

# SUPREME COURT OF QUEENSLAND

CITATION: *Miccon Hire Pty Ltd (in liquidation) v Birla Mt Gordon Pty Ltd (No 2)* [2013] QSC 161

PARTIES: **MICCON HIRE PTY LTD (IN LIQUIDATION)**  
**ACN 084 520 230**  
(plaintiff)

v

**BIRLA MT GORDON PTY LTD**  
**ACN 106 396 801**  
(defendant)

FILE NO/S: SC No 554 of 2011

DIVISION: Trial Division

PROCEEDING: Civil Trial

ORIGINATING COURT: Supreme Court at Townsville

DELIVERED ON: 19 June 2013

DELIVERED AT: Brisbane

HEARING DATE: Dealt with on the papers

JUDGE: Chief Justice

COUNSEL: DA Savage SC and A Moon for the plaintiff  
PJ McCafferty for the defendant

SOLICITORS: Connolly Suthers for the plaintiff  
Corrs Chambers Westgarth for the defendant

## RULING ON INTEREST AND COSTS

- [1] **CHIEF JUSTICE:** On 31 May 2013 I gave judgment for the plaintiff against the defendant for \$2,249,912.08. With the agreement of the parties, for which I was grateful, judgment was handed down by the provision of a copy of the reasons for judgment by email. This ruling deals with interest and costs, and will be published the same way.
- [2] On 9 May 2013 the plaintiff formally offered to settle under Part 5 Chapter 9 of the Uniform Civil Procedure Rules, in the total amount of \$2,384,359.01 plus costs. That total sum comprised principal of \$1,929,520.75 and interest of \$454,838.26. The defendant did not accept that offer. The plaintiff contends now that with the addition of interest, the amount of the judgment exceeds the amount of the offer, so that indemnity costs should be awarded under Rule 360. I turn to the computation of interest.

- [3] Account must be taken of practice directions 21 and 22 of 2012 as to the period prior to 19 April 2013, where interest of no less than 10 percent was provided for. From that date, the award of interest has been governed by practice direction 7 of 2013 with rates set by reference to the Reserve Bank of Australia cash rate.
- [4] The calculation advanced by Counsel for the plaintiff would lead to the following award of interest.

#### **A. Surface Mining Services Agreement invoices**

- [5] These invoices (numbers 25926 and 126066) were respectively payable by 7 June 2010 and 7 July 2010. The plaintiff accepts an interest calculation on the total of the two invoices (\$1,927,622.82) from 7 July 2010.
- [6] Interest is therefore payable as follows:
- |     |   |                     |
|-----|---|---------------------|
| (a) | 7 July 2010 to 18 April 2013, interest at 10 percent, | \$536,565.69        |
| (b) | 19 April 2013 to 31 May 2013, interest at 9 percent,  | <u>\$20,438.08</u>  |
|     | Total   | <u>\$557,003.77</u> |

#### **B. Esperenza Creek Contract invoice**

- [7] \$72,020.31 was payable by 5 February 2010.
- [8] This interest is payable:
- |     |  |                    |
|-----|--|--------------------|
| (a) | 5 February 2010 to 18 April 2013, at 10 percent, | \$23,046.50        |
| (b) | 19 April 2013 to 31 May 2013, at 9 percent,      | <u>\$593.92</u>    |
|     | Total  | <u>\$23,640.42</u> |

#### **C. Additional work invoices**

- [9] Of these amounts, \$31,715.20 was payable by 7 July 2010, and \$165,373.45 by 7 August 2010.
- [10] The following interest is payable.
- On the amount of \$31,715.20:
- |     |   |            |
|-----|---|------------|
| (a) | from 7 July 2010 to 18 April 2013, at 10 percent, | \$8,828.12 |
| (b) | from 19 April 2013 to 31 May 2013, at 9 percent,  | \$336.27   |
- On the amount of \$165,373.45:
- |      |   |                    |
|------|---|--------------------|
| (i)  | from 7 August 2010 to 18 April 2013, at 10 percent, | \$44,628.19        |
| (ii) | from 19 April 2013 to 31 May 2013, at 9 percent,    | <u>\$1,753.41</u>  |
|      | Total   | <u>\$55,545.99</u> |

#### **D. Miscellaneous invoices**

- Invoice 1140737, \$1,430, payable by 10 September 2010:
 

Interest 10 September 2010 to 18 April 2013, at 10 percent,	\$372.58
Interest 19 April 2013 to 31 May 2013, at 9 percent,	\$15.16
- Invoice 1140741, \$23,292.50, payable by 24 September 2010:
 

Interest 24 September 2010 to 18 April 2013, at 10 percent,	\$5,979.47
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	Interest 19 April 2013 to 31 May 2013, at 9 percent,	\$246.96
3.	Invoice 1140742, \$13,217.60, payable by 24 September 2010:	
	Interest 24 September 2010 to 18 April 2013, at 10 percent	\$3,393.12
	Interest 19 April 2013 to 31 May 2013, at 9 percent	\$140.14
4.	Invoice 1140743, \$13,915, payable by 24 September 2010:	
	Interest 24 September 2010 to 18 April 2013, at 10 percent,	\$3,572.15
	Interest 19 April 2013 to 31 May 2013, at 9 percent,	\$147.54
5.	Invoice 10906527, \$253, payable by 7 May 2010:	
	Interest 7 May 2010 to 18 April 2013, at 10 percent,	\$72.51
	Interest 19 April 2013 to 31 May 2013, at 9 percent,	\$2.68
6.	Invoice 1025278, \$1,072.50, payable by 26 March 2010:	
	Interest 26 March 2010 to 18 April 2013, at 10 percent,	\$328.80
	Interest 19 April 2013 to 31 May 2013, at 9 percent,	\$11.37
	Total	<u>\$14,282.48</u>

[11] The total amount thus payable as interest would be \$650,472.66.

