SUPREME COURT OF QUEENSLAND

CITATION:	*Binaray Pty Ltd (ACN 119 724 211) as Trustee for the Allen Family Trust v RAMS Financial Group Pty Limited (ACN 105 207 538)* [2019] QSC 165
PARTIES:	**BINARAY PTY LTD (ACN 119 724 211) as Trustee for the Allen Family Trust** (plaintiff) **v** **RAMS Financial Group Pty Limited (ACN 105 207 538)** (defendant)
FILE NO/S:	BS No 11484/13
DIVISION:	Trial Division
PROCEEDING:	Civil trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	27 June 2019
DELIVERED AT:	Brisbane
HEARING DATE:	30 April 2019
JUDGE:	Brown J
ORDER:	**I order that:** **1. The defendant pay the plaintiff the sum of $45,174.20 as damages;** **2. The defendant provide an affidavit from Mr Mullins setting out his calculation of interest by 12 July 2019; and** **3. The parties provide submissions as to interest and costs by 19 July 2019.**
CATCHWORDS:	DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR BREACH OF CONTRACT – REMOTENESS AND CAUSATION –LOSS OF PROFITS – calculation of loss of a valuable commercial opportunity LIMITATION OF ACTIONS – LIMITATION OF PARTICULAR ACTIONS – SIMPLE CONTRACTS, QUASI-CONTRACTS AND TORTS - where defendant contended part of action for breach of contract statute

barred – basis of calculation

INTEREST – RECOVERABILITY OF INTEREST – IN GENERAL – basis of calculation

Limitation of Actions Act 1974 (Qld), s 10(1)
Civil Proceedings Act 2011 (Qld), s 58

Spotlight Pty Ltd v NCON Australia Ltd (2012) 46 VR 1, cited
Wiggins Island Coal Export Terminal Pty Ltd v Civil Mining & Construction Pty Ltd [2017] QCA 296, cited

COUNSEL:	A P J Collins, with S F Lamb, for the plaintiff P Neskovcin QC, with N Andreatidis, for the defendant
SOLICITORS:	Bell Legal Group for the plaintiff Allens Linklaters for the defendant

Introduction

[1] Judgment was delivered in this matter on 22 February 2019.[1] I permitted further submissions to be provided by the parties with respect to:

(a) the approach adopted with respect to quantum;[2]

(b) how the damages calculation is affected by the finding that the action was partly statute barred;[3]

(c) the calculation of interest;[4] and

(d) costs.[5]

[2] I permitted both parties an extension of time to provide submissions, following a request for extension from Binaray. Binaray raised an objection to the defendant having provided further evidence in respect of the calculation as to how the time limitation affected damages and the calculation of interest. I therefore listed the matter to hear further submissions orally on 30 April 2019.

Quantum

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1 *Binaray Pty Ltd as Trustee for the Allen Family Trust v RAMS Financial Group Pty Limited* [2019] QSC 33.

2 At [451].

3 At [462].

4 At [462] and [464].

5 At [464].

[3] I allowed further submissions to be made as to the determination of quantum set out at [448] to [450] of the reasons.[6]

[4] Binaray in its further submissions seeks to treat all the findings as to loss in the reasons for judgment as provisional.[7] Its submissions therefore sought to revisit and challenge a number of the findings made, rather than being limited to the approach set out in respect of quantum. It is evident from the reasons themselves that the reasons were not provisional. In doing so, Binaray has gone well beyond the scope of the submissions that the Court had permitted the parties to make. The defendant makes submissions setting out, correctly, the Court's approach and submits that the approach adopted in regards to the assessment of damages was consistent with principle.[8]

[5] Binaray seeks to challenge findings I have made and make additional submissions as to evidence, submitting that the reasons involve a misinterpretation of critical evidence. Similarly, the plaintiff submits that the second stage conversion rate has the effect of double discounting.[9] These are all matters upon which the parties had the opportunity to make submissions at trial and are issues which were considered in the reasons. It is not therefore appropriate that I revisit findings that I have made[10] in either of these respects, nor was that the purpose of allowing further submissions.

