SUPREME COURT OF QUEENSLAND

CITATION:	*Mineralogy Pty Ltd v BGP Geoexplorer Pte Ltd (No 2)* [2018] QSC 42
PARTIES:	**MINERALOGY PTY LTD** ACN 010 582 680 (applicant) **v** **BGP GEOEXPLORER PTE LTD** (respondent)
FILE NO/S:	SC No 3482 of 2016
DIVISION:	Trial Division
PROCEEDING:	Application filed on 28 December 2017 Application filed on 25 January 2018
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	8 March 2018
DELIVERED AT:	Brisbane
HEARING DATE:	8 February 2018
JUDGE:	Jackson J
ORDER:	**1. Interest on the judgment debt under s 59 of the *Civil Proceedings Act* 2011 (Qld) is payable at the rate of 4.5% per annum.** **2. Otherwise, the applications are dismissed.** **3. The plaintiff pay the defendant's costs of the application filed on 28 December 2017.** **4. Costs of the application filed on 25 January 2018 be costs in the proceeding of appeal no. 11186/17 (with the effect that the costs of the application automatically follow the outcome of the appeal).**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JUDGMENTS AND ORDERS – SATISFACTION AND SET-OFF OF JUDGMENTS – where amount of money order debt held in judgment creditor's solicitors' trust account subject to an undertaking not to disburse until further order – whether money order debt

remains payable – whether interest continues to accrue

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JUDGMENTS AND ORDERS – INTEREST ON JUDGMENTS – RATE – where money order debt in US dollars – where amount of money order debt held in judgment creditor's solicitors' trust account subject to an undertaking not to disburse until further order– whether a rate lower than the prescribed rate is appropriate

Civil Proceedings Act 2011 (Qld), s 59

Anthony v Tasmanian Alkaloids Pty Ltd (No 2) (2005) 15 Tas R 84, cited
Asia Pacific International Pty Ltd v Dalrymple [2000] 2 Qd R 229, cited
Guardian Mortgages Pty Ltd v Miller [2004] NSWSC 1236, cited
Jefford v Gee [1970] 2 QB 130, cited
Mercantile Credits Ltd v Buckeridge [1986] WAR 149, cited
Metro Meat Ltd v Werlick (1993) Aust Torts Rep ¶81-242, cited
Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (No 2) [2014] NSWCA 425, cited
Newton v Grand Junction Railway Co (1846) 153 ER 1133, cited
Novoship (UK) Ltd v Mikhalyuk [2015] QB 499, cited
Parsons v Mather & Platt Ltd [1977] 1 WLR 855, cited
Rossiter v Core Mining Ltd [2015] NSWSC 360, cited
Saul and Anor v Menon [1980] 2 NSWLR 314, cited
Secure Parking Pty Ltd v Woollahra Municipal Council (No 2) [2017] NSWCA 51, cited
State Bank of New South Wales Ltd v Swiss Bank Corporation (1995) 39 NSWLR 350, cited

COUNSEL: D O'Sullivan QC and E Robinson for the applicant
T Pincus for the respondent

SOLICITORS: Alexander Law for the applicant
GRT Lawyers for the respondent

Jackson J

[1] These two applications relate to payment of a judgment debt and the amount of post-judgment interest that is payable on that debt.

[2] On 9 October 2017 I ordered the plaintiff to pay the defendant the sum of US$17,629,673.68 ("the judgment"). Statutory post-judgment interest became payable from that date. The applicant judgment debtor has paid that amount to the solicitors for the respondent judgment creditor. The amount has been deposited into an interest

bearing account in the name of the respondent's solicitors to be held on trust for the respondent until further order pending the hearing of an appeal listed for hearing this month.

[3] The questions for decision are whether the money order debt payable under the judgment is satisfied or remains payable and at what rate post-judgment interest should be payable until the judgment was or is satisfied.

[4] These questions arise in the context where after the applicant had tendered a "bank cheque" in payment to the respondent's solicitors, the respondent applied for and obtained from the registrar an order for an enforcement hearing to be attended by one of the applicant's officers.