[12] Counsel for the defendant, while not disputing the rates, submits interest should be allowed as claimed, that is from 24 September 2010 and as a lump sum, not allocated according to respective invoices.

[13] Paragraph E of the prayer for relief in the amended statement of claim (no 4) reads:  
 “E. Interest thereon pursuant to the provisions of the Supreme Court Act 1995, on the sum of \$2,436,758.96 being the total of the amounts set out in paragraphs A, B, C and D of this prayer from 24 September 2010 at the rate of 9% per annum being an amount as at 29 October 2012 of \$460,247.02, and thereafter at the rate of \$600.84 per day until judgment or payment whichever is the earlier;”

[14] That would lead to an award of interest of \$601,435.39, broken down as follows:

Invoices	Principal	Interest		Total
		24/09/2010 to 18/04/2013 10% pa	18/04/2013 to 31/05/2013 9% pa	
<b>SMSA Claim</b>	\$1,927,622.82	\$494,844.54	\$20,438.08	\$515,282.62
<b>ECC variation</b>	\$72,020.31	\$18,488.50	\$763.61	\$19,252.11
<b>Additional work</b>	\$197,088.35	\$50,595.01	\$2,089.68	\$52,684.69
<b>Miscellaneous Invoices</b>	\$53,180.60	\$13,652.11	\$563.86	\$14,215.97
<b>TOTAL</b>	<b>\$2,249,912.08</b>	<b>\$577,580.16</b>	<b>\$23,855.23</b>	<b>\$601,435.39</b>

[15] Rule 159 of the Uniform Civil Procedure Rules requires a claim for interest to be pleaded specifically – as per para E above.

- [16] Counsel for the plaintiff submits however that without causing relevant prejudice to the defendant, the plaintiff could now (with leave) amend E so that it accords with the interest claims made in his submissions on interest dated 5 June 2013. In pursuing that interest claim, the plaintiff implicitly seeks leave to amend, and I proceed on that basis.
- [17] Leave to amend may be allowed at any time (Rules 375, 380), including post-judgment. Here the amendment would relate only to the interest claim, on which judgment was reserved pending submissions.
- [18] I accept there is no reason why the plaintiff should be denied interest otherwise due (because of non payment in accordance with the contract), where the defendant has not made payment of the sums on which the interest has accrued.
- [19] The contrary contention from Counsel for the defendant is based on the plaintiff's having pinned itself to the claim in 'E' of the prayer for relief. What the plaintiff now seeks is payment of interest in what is the somewhat higher amount due taking account of its precise contractual and procedural entitlements.
- [20] The defendant can point to no disadvantage beyond liability to pay the plaintiff an additional \$50,000. But that is money to which the plaintiff is entitled. Allowing interest in the higher amount does not impinge on the significance of the offer to settle.
- [21] To deny the plaintiff that money, by refusing leave to amend now, would be to punish the plaintiff for failure earlier to seek leave to amend (which would have been granted), and to allow the defendant a windfall on a procedural technicality.
- [22] There will therefore be an order that para E of the prayer for relief in the amended statement of claim (no 4) be amended by the insertion in lieu thereof of paras 13 to 43 of the plaintiff's outline of submissions dated 5 June 2013.
- [23] The interest claimed by the plaintiff should be allowed.
- [24] I therefore add \$650,472.66 to the amount of the judgment (\$2,249,912.08). The total is \$2,900,384.74. The amount of the judgment and the amount for interest respectively exceeded, indeed substantially exceeded, the components of the offer to settle. The plaintiff will have obtained a judgment "no less favourable" than the offer to settle (Rule 360).
- [25] Counsel for the defendant submits that indemnity costs as sought by the plaintiff should nevertheless not be allowed, or allowed only from a date later than claimed.
- [26] As to the Surface Mining Services Agreement claim, the defendant relies on these matters:

1. The defendant says it was entitled to put the plaintiff to “strict proof” of its claims because of the absence of the daily load sheets disclosing destinations.

These points should be made in response: the sheets were provided at the daily meetings (para 9 reasons for judgment), and used by the defendant (para 10), the absence of documents at trial was adequately explained (para 23), and there is no basis to suggest the plaintiff breached its duty of disclosure (para 23).

2. The defendant then complains that it did not appreciate the “precise method” by which the plaintiff calculated its claim until Ex 2 was tendered at the trial.

It suffices in response to refer to my findings that the plaintiff provided sufficient information to the defendant, accepted as such by the defendant (para 13). As to Ex 2 and its basis, I mention without further elaboration the defendant’s attempt at the trial to diverge from the expert evidence regime so clearly set in place by North J. There was nothing inappropriate or exceptionable about the way the plaintiff conducted the trial.

- [27] As to the Esperanza Creek Contract variations, of much lesser proportion, the defendant relies on the amendment of the reply on the second day of the trial (to which this claim related). That was however explained by a significant amendment to the defence effected in the week before trial. That amendment replaced a non-admission with a denial, and that justified the plaintiff’s response.
- [28] None of the submissions raised for the defence warrants a costs order other than that which Rule 260 would ordinarily, in these circumstances, require.
- [29] In addition to the order as to amendment of the claim (para 22 above), I order that the amount of the judgment entered on 31 May 2013 be varied by the inclusion of an interest component of \$650,472.66, so that the amount of the judgment overall is \$2,900,384.74. I order in addition that the defendant pay the plaintiff’s costs of and incidental to the proceeding, including any reserved costs, to be assessed as necessary on the indemnity basis.