[6] I have considered the plaintiff's submissions in respect of the discount rate adopted at [450] and the finding that the loss would have generated a loss equivalent to only five or six loans over the period of the franchise. The plaintiff contends that the discount rate adopted of 60 percent is too high and a more moderate discount should be adopted. My reasons outlined a number of matters which led me to consider that it was appropriate to apply a discount rate of 60 percent. They included the fact that I considered the conversion rate was likely to be less than 25 percent,[11] the effect of natural drift[12] and the other contingencies identified in the judgment.[13] The plaintiff's submissions at [25] and [27] suggest that the discount rate takes account of whether or not a BOC wished to take out an additional loan and variable costs. That is incorrect. The discount did take into account that I found that the 25 percent conversion figure was the maximum that could be achieved and that the more probable figure was likely to be less.[14] There was a possibility no loans would have been converted at all.

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6 [2019] QSC 33 at [451].

7 Plaintiff's Further Submissions, [2].

8 Defendant's Further Submissions, [5].

9 Plaintiff's Further Submissions, [14].

10 Nor comment on the correctness or otherwise of the assumptions or assertions made by the Plaintiff as to those findings.

11 At [367], [448] and [449].

12 At [450].

13 See, for example: [309], [347] and [432].

14 At [448] and [450].

[7] None of the matters raised by the plaintiff cause me to reconsider the discount rate adopted as a matter of principle.

[8] Binaray's submissions as to referrals again seek to have the Court revisit findings already made. They were not provisional and it is not appropriate that I revisit those findings.

[9] Binaray's submissions in conclusion at paragraphs [30]-[31] seek to have the Court adopt a different approach to quantum. That approach is, however, inconsistent with the Court's reasons and findings and relies on the Court accepting submissions challenging the findings already made by the Court. I therefore decline to adopt the alternative approach proffered by Binaray, and confirm the approach set out in [448] to [450].

[10] I therefore find that RAMS is liable to Binaray for damages in the amount of $90,348.40.

Effect of limitation defence

[11] Neither the plaintiff nor defendant provided calculations in their original submissions that excluded any BOC additional loans that allegedly could have been written prior to 28 November 2007. That is surprising, given it was a live issue on the pleadings. However, in fairness to the parties, there were a number of different variables that were in dispute in relation to the question of the quantum.

[12] Having asked the parties for further submissions following the provision of my reasons, it is apparent that the evidence admitted during the trial does not allow precise calculations to be made but, at best, provides a basis for approximating the reduction based on the action for breach of contract being statute barred before November 2007.

[13] The defendant in its submissions provides calculations in Annexure 1 based on numbers which were not in evidence but which were said to have underlain Mr Potter's calculations in the alternate Potter calculation at [1.5] of Exhibit 77, which was relied upon by the Court in calculating the quantum, in order to calculate the effect of the limitation defence. RAMS also states that the total number of customers was assumed by Mr Potter to be 1161.56, which again underlay his model for the alternate Potter calculation, but again was not in evidence. RAMS in its further submissions raises the prospect of providing further evidence in relation to Annexure 1 because of the difficulty with the state of the evidence before the Court and the limitations of using 449 BOCs as at September 2007,[15] which only represent active BOCs as at that date. It states that the total number of BOCs that existed between June 2006 and November 2007, which includes those who had discharged their loans, was estimated to be 835.66. RAMS offered to put on a further affidavit if the Court considered it wished the parties to adduce further evidence, but did not make an application to do so.

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[15] See *Binaray Pty Ltd as Trustee for the Allen Family Trust v RAMS Financial Group Pty Limited* [2019] QSC 33 at [457].