[5] Summarising, the applicant applies, first, for an order to set aside the order for an enforcement hearing or to stay the order until further order. It is no longer in dispute that the enforcement hearing should not proceed. Second, the applicant also applies for an order declaring that the applicant has paid the money order debt payable under the judgment. Lastly, the applicant applies for an order that the post judgment interest payable on the money order debt is payable at the rate of 3.5 percent per annum rather than the prescribed rate of 7.5 percent, a consequential declaration that the applicant has paid to the respondent all of the interest it is required to pay and an order that the respondent pay to the applicant the excess amount of $102,295.80.[1]

Statutory provisions

[6] Post-judgment interest is provided for in s 59 of the *Civil Proceedings Act* 2011 (Qld) as follows:

> "**59 Interest After Money Order**
>
> (1) …
>
> (2) Interest is payable from the date of a money order on the money order debt unless the court otherwise orders.
>
> (3) The interest is payable at the rate prescribed under a practice direction made under the *Supreme Court of Queensland Act 1991* unless the court otherwise orders.
>
> (4) However—
>
> (a) if the money order includes an amount for damages and the damages are paid within 21 days of the date of the order, interest on the damages is not payable unless the court otherwise orders; and
>
> (a) if the money order includes an amount for costs and the costs are paid within 21 days after assessment, interest on the costs is not payable unless the court otherwise orders"

[1] Calculated at the exchange rate relevant as at 8 February 2018.

[7] Section 85 of the same Act provides that an enforcement warrant for the enforcement of a money order authorises, without the need for any further order, the levying of interest on the amount payable at the rate applying under s 59. In other words, post-judgment interest is payable and may be enforced without any order of the Court.

[8] Relevant definitions for the purposes of s 59 appear in Schedule 1 of the same Act as follows:

> "***money order*** means an order of the court, or part of an order of the court, for the payment of money, including an amount for damages, whether or not the amount is or includes an amount for interest or costs.
>
> ***money order debt*** means the amount of money payable under a money order."

[9] Practice Direction 7 of 2013 provides, in part:

> "4. The following is the rate applicable to a money order debt:
>
> (a) in respect of the period from 1 January to 30 June in any year, a rate six percent above the cash rate last published by the Reserve Bank of Australia before that period commenced; and
>
> (b) in respect of the period from 1 July to 31 December in any year, a rate six percent above the cash rate last published by the Reserve Bank of Australia before that period commenced.

[10] It is uncontroversial that since 3 August 2016 the cash rate published by the Reserve Bank of Australia has been 1.5 percent. Accordingly, the rate applicable to the judgment under s 59 is 7.5 percent unless the Court otherwise orders and interest is payable at that rate from the date of the judgment unless the Court otherwise orders.

Facts

[11] The judgment included an amount of US$2,084,422.95 for pre-judgment interest.[2] Part of the reasoning was that where judgment is given in a foreign currency in respect of an amount that was to be paid to the creditor in a foreign place, it is the rate of interest on that currency in that place which reflects the purpose of an award of interest under s 58 of the *Civil Proceedings Act* 2011 (Qld), namely to compensate the creditor for being kept out of their money. It followed that the pre-judgment interest awarded was not calculated by reference to the rates applicable to default judgments in this State in Australian dollars for claims that arise within the jurisdiction, but was calculated by reference to the average of the rates of interest described as the "deferred payment finance fee" under article 5.12 of the contract between the parties, being 3.5 percent per annum.[3]

[12] On 25 October 2017, the applicant started an appeal against the whole of the judgment.

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2 *Mineralogy Pty Ltd v BGP Geoexplorer Pte Ltd* [2017] QSC 219, [188].
3 *Mineralogy Pty Ltd v BGP Geoexplorer Pte Ltd* [2017] QSC 219, [185]-[186].

[13] On 10 November 2017 the applicant applied for a stay of enforcement of the judgment. A ground of the application was that there was a risk that if the appeal succeeded and the Court of Appeal ordered the respondent to repay money paid by the applicant pursuant to the judgment, the repayment order may prove to be ineffective.

[14] In resisting the application for a stay the respondent and its solicitors undertook to the Court that all moneys recovered from the applicant pursuant to the judgment will be held by the respondent's solicitors on trust for the respondent in an interest bearing account in an Australian bank pending further order of the court ("the undertaking").

