DISTRICT COURT OF QUEENSLAND

CITATION:	*Cathedral Place Community Body Corporate v The Proprietors Cathedral Village BUP 106957 (No 2)* [2019] QDC 210
PARTIES:	**CATHEDRAL PLACE COMMUNITY BODY CORPORATE** (Plaintiff) **v** **THE PROPRIETORS CATHEDRAL VILLAGE BUP 106957** (Defendant)
FILE NO/S:	D2754/2010
DIVISION:	
PROCEEDING:	Civil trial – further consideration
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	29 October 2019
DELIVERED AT:	Brisbane
HEARING DATE:	16 May 2019
JUDGE:	McGill SC DCJ
ORDER:	**Judgment that the defendant pay the plaintiff $290,077.44 including $106,419.24 by way of interest.**
CATCHWORDS:	INTEREST – Recoverability under statute – whether plaintiff truly kept out of money – whether unfair for defendant to have to pay – whether unreasonable delay by the plaintiff justifies reducing interest. *Civil Proceedings Act* 2011 s 58. *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783 – considered. *Batchelor v Burke* (1982) 148 CLR 448 – considered. *EB 9 & 10 Pty Ltd v The Owners Strata Plan 934* [2018] NSWCA 288 – considered. *Fire and all Risks Insurance Co Ltd v Callinan* (1978) 140 CLR 427 – cited. *Hadzigeorgiou v O'Sullivan* [1983] 1 Qd R 55 – cited.

Interchase Corporation Ltd v Grosvenor Hill (Qld) Pty Ltd (No.3) [2003] 1 Qd R 26 – cited.
Maestrale v Aspite (No 2) [2014] NSWCA 302 – considered.
McBride v Christies Australia Pty Ltd (No 2) [2015] NSWSC 754 – considered.
McGill v Shield Contractors Pty Ltd [1998] 2 Qd R 398 – cited.
Mr Green Pty Ltd v Broadbeach Bowls & Community Club Inc (No 2) [2018] QDC 65 – followed.
Nu Line Construction Group Pty Ltd v Fowler (No 3) [2014] NSWCA 229 – cited.
Potts v Smith [1993] 2 Qd R 44 – considered.
Ruby v Marsh (1975) 132 CLR 642 – cited.
Scanlon v McLeay (No 2) [2018] QDC 59 – cited.
Westdeutsche Landesbank Girozentrale v Islington London Borough Council [1994] 1 WLR 938 – considered.
Westpac Banking Corporation v Commissioner of State Revenue [2004] QSC 19 – cited.

COUNSEL: P D Tucker for the plaintiff

S Couper QC for the defendant

SOLICITORS: Nicholsons Solicitors for the plaintiff

HWL Ebsworth for the defendant

[1] In this matter I published reasons on 21 December 2018, and invited the parties to make further submissions as to the relief to be granted, after they had had the opportunity to consider the reasons. There was some delay before the matter could again be relisted for hearing, but it came back before me earlier this year, and further submissions were received. After that I received further submissions in writing, and the defendant filed an amended defence and counterclaim.

[2] The background of the matter is set out in my earlier reasons. Briefly, the plaintiff is the community body corporate for a development under the *Mixed Used Development Act* 1993 ("the Act"). The defendant is one of six separate bodies corporate which constitute the community body corporate. The plaintiff sought to recover two levies of contributions made on the defendant, which had not been paid. The defendant resisted these claims, essentially on the basis that the plaintiff had not been confining levies on members to amounts required properly to carry out the functions of a community body corporate under the Act, but had been bearing costs which ought to have been the separate responsibility of the other individual bodies corporate.

[3] For reasons that I gave previously, I concluded that in a number of respects the defendant's complaints were justified, in that the plaintiff had been paying for various things which ought to have been at the cost of the separate bodies corporate other than the defendant, but that, because of the operation of the Act, this did not provide a defence to the plaintiff's claims, and the defendant was liable to pay the amounts proved to have been levied as contributions from it.

