SUPREME COURT OF QUEENSLAND

CITATION:	*Chambers v Brice* [2014] QSC 52
PARTIES:	**JOHN CHARLES CHAMBERS** (first plaintiff) **DORRIGO PROPERTY PTY LTD (ACN 127 862 033)** (second plaintiff) **HARROD HOLDINGS PTY LTD (ACN 009 611 278)** (third plaintiff) **v** **ROBERT ANDREW CREETH BRICE** (defendant) **SUSAN MARGARET CHAMBERS** (defendant by counterclaim)
FILE NO/S:	BS1317 of 2010
DIVISION:	Trial Division
PROCEEDING:	Hearing
DELIVERED ON:	27 March 2014
DELIVERED AT:	Brisbane
HEARING DATE:	3 October 2013
JUDGE:	Justice Peter Lyons
ORDER:	**1. The first plaintiff be awarded interest on the sum of $2,086,700 in the amount of $1,008,858.50 up to the date of judgment, being 27 March 2014.** **2. The defendant be awarded interest on the sum of $1,500,000 in the amount of $1,019,920.85 up to the date of judgment, being 27 March 2014.**
CATCHWORDS:	INTEREST – RATE OF INTEREST AND COMPOUND INTEREST – RATE IN OTHER CASES – where the Court gave judgment for the first plaintiff against the defendant for $2,086,700 in damages for breach of contract – where the first plaintiff claimed interest on this amount under s 47(1) of the *Supreme Court Act* 1995 (Qld) – where the first plaintiff submitted that interest should be awarded at the rates specified in Practice Directions relevant to the inclusion of interest in a judgment in default of notice of intention to defend – where the defendant submitted that the rates in the

Practice Directions were not reflective of commercial interest rates and were not appropriate – whether interest should be awarded to the first plaintiff on the basis of the relevant Practice Directions.

INTEREST – AGREEMENTS TO PAY INTEREST – where the Court gave judgment for the defendant against the second and third plaintiffs for $1,500,000 owing under the Loan Agreement – where the Loan Agreement provided an obligation, upon a declared "Event of Default", to pay interest on the "Amount Owing" – where the defendant submitted there was an Event of Default when the second and third plaintiffs failed to repay the first instalment on 19 July 2008 – where the second and third plaintiffs submitted that the defendant must exercise his option to declare an Event of Default, which was not done until 29 March 2010 – where "Amount Owing" was defined in the Loan Agreement to be all moneys owing, including interest – whether the Loan Agreement is construed to require simple or compound interest, and from what date.

Civil Proceedings Act 2011 (Qld), s 58
Supreme Court Act 1995 (Qld), s 47
Uniform Civil Procedure Rules 1999, r 283

Alstom Ltd v Yokogawa Australia Pty Ltd & Anor (No 8) [2012] SASC 117, considered
Chambers v Brice [2013] QSC 232
Cullen v Trappell (1980) 146 CLR 1, followed
Gould v Vaggelas (1985) 157 CLR 215, followed
Hexiva Pty Limited & Ors v Lederer & Ors (2) [2007] NSWSC 49, distinguished
In re Rogers' Trusts (1860) 1 Drew & Sm 338, considered
Interchase Corporation Limited v ACN 010 087 573 Pty Ltd & Ors [2001] QCA 191, followed
Kalls Enterprises Pty Ltd (in liq) v Baloglow & Anor (No 3) [2007] NSWCA 298, followed
Morton v Elgin-Stuczynski & Anor (2008) 19 VR 294, considered
Richard Crookes Constructions (Qld) Pty Ltd v Wendell [1990] 1 QdR 392, considered

COUNSEL: D Kelly QC and E Goodwin for the plaintiffs and defendant by counterclaim

R Bain QC and G Beacham for the defendant

SOLICITORS: Hopgood Ganim for the plaintiffs and defendant by counterclaim

Tresscox for the defendant

[1] On 5 September 2013 I delivered reasons for judgment in this matter. I indicated that I proposed to give judgment for Mr Chambers on his claim against Mr Brice in

the sum of $2,086,700; and on Mr Brice's counter-claim, to give judgment in his favour against the Dorrigo Property and Harrod Holdings in the sum of $1,500,000. Mr Chambers and Mr Brice have sought interest on the amount awarded in favour of each of them.

