

# SUPREME COURT OF QUEENSLAND

CITATION: *Mineralogy Pty Ltd v BGP Geopexplorer Pte Ltd* [2018] QCA 256

PARTIES: **MINERALOGY PTY LTD**  
ACN 010 582 680  
(appellant)  
v  
**GEOEXPLORER PTE LTD**  
(respondent)

FILE NO/S: Appeal No 3419 of 2018  
SC 3482 of 2016

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane – [2018] QSC 42 (Jackson J)

DELIVERED ON: 8 October 2018

DELIVERED AT: Brisbane

HEARING DATE: 14 September 2018

JUDGES: Gotterson and McMurdo JJA and Henry J

ORDERS: **1. Appeal dismissed.**  
**2. The appellant is to pay the respondent’s costs of and incidental to the appeal on the standard basis.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JUDGMENTS AND ORDERS – INTEREST ON JUDGMENTS – GENERALLY – where the judgment sum was paid but subject to it being held on trust pending appeal – whether the appellant was required to pay post judgment interest on that sum

*Civil Proceedings Act* 2011 (Qld)

*Anthony v Tasmanian Alkaloids Pty Ltd (No 2)* (2005) 15 Tas R 84; [2005] TASSC 68, cited

*George v Cluning* (1979) 28 ALR 57, cited

*Mineralogy Pty Ltd v BGP Geopexplorer Pte Ltd* [2017] QSC 219, cited

*Mineralogy Pty Ltd v BGP Geopexplorer Pte Ltd* [2018] QCA 174, cited

*Mineralogy Pty Ltd v BGP Geopexplorer Pte Ltd (No 2)* [2018] QSC 42, cited

*Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (No 2)* [2014] NSWCA 425, cited

*Tilley v Official Receiver in Bankruptcy* (1960) 103 CLR 509; [1960] HCA 86, cited

COUNSEL: E Robinson for the appellant  
T Pincus for the respondent

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

- [1] **GOTTERSON JA:** I agree with the orders proposed by Henry J and with the reasons given by his Honour.
- [2] **McMURDO JA:** I agree with Henry J.
- [3] **HENRY J:** On 9 October 2017, by a judgment of the trial division, Mineralogy Pty Ltd (“Mineralogy”) was ordered to pay BGP Geopexplorer Pte Ltd (“BGP”) the sum of US\$17,629,673.68.<sup>1</sup> Mineralogy appealed that judgment.<sup>2</sup> Pending that appeal it paid the judgment sum to BGP’s solicitors to be held on trust until further order.
- [4] An issue arose as to whether or not the post-judgment interest Mineralogy was obliged to pay on the judgment sum ceased accruing from the making of that payment. A judge of the trial division decided it did not.<sup>3</sup> Mineralogy has appealed that decision. It is that appeal and that issue with which these reasons are concerned.

### **Background**

*An undertaking is given*

- [5] The issue stems from what occurred when Fraser JA heard and determined an application by Mineralogy for a stay of enforcement of the 9 October 2017 judgment, pending the determination of its appeal against that judgment. Mineralogy perceived a risk if it paid BGP the judgment sum and then succeeded in the appeal it may struggle to recover the money. BGP perceived a risk it would struggle to obtain payment of the judgment sum from Mineralogy. At the hearing of the stay application, on 10 November 2017, BGP offered an undertaking.
- [6] In dismissing the application for a stay on 13 November 2017, Fraser JA explained the nature and significance of BGP’s undertaking:

“[T]he grounds upon which the appellant relies in justifying a stay fall away in light of the respondent’s offer to undertake that if the application for a stay is refused, any amount paid by the appellant to the respondent will be paid into and kept in an Australian bank account until the determination of the appeal. The appellant does not seek to contradict the respondent’s submission that an appropriate form of undertaking to that effect obviated any risk that any order ultimately made in favour of the appellant might be ineffective. Subject to the formulation of an order incorporating an appropriate

<sup>1</sup> *Mineralogy Pty Ltd v BGP Geopexplorer Pte Ltd* [2017] QSC 219.

<sup>2</sup> Which appeal was ultimately dismissed by the Court of Appeal on 31 July 2018 – see *Mineralogy Pty Ltd v BGP Geopexplorer Pte Ltd* [2018] QCA 174.