(The claim included a relatively small amount, liability for which was not demonstrated by the plaintiff, so that was not found to be payable). I also held that certain provisions in bylaws about payment of interest and payment of costs were invalid, but interest is payable under the *Civil Proceedings Act* 2011, and some submissions have been made in relation to costs.

A further authority

[4] One of the matters that I drew attention to in the reasons was a decision of the New South Wales Court of Appeal, *EB 9 & 10 Pty Ltd v The Owners Strata Plan 934* [2018] NSWCA 288, which had been delivered by that court between the hearing and when I gave judgment, and upon which I had not at that stage received submissions, though it appeared to me to determine that it was possible for a court to grant equitable relief in order to ensure that the plaintiff complied with the requirements of the Act. Accordingly the matter came on for further argument in May this year.

[5] Prior to the further hearing each party filed further written submissions. Those submissions advanced the proposition that I should grant an injunction restraining the plaintiff from enforcing the levies claimed in the proceeding, essentially on the basis that the plaintiff had been levying contributions in order to meet expenses which ought not to have been met by the plaintiff, or at least, if met by the plaintiff initially, ought to have been reimbursed by one or more of the other bodies corporate. This however was based on a misconception of what I had in mind when inviting further submissions about equitable relief: I had contemplated the possibility of granting some equitable relief to regulate the conduct of the plaintiff in the future, so as to require it to conduct its affairs in accordance with the Act. For the reasons I gave previously, I take the view that the provisions of the Act on their true construction require that contributions levied under the Act be paid, even if the basis of levying those contributions is wrong, and accordingly I held that the amounts levied were payable. In these circumstances, I am not prepared to grant equitable relief to restrain the progress of the current claims. My concern was simply whether some equitable relief might be available to the defendant, in a way which would produce for the future a more appropriate liability to pay contributions.

[6] There were further matters raised in the written submissions directed to showing that the decision to levy the contributions was invalid, matters which I had considered and determined against the defendant in my previous reasons. My proposal to receive further submissions was not in order to enable the defendant to deliver further arguments in relation to matters which had been the subject of argument before, and which I had resolved in my earlier reasons.

[7] There were also submissions advanced as to the existence of a fiduciary duty owed by the plaintiff to the members of the community body corporate, but I had in my earlier reasons referred to authority in New South Wales which showed that there were necessarily no fiduciary duties owed beyond those covered by the statute, and in circumstances where the statute did not make any relevant provision protecting the members from contributions levied in such circumstances, no such fiduciary duty would be imposed by the court. The operation of a community under the Act is essentially regulated by statute, and there are no grounds for the court to add to or modify the operation of any statutory obligations. Again, these submissions were directed to matters which I had already decided in the earlier reasons.

[8] At the hearing I did listen to what counsel for the defendant had to say about granting injunctive relief against the enforcement by the plaintiff of the levies sought to be enforced in this proceeding, but was not persuaded to depart from the view that I had previously expressed.

It was submitted that, if the plaintiff had prior to the relevant meeting given notice of an intention to levy a contribution which it was not entitled to levy under the Act, it would be open to the defendant to apply for an injunction to restrain the levying of that contribution. In principle it may well be right that a court of general equitable jurisdiction could restraint the levying of a contribution in such circumstances, although I suspect that in practice the issue of the balance of convenience would make a court reluctant to interfere with the ordinary financial operation of a body corporate. But for reasons I gave previously, once a decision is taken to levy a contribution, the validity of that decision, and hence the enforceability of the contribution, does not depend on whether all the matters taken into account in fixing the amount of the contribution have been properly taken into account.

