that to the extent one gets into an argument about the fairness of an award of interest, one is seeking to argue an equity whereas what we

are debating here in the respondent's submission is a statutory entitlement, a jurisdictional point of statutory entitlement and at paragraph 47. The consistent pleading in the face of the Court of Appeal's findings, and that is the earlier Court of Appeal judgments as to deem disposal, it is submitted, "blighted the title and ownership of the respondent to QPAM.

WILLIAM YOUNG J:
Sorry is this an argument addressed to discretion?

MR SORRELL:
It is addressed to, yes it is.

WILLIAM YOUNG J:
Really.

MR SORRELL:
And we deal with our substantive submissions at paragraph 3.5 and 10.5 and their Honours dealt with it, I have given the reference in the case on appeal there at paragraphs 49 and 50 of the Court of Appeal.

GLAZEBROOK J:
Substantive submissions before the Court of Appeal you mean?

MR SORRELL:
I am sorry, Your Honour, I am talking about the appellant's substantive submissions.

GLAZEBROOK J:
Oh, okay.

MR SORRELL:
Yes at 3.5 and 10.5 At page 3 of the appellant's submissions, paragraph 3.5 the error that is asserted is erroneously taking the view that a vendor's lending amounts to a denial of the purchaser's beneficial interest and would present an impediment in the way of an argument that the respondent enjoyed all benefits incidental to the ownership of the B units and shares and at 10.5 –

ELIAS CJ:

But I thought we had got beyond reliance on benefits in the course of the argument.

MR SORRELL:

Well if it reached that point Your Honour, there is no need for me to address it.

ELIAS CJ:

Well I am not sure what points you were going to be making.

MR SORRELL:

Just that the manner of conduct of the proceeding with the extent involvement of QPAM, the asset being fought over, there was not the usual, it is –

WILLIAM YOUNG J:

You say that the Judge should not have awarded interest because Worldwide had taken an unreasonable litigation stance that had affected it's enjoyment of the asset it had acquired?

MR SORRELL:

Yes and in the discussion earlier today, Your Honours evinced some interest in the possession power and control being taken on the 26th of April.

WILLIAM YOUNG J:

Rather more interest in the fact that you held on to $2.69 million for five years.

MR SORRELL:

Yes Your Honour, yes.

WILLIAM YOUNG J:

I think that is the primary reason why it is suggested that your client should be paying interest.

MR SORRELL:

And just as His Honour, Justice Hardie Boys said in the second paragraph there, "This may not seem a fair or reasonable result etc." It is not an unknown outcome but this is the bargain that the parties sought to make and this is the litigation that was within their control.

GLAZEBROOK J:
So they made the bargain through the litigation, is that the submission?

MR SORRELL:
They made the bargain and litigated it in the way they did and therefore placed themselves outside the ambit of the statutory provision for interest.

So dealing now with the support on other grounds point, if I might move to that Your Honours. This engages a little bit with what His Honour Justice Young has just said. The High Court judgment contains a speculation stating that the Jacobsens alone stand to benefit from delay. The parties agreed on an historic valuation date, that was never argued in any of the hearings and they could have agreed that it was another date with risks that were inherent in that, a prospective valuation date with risks of intervening insolvency etc and I have referred to a case there which *Brown v Koutsojiannis* expecting Justice Anderson to be on the bench which was a case he did on the company where there was an intervening insolvency and the presentation of the transfers was deemed sufficient to trigger payment.

The appellant is responsible for considerable delay in it focussing a claim. The appellant was not willing to perform its obligations as it continued to assert a right to set the price until filing its second amended statement of claim dated 22 March 2007.

WILLIAM YOUNG J:
But it can't have been really asserting that in a real sense, after the Court of Appeal judgment, can it?

MR SORRELL:
You might very well say that Your Honour.

WILLIAM YOUNG J:
But are you saying that – I mean were they continuing to assert a right to set the price or had they simply not got round to amending the pleadings?

MR SORRELL:
Well I can't answer that Your Honour.

GLAZEBROOK J:

Well were they really setting the price though. They were just saying, give us the information and we will tell you what the market value is. The price was set at market value. I know what the pleadings said but realistically, the price was set at market value. In fact this idea is for who sets the pricings, to me to be a red herring because it has to be set at market value. You would always be able to go to the Court and say they haven't done so If QPAM set out, no doubt the appellants could say that is not market value.

MR SORRELL:

I really can only responsibly make submissions based on what they did and how they acted rather than whether it was here today, whether one regards that as a reasonable thing to have done.

WILLIAM YOUNG J:

But this was argued – this is a discretion point and it must have been addressed by the Judge.

MR SORRELL:

Well implicitly you would think it would have been Your Honour I agree.

GLAZEBROOK J:

And if she wasn't asked to address it then that was your current client's problem, wasn't it?

MR SORRELL:

Yes. It's again a function of the framing of the pleading. The jurisdictional –

GLAZEBROOK J:

Well they chose to say –

MR SORRELL:

– point was taken.

GLAZEBROOK J:

– no jurisdiction.

MR SORRELL:

Yes.

GLAZEBROOK J:

And if they didn't bother to say well if there is jurisdiction these discretionary things should apply well that's just too bad, isn't it?

MR SORRELL:

It is just too bad provided the flexibility of the pleadings has that affect. I agree Your Honour.

GLAZEBROOK J:

Well it was absolutely clear interest was being asked for and from a particular date.

MR SORRELL:

Yes Your Honour and that's why the respondent in this area suggests that the interest should not run until the 15th of July 2009, which is the date where it was first asked for.