[15] On 13 November 2017, the Court of Appeal dismissed the application for a stay, on the basis that the risk of non-repayment if the appeal succeeds fell away in light of the respondent's undertaking.[4]

[16] On 20 November 2017, the respondent's solicitor sent an email to the applicant's solicitor stating that the respondent would accept a bank cheque from the applicant payable to the respondent's solicitors' trust account in the sum of US$17,629,673.68 to be paid into the respondent's solicitors' trust account as per the order of the Court of Appeal made on 13 November 2017 and subject to the undertaking.

[17] On 20 November 2017, the applicant purchased and paid for Bendigo Bank bank cheque number 220581 in the amount of US$17,629,673.68 drawn on Bank of New York Mellon and payable at New York to the order of GRT Lawyers trust account.

[18] On 20 November 2017, the applicant delivered the bank cheque and the respondent's solicitors acknowledged receipt.

[19] On 27 November 2017, the respondent's solicitors issued a trust account receipt for the amount of the bank cheque as received for and on behalf of the respondent's Singapore solicitors as funds received from the applicants.

[20] On or about 27 November 2017, the respondent's solicitors opened a US dollar account with Westpac Banking Corporation in order to deposit the bank cheque.

[21] On 12 December 2017, the respondent applied for an enforcement hearing summons on the footing that the amount outstanding as at that date was the full amount.

[22] On 13 December 2017, an officer of Westpac made an inquiry of an officer of Bendigo seeking confirmation of some details relating to the bank cheque.

[23] By 19 December 2017, the letter of confirmation that was sought was provided by Bendigo Bank to Westpac. However on that day Westpac sought further information to process the cheque:

> "[t]o enable [Westpac] to start processing this bill for collection"

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[4] *Mineralogy Pty Ltd v BGP Geoexplorer Pte Ltd* [2017] QCA 275, [15]-[17].

[24] On 22 December 2017, the court issued an enforcement hearing summons directed to an officer of the applicant set down for hearing on 31 January 2018.

[25] In late December 2017, Westpac sent the bank cheque to Bank of New York Mellon in New York for collection.

[26] On 28 December 2017, the applicant electronically transferred the amount of A$196,268.98 in payment of post-judgment interest into the respondent's solicitors' trust account.

[27] On 28 December 2017, the applicant filed the application to set aside or stay the enforcement hearing summons and further enforcement of the money order.

[28] On 29 December 2017, Bank of New York Mellon received the bank cheque for payment.

[29] On 11 January 2018, the respondent's lawyers served the enforcement hearing summons on the applicant's officer. The summons required completion of a statement of financial position by four business days before 31 January 2018.

[30] On 25 January 2018, the applicant filed an application for an order that interest on the judgment sum is payable at the rate 3.5 percent per annum, a declaration that it has paid the respondent all of the interest that it is required to pay and an order for repayment of the amount in excess of 3.5 percent per annum up to the date of tender of the bank cheque on 20 November 2017.

Is the money order debt still payable?

[31] The applicant's primary contention is that the money order debt was satisfied on 20 November 2017, when the respondent's solicitors accepted the tender of the bank cheque. Before dealing with the applicant's primary contention as to the effect of tender and acceptance of a cheque, it is convenient to deal with the respondent's contention that the money order debt of the full amount of the judgment remains payable notwithstanding the payment by the Bank of New York Mellon to Westpac of the amount of the bank cheque on 30 January 2018 and the credit by Westpac of that amount to the respondent's solicitors' trust account.

[32] The basis for the respondent's contention is that because the amount has been paid into the account pursuant to the undertaking, to be held on trust until further order, the money order has not been satisfied and the money order debt remains payable. The respondent submits that because it is not at liberty to use the amount deposited to its solicitors' account as trustee, the amount of the judgment comprised in the money order has not been paid.

[33] The respondent submits further that it has been held in other cases that neither a payment into court pending appeal nor a payment into a joint bank account made pursuant to an order of court satisfies a judgment debt. In those cases post-judgment

interest continued to accrue. The respondent submits that, in a similar vein, the payment made to the respondent's solicitors on condition that it be held pursuant to the undertaking does not satisfy the money order debt, so that it remains payable and interest continues to accrue and be payable.

