

SUPREME COURT OF QUEENSLAND

CITATION: *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors* [2014] QCA 124

PARTIES: **BM ALLIANCE COAL OPERATIONS PTY LTD**
ABN 67 096 412 752
(appellant)
v
BGC CONTRACTING PTY LTD
ABN 88 008 766 407
(first respondent)
RUSSELL WELSH
(second respondent)
RICS DISPUTE RESOLUTION SERVICE
(third respondent)

FILE NO/S: Appeal No 3287 of 2013
SC No 4422 of 2012

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal – Further Orders

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 27 May 2014

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGES: Holmes and Muir JJA and Ann Lyons J
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS:

- 1. The appeal be allowed.**
- 2. The orders made on 22 March 2013 be set aside.**
- 3. It is declared that the decision of the second respondent dated 7 May 2012 in relation to adjudication application No 1064504_831 is void.**
- 4. The first respondent be restrained from enforcing or otherwise relying upon the decision of the second respondent dated 7 May 2012 in relation to adjudication application No 1064504_831.**
- 5. Within seven days of the date of this Order, the first respondent shall pay the appellant the amount of \$26,731,630.35 which comprises the following amounts:**
 - (a) \$21,764,590.82, being the GST exclusive amount paid by the appellant to the first respondent on 16 May 2012 (\$26,109,968.24) less the amount**

paid by the first respondent to the appellant on 3 April 2013 pursuant to paragraph (a) of the Undertaking referred to in the Orders made on 22 March 2013 (\$4,345,377.42);

- (b) \$2,753,557.60, being the interest payable on the sum in (a) above, which comprises of the following amounts:
 - i. \$400,591.29, being the interest payable on \$26,109,968.24 at the rate of four per cent per annum from 16 May 2012 to 3 October 2012;
 - ii. \$1,139,181.49, being the interest payable on \$26,109,968.24 at the rate of 8.75 per cent per annum from 4 October 2012 to 3 April 2013;
 - iii. \$1,361,777.65, being the interest payable on \$21,764,590.82 at the rate of 8.75 per cent per annum from 4 April 2013 to 20 December 2013;

less

 - iv. \$147,992.84, being the interest the first respondent paid to the appellant on 3 April 2013 pursuant to paragraph (b) of the Undertaking referred to in the Orders made on 22 March 2013;
- (c) \$72,032.92, being the GST exclusive sum paid by the appellant to the first respondent in respect of the adjudicator's fees on 22 May 2012;
- (d) \$8,707.60, being the interest payable on the sum in (c) above, which comprises the following amounts:
 - i. \$1,057.80, being interest payable on \$72,032.92 at the rate of four per cent per annum from 22 May 2012 to 3 October 2012;
 - ii. \$7,649.80, being interest payable on \$72,032.92 at the rate of 8.75 per cent per annum from 4 October 2012 to 20 December 2013;
- (e) \$2,125,538.12, being the sum paid by appellant to the first respondent in respect of GST on the adjudication amount on 16 May 2012 (\$2,560,075.86) less the amount paid by the first respondent to the appellant on 3 April 2013 pursuant to paragraph (c) of the Undertaking referred to in the Orders made on 22 March 2013 (\$434,537.74);
- (f) \$7,203.29, being the GST paid by the appellant to the first respondent in respect of the adjudicator's fees on 22 May 2012;

6. **The first respondent shall pay to the appellant interest on the amounts referred to in subparagraphs 5(a) and (c) above, or upon however much of those amounts are outstanding on and from 21 December 2013, at the rate of 8.5 per cent per annum.**
7. **The first respondent pay the appellant's costs of and incidental to these proceedings including the costs of this appeal (No 4422 of 2012 and No 3287 of 2013) as agreed or assessed, including for the avoidance of doubt, any costs reserved in these proceedings.**