<sup>3</sup> *Mineralogy Pty Ltd v BGP Geopexplorer Pte Ltd (No 2)* [2018] QSC 42.

undertaking, I accept the respondent's submission."<sup>4</sup> (emphasis added)

*The terms of the order*

[7] His Honour relevantly ordered:

"1. Upon the undertaking by the respondent and its solicitors that all monies recovered from the appellant pursuant to the orders of Jackson J on 9 October 2017 in BS 3482/16 will be held on trust in an interest bearing account in an Australian Bank pending further order of the court, the application for a stay is dismissed." (emphasis added)

*A payment is made*

[8] On 20 November 2017 Mineralogy's solicitor emailed BGP's solicitor, stating:

"Mineralogy is arranging for 2 bank cheques to be delivered to you payable to your trust account:

USD \$17,629,673.68

AUD \$51,733.57

These cheques are delivered on the basis of the undertaking offered by your firm to the Court to hold the amounts until hearing and determination of the appeal. ("emphasis added")

Would you please confirm your undertaking by reply..."<sup>5</sup> (emphasis added)

[9] The two amounts were the amount of the judgment sum and of assessed costs. The orders of 9 October 2017 only related to the dismissal of Mineralogy's claim and payment of the judgment sum, not to costs. BGP's solicitor responded by email on the same date writing:

"Further to our discussion and your email below, my client will accept the 2 cheques from Mineralogy as follows:

1. USD \$17,629,673.68 to be paid into the GRT Lawyers trust account as per the Order of His Honour Justice Fraser made 13 November 2017. This amount represents the judgment sum only and is subject to the undertaking; and,

2. AUD \$51,733.57 paid to GRT Lawyers in respect to costs as assessed further to the Order of His Honour Justice Jackson dated 7 April 2017 ... . This amount is paid without condition or any undertaking attached to it."<sup>6</sup>

[10] The relevant bank cheques were delivered to BGP's solicitor who acknowledged receipt of the cheques by an email to Mineralogy's solicitor later that day, stating:

"Cheques have been received. Thanks."<sup>7</sup>

<sup>4</sup> *Mineralogy Pty Ltd v BGP Geosplorer Pte Ltd* [2017] QCA 275, [17].

<sup>5</sup> AR p 146.

<sup>6</sup> AR p 145.

<sup>7</sup> AR p 145.

- [11] There followed a prolonged delay with clearance of the USD cheque. The proceeds were finally received and transferred by Westpac on 31 January 2018 to BGP's solicitor's trust account.<sup>8</sup>

*The penny drops*

- [12] Only a few days earlier, on 28 December 2017, Mineralogy electronically transferred payment of post-judgment interest calculated at the prescribed rate on the judgment sum for the period between the date of judgment through to 20 November 2017, the date of delivery of the cheque. Perhaps it did not include that amount in the total of its cheque delivered on 20 November 2017 because it had not by then realised it faced a potential issue regarding the accrual of post-judgment interest.
- [13] It had evidently realised that issue loomed by early December. Its solicitors then asserted to BGP's solicitors that acceptance of the cheque for the judgment debt on 20 November 2011 constituted payment of the judgment debt<sup>9</sup> and that the post-judgment interest ceased to accrue on the date of delivery of the cheque. BGP's position, at least as articulated by its solicitor's email of 8 December 2017 to Mineralogy's solicitor, was:

“[P]ost-judgment interest..., of course, continues to accrue until BGP has the benefit of the funds. That seemingly could only be until the Bendigo Bank cheque clears (which it hasn't) and Mineralogy either withdraws its appeal or the appeal is decided.”<sup>10</sup>

*The applications below*

- [14] Against the background of delay in the cheque clearing BGP obtained an enforcement hearing summons. Mineralogy applied to set aside or stay the summons. It also made application for an order that the interest it belatedly paid on the judgment sum ought only have been payable at the rate of 3.5 per cent per annum and sought an order for repayment of the excess paid to date. It also sought a declaration that it had paid BGP all of the post-judgment interest it was required to pay.
- [15] Those applications were determined in the decision now under appeal.
- [16] It was common ground below that the enforcement hearing should not proceed.<sup>11</sup> As to the appropriate rate of interest, the learned primary Judge concluded it should be less than the prescribed interest rate and set it at 4.5 per cent per annum. No complaint is made about that order.
- [17] On the key issue of whether post-judgment interest had ceased to accrue by reason of the payment of the judgment sum, his Honour concluded, by reason of the circumstances of the payment, it had not had the effect that the judgment sum was

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<sup>8</sup> AR p 258. In fact the Bank of New York Mellon paid Westpac US\$100 less than the sum identified on the cheque, a shortfall which was subsequently remedied.