[34] Against that, the applicant submits that the respondent was not ordered to pay the money into a trust account – it voluntarily undertook to do so as part of its defence to the application for a stay. Second, the applicant submits that it would be inconsistent with the basis on which the respondent gave the undertaking for it to be entitled to enforce the judgment notwithstanding that the applicant has paid the full amount to the respondent's solicitors. The applicant submits that the assumption underlying the dismissal of the application for a stay was that payment to the respondent's solicitors would operate as a payment in satisfaction of the judgment so that further enforcement would be impossible.

[35] In reply, the respondent submits that any question of further enforcement after payment to the respondent's solicitors' account to be held on trust could be dealt with by a further application for a stay.

[36] In support of those submissions, the respondent relied on *Anthony v Tasmanian Alkaloids Pty Ltd (No 2)*,[5] *Parsons v Mather & Platt Ltd*[6] and *Mercantile Credits Ltd v Buckeridge.*[7]

[37] However, in my view, consideration should be given first to the statutory text, context and purpose. It is also of use, in my view, to consider the history of the antecedents of the relevant section.

[38] The text of s 59 *Civil Proceedings Act* 2011 (Qld) is set out above. It does not provide expressly when interest ceases to run. However, by providing that interest is payable on the "money order debt", it picks up the meaning of the defined term that the money order debt is the "amount payable". When the amount is paid, no money order debt remains on which interest is payable.

[39] The legislative history as context may be briefly recounted. In Queensland, the antecedent to s 59 of the is s 73 of the *Common Law Practice Act* 1867 (Qld).[8] Prior to 1972, there was no general provision providing for post-judgment interest in this State. There were, however, such provisions in other States and in England. The progenitor of such provisions was introduced first by s 17 of the English *Judgments Act* 1838 that provided:

> "… every judgment debt shall carry interest at the rate of four… per centum per annum from the time of entering up the judgment… until the same shall be satisfied…"

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5 (2005) 15 Tas R 84.
6 [1977] 1 WLR 855.
7 [1986] WAR 149, 154.
8 Section 73 was relocated into the *Supreme Court Act* 1995 (Qld), s 48.

[40] A modernised provision of that kind currently appears in the legislation of all other Australian jurisdictions.[9]

[41] Cases decided under other similar provisions assist in identifying the mischief leading to and purpose of provisions such as s 59. Not long after the passage of the English Act of 1838, a case came before the Court of Exchequer Pleas as to whether post-judgment interest ran from the first act done for the purpose of entering up a judgment or only from the time of perfecting the judgment after the taxation of costs. The court unanimously decided that it was from the first act, following a decision of the Court of Common Pleas. In a passage that has been much cited since, Pollock CB said:

> "The giving of interest is not by way of a penalty, but is merely doing the plaintiff full justice, by having his debt with all the advantages properly belonging to it. It is in truth a compensation for delay. If loss accrues from that, it should rather fall on the defendants, who are in the wrong, than on the plaintiff."[10]

[42] At least since then, it has been accepted that the purpose of post-judgment interest is to compensate a plaintiff who has not been paid. However, as the text of s 59 and the practice direction set out above show, the starting point is that the rate of interest is that prescribed by the practice direction, unless a different order is made by the court. It has not been argued that the court cannot make a different order after the judgment is pronounced which would retrospectively vary interest after interest at the prescribed rate has accrued.