[9] Apart from this, the bulk of the money claimed in this proceeding is in respect of a contribution levied specifically to correct an error in certain contributions previously levied, which error had operated in the defendant's favour. The defendant did not dispute the existence of that particular mistake. It was seeking to resist that liability instead by challenging the whole approach of the plaintiff to levying contributions over a period of time. If a contribution had been levied for a specific purpose which could be shown to be not validly levied in accordance with the Act, there may be some justification in restraining the community body corporate from enforcing that particular contribution, but the contribution here does not fall into that category. The approach of the defendant was rather to challenge the validity of the raising of other contributions which had already been paid, and there could not be any question of an injunction to restrain the enforcement of those contributions because the plaintiff was not seeking to enforce them. For these reasons as well it would not be appropriate to grant an injunction to restrain the plaintiff from enforcing these contributions, or in effect sustain some form of equitable defence against the plaintiff's claim.[1]

[10] The defendant also sought to argue that the earlier contributions had not been determined in good faith, and so the decision to fix various amounts for the purpose of determining contributions could be challenged on administrative law grounds. Such a decision is one under the Act, and therefore, at least in theory, potentially able to be challenged on administrative law grounds, but this was not something pleaded by the defendant or litigated at the earlier hearing, and in those circumstances I consider that it is now too late to raise it. It was an issue on which additional evidence could no doubt have been called if it had been raised in a timely way.

Conclusion on claim

[11] There were no other matters raised which are relevant to the ability of the plaintiff to recover on the claim, subject to the adjustments referred to in the reasons. In my reasons I referred to a figure of $168,715 as the amount to recover the underpaid levies, but the amount claimed, by reference to the second reissued levy notice in para 21 of the statement of claim, is actually $168,714.70. The other two amounts set out in para [131] of my previous reasons if added to that figure produce a total, as in that paragraph, of $183,658.20. The plaintiff is therefore entitled to judgment for that amount.

Interest by statute

[12] The plaintiff is also entitled to interest under the *Civil Proceedings Act* 2011 s 58. In response to this claim, the defendant made three submissions, the first being that, in circumstances where the plaintiff has in fact been levying contributions from the defendant on an incorrect basis for years, and on the evidence no money is in fact owing by the defendant to the plaintiff at the

time of the levy notices the subject of the proceeding, the justice of the case does not require the defendant to pay interest to the plaintiff. The difficulty with that argument is that the liability to pay the contributions levied did not depend on whether the contribution was correctly assessed by the plaintiff, and what matters is whether the contribution was as a matter of law recoverable from the defendant. Having held that it was, the position is that the defendant should have paid the contribution, whether or not it chose to challenge, under the dispute resolution method provided by the legislation, the decision to levy any particular annual amount.

[13] In effect I have found that the defendant was liable to pay this amount to the plaintiff, even though, if the plaintiff had been properly performing its proper function under the Act, it would have been levying quite different amounts over the years on the defendant. This is an appeal to the underlying injustice of the defendant's position, where it is being forced to subsidise the provision of benefits which will only ever be enjoyed by the owners or occupiers of units within the residential bodies corporate. However the defendant was not able to cite any authority supporting the proposition that such a factor may be taken into account in the exercise of the discretion under s 58, which discretion must be exercised judicially.[2] This I apprehend involves taking into account the existence of the legal liability to pay the money subject of the judgment, rather than considerations of the underlying fairness of the position of the respective parties, or for that matter whether it was reasonable for the defendant to dispute the plaintiff's claim in all the circumstances.

[14] There is some authority to the effect that, if the defendant is not going to be aware of the plaintiff's claim until it has been advanced, the defendant is allowed a reasonable opportunity to investigate the existence of liability and quantum before a point is reached where interest by statute will be imposed. For example, where a claim is made on an insurance policy, or where company liquidators claim the return of money paid by the company as a preference, this has occurred. But once the point is reached where it can be said, with the benefit of hindsight, that the plaintiff is being kept out of its money, interest is imposed.