<sup>9</sup> AR p 150.

<sup>10</sup> AR p 153.

<sup>11</sup> Reasons [5].

no longer payable. He concluded post-judgment interest had accrued and continued to accrue from the date of judgment on the amount ordered.<sup>12</sup>

### Discussion

- [18] The order of 9 October 2017, that Mineralogy pay BGP the sum of US\$17,629,673.68, was a “money order” as that term is defined in *Civil Proceedings Act 2011* (Qld) (“the Act”), namely:

“**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.” (emphasis added)

- [19] Section 59(2) of the Act creates and regulates the obligation to pay post-judgment interest on such a money order, providing:

“Interest is payable from the date of a money order on the money order debt unless the court otherwise orders.”

- [20] That provision makes express provision for when payable interest commences but not for when payable interest ceases accruing. As a matter of logic, it must cease when there is no longer a money order debt to pay interest on. When is that?

- [21] The Act defines a “money order debt”:

“**money order debt** means the amount of money payable under a money order”.

- [22] Two conclusions flow from these provisions. Firstly, interest ceases accruing when there is no longer any “amount of money payable under a money order”. Secondly, money will no longer be payable on a money order debt when the “order ... for the payment of money” has been satisfied.

- [23] In this case that order was against the then plaintiff, Mineralogy, in favour of the successful counter-claiming defendant, BGP, in these terms:

“The plaintiff pay the defendant the sum of US\$17,629,673.68.”  
(emphasis added)

- [24] Mineralogy presses the conclusion such a payment occurred when it made payment of the amount of judgment sum to BGP’s solicitor. It contends that occurred on 20 November when the cheque was received by BGP<sup>13</sup> or alternatively 31 January 2018 when the funds cleared and were transferred to BGP’s solicitor’s trust account.

- [25] Many of Mineralogy’s arguments went to establishing that a payment of the amount of the judgment sum was made by Mineralogy to BGP’s solicitor. That is neither in dispute nor is it the determinative question. The determinative question is: did that payment satisfy the court’s money order? The answer is no.

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<sup>12</sup> Reason [56]-[57].

<sup>13</sup> The usual principle being, as explained in *Tilley v Official Receiver in Bankruptcy* (1960) 103 CLR 529, 532, 535, that acceptance of a cheque implies agreement it shall be considered as payment, conditional upon the cheque clearing. Also see *George v Cluning* (1979) 28 ALR 57, 62.

- [26] Emphasis was placed in argument upon the conceptually bilateral nature of payment, as distinct from the unilateral nature of tender. In the context of payment of a contractual debt, it is well established payment must be consensual, requiring an accord between the parties in the sense money is not only paid by the debtor but is accepted as payment by the creditor, either expressly or by the creditor treating the funds as the creditor's own.<sup>14</sup> In the present context though, it is more pertinent to enquire what the parties' accord was as to the purpose for which the payment was made and accepted. That enquiry exposes that the payment was neither made nor accepted for the purpose of it being applied in satisfaction of the Court's money order.
- [27] The money order required a payment which was of its nature unconditional. It simply required a payment of money to BGP. Had the order been satisfied BGP would have been unconditionally entitled to possess and use the money as its own. The payment made by Mineralogy did not have that unconditional character. As Mineralogy's solicitor explained to BGP's solicitor in the email of 20 November 2017, the payment was being delivered to BGP's solicitor "on the basis of the undertaking offered by your firm to the Court to hold the amounts until hearing and determination of the appeal". Money paid on that basis could not be applied in satisfaction of the Court's money order.
- [28] It matters not if one re-frames the determinative question above, to accommodate the language of Mineralogy's argument, and ask: did the payment satisfy the money order debt? The payment did not satisfy the debt because the condition on which the money was paid prevented it from being applied in satisfaction of the debt.
- [29] It is no answer to say, as Mineralogy does, that BGP made a commercial choice to give an undertaking which prevented the payment made pursuant to the money order being disbursed to BGP to use as its own. There were two parties here. Mineralogy clearly only made the payment on the basis the money was to be held on trust pending appeal, not on the basis BGP was free to possess and use the money as it would have had the money simply been paid in satisfaction of the debt.
- [30] There is no evidence to suggest Mineralogy sought agreement or BGP agreed that BGP's solicitor's act of receipt of the payment would constitute an acceptance that the money order was satisfied. Nor does such agreement arise by implication. It is true that in Fraser JA's order, encapsulating the undertaking given, he referred to monies "recovered" from Mineralogy "pursuant to" the money order. In the circumstances of this case that does not bespeak an implied agreement to surrender the fruits of the money order. The reference to the recovery of monies "pursuant" to the money order was to that feature of the money order necessitating payment of the judgment sum by Mineralogy. It was not a reference to that feature of the money order which required the payment be made to BGP, for Mineralogy only made the payment on the basis it would be held pending appeal and not paid out to BGP.
- [31] It is also no answer to say, as Mineralogy does, that a payment to BGP's solicitor was in effect a payment to BGP. Payment to a principal's agent may in many