Interest on amount awarded to Mr Chambers

[2] The amount awarded to Mr Chambers was based upon an assessment of his damages as at 21 February 2009. He claimed interest under s 47(1) of the *Supreme Court Act* 1995 (Qld) (*SC Act*), from that date to 5 September 2013. Section 47 has been repealed, the current equivalent provision being s 58 of the *Civil Proceedings Act* 2011 (Qld) (*CP Act*). The submissions for Mr Brice treated Mr Chambers' claim for interest as one made under s 58 of the CP Act. That approach seems to me to be correct. Section 47 of the SC Act is no longer in force; and it could not be said that, prior to judgment, Mr Chambers had an accrued right, whether to interest or to the exercise of a discretion under s 47, which might have made operative the provisions of s 20 of the *Acts Interpretation Act* 1954 (Qld). Accordingly I shall deal with the application as one made under s 58 of the CP Act. In any event, no material difference has been identified between the two provisions.

[3] Like s 47 of the SC Act[1], s 58 of the CP Act does not authorise an award of interest on interest[2]. Accordingly when interest is included in a judgment under these provisions, it is an award of simple interest[3].

[4] It was submitted on Mr Chambers' behalf that interest should be awarded at the rates specified in Practice Directions relevant to the inclusion of interest in a judgment in default of notice of intention to defend, under r 283 of the *Uniform Civil Procedure Rules* 1999 (*UCPR*). The current Practice Direction is PD 7 of 2013.

[5] For Mr Chambers, reliance was placed on propositions said to be derived from *Kalls Enterprises Pty Ltd (in liq) v Baloglow & Anor (No 3)*[4]. Essentially the propositions were that use of the Practice Directions to determine interest represents the conventional approach; a party seeking to adopt a different approach has both an evidentiary and a persuasive burden of demonstrating that some other order is appropriate[5]; the interest rates specified in the Practice Directions are intended in a broad and practical way to reflect average commercial rates available from time to time[6]; and it is relevant that Mr Brice chose to defend the proceedings, knowing that he faced a claim for interest (originally made under s 47 of the SC Act). Underlying the approach taken for Mr Chambers is the proposition that such interest should be awarded at ordinary commercial rates.

[6] For Mr Brice it was submitted that the rates in the Practice Directions were not reflective of commercial interest rates, demonstrated by the fact that a number of them are simply four percent above the cash rate set by the Reserve Bank. They

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1 See s 47(3)(a) of the SC Act

2 See s 58(4)(a) of the CP Act.

3 Compare *Avis & Anor v Mark Bain Constructions Pty Ltd [No 2]* [2011] QSC 151 at [5]; *Fulcher & Ors v Knott Investments Pty Ltd & Ors* [2012] QSC 232 (*Fulcher*) at [173].

4 [2007] NSWCA 298 (*Kalls*).

5 Ibid at [17].

6 See *Kalls* at [19] and *Fulcher* at [173].

reflected a policy, designed to promote uniformity and simplicity. Accordingly, they were not appropriate for the exercise of the discretion conferred by s 58 of the CP Act. Alternatively, if the rate is to be used, only the current rate should be used. The adoption of the rates in the Practice Directions would not be consistent with the compensatory function of the power to award interest under s 58 of the CP Act. It was further submitted that the propositions found in *Kalls* have not been adopted in Queensland. A rate of 6.75 percent would more accurately reflect average commercial rates over the period from 21 February 2009 to judgment.

[7] The power to award interest (then found in s 47 of the SC Act) was discussed by McPherson JA (with whose reasons the other members of the Court agreed) in *Interchase Corporation Limited v ACN 010 087 573 Pty Ltd & Ors*[7]. His Honour observed that the section conferred a discretion, to be exercised judicially[8]. The purpose of an award of interest is to compensate the plaintiff for being kept out of the money represented by the judgment sum[9], and accordingly an interest award is itself "in the nature of damages"[10]. I respectfully accept the correctness of these propositions. With respect to the observation that the section confers a discretion which is to be exercised judicially, it seems to me that, in general, in circumstances which are relevantly similar, outcomes of the exercise of the discretion should also be similar; but outcomes should differ if circumstances are relevantly different; and the purpose of an award of interest is to be considered in determining the relevance of the circumstances relied upon by the parties.

[8] I also accept that, at least as a general proposition, where interest is to be awarded, it should be awarded "at ordinary commercial rates"[11]; and that an award of interest should be approached "in a broad and practical way"[12].

[9] The provisions of r 283 of the UCPR to which the Practice Directions relate are intended to facilitate an award of interest when judgment is to be given in default of a notice of intention to defend, and defence, where the claim is for a debt or liquidated demand. Interest awarded under the relevant statutory provisions, is not, under the general law, a debt or liquidated demand; and accordingly, r 283 is designed to provide a mechanism by which a judgment for a debt or liquidated demand, in default, might also include an award of interest. Earlier rules which provided for the inclusion of a claim for interest under such provisions, with a claim for a debt or liquidated demand, and the giving of a judgment on such a claim, were discussed by Cooper J in *Richard Crookes Constructions (Qld) Pty Ltd v Wendell*[13]. There is no reason to think that r 283, and its associated Practice Directions, so far as they relate to a claim for interest under s 58 of the CP Act or analogous provisions, have a different purpose than the exercise of the power to award interest when a plaintiff succeeds at trial. It would follow that the Practice Directions are intended to provide a mechanism for awarding interest to compensate a successful plaintiff for the loss of use of money, in the same way as an award made by the

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7 [2001] QCA 191 (*Interchase*).

8 Ibid at [59].

9 *Batchelor v Burke* (1981) 148 CLR 448, 455; *Grincelis v House* (2000) 74 ALJR 1247, 1250, cited with approval in *Interchase* at [59].

10 *Haines v Bendall* (1991) 172 CLR 60, 66, cited with approval in *Interchase* at [59].

11 *Cullen v Trappell* (1980) 146 CLR 1, 21 per Gibbs J; *Gould v Vaggelas* (1985) 157 CLR 215, 275.

12 *Cullen v Trappell* (1980) 146 CLR 1, 22, per Gibbs J; *Heydon v NRMA Ltd (No 2)* (2001) 53 NSWLR 600 at [31], cited with approval in *Kalls* at [16].

13 [1990] 1 QdR 392, especially at 399.

Court under a provision such as s 58 of the CP Act. It also follows that the Practice Directions inevitably provide a useful guide for the exercise of the discretion under that section.

[10] Since the award of interest is intended to compensate Mr Chambers for the loss of use of money since 2009, the discretion may be exercised by reference to his particular circumstances. It is apparent that the loan transaction which resulted in the judgment in favour of Mr Brice was linked to Mr Brice's obligation to pay for cattle, which, on my findings, he failed to perform[14]. Both Dorrigo Property and Harrod Holdings are companies closely associated with Mr Chambers. Dorrigo Property was incorporated as a consequence of the agreement reached between Mr Chambers and Mr Brice, as part of the mechanism by which Mr Chambers might achieve the goal of moving from Darwin to the east coast of Australia. On Mr Brice's pleaded case, the discussions at this time related to a loan to be made to Mr Chambers, for this purpose. Harrod Holdings also provided means by which Mr Chambers could achieve financial and other goals for himself and his family. Both Dorrigo Property and Harrod Holdings were substantially under the control of Mr Chambers (as the loan agreement and mortgage themselves demonstrate). Accordingly, the fact that interest will be payable on the amount awarded to Mr Brice, and the rate at which it is to be paid, seems to me to be relevant to the exercise of the discretion. In my view, there is much to be said for the proposition that there should not be a marked disparity between the interest rate applicable to the amount payable to Mr Brice on the counterclaim, and the interest rate for the award of interest to Mr Chambers under s 58 of the CP Act.

[11] In my view, the debt owed by DVH Pharmaceutical in respect of the Smith Street property is also relevant. In October 2007, the amount of the debt was some $1.7 million. The evidence shows that this debt was "bothering/stressing" Mr Chambers[15], and that he was considering using funds from the sale of his cattle[16] to reduce this debt, in lieu of using funds to make the Smith Street property saleable[17]. Like the two companies just discussed, DVH Pharmaceutical was substantially under the control of Mr Chambers; and it provided a means by which Mr Chambers could achieve financial goals for himself and his family.

[12] While it may be accepted that the rates set out in the Practice Directions reflect a policy decision, and are intended to promote uniformity and simplicity, that does not demonstrate that they do not also provide an appropriate measure of the loss suffered by a plaintiff who has been kept out of a sum of money. The context provided by r 283 of the UCPR indicates that that is their purpose.