CATCHWORDS: INTEREST – RATE OF INTEREST AND COMPOUND INTEREST – RATE IN OTHER CASES – where reasons in this matter were delivered on 20 December 2013 – where the appellant was directed to consult with the first respondent and bring in draft minutes of order reflecting the reasons – where parties were able to agree on a form of order except in one respect – where the first respondent contended no pre or post judgment interest should be payable on the outstanding principal amount between 20 December 2013 and the date on which judgment is formally entered – where the appellant contended interest should be payable on the outstanding amount on and from 21 December 2013 – whether interest should continue to be paid until payment by the first respondent of all outstanding monies – whether interest should be payable in respect of GST amounts

Civil Proceedings Act 2011 (Qld), s 59

COUNSEL: No appearance for the appellant, the appellant's submissions were heard on the papers
 No appearance for the first respondent, the first respondent's submissions were heard on the papers
 No appearance for the second and third respondents

SOLICITORS: Herbert Smith Freehills for the appellant
 McCullough Robertson for the first respondent
 No appearance for the second and third respondents

- [1] **HOLMES JA:** I agree with the reasons of Muir JA and the orders he proposes.
- [2] **MUIR JA:** When reasons in this matter were delivered on 20 December 2013, the appellant was directed to consult with the first respondent and bring in draft minutes of order reflecting the reasons. The parties were able to agree on a form of order except in one respect. A tentative form of order put forward in the reasons for consideration by the parties, included:
- “5. The first respondent pay to the appellant the sum of \$2,613,570.94 being the sum paid by the appellant to the respondent in respect of GST.
 6. The first respondent pay to the appellant interest on the sum of \$2,613,570.94 from 16 May 2012 at the rate of four per cent per

annum and from 13 November 2012 until today's date at the rate of 8.75 per cent per annum."

- [3] The sum of \$2,613,570.94 referred to in paragraph 6 above was the amount paid by the appellant to the first respondent in respect of GST.
- [4] The first respondent contended, in effect, that as the tentative order contemplated the payment of prejudgment interest only up until 20 December 2013, no pre or post judgment interest should be payable on the outstanding principal amount between 20 December 2013 and the date on which judgment is formally entered.
- [5] The purpose of the tentative order was to provide the parties with an opportunity to agree the terms of an order which would appropriately reflect the reasons or to make submissions in relation to it. As was explained in paragraph [89] of the reasons, the Court was not satisfied that it had been directed to the evidence necessary to ensure that the orders in respect of interest payments were properly addressed.
- [6] The appellant contended that paragraph 6 should provide:
- "The First Respondent shall pay to the Appellant interest on the amounts referred to in subparagraphs 5(a), (c), (e) and (g) above, or upon however much of those amounts are outstanding on and from 21 December 2013, at the rate of 8.50% per annum."
- [7] Paragraph 4 of the tentative order provided for the payment of interest at 8.75 per cent per annum on the principal sum of \$26,135,709.37 from 3 October 2013 (the date on which the primary judge gave reasons finding that the first respondent was entitled to a declaration that the second respondent's decision dated 7 May 2012 was void) to the date of the reasons.
- [8] The rate of 8.5 per cent per annum is the interest rate applicable at relevant times pursuant to s 59 of the *Civil Proceedings Act* 2011 (Qld) and Practice Direction 7 of 2013 in respect of money order debts. It was thought appropriate that this interest rate should apply from the time when the primary judge effectively determined the appellant's entitlement to repayment of the monies paid pursuant to the void decision of 7 May 2012.
- [9] There is no valid reason why interest at this rate should not continue to be paid until payment by the first respondent of all outstanding monies. If the first respondent's submissions were to be accepted, interest would be payable by it on the outstanding monies until 20 December 2013 and then from the date on which the orders are pronounced at the rate prescribed by s 59 of the *Civil Proceedings Act* 2011 (Qld) and Practice Direction 7 of 2013. No interest would be payable in the new considerable gap between the two dates.
- [10] The first respondent also raised another matter. It submitted (in an exchange of correspondence with the appellant) that:
- "Pursuant to usual and prudent business practices [the appellant] would have, upon making payment of relevant GST amounts to [the first respondent], claimed a corresponding GST credit from the Australian Tax Office in accordance with sections 11-5, 11-15 and 29-10 of *A New Tax System (Goods and Services Tax) Act* 1999. To this end, your client would not have been 'kept out of' these monies.

