

SUPREME COURT OF QUEENSLAND

CITATION: *Avis & Anor v Mark Bain Constructions Pty Ltd [No 2]*
[2011] QSC 151

PARTIES: **BS2488 of 2007**
CAROL LYNETTE AVIS
(plaintiff)
v
MARK BAIN CONSTRUCTIONS PTY LTD
ACN 010 846 385
(defendant)

BS2491 of 2007
BARNSCAPE PTY LTD
ACN 077 636 367
(plaintiff)
v
MARK BAIN CONSTRUCTIONS PTY LTD
ACN 010 846 385
(defendant)

FILE NO/S: SC No 2488 of 2007
SC No 2491 of 2007

DIVISION: Trial Division

PROCEEDING: Claim

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 6 June 2011

DELIVERED AT: Brisbane

HEARING DATES: 21 April 2011
12, 16 May 2011

JUDGE: Atkinson J

ORDERS: **The first defendant in BS2488 of 2007 pay:**

- (1) **the plaintiff the sum of \$283,917 as compensation under s 82 of the *Trade Practices Act 1974* (Cth);**
- (2) **the plaintiff the sum of \$185,471.70 in interest;**
- (3) **the plaintiff's costs of the proceedings to be assessed on the standard basis save that the plaintiff is to pay the first defendant's costs of the application to amend heard on 16 April 2010, the costs of the hearings on 31 May 2010, 1 June 2010 and 3 June 2010, including the first defendant's costs of obtaining the further expert report ordered on 16 April 2010.**

The first defendant in BS2491 of 2007 pay:

- (1) **the plaintiff the sum of \$216,483 as compensation under s 82 of the *Trade Practices Act 1974* (Cth);**
- (2) **the plaintiff the sum of \$141,419.75 in interest;**
- (3) **the plaintiff's costs of the proceedings to be assessed on the standard basis save that the plaintiff is to pay the first defendant's costs of the application to amend heard on 16 April 2010, the costs of the hearings on 31 May 2010, 1 June 2010 and 3 June 2010, including the first defendant's costs of obtaining the further expert report ordered on 16 April 2010.**

CATCHWORDS: PROCEDURE – COSTS – RECOVERY OF COSTS – where the plaintiffs were awarded compensation pursuant to s 82 of the *Trade Practices Act 1974* (Cth) – whether the first defendant should pay the plaintiffs' costs of the proceedings

PROCEDURE – JUDGMENTS AND ORDERS – INTEREST ON JUDGMENTS – RATE – where the plaintiffs submitted three alternative methods by which the interest calculation could be performed – on what basis interest should be calculated

Supreme Court Act 1995 (Qld), s 47(1)

Trade Practices Act 1974 (Cth), s 82

Uniform Civil Procedure Rules 1999 (Qld), r 681

COUNSEL: S Monks for the plaintiff in both matters
A Collins for the first defendant in both matters

SOLICITORS: Boyd Legal for the plaintiff in both matters
Holland & Holland for the first defendant in both matters

- [1] On 11 April 2011, reasons for judgment were handed down in these matters ordering the first defendant in BS 2488 of 2007 to pay the plaintiff, Carol Lynette Avis, the sum of \$283,917 as compensation under s 82 of the *Trade Practices Act 1974* (Cth) (“TPA”) and the first defendant in BS 2491 of 2007 to pay the plaintiff, Barnscape Pty Ltd (“Barnscape”) the sum of \$216,483 as compensation under s 82 of the TPA.
- [2] The reasons for judgment said that those payments were to be made with interest and that the court would hear submissions about the precise form of the orders including the orders that should be made with regard to interest and costs.

Interest

- [3] So far as interest is concerned, the plaintiffs submitted that there were three alternative methods by which this calculation might be performed. The first, conventional method, involved applying the interest rate set out in Practice Direction No 2 of 2002 and Practice Direction No 6 of 2007 from the date of settlement when the loss occurred until the date of judgment. Other methods of

calculation, more advantageous to the plaintiffs, were suggested to take account of the interest foregone on the amount of damages paid by the second defendant who settled with the plaintiffs just before the trial. Such methods would not be fair to the first defendant Mark Bain Constructions Pty Ltd (“Mark Bain Constructions”). It can and should only be made to pay interest on the amount of compensation which it has been ordered to pay.

- [4] As the first defendant submitted, the first method ought to be adopted as the only method consistent with the reasons for judgment and the order for the payment of compensation made.
- [5] Section 47(1) of the *Supreme Court Act 1995* (Qld) provides that:

“In any proceedings in respect of a cause of action that arises after the commencement of the *Common Law Practice Act Amendment Act 1972* in a court of record for the recovery of the money (including proceedings for debt, damages or the value of goods) the court may order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of that sum for the whole or any part of the period between the date when the cause of action arose and the date of judgment.”

The purpose of an award of interest is to compensate a party for being kept out of its money. It would be inappropriate to apply commercial bank rates as proposed by the first defendant as those rates are essentially compound rates of interest because interest is paid on interest. The court will ordinarily apply the simple interest rate used in the Practice Directions.

- [6] The criteria which I intend to apply to the award of interest in this case are as follows:
- Interest should be awarded on the judgment sums;
 - Interest should be awarded from the date of settlement, when the loss was incurred, until the date of judgment;
 - The interest rate to be applied is the simple interest rate set out in the Practice Directions of the court which apply to default judgments but are also conventionally used for the calculation of interest on a judgment sum after trial.
- [7] Using that method of calculating interest, interest payable to Mrs Avis pursuant to Practice Direction No 2 of 2002, which prescribed an interest rate of 9 percent per annum, is \$78,127.74 for the period from 9 June 2004 to 30 June 2007; and from 1 July 2007 until 11 April 2011, when Practice Direction No 6 of 2007 prescribed a rate of 10 percent per annum, the amount of interest payable is \$107,343.96. With regard to Barnscape, the amount of interest payable from 9 June 2004 to 30 June 2007 is \$59,571.38 and from 1 July 2007 until 11 April 2011 the sum of \$81,848.37.
- [8] It follows that Mark Bain Constructions should be ordered to pay Mrs Avis interest in the sum of \$185,471.70 and interest to Barnscape of \$141,419.75.

Costs

[9] Rule 681(1) of the *Uniform Civil Procedure Rules 1999* (Qld) (“UCPR”) provides:

“Costs of a proceeding, including an application in a proceeding, are in the discretion of the court but follow the event, unless the court orders otherwise.”

[10] There were various settlement negotiations between the parties which are referred to by the plaintiffs in their submissions but there was no settlement offer put by the plaintiffs to the second defendant alone. In my view, none of the settlement offers are relevant to the question of costs. A costs order was made during the proceedings which ought not be set aside.

[11] Accordingly the costs order should be that the first defendant is to pay the plaintiffs’ costs of the proceedings to be assessed on the standard basis save that the plaintiffs are to pay the first defendant’s costs of the application to amend heard on 16 April 2010, the costs of the hearings on 31 May 2010, 1 June 2010 and 3 June 2010, including the first defendant’s costs of obtaining the further expert report ordered on 16 April 2010.