[13] For Mr Brice, evidence was given of deposit and investment rates, generally considerably lower than the rates in the Practice Directions. Reliance on these rates would be appropriate if it were established that a plaintiff would invest his money in a deposit to which the rates apply; or that a plaintiff would unlikely to have used the money in a way which would reliably achieve a better return, or result in a greater saving. That is not shown in the present case. The very structure of the agreement

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14 *Chambers v Brice* [2013] QSC 232 (*2013 Reasons*) at [150]; [153]; [163], [164].

15 Ex 1, tab 180; 2013 Reasons at [35].

16 Although the evidence referred to the funds from the sale of "the business", the sale was also referred to as a sale of the cattle business: see 2013 Reasons at [34], [37]. No other sale was, at that time, in prospect.

17 See Ex 1, tab 180.

between Mr Chambers and Mr Brice makes it likely that, had Mr Brice performed his obligations under that agreement, the amounts he paid would have been used to meet the repayment obligations of Dorrigo Property under the loan agreement, avoiding the risk that Dorrigo Property would become liable to pay interest at the default rate. It would follow that, had Mr Brice paid the damages which I have assessed, at the date of assessment, they would have been used to reduce the debt owed to him by Dorrigo Property. An alternative course, of some likelihood, is that the debt on Smith Street would have been reduced. As a matter of general experience, the rate of interest charged on such a loan would be higher than the rate payable on a deposit. It was submitted that there may have been tax advantages in leaving both loans in place, but that is speculation; and in any event, given the evidence of Mr Chambers' state of mind in late 2007, such a consideration may well not have been decisive. It was submitted that there was no evidence that Mr Chambers would have applied money from Mr Brice to debt reduction. In my view, the evidence makes it more likely than not that he would have done so.

[14] Moreover, investments of the kind to which the rates relied upon on behalf of Mr Brice would apply, would inevitably result in the receipt of interest from time to time which could be reinvested. On the other hand, an award under s 58 of the CP Act is of simple interest, and is not compounded. It follows that the rate must be higher than the rate which would apply to deposits of the kind to which that evidence relates.

[15] The submissions made on behalf of Mr Brice placed considerable reliance on the judgment of Brereton J in *Hexiva Pty Limited & Ors v Lederer & Ors (2)*[18]. There, his Honour refused to apply the rate prescribed for interest to be paid on and out of the judgment, in the period after the judgment is given. A significant difference between that case and the present one, in my view, is his Honour's statement that the evidence did not show that *Hexiva* had any borrowings that it might have repaid[19]. It might also be observed that in that case, a lower rate was adopted only until 16 May 2001; and that thereafter (apparently until 1 November 2006[20]) interest was awarded at the rates prescribed[21]. I do not detect in his Honour's reasons recognition of the fact that had money been invested at the lower rate adopted by his Honour, the plaintiff would have had the benefit of interest occurring from time to time. The fact that the case was referred to in *Kalls*, where the Court of Appeal ultimately adopted the prescribed rate, demonstrates that it is a case decided by reference to its particular circumstances. For these reasons, I do not intend to take the approach taken by his Honour.

[16] Accordingly, I propose to award interest to be determined by reference to the rates found in the Practice Directions. The submissions for Mr Chambers referred to rates based on the interest calculator on the Court's website. It was not suggested that, if the Practice Directions were to be applied, these rates were not the appropriate rates. Accordingly, I propose to award interest at the rate 10 percent from 21 February 2009 to 18 April 2013; from 19 April 2013 to 3 June 2013 at seven percent per annum; and thereafter at 6.75 percent per annum.

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18 [2007] NSWSC 49 (*Hexiva*).

19 Ibid at [20].

20 Ibid at [2], [3].

21 Ibid at [24].

Mr Brice's claim for interest

[17] For Mr Brice it was submitted that interest should be awarded on the sum of $1.5 million, calculated at 8.5 percent to 19 July 2008, compounding monthly; and thereafter at 10.5 percent, compounding daily to 23 September 2013, the amount awarded on this basis was said to total $1,215,177.26.

[18] For Mr Chambers it was said that interest should be simple interest on that amount at 8.5 percent until 29 March 2013, and thereafter simple interest was payable at 10.5 percent. At one point it was submitted that the position was affected by an email from Mr Brice to Mr Chambers of 9 September 2008, which referred to a moratorium; but this submission was ultimately abandoned.

[19] The counter-claim sought interest both pursuant to the Loan Agreement and under the statutory provision. Since the Loan Agreement makes provision for interest, interest can not be awarded under the statute[22].

[20] The following provisions of the Loan Agreement are relevant:

> "Loan — Subject to this agreement and in reliance on the representations and warranties in this agreement, the Lender agrees to make the Loan set out below in the Loan Details available to the Borrower.
>
> LOAN DETAILS
> Interpretation - definitions are at the end of the General Terms.
>
> | | |
> |---|---|
> | Loan Amount | $1,500,000.00 (One million five hundred thousand dollars) |
> | Repayment Date | 19 July 2010 |
> | Mandatory Repayment | The Borrower must repay the Loan by repaying:
▪ $500,000 on 19 July 2008;
▪ $500,000 on 19 July 2009; and
▪ $500,000 on 19 July 2010. |
> | Interest Rate | 8.5% per annum |
> | Interest Payments | The Borrower must pay interest at the Interest Rate on the Amount Owing, calculated monthly and payable in arrears on the following dates:
▪ 19 July 2008; and
▪ 19 July 2009; and
▪ 19 July 2010. |
> | Default Rate | 10.5% per annum |
>
> …
>
> Definitions
> Unless the context otherwise requires:

[22] See s 47(3) SC Act; s 58 (2)(b), (4)(a) CP Act.

(1) **Amount Owing** means all moneys owing to the Lender by the Borrower on any account, and includes all interest and moneys lent or advanced by the Lender to the Borrower pursuant to this agreement and which have not been repaid to the Lender including the Loan and all other money which the Borrower agrees to pay the Lender including all interest accrued.

…

(6) **Default Rate** has the same meaning as in the Loan Details.

…

(8) **Event of Default** has the meaning given to it in clause 9.

…

(10) **Interest Rate** means the rate specified as such in the Loan Details.

…

(12) **Loan** means loan granted by the Lender to the Borrower under this agreement.

(13) **Loan Amount** means the amount specified as such in the Loan Details.

…

(18) **Repayment Date** means the date specified as such in the Loan Details.

…

2. AGREEMENT TO LEND

2.1 **The Loan**

The Lender grants the Borrower the Loan as set out in the Loan Details to be used in accordance with this agreement.

…

4. INTEREST

4.1 **Interest payable on Loan**

The Borrower must pay interest on the Loan in accordance with the Loan Details.

4.2 **Interest on late payments**

Following an Event of Default, the Borrower agrees to pay interest on the Amount Owing at the Default Rate. The interest accrues daily from (and including) the due date to (but excluding) the date of actual payment and is calculated on actual days elapsed and a year of 365 days. The Borrower agrees to pay interest under this clause on demand from the Lender.

…

9. DEFAULT

9.1 **Default**

The Borrower will, at the option of the Lender, be immediately in default upon the occurrence of any of the following:

(1) If there is default (other than by the Lender) in the performance of any term, covenant, agreement or condition contained in or implied by the Transaction Documents;

(2) If the Borrower or the Guarantor defaults in duly and punctually paying when due any amount owing or if any indebtedness of the Borrower or the Guarantor to any person is not paid when due or becomes due and payable prior to its specified maturity or any creditor of the Borrower or the Guarantor becomes entitled to declare any indebtedness of the Borrower or the Guarantor due or the Borrower or the Guarantor makes default under any charge or security in favour of any person;

…

9.2 Consequence of Default

If any Event of Default occurs the Lender may, by written notice to the Borrower declare:

(1) the Loan and the Lender's obligations under this agreement to be immediately cancelled; and

(2) all Amount Owing payable together with any interest accrued as is outstanding be repaid immediately."

[21] For convenience, I shall refer to that part of the document which appears beneath the heading "LOAN DETAILS" as the *Schedule*.

[22] In December 2007, Mr Brice paid $1.5million to the trust account of the solicitors who were, in respect of the loan, acting for Mr Chambers[23]. However, only $762,624.54 was made available to Dorrigo Property, for the settlement of the purchase of Big Top, on 30 January 2008[24]. Mr Brice's instructions were that the balance ($737,375.46) would not be made available to Dorrigo Property until "receipt of the stamped transfer documents"[25]. It is an agreed fact that the balance was deposited into the account of Dorrigo Property on or about 5 February 2008.

[23] The submissions for Mr Brice relied upon the reference to the Amount Owing in that part of the Schedule relating to interest payments for the proposition that interest was to be compound interest. It was submitted that, Dorrigo Property having failed to pay the instalment and interest due on 19 July 2008, there was an event of default which had the consequence that interest was payable at the default rate; and clause 4.2 meant that such interest was to compound daily.

[24] For Mr Chambers it was submitted that under clause 4.1, interest was payable on the loan, not on the Amount Outstanding; and accordingly interest payable under that clause was simple interest. It was submitted that an event identified in the subclauses of clause 9.1 did not become an Event of Default until such time as Mr Brice exercised the option to give the event that character; and that did not occur until 29 March 2010 (or possibly November 2009). Alternatively, because clause

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23 2013 reasons at [38]-[42].

24 Ibid at [42], [45].

25 Ex 1, tab 278; tab 281.

4.2 provides that interest at the default rate is to accrue from "the due date", that can only make sense in the context of a declaration by Mr Brice under clause 9.2 that the Amount Owing is to be repaid immediately; and on this basis, interest at the Default Rate would be payable from 29 March 2010.

[25] Clause 4.1 required Dorrigo Property to pay interest "on the Loan". The definition in clause 1.1 of the term "Loan" is of no assistance. The term has been defined to mean "anything lent or given to another on condition of return or repayment"[26]. To similar effect is the definition of the term in the Australian Oxford Dictionary[27], which includes, "something lent, especially a sum of money to be returned normally with interest". Likewise in the Macquarie Dictionary[28] the definition includes, "something lent or furnished on condition of being returned, especially a sum of money lent at interest".

[26] The term, however, is also used to identify the underlying transaction. In dealing with the definition of the term, one author[29] has written:

> "A loan of money may be defined, in general terms, as a simple contract whereby one person ('the lender') pays or agrees to pay a sum of money in consideration of a promise by another person ('the borrower') to repay the money upon demand or at a fixed date. The promise of repayment may or may not be coupled with a promise to pay interest on the money so paid. The essence of the transaction is the promise of repayment. … In essence then a loan is a payment of money to or for someone on the condition that it will be repaid." (references omitted)

[27] As a matter of common expression, a statement that interest is payable "on" something is usually a reference to the fact that the interest is to be calculated by reference to the amount lent. In my view, the effect of clause 4.1 is that it requires the payment of interest, calculated by reference to the amount lent. Ordinarily, interest which becomes payable under a loan agreement is not regarded as part of the amount lent.

[28] This may be seen as being at odds with the provision in the Schedule stating that interest is to be paid "on the Amount Owing", because the definition of that expression extends to interest, in particular to "all interest accrued". However, clause 1.1 makes plain that the definitions are to operate unless the context otherwise requires. The function of the Schedule is to provide information relevant to the obligations to be found in the agreement. Some entries in the Schedule do no more than provide such information, for example, the amount of the loan, dates, and rates of interest. Prima facie, the entry relating to "Interest Payments" is intended to identify the dates on which interest is to be paid, and some further specificity about the obligation to pay interest created by the Loan Agreement. It does not seem to me likely that an entry in a Schedule such as this would be intended to vary the obligation created in a clause such as 4.1; and in particular to convert an obligation to pay simple interest, into one that requires the payment of compound interest. It

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26 Greenburg (Ed), *Jowitt's Dictionary of English Law* (Sweet and Maxwell, 3rd ed, 2010) p 1368.

27 (Oxford University Press, 2nd ed, 2004) p 745.

28 (Macquarie Library, 3rd ed, 1997) p 1259.

29 Pannam, *The Law of Money Lenders in Australia and New Zealand* (The Law Book Company, 1965) p 6.

follows that I do not consider that the meaning of the expression "Amount Owing" in that entry is the defined meaning; rather, it is a reference to the amount which has been lent, to the extent that that amount remains owing when interest is to be calculated.

[29] The Loan Agreement did not require Dorrigo Property to draw the whole amount of the loan, whether on the Commencement Date, or on any other occasion[30]. Indeed, Mr Brice was not required to make the loan available to Dorrigo Property until conditions precedent had been satisfied[31]; and he was to be given 24 hours notice of an intention by Dorrigo Property to utilise the loan[32]. The reference to the Amount Owing in the entry for "Interest Payments" in the Schedule, it seems to me, is intended to accommodate the fact that after the Commencement Date, there may be a period when none of the loan money has been utilised by Dorrigo Property; and the fact that some but not all of it might have been called upon by Dorrigo Property subsequently.

[30] Clause 4.1 requires the payment of interest on the loan "in accordance with the Loan Details". It seems to me that latter phrase is intended to make applicable the interest rate, method of calculation, and dates for payment, identified in the Schedule; but not to vary the effect of the obligation in clause 4.1 to pay interest on the amount lent.

[31] Accordingly, in my view, clause 4.1 required the payment of interest on the amount lent, and did not have the effect of changing the operation of clause 4.1 so that interest also became payable on interest.

[32] The expression "calculated monthly" in the entry for Interest Payments, in my view, meant that the interest was to be calculated at the end of each month; notwithstanding that Interest Payments were to be made on a day other than the end of each month; or that monies might have been utilised under the Loan Agreement on dates other than the beginning of the month. There is a distinction between the computation of interest, and the compounding of interest[33].

[33] The conclusion I have expressed is based on the language of the Loan Agreement. However, the circumstances in which the parties entered into the agreement would suggest a less commercial, rather than a more commercial, approach be taken to any ambiguity in its terms. Although made to Dorrigo Property, the loan was intended to be of benefit to Mr Chambers. At the time, Mr Brice and Mr Chambers were friends. For a considerable period, Mr Chambers had been providing, at no cost, assistance to Mr Schwennesen, Mr Brice's son-in-law, in relation to the business of Ywagyu, in which Mr Brice had an interest. From Mr Chamber's point of view, the loan was uncommercial, to be paid in three years by equal annual instalments.

[34] The next question to consider is whether, and if so when, interest became payable at the default rate. That depends on there being an Event of Default. In my view, that would happen only when one of the events identified in clause 9.1 occurred, and Mr

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30 See clause 2.2.

31 See clause 3.1.

32 See the entry "Utilisation of the Loan" in the Schedule.

33 Hapgood, *Paget's Law of Banking* (Butterworths, 12th ed, 2002) p 192, para 13.6. A similar passage from an earlier edition was applied in *Kitchen v HSBC Bank plc* [2000] 1 All E.R. (Comm) 787 (see pp 7, 9 of the official transcript).

Brice had exercised his option to have that occurrence treated as an Event of Default. That is the natural reading of clause 9.1, which expressly refers to the option. It should be noted that, in addition to the option referred to in clause 9.1, a separate decision was provided for in clause 9.2, the effect of which would be to make all amounts then outstanding immediately repayable. Moreover, some of the events described in clause 9.1 might have nothing to do with Dorrigo Property. There was good reason why such an event should not be regarded as an Event of Default without a specific decision having been made for the event to have that character, and notice be given to Dorrigo Property.

[35] Dorrigo Property failed to pay the instalment of principal and interest due for payment on 19 July 2008. An occasion then arose for Mr Brice to exercise the option referred to in clause 9.1. He did not do so. Indeed, on 9 September 2008, Mr Brice sent an email to Mr Chambers in which he said, "I am writing to you to set a moratorium on the interest and repayments due under the loan agreement on 19th July 2008 until 19th October 2008"[34].

[36] Whatever might be the legal effect of this email, there is no evidence to suggest any action taken by Mr Brice on or shortly after 19 July 2008, to exercise the option found in clause 9.1. Nor is there evidence of such action after 19 October 2008.

[37] On 10 November 2009[35] and again on 1 December 2009[36], Mr Brice sent to Mr Chambers calculations of interest due under the loan. Interest was calculated at the Default Rate from 19 July 2008. On each occasion, the accompanying email stated that a calculation of amounts outstanding on the loan was enclosed, and Mr Chambers was asked whether he agreed with the calculation. Neither, in terms, called for immediate payment, whether of principal, or interest. It might be observed that the calculations appeared to compound default interest monthly.

[38] In my view neither of these emails constituted the exercise of an option under clause 9.1. Neither purported to do so. There was no reference to an event, of the kind identified in clause 9.1; nor was there a statement that Mr Brice was exercising his option to have such an event treated as an Event of Default. Rather, each seemed to have been sent on the basis that default interest became payable immediately on the failure to pay principal and interest on 19 July 2008. That view, which I consider to be mistaken, makes it unlikely that either email was intended to be an exercise of the option under clause 9.1. It might also be observed that these emails took no account of Mr Brice's declaration of a moratorium in September 2008; something which might be relevant if he were intending to identify, as an event of default, a failure to make a payment at an earlier date, and to exercise the option to give that failure the character of an Event of Default under clause 9.1.