[14] Otherwise, RAMS submits that the Court has to do the best it can on the basis of the evidence before it and suggests that a proportional approach be adopted. It contends that when the Court has regard to the evidence that is before the Court and the number of BOCs at the beginning of the franchise in 2006, which was 304, and the number of BOCs that existed post-2008, which was 316, it is apparent that most of the BOCs existed in the pre-limitation period. It submits that the Court might adopt a proportionality assessment or percentage assessment and reduce the claim in that way.

[15] Binaray took issue with the new evidence, although when I relisted the matter for a hearing in respect of its objection for the matter to be argued, the opposition was tempered somewhat. It does, however, submit that the Court should do the best with what it has, rather than having further expert evidence adduced.

[16] Binaray submits that the proportional approach is not appropriate. It submits that the vast majority of the losses the subject of the claim would have accrued after November 2007 and that the limitations defence is therefore of minimal impact. It contends that because the timeframe for the loans was 4.8 to 5 years,[16] many of the loans entered pre-November 2007 would have ceased by November 2007 and no income would have come to the plaintiff in respect of those loans after that date, given the database returned to zero in January 2008 after Westpac purchased RAMS but not the database. It contends that the BOCs that existed at the commencement of the franchise up until the limitation point would have a far greater drop off rate than what would happen after that point. It therefore submits that dissipation of the loans would not be taken into account in the proportionality approach.

[17] The plaintiff submits that I should use Table 5 of Ms Letts calculation,[17] which in column 5 contains figures post January 2008 using a zero balance, as the best proxy for the damages. That was linked with its submission that the Court should adopt a different approach to quantum outlined in [30] of its submissions. The difficulty with Binaray's submission, however, is that Ms Letts' approach is not consistent with the approach that the Court has taken as to quantum.

[18] RAMS submits that Binaray's submission that the greater part of the loss was suffered by Binaray after January 2008 is unsupported by the evidence of Binaray's own expert.[18] Ms Letts' calculation does, however, demonstrate that the loss for the period pre January 2008 is greater than for the period post January 2008, which accords with the fact that the BOC database was only open for the period from January 2008 to February 2010.

[19] I have considered whether to permit further evidence to be led to resolve this issue but have reached the view it is not appropriate. First, I am not satisfied it is a simple process of providing figures such as those contained in Annexure 1 to the

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16 Which was an estimate accepted by both parties.

17 Exhibit 77, Letts Attachment A to Second Joint Statement of Experts 7 May 2017, "Calculation 5".

18 Exhibit 77, Letts Attachment A to Second Joint Statement of Experts 7 May 2017, "Calculation 5", CF "Calculation 6".

defendant's submissions without an explanation of how they were determined, which will quite possibly lead to the plaintiff wishing to carry out its own exercise in response.[19] Secondly, the quantum is not significant and the cost of further expert evidence is unwarranted, particularly given that there has been extensive expert evidence presented in this case and the limitation defence was a live issue on the pleadings leading up to the trial. Further, given the state of the evidence and the uncertainty as to the number of BOCs in Binaray's territory before 2008, any exercise can only be an approximation. There are not exceptional circumstances warranting the re-opening of evidence, particularly when weighed against the considerations of the need for certainty and finality of litigation with the case having been closed.[20]

[20] Adopting a broad brush approach and doing the best I can on the evidence, if I look at the comparison between Ms Letts' calculation 5,[21] which in the fifth column makes a calculation of damages post January 2008 with a nil opening balance and 316 customers post 2008, and the calculation contained in Table 6, which includes figures assuming 304 customers as the opening balance in 2006 and 316 customers post January 2008 for:

(e) the 7.09 percent conversion rate;

(f) the 25 percent conversion rate; and

(g) based on an 18 month and 24 month time lag, the results are as follows:

	316 in Jan 2008 (nil opening balance)	**316 in Jan 2008 (304 opening balance)**	**% of 2008 loss of total loss for the period from 2006 onwards**
7.09% Conversion Rate (18 Month Time Lag)	182,109	475,361	38.31%
7.09% Conversion Rate (24 month Time Lag)	191,389	468,161	40.88%
25% Conversion Rate (18 Month Time Lag)	361,648	1,361,658	26.56%
25% Conversion Rate (24 Month Time Lag)	394,038	1,337,856	29.45%

[21] Even though I have not adopted Ms Letts' calculations in the calculation of quantum, the comparison gives a means of estimating the proportion of damage for the period post January 2008 compared to the whole of the period from 2006. The above

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19 *Spotlight Pty Ltd v NCON Australia Ltd* (2012) 46 VR 1 at [21]-[22], in which the Victorian Court of Appeal referred to the uncertainty of the evidence that would be adduced as a factor to be taken into account in determining whether to re-open the evidence.

20 *Wiggins Island Coal Export Terminal Pty Ltd v Civil Mining & Construction Pty Ltd* [2017] QCA 296, [57].

21 Exhibit 77, Letts Attachment A to Second Joint Statement of Experts 7 May 2017.

percentages are not disproportionate to the fact that there were 304 customers in 2006 and 316 post January 2008.

[22] Given I considered that Binaray would have maintained some of the BOCs on its own database notwithstanding that the database returned to nil after the purchase by Westpac, any estimate must take into account that the opening balance post January 2008 would not have been nil. Further, as submitted by Binaray, some BOCs would have had their loans discharged by November 2007 and some additional BOCs would have been added to the database in December 2007.

[23] Taking those matters into account and adopting a conservative, broad brush approach, I think that the damages should be reduced by 50% to account for the effect of the limitation defence and therefore lowered from $90,348.40 to $45,174.20.

Interest

[24] As to the calculation of interest it is, consistent with the reasons,[22] appropriate that interest be determined by applying it progressively as upfront and trailing commissions were earned, using the figure of $45,174.20. Binaray did not object to Mr Mullins, who is engaged by RAMS, providing an affidavit setting out the basis for his calculation of interest, calculated progressively as upfront and trailing commissions were earned. Mr Mullins should provide an affidavit based upon the figure of $45,174.20 that should be served upon the plaintiff by 12 July 2019. The parties should provide confirmation to the Court of the correct figure to be adopted for interest if it can be agreed or, otherwise, make submissions as to the calculation of interest by 19 July 2019.

Costs and interest

[25] The parties should provide submissions as to the calculation of interest by 19 July 2019.

[26] The parties should provide submissions as to costs by 19 July 2019.

[27] Orders as to interest and costs will be made on the papers unless the parties make a submission that a hearing is required.

Orders

[28] I order that:

(1) The defendant pay the plaintiff the sum of $45,174.20 as damages;

(2) The defendant provide an affidavit from Mr Mullins setting out his calculation of interest by 12 July 2019; and

(3) The parties provide submissions as to the calculation of interest and costs by 19 July 2019.

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22 At [462].

Corrigendum

[29] In the course of reviewing my reasons I noted the following errors:

(a) [82] – in the second last sentence, “Given the” should be “There was”;

(b) [144] – the word “not” should be inserted before “sufficient”;

(c) [203] – “one and three” and “three and seven” should be “one on three” and “three on seven” (see also [211]);

(d) [234] – “Fardon” should be “Kilpatrick”;

(e) [252] – in the last line, “brokers working through brokers” should be “brokers working through aggregators”;

(f) [271] – “Closure of broker channel” should be a heading;

(g) [347] – delete first sentence;

(h) [392] – in the fourth sentence, “rates” should be “loans”;

(i) [410] – insert the words “they went” after “fact” in the first line;

(j) [426] – at the end of the first sentence, “to then apply” should be “then applies”; and

(k) [463](v) – insert the words “RAMS did have an obligation to” before the word “provide”.

[30] There were also some minor typographical and grammatical errors. I will cause the published judgment to be corrected to correct the above errors and the typographical and grammatical errors.