WILLIAM YOUNG J:

Was that argued in the High Court? I think not.

MR SORRELL:

No it wasn't.

WILLIAM YOUNG J:

Well isn't it a bit late now?

MR SORRELL:

Well it was the subject of the cross-appeal in the Court of Appeal and wasn't dealt with Your Honour. It is, I acknowledge, a difficult matter to deal with today and it would have been better if it was dealt with in the Court of Appeal but it wasn't and we now have a High Court Judge that's retired who determined it so even if Your Honours were minded to remit it back –

WILLIAM YOUNG J:

It's not in my mind at the moment.

MR SORRELL:

So unless I can assist Your Honours further that's the submissions for the respondent.

ELIAS CJ:

Thank you. Do you wish to be heard in reply?

MR FISHER:

Your Honour just to point out some important factual matters. First of all in relation to that third cause of action, that was struck out by the Court of Appeal in 2008 and if I can take Your Honours to volume 2, page 369.

GLAZEBROOK J:

I think I've lost what the –

MR FISHER:

The points are, it was just taking up Justice Young's point about the third cause of action in the early pleadings seeking the fixing of the price.

GLAZEBROOK J:

Okay.

MR FISHER:

Sorry if you turn to 375, which is paragraph 23 of the judgment, you'll see there that there was a third line of argument reflected in the third cause of action, "On its true construction the QPAM trust deed permits WWNZ to state a consideration for the shares and to deter doing so until it has all relevant information. In the course of argument, Mr Fisher accepted that this cause of action was untenable and that it could fairly be struck out." And that is one of the orders that the Court made back then. So that alternative argument ceased to have any further significance.

In terms of the pleading there was an amendment made to the pleading which is material to that paragraph 20A at the hearing. If we go to volume 1 at page 16 you'll see there that that relief sought in paragraph F was abandoned by the plaintiff and that's acknowledged in the judgment of the High Court. At page 105 you'll see there at paragraph 280 Her Honour identifies the prayer for relief and you follow that paragraph over the page down to F and you'll see that as being abandoned. So what

that effectively did was rendered that part, although it's not expressly done, but it rendered that part of 22(b) seeking the degree of specific performance and/or damages as irrelevant.

Concerning paragraph 20A, that's at page 13 of volume 1, the argument the appellants advance is that there were two options there. The reasonable period of time after the fixing of the price by the parties or determination of the fair market value. So it envisaged that the fair market value would be payable within a reasonable period of time of its being fixed by the party or of the determination of fair market value. But that's not to say that interest wouldn't accrue in the meantime.

WILLIAM YOUNG J:
Can I just ask, because I don't understand why the pleadings went into this much detail, I thought the result of the Court of Appeal judgment was that all that was required was an application for judgment for the amount of the fair value of the shares to be fixed by the Court? I mean all this pleading about why they're implied terms or whatever is all by the by, isn't it?

MR FISHER:
Well it is because there was no such rights that existed that were being asserted. The concern always was that Worldwide would never get any money out of the second respondents so that's why it continued in the pleading to assert the vendor's lien argument which was rejected.

WILLIAM YOUNG J:
Okay but all of this stuff about implied terms as to when it was to be paid.

MR FISHER:
Yes.

WILLIAM YOUNG J:
All of this was unnecessary, wasn't it, because the effect of the Court of Appeal judgment was that you could have had a one page statement of claim. You owe us the market value of the shares.

MR FISHER:
Yes.

WILLIAM YOUNG J:

We seek judgment for the market value of the shares to be assessed by the Court. I mean it didn't need – that was the only issue, leaving aside your anxiety about payment, that was the only issue for the Court?

MR FISHER:

Yes.

ELIAS CJ:

I would like you to finish the point that you were making as to why this says nothing about interest. That it envisages payment at a – within a reasonable period of time, rather than an immediate obligation.

MR FISHER:

It's a response perhaps to an attempt to put forward a reasonable position that, as Justice Young said, if judgment was entered on the day then there'd be all these execution remedies available to Worldwide. So if one puts forward a reasonable position.

ELIAS CJ:

Well that might be the explanation but what's the claim? Because it does look as though the claim is for payment within a reasonable time after the setting of the fair market value.

MR FISHER:

Well to the extent that that pleading could be construed as an indication that the appellant was not seeking an order that the sum was payable then I would suggest that that pleading is not one that should be followed strictly in its wording because that doesn't reflect the underlying claim. The underlying claim was, and the cause of action was, that upon the exercise of the pre-emptive right an obligation arose on the respondent to pay the fair market value.

ELIAS CJ:

Well I understand that that claim was available to you. The question is whether you made it.

GLAZEBROOK J:

Well they said that in the earlier paragraphs. It's just 20A they didn't. If you look back at the earlier paragraphs I think it's 18 and 19 that's certainly made as a claim and then the prayer for relief has the interest claim. So it's not very happily worded perhaps in 20A but it's 19 and 20. It's pleaded as an implied term.

MR FISHER:

Yes. And it is to be read in conjunction with the prayer for relief which plainly seeks a judgment for a determination that the fair market value is payable and that interest is payable on that sum from 26 April. There is no doubt about that. In substance the object of the pleading is to bring notice to the respondent the claim they face and there's just no doubt about that.

So unless I can be of any further assistance to Your Honours?

ELIAS CJ:

No, thank you, that's been very helpful. Thank you counsel. We'll reserve our decision in this matter.

COURT ADJOURNS:2. 47 PM