The payment of interest on GST amounts will (wrongly in [the first respondent's] view) result in [the appellant] being paid interest over a substantial period on monies which it has, upon receiving a tax credit, had the benefit of during the relevant period. To this end, we consider it inappropriate that proposed orders 5(d) and 5(f) be made requiring the payment of interest on GST.

You will recall that submissions were made on this point before [the primary judge], who ultimately accepted our client's position. The Court of Appeal did not criticise [the primary judge's] determination on matters concerning interest generally, but rather endorsed it, though it did not specifically consider the issue of interest on GST except in proposing draft orders in paragraph 88."

- [11] The appellant did not respond to these submissions which, on their face, have merit. I accept them. I am assisted in my approach in relation to interest by the consideration that, although the appellant failed to succeed in having the primary judge's findings on the appropriate rate of interest set aside, the findings were favourable to the first respondent.
- [12] Accordingly, I would not order that interest be payable in respect of GST. The orders I propose are:
1. The appeal be allowed.
 2. The orders made on 22 March 2013 be set aside.
 3. It is declared that the decision of the second respondent dated 7 May 2012 in relation to adjudication application No 1064504_831 is void.
 4. The first respondent be restrained from enforcing or otherwise relying upon the decision of the second respondent dated 7 May 2012 in relation to adjudication application no 1064504_831.
 5. Within seven days of the date of this Order, the first respondent shall pay the appellant the amount of \$26,731,630.35 which comprises the following amounts:
 - (a) \$21,764,590.82, being the GST exclusive amount paid by the appellant to the first respondent on 16 May 2012 (\$26,109,968.24) less the amount paid by the first respondent to the appellant on 3 April 2013 pursuant to paragraph (a) of the Undertaking referred to in the Orders made on 22 March 2013 (\$4,345,377.42);
 - (b) \$2,753,557.60, being the interest payable on the sum in (a) above, which comprises of the following amounts:
 - i. \$400,591.29, being the interest payable on \$26,109,968.24 at the rate of four per cent per annum from 16 May 2012 to 3 October 2012;
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- iii. \$1,361,777.65, being the interest payable on \$21,764,590.82 at the rate of 8.75 per cent per annum from 4 April 2013 to 20 December 2013;
- less*
- iv. \$147,992.84, being the interest the first respondent paid to the appellant on 3 April 2013 pursuant to paragraph (b) of the Undertaking referred to in the Orders made on 22 March 2013;
- (c) \$72,032.92, being the GST exclusive sum paid by the appellant to the first respondent in respect of the adjudicator's fees on 22 May 2012;
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 - (e) \$2,125,538.12, being the sum paid by appellant to the first respondent in respect of GST on the adjudication amount on 16 May 2012 (\$2,560,075.86) less the amount paid by the first respondent to the appellant on 3 April 2013 pursuant to paragraph (c) of the Undertaking referred to in the Orders made on 22 March 2013 (\$434,537.74);
 - (f) \$7,203.29, being the GST paid by the appellant to the first respondent in respect of the adjudicator's fees on 22 May 2012;
6. The first respondent shall pay to the appellant interest on the amounts referred to in subparagraphs 5(a) and (c) above, or upon however much of those amounts are outstanding on and from 21 December 2013, at the rate of 8.5 per cent per annum.
7. The first respondent pay the appellant's costs of and incidental to these proceedings including the costs of this appeal (No 4422 of 2012 and No 3287 of 2013) as agreed or assessed, including for the avoidance of doubt, any costs reserved in these proceedings.
- [13] The foregoing orders are as per the draft agreed by the parties except that paragraphs 5(f) and 5(h) of that draft have been deleted for the reasons stated above and consequential amendments have been made to paragraph 6.
- [14] **ANN LYONS J:** I agree in all respects with his Honour's reasons and the orders proposed.