[43] More modern cases suggest that the rate of interest that is fixed serves a secondary purpose, namely to encourage the defendant to pay the outstanding amount of the judgment debt, so as to avoid interest continuing to accrue at a relatively high rate. That consideration emerges from a number of cases, but it is sufficient to refer to two decisions of the Court of Appeal of New South Wales. In *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (No 2)*[11] the court ordered interest on an amount to be repaid following a successful appeal. It chose the pre-judgment interest rate. The court considered whether the right to interest in such a situation more closely approximated that of pre-judgment interest or post-judgment interest. As is the case in this State, the pre-judgment interest rate was fixed at 4 percent above the cash rate last published by the Reserve Bank of Australia and the post-judgment interest rate was fixed at the same cash rate plus 6 percent. McFarlan JA said:

> "… the purpose of the statutory requirement… for payment of post-judgment interest is primarily compensatory. The fact that the rate prescribed thereunder is higher than that applicable to … pre-judgment interest has been attributed to an intention that the rate for post-judgment

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9 *Judiciary Act* 1903 (Cth), s 77 N; *Federal Court of Australia Act* 1976 (Cth), s 52; *Civil Procedure Act* 2005 (NSW), s 101; *Supreme Court Act* 1986 (Vic), s 101; *Supreme Court Act* 1935 (SA), s 114; *Civil Judgments Enforcement Act* 2004 (WA), s 8; *Supreme Court Civil Procedure Act* 1932 (Tas), s 165; and *Supreme Court Act* 1996 (NT), s 85.

10 *Newton v Grand Junction Railway Co* (1846) 153 ER 1133, 1135.

11 [2014] NSWCA 425.

> interest 'provide a disincentive to unsuccessful parties to delay payment of a judgment sum'. …"[12]

[44] In *Secure Parking Pty Ltd v Woollahra Municipal Council (No 2)*,[13] the court observed that there may be some difference between the approach taken in *Mount Bruce Mining* and another earlier decision about the award of interest on a successful appeal where a judgment sum is ordered to be repaid. However, the court accepted that a reason for the difference between the prescribed pre-judgment interest rate and the post-judgment interest rate is an intention that the post-judgment interest rate be fixed to as to provide a disincentive to unsuccessful parties delaying payment of a judgment sum.[14] The court also accepted that:

> "a reason for departing from the practice of awarding interest at the rates payable on judgments might reasonably include that those rates were fixed 'in disregard of commercial reality or that they embody a deterrent or punitive intent'…"[15]

[45] Another relevant consideration raised by the case law emerges more clearly from cases dealing with pre-judgment interest. Statutes providing courts with power to award pre-judgment interest stem from one of the English Acts known as Lord Tenterden's Act,[16] enacted in 1833, five years before the English Act of 1838 relating to post-judgment interest. There are many cases that discuss the general principles and purpose that inform the discretionary power to award pre-judgment interest. One case often referred to is *Jefford v Gee*.[17] The question in that case was from what date pre-judgment interest should be awarded. A statement of principle by Lord Denning MR from the case has been repeated often:

> "In 1893 in *London, Chatham and Dover Railway Co. v South Eastern Railway Co.* [1893] AC 429, Lord Herschell LC stated the principle, which he thought should be applied, in these words, at p. 437:
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> > '… I think that when money is owing from one party to another and that other is driven to have recourse to legal proceedings in order to recover the money due to him, the party who is wrongfully withholding that money from the other ought not in justice to benefit by having the money in his possession and enjoying the use of it, when the money ought to be in the possession of the other party who is entitled to its use. Therefore, if I could see my way to do so, I should certainly be disposed to give the appellants, or anybody in a similar position, interest upon the amount withheld from the time of action brought at all events.'"[18]

[46] That passage looks not only to the position of the plaintiff who is to be compensated for being kept out of their money by an award of statutory interest but also to the position

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12 *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (No 2)* (2014) NSWCA 425, [14].
13 [2017] NSWCA 51.
14 *Secure Parking Pty Ltd v Woollahra Municipal Council (No 2)* [2017] NSWCA 51, [11].
15 *Secure Parking Pty Ltd v Woollahra Municipal Council (No 2)* [2017] NSWCA 51, [12].
16 *Civil Procedure Act* 1833.
17 [1970] 2 QB 130.
18 *Jefford v Gee* [1970] 2 QB 130, 143.

of the defendant who benefits by having the money in their possession. Both considerations look to the time value of money. When a judgment debt is not paid both considerations point in the one direction, namely that the judgement debtor should compensate the judgment creditor. On the other hand, when a judgment creditor has been paid, the purpose of a statutory interest award is served because the judgment creditor has the benefit of having the money and the judgment debtor does not.