[39] However, on 29 March 2010, Mr Brice sent to Mr Chambers by email a notice which, amongst other things, stated that by reason of the failure of Dorrigo Property to make repayments of principal and interest under the Loan Agreement, an Event of Default had occurred[37]. The notice went on to declare, under clause 9.2, that all of the Amount Owing was to be repaid immediately. Default Interest was charged at 10.5 percent, compounded monthly. It was not contentious that this notice had

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34 Ex 1, tab 466.
35 Ex 1, tab 626.
36 Ex 1, tab 629.
37 Ex 1, tab 647.

the consequence that the failures to make payment became Events of Default under the Loan Agreement. In my view, interest at the Default Rate became payable from the date of this notice.

[40] The provisions of clause 4.2 require the calculation of interest at the Default Rate on the Amount Outstanding. It is clear from the definition of this term, that it includes interest which has already accrued. The clause states that interest (at the Default Rate) accrues daily.

[41] The submissions for Mr Chambers referred to *Morton v Elgin-Stuczynski & Anor*[38] for the proposition that a reference to interest accruing is neutral, on the question whether the interest on a loan is simple interest or compound interest. The loan agreement in that case required the borrowers to repay two loans "together with interest accrued for the period of the loan, at the rate of interest charged by the Commonwealth Bank of Australia … " for certain overdrafts[39]. The effect of interest accruing daily may be seen in *In re Rogers' Trusts*[40], a case where the interest was not compounded daily.

[42] It was also submitted on behalf of Mr Chambers, relying on a statement from *Alstom Ltd v Yokogawa Australia Pty Ltd & Anor (No 8)*[41], that a reference to interest being "calculated daily" did not have the effect that interest was payable daily; and accordingly, the reference in clause 4.2 to interest being calculated at one actual day's elapsed did not have the effect that after an Event of Default, interest at the Default Rate was to be compounded. I have previously referred to the distinction between calculating interest, and compounding interest.

[43] Implicit in the submissions made on behalf of Mr Chambers is the proposition that the amount on which interest is to be charged under clause 4.2 does not include the amounts charged under clause 4.2 which accrue daily. In my view, the reference in the second sentence of this clause to interest being calculated on actual days elapsed is to be read with the reference to a year of 365 days; and they explain the application of an annual interest rate to a circumstance where interest accrues daily. It seems to me, taken as a whole, the sentence is neutral on the question whether interest under the clause is to be simple interest on compound interest.

[44] In the end, I have come to the view that clause 4.2, read in the light of clause 9.1, has the following effect. Once Mr Brice exercised his option in respect of an event identified in clause 9.1, Dorrigo Property became bound at that point to pay interest on the Amount Owing at that time, at the Default Rate. The interest, at the Default Rate, was to be calculated daily; but in respect of the Amount Owing, when the option was exercised. It was payable for each day which passed until (but excluding) the date of payment. The interest was payable on demand.

[45] The Loan Agreement was prepared by a lawyer. Had it been intended that the interest would be compound interest, the Loan Agreement could have made that clear[42]. If Default Interest were to be compounded, then it would seem it has to be

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38 (2008) 19 VR 294 (*Morton*) [41].
39 Ibid at [7].
40 (1860) 1 Drew & Sm 338, especially at 341.
41 [2012] SASC 117 (*Alstom*) at [89].
42 Compare the statement of Bleby J in *Alstom* at [89].

compounded daily. That seems to me an unlikely intention to attribute to the parties, particularly in the context in which they entered into the Loan Agreement.

[46] The oral submissions made on behalf of Mr Chambers sought to make something of the use of the expression "the due date" in clause 4.2, though it was not entirely clear what significance was attributed to this expression. In context, it seems to me that the expression is intended to refer to the date on which interest at the Default Rate first becomes payable, its sole function being to identify the starting point for the period for which such interest is to be calculated.

[47] In summary, in my view Mr Brice is entitled to an award of simple interest at 8.5 percent on the amount of $762,694.54 from 30 January 2008, and the amount of $737,375.46 from 5 February 2008, in each case until 28 March 2010; and from 29 March 2010 to an award of simple interest at 10.5 percent on the interest payable till that date, together with the sum of $1.5million.