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<sup>14</sup> *Mann On The Legal Aspect of Money* 7<sup>th</sup> Edition [7.09].

circumstances constitute payment in satisfaction of a debt owed to the principal<sup>15</sup> but not in circumstances where more is required for it to have that effect.

- [32] Here the condition requiring the payment to be held pending disposition of the appeal meant more was required before the order that the judgment sum be paid to BGP was satisfied. The money order debt was not satisfied by the payment because the condition on which the payment was made prevented it from being applied in satisfaction of the debt. As described by the order of Fraser JA, this was a payment of monies to be “held on trust ... pending further order of the court”.
- [33] The matter has some similarity to *Anthony v Tasmanian Alkaloids Pty Ltd (No 2)*.<sup>16</sup> In that case Blow J, as he then was, made a consent order staying execution of a money judgment pending determination of an appeal against it, on condition the defendant pay the plaintiff’s solicitors part of the judgment sum to be held in a trust account and pay the balance to a bank account of the defendant’s choice with the interest generated to be held in an account of both parties. The appeal was dismissed and his Honour declined to order that no post-judgment interest accrued in respect of the period since the making of the above payments. His Honour concluded payment in those circumstances did not extinguish the judgment debt.
- [34] Mineralogy sought to distinguish that case from the present on the basis the arrangement there was the product of a court order, not an undertaking. This echoes Mineralogy’s argument, premised on the fact of the undertaking, that BGP made a commercial choice to forego its entitlement to use the payment. This is to ignore that the undertaking was given in an application by which Mineralogy was seeking to avoid payment of the judgment sum into the hands of BGP, lest Mineralogy struggle to retrieve it should Mineralogy’s appeal succeed. It is to ignore the stance adopted by Mineralogy that it was only making the payment on the basis it was to be held in accordance with the undertaking. It is to ignore that the order made in Mineralogy’s application expressly referred to that aspect of the undertaking that the money would be held pending “further order of the court”.
- [35] The purpose of post-judgment interest is to compensate a plaintiff who has not been paid. As the learned primary judge observed<sup>17</sup> it also serves the purpose of inducing timely payment. It is however illusory to cast Mineralogy’s payment as timely, so that, having fulfilled the latter purpose it ought not bear the brunt of further post-judgment interest. The position taken by it in paying the money only on the basis specified meant that it was not prepared to allow the payment to be used to compensate the plaintiff.
- [36] The payment by Mineralogy was a payment of money to be held on trust. The trust was inchoate. It is clear though that the fate of the money held on trust – whether it was eventually to be paid to BGP or paid to Mineralogy – was dependent upon the further order of the court, which order would invariably turn upon the outcome of the appeal. Mineralogy did not make the payment on the basis it could be applied by BGP in satisfaction of the money order. Rather it was made on the basis that would not happen, not at least until and depending upon the outcome of the appeal and the making of a further order. On no view did the payment satisfy the court’s

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<sup>15</sup> For instance a solicitor has implied authority to receive payment of a debt for which the solicitor is instructed to sue – see *Chitty on Contracts* 32<sup>nd</sup> Edition [21-044].

<sup>16</sup> (2005) 15 Tas R 84.

<sup>17</sup> Citing *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (No 2)* [2014] NSWCA 425.

money order or the money order debt. The primary judge was right to conclude the amount payable to BGP under that order remained payable.

[37] Those conclusions are determinative of the appeal. The appeal should be dismissed with costs.

[38] I would order:

1. Appeal dismissed.
2. The appellant is to pay the respondent's costs of and incidental to the appeal on the standard basis.