[47] In the present case, these considerations point in opposing directions. Because the money is held on trust (although in an interest bearing account) the respondent does not have the benefit of receiving payment of the money order debt created by the judgment. On the other hand, because the amount has been paid by tendering the bank cheque and deposit of the proceeds into the trust account on trust for the respondent, the applicant does not have the benefit of having the money either and has not done so since purchasing the bank cheque on 20 November 2017,

[48] There are some analogous cases to the present case. In *Parsons v Mather & Platt Ltd*[19] the Queen's Bench Division of the High Court of Justice considered the operation of s 17 of the English Act of 1838 in relation to post-judgment interest. In that case there was a delay between an order for the payment out of court of money previously paid into court and receipt of the money through carrying out the usual administrative steps. The question was whether post-judgment interest continued to run on the amount of money ordered to be paid out of Court after the date of the order until it was received. Ackner J held that it did, saying:

> "… it seems to me to be quite unrealistic to urge that the judgment is satisfied as soon as there is an order for the sum to paid out, when everyone knows it takes several weeks before the party in whose favour the order has been made is allowed to receive the money… a judgment in respect of a sum greater than the amount in court, and the order for payment out was merely to enable that judgment to be satisfied pro tanto by the payment out of the sum in court."[20]

[49] That reasoning accepts that post-judgment interest continues to accrue notwithstanding a payment into court, and notwithstanding an order for payment out of court, until the money is actually received by the judgment creditor.

[50] In *Mercantile Credits Ltd v Buckeridge*[21] the Full Court of the Supreme Court of Western Australia held that post-judgment interest is to be calculated on that portion of a judgment which is from time to time outstanding after giving credit to the judgment debtor for amounts paid and accepted. Kennedy J referred to the reasons for judgment in *Parsons v Mather & Platt Ltd* and continued:

> "Its reasoning appears to me to support the view that interest should only be charged on the balance of the judgment debt remaining outstanding, the plaintiff already having had the benefit of that portion of the judgment debt which it has already received."[22]

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19 [1977] 1 WLR 855.
20 [1977] 1 WLR 855, 858.
21 [1986] WAR 149.
22 *Mercantile Credits Ltd v Buckeridge* [1986] WAR 149, 154.

[51] In *Anthony v Tasmanian Alkaloids Pty Ltd (No 2)*[23] the Supreme Court of Tasmania considered whether post-judgment interest continued to accrue when an order was made that execution on the judgment be stayed until the determination of an appeal, on condition that the defendant pay a specified part of the judgment sum to be held in the judgment creditor's solicitors' trust account in trust for him and the balance into an interest bearing account in the joint names of the parties. The judgment debtor sought an order that interest cease to accrue from when amounts were paid. However no order to that effect was made. After the appeal was dismissed, it was apparent that the interest that had accrued on the invested money was at a rate or rates lower than that prescribed under the statutory provision for post-judgment interest. The question was whether the judgment debtor was obliged to pay the difference.

[52] Blow J held that the effect of the section in that case was that a judgment was to carry interest until the same shall be satisfied, that a stay of execution might be ordered pending the determination of an appeal on terms that might include an order as to or about interest, including that no interest accrue or that it accrue at some rate other than that prescribed, or which has the effect of discharging the liability of the judgment debtor to pay post-judgment interest.[24] He said:

> "In the present case, no order was made or sought as to what was to become of the invested monies following the determination of the appeal to the Full Court, nor as to the rights of the parties in respect of interest. The judgment debt remained owing to the plaintiff. The fact that an order had been made temporarily preventing execution, and the fact that sums sufficient to satisfy the judgment had been invested pursuant to an order intended to operate temporarily, did not extinguish the judgment debt. When the parties agreed to the consent orders of 6 December, they made no agreement in relation to interest. Since no order was made as to interest, no order was made discharging the judgment debt, and no contractual arrangement was made as to interest, the judgment debt continued to 'carry interest' pursuant to [the section]."[25]

[53] In the present case, although no order in the nature of a stay was made, the undertaking was given in answer to an application for a stay and was the principal reason for refusal of the application. The effect of the undertaking was to oblige the respondent and the respondent's solicitors to cause any moneys obtained in respect of the judgment to be held by the respondent's solicitors on trust for the respondent until further order pending the hearing and resolution of the applicant's appeal from the judgment. In the meantime, the respondent was not to have the benefit or use either of any money obtained or interest earned on it in the account with an Australian bank into which the money was to be deposited. The analogy with *Anthony* is not perfect but is undoubtedly strong.