[15] One matter where interest was refused was *Potts v Smith* [1993] 2 Qd R 44. The plaintiff purchased a ticket in an art union organised by a charity, where the winning ticket was to win a non-cash prize, namely a home unit. The plaintiff's ticket was drawn as the winning ticket, but the charity had been unable to fund the purchase of the home unit, and the plaintiff obtained as damages the value of the prize which should have been handed over. The trial judge refused to award interest on the basis that there was no evidence that the plaintiff had suffered a loss of income by reason of the failure to deliver the nominated prize: p 54. An appeal to the Full Court was dismissed. Moynihan J, with whom the other members of the court agreed, said that this was not a case where the plaintiff had been kept out of money to which he was entitled while the other party had had the use of that money. His Honour said that the fact that the defendant was a charitable organisation was a relevant consideration, but not a decisive one: p 55. McPherson SPJ agreed that that was a relevant consideration, and noted that the defendant had not been able to make profitable use of the money that ought to have been applied for the acquisition of prizes but was not. The refusal of interest was within the discretion conferred by the Act.

[16] The effect of the decision was that some sympathy was shown to the defendant, but the decision was justified on the basis that there was no evidence as to how the plaintiff would have used the unit, so it was not shown that she had been kept out of any money. This was in the circumstances a generous finding for the defendant, since clearly the plaintiff could have let or

sold the unit if it had been handed over. In the present case, what is important is that the money was payable as a matter of law, and whether the defendant should have had nothing to pay remains contentious in the proceeding. It is not appropriate for me to try the whole case as to what amounts should have been raised each year, just to decide the question of interest.

Was the plaintiff kept out of money?

[17] The second proposition relied on was that the function of an award of interest is to compensate the plaintiff for being kept out of its money, and if a plaintiff has not in fact been out of pocket, or entirely out of pocket, by reason of the delay in payment of the amount recovered in the proceeding, this is a factor to be taken into account in the way in which interest is to be calculated. So much was established by the decision of the High Court in *Batchelor v Burke* (1982) 148 CLR 448. In the present case the levy was not for the purposes of defraying expenditure of the plaintiff, but to enable overpayments by the other members of the plaintiff to be refunded to them, and unless those refunds have already been made, the plaintiff has not in fact been kept out of any money. The statement of claim alleged that at an extraordinary general meeting of the plaintiff held on 18 May 2010 a resolution was passed for the levying of the further contribution on the defendant, and for the refund to the other five member bodies corporate of their overpaid contributions in accordance with the amounts determined in a report from some accountants, but there is no allegation that the refunds had already been paid, and it is at least possible that it has not been effected, in which case it is not the plaintiff who has been kept out of its money by the delay in payment, but the other five residential bodies corporate.

[18] The authorities speak only about the plaintiff's being kept out of money rather than anyone else, and the proposition that an order for interest by statute focuses on the position of the plaintiff is consistent with the analysis in *Batchelor v Burke* (supra). That was a case where a plaintiff had lost earnings but had received workers compensation during the relevant period, which was repayable out of any damages received. It was held that the amount received by way of compensation by the plaintiff was to be deducted before interest was calculated, specifically because the purpose of interest was to compensate the plaintiff for the detriment suffered by being kept out of his money. Of course in that case *someone* was kept out of their money: the report speaks of the employer, but no doubt in practice it was the workers compensation insurer, which would not have been entitled to interest on the amount repayable in respect of compensation paid out of the damages.

[19] In response counsel for the plaintiff submitted that in that case the payment of compensation from the employer was closely related to any damages received in due course, and that the statute effectively provided for payment of compensation in place of loss of earnings. So much may be accepted, but the reason why this had an effect on the entitlement to interest under the statute was because the close relationship made it possible to make the necessary factual identification between the money paid by way of compensation and the money paid by way of damages for past loss of earning capacity. The reasoning would be equally applicable if the employer, moved by sympathy for the plaintiff's plight, had voluntarily continued to pay his wages while the claim was being litigated, on the basis that the amount would be repayable from the damages received. