

# SUPREME COURT OF QUEENSLAND

CITATION: *Mules v Ferguson* [2015] QCA 77

PARTIES: **NANCY LEANNE MULES**  
(appellant)  
v  
**KAYLENE JOY FERGUSON**  
(respondent)

FILE NO/S: Appeal No 3754 of 2014  
SC No 339 of 2011

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal – Further Orders

ORIGINATING COURT: Supreme Court at Cairns

DELIVERED ON: 5 May 2015

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGES: Margaret McMurdo P, Applegarth and Boddice JJ  
Judgment of the Court

ORDERS: **1. The respondent, Kaylene Joy Ferguson, is to pay the appellant, Nancy Leanne Mules, interest in the sum of \$23,561.38.**  
**2. There be no order as to the costs of the application.**

CATCHWORDS: PROCEDURE – COSTS – where the appellant was successful on appeal – where the appellant sought interest on the entire judgment sum, calculated from the date of judgment at first instance – where the respondent contended additional interest was payable only on those heads of damages which attracted interest in the original assessment of damages – whether the Court should exercise its discretion to order interest on the entire judgment sum from the date of judgment at first instance  
*Civil Proceedings Act 2011 (Qld), s 58(3), s 59(2)*  
*L Shaddock & Associates Pty Ltd v Parramatta City Council [No 2]* (1982) 151 CLR 590; [1982] HCA 59, cited  
*Nicol v Allyacht Spars Pty Ltd [No 2]* (1988) 165 CLR 306; [1988] HCA 48, cited

COUNSEL: No appearance by the appellant, the appellant's submissions were heard on the papers  
No appearance by the respondent, the respondent's

submissions were heard on the papers

SOLICITORS: Shine Lawyers for the appellant  
K & L Gates for the respondent

- [1] **THE COURT:** On 6 February 2015 this Court, by majority, allowed the appellant’s appeal, set aside the judgment and orders entered below and entered judgment for the appellant in the amount of the damages assessed by the trial Judge “together with interest thereon”.
- [2] A dispute has arisen between the parties as to the obligation to pay interest. The appellant contends interest is payable on the entire judgment sum, calculated from the date of judgment at first instance, namely 25 March 2014. The respondent contends additional interest is only payable on those heads of damage which attracted interest in the original assessment of damages (past economic loss, past gratuitous care and past out-of-pocket expenses), calculated at the rate prescribed by the *Civil Liability Act 2003* (Qld).
- [3] The appellant’s contention that she is entitled to interest on the entire judgment amount from 25 March 2014 relies on s 58(3) and/or s 59(2) of the *Civil Proceedings Act 2011* (Qld). Relevantly, those sections provide:

**“58 Interest up to judgment**

...

- (3) The court may order that there be included in the amount for which judgment is given interest at the rate the court considers appropriate for all or part of the amount and for all or part of the period between the date when the cause of action arose and the date of judgment.

...

**59 Interest after money order**

...

- (2) Interest is payable from the date of a money order on the money order debt unless the court otherwise orders.”

- [4] The appellant contends the discretion provided by these sections should be exercised to order interest on the entire judgment sum from 25 March 2014 because if the primary Judge had correctly found for the appellant, she would have had a right to interest on the whole of the judgment from that date. The appellant has been deprived of access to the judgment monies since that date. Conversely, the respondent has had the advantage of retaining that sum for that period.
- [5] The respondent submits the appellant’s only entitlement to interest is in respect of those heads of damage which attracted a pre-judgment assessment of interest. The appellant did not seek any special order concerning interest in her notice of appeal, or at the hearing of the appeal. There is no basis to interpret the words “interest thereon” as amounting to a special order for interest on the whole of the judgment sum, from the date of the judgment at first instance.

**Discussion**

- [6] Section 58(3) provides a wide discretion in relation to the awarding of interest. That discretion is to be exercised judicially, having regard to the whole of the circumstances. Those circumstances include that the applicant failed at first instance. The judgment at first instance was not provisional, pending the outcome of any appeal. There is no reason why the respondent should have been required to make commercial decisions about the retention of those monies on the basis the judgment may be overturned on appeal.
- [7] The appellant has received the benefit of a substantial award of damages as a consequence of a successful appeal. Nothing in the respondent's conduct, or the appellant's circumstances justifies ordering that the respondent suffer the consequence of having to pay a significant additional sum by way of interest as a consequence of this Court ordering that its judgment operate from the date of the initial determination of this proceeding.
- [8] Nothing in the conduct of the respondent, or in the appellant's circumstances justifies the exercise of a discretion under s 58(3) which results in the judgment of this Court operating on a date earlier than the date upon which judgment in favour of the appellant was pronounced by this Court. Interest should only be payable from the date of this Court's judgment, except on those components of the judgment which were the subject of an award of pre-judgment interest.
- [9] The decisions in *Nicol v Allyacht Spars Pty Ltd [No 2]*<sup>1</sup> and *L Shaddock & Associates Pty Ltd v Parramatta City Council [No 2]*<sup>2</sup> support that approach. Whilst additional interest in the case of past losses is appropriately payable pursuant to the discretion under s 58 of the Act, we would not exercise the discretion so as to vary the date from which the judgment is to take effect for the purposes of payment of post-judgment interest.
- [10] Similarly, we would not exercise the discretion under s 59(2) to vary the date from which the judgment is to take effect. There is no relevant difference between s 59 of the Act and its predecessor, s 48 of the *Supreme Court Act 1995* (Qld). That provision was interpreted as requiring, if the exercise of the discretion was to involve a varying of the date from which the judgment is to take effect, something more than the mere withholding of the money. There must be some "wrongdoing" or "unreasonable act".<sup>3</sup> There are no such circumstances in the present case.

### Conclusion

- [11] The Court declines, in the exercise of its discretion, pursuant to either s 58(3) or s 59(2), to order interest be payable on the whole of judgment entered for the appellant on 6 February 2015, from 25 March 2014.
- [12] The parties agree there is a need to calculate interest in respect of past losses. That sum should be added to the appellant's judgment.
- [13] Whilst the respondent succeeded in resisting the appellant's application for the exercise of a discretion in its favour in relation to the payment of interest, the appellant's claim was

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<sup>1</sup> (1988) 165 CLR 306 at 309.

<sup>2</sup> (1982) 151 CLR 590.

<sup>3</sup> *Nitrate Producers Steamship Co Ltd v Short Brothers Ltd* [1922] All ER 710; cited with approval by Pincus JA in *Rogers v Brambles Australia Ltd* [1998] 1 Qd R 212.

fairly arguable. In the circumstances, there should be no order as to the costs of this application.

**Orders**

1. The respondent, Kaylene Joy Ferguson, is to pay the appellant, Nancy Leanne Mules, interest in the sum of \$23,561.38.
2. There be no order as to the costs of the application.