[54] The applicant does not submit that *Anthony* was wrongly decided. Instead, it submits that it is distinguishable in terms of the statute that applies in this case, the order made, and the payment made. Specifically, the applicant submits that because the definition of

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[23] (2005) 15 Tas R 84.
[24] *Anthony v Tasmanian Alkaloids Pty Ltd (No 2)* (2005) 15 Tas R 84, 86 [5].
[25] *Anthony v Tasmanian Alkaloids Pty Ltd (No 2)* (2005) 15 Tas R 84, 87 [7].

"money order debt" is that it means “the amount of money payable” under “a money order”, post-judgment interest under s 59 will not accrue if no amount is payable under the relevant money order. Second, it submits that the tender, acceptance and payment of the bank cheque means that no amount of money is payable under the money order comprised by the order that the applicant pay the respondent the relevant sum.

[55] The applicant’s submissions focussed on the law relating to when a debt is paid and satisfied by tender and acceptance of a bill of exchange or cheque. However, in my view, such an approach fails to give sufficient attention to the circumstances under which the payment was made in the present case. That payment was made after the respondent had given the undertaking that any amount received would be held by the respondent's solicitors on trust until further order and tender of the bank cheque was made and accepted expressly on condition that the proceeds of the bank cheque would be held on the terms of the undertaking.

[56] In my view, neither the text, context, nor purpose of s 59(2) requires the conclusion that, on the section’s proper construction, the payment made by the applicant in those circumstances had the effect that there is no amount of money payable under the money order comprised in the judgment from the payment of the bank cheque, whether that was on the date it was tendered or the date on which the cheque’s proceeds were (or ought to have been) received into the respondent’s solicitors’ trust account.

[57] Because the Court has not ordered otherwise, interest has accrued and continues to accrue and is payable from the date of the money order on the amount of the money order debt.

Should the rate of interest be decreased?

[58] As previously stated the rate of interest that has been fixed by the operation of paragraph 4 of Practice Direction 7 of 2013 is 7.5 percent.

[59] There is no material that informs how the increase of 6 percent above the cash rate was chosen. It may be compared to the rate for pre-judgment interest on a default judgment under paragraph 3 of Practice Direction 7 of 2013 of 4 percent above the same cash rate.

[60] That structure of pre-judgment and post-judgment interest rates is the same in New South Wales, Tasmania and in the Federal Court.[26]

[61] The applicant submits that for the same reasons that I ordered that the pre-judgment interest rate in the present case should be lower than the interest rates calculated under paragraph 3 of Practice Direction 7 of 2013, I should order that the post-judgment interest rate is 2.5 percent, not 7.5 percent. In substance, the point is that the interest

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[26] *Civil Procedure Act* 2005 (NSW), ss 100, 101; *Uniform Civil Procedure Rules* 2005 (NSW), r 36.7; *Practice Note SC Gen 16* (NSW), s 5; *Supreme Court Civil Procedure Act* 1932 (Tas), ss 34, 165; *Supreme Court Rules* 2000 (Tas), r 5A; *Federal Court Rules* 2011 (Cth), r 39.06; *Interest on Judgments Practice Note GPN-INT* 2017 (Cth).

rate should reflect an appropriate rate for the respondent being kept out of the amount of the judgment being an amount to be received in $US in Dubai.

[62] In principle, and subject to one qualification, I accept that the same form of reasoning should apply. That is supported by relevant case law. In *State Bank of New South Wales Ltd v Swiss Bank Corporation*,[27] a similar question was considered. The court said:

> "It was common ground before Giles J and this Court that the purpose of an award of interest pursuant to s 94 was 'to compensate the plaintiff for the detriment that he has suffered by being kept out of his money, and not to punish the defendant for having been dilatory in settling the plaintiff's claim': *Batchelor v Burke* (1981) 148 CLR 448 at 455, per Gibbs CJ. Giles J held that where judgment is given in a foreign currency interest should normally be calculated at rates relevant to that currency but the appropriate rates must depend on all the circumstances."[28]

[63] The question was considered in England and Wales in *Novoship (UK) Ltd v Mikhalyuk*.[29] At that time the English Act provided for post-judgment interest rate of 8 percent. A 1970 amendment to the operation of the English Act provided:

> "Where a judgment is given for a sum expressed in a currency other than sterling and the judgment debt is one to which section 17 of the *Judgments Act* 1838 applies, the court may order that the interest rate applicable to the debt shall be such rate as the court thinks fit."[30]

[64] The court exercised the discretion to order that the interest rate applicable should be 2.5 percent above the 3 month $US LIBOR (London Interbank Offer Rate).

[65] The divergence between the 8 percent rate for sterling judgments and the lower $US rates on the LIBOR was significant and had grown over time. The Court of Appeal was not deterred in selecting the lower rate as appropriate to compensate the judgment creditor for being kept out of a sum payable in a foreign currency, saying:

> "…the judge was right to hold that the compensatory principle provided sufficient (we might even say compelling) grounds for departing from the prescribed rate applicable to sterling judgments."[31]

[66] Other cases support the same conclusion, such as *Rossiter v Core Mining Ltd*[32] and *Secure Parking Pty Ltd v Woollhara Municipal Council (No 2)*.[33]

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27 (1995) 39 NSWLR 350.
28 *State Bank of New South Wales Ltd v Swiss Bank Corporation* (1995) 39 NSWLR 350, 360.
29 [2015] QB 499.
30 *Novoship (UK) Ltd v Mikhalyuk* [2015] QB 499, 538.
31 *Novoship (UK) Ltd v Mikhalyuk* [2015] QB 499, 540.
32 [2015] NSWSC 360.
33 [2017] NSWCA 51.

[67] In the present case, no evidence was tendered by either party as relevant to the application to vary the post-judgment interest rate. No evidence was tendered by the respondent that its loss is greater than the 3.5 percent rate I awarded for pre-judgment interest. But also no evidence was tendered by the applicant as to the interest rates that are available for investment of $US sums on the LIBOR. Of course, some evidence of such rates is readily available on the internet, but that is not the way in which a court proceeds on a question of a special rate of interest, as opposed to general rates applying in the jurisdiction.[34] Perhaps the logic of this distinction may need to be revisited in an internet age, but the parties did not address the question and, in my view, no different approach should be taken in the absence of such submissions and a more detailed examination of the relevant considerations.

[68] There are three possible outcomes. First, to dismiss the application because of the absence of evidence as to the appropriate interest rates for a debt payable in $US in Dubai. Second, to utilise the interest rates in the contract for late payment, in the same way as I did for pre-judgment interest. Third, to also recognise that the 2 percent difference between the fixed pre-judgment and post-judgment interest rates under Practice Direction No 7 of 2013 is intended to encourage a judgment debtor to pay by fixing a higher rate, and to have regard to that consideration in fixing the interest rate.

[69] Recognising the shortcomings of the evidentiary basis, but in the exercise of "a broad discretion to be exercised on common sense lines",[35] I conclude that I should award a rate of interest determined by reference to the pre-judgment rate I adopted in my earlier judgment but increased by 1 percent. I adopt that increase to reflect a higher rate of interest for post-judgment interest as fixed by the practice direction, but reduce the margin from 2 percent to 1 percent to recognise that the applicant does not have the benefit of retaining the amount of the judgment because of the payment made to the respondent's solicitors to be held on trust pending the outcome of the appeal.

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[34] *Guardian Mortgages Pty Ltd v Miller* [2004] NSWSC 1236, [105]; cf *Asia Pacific International Pty Ltd v Dalrymple* [2000] 2 Qd R 229, 242 [62] and *Saul and Anor v Menon* [1980] 2 NSWLR 314, 325.

[35] *Metro Meat Ltd v Werlick* (1993) Aust Torts Rep ¶81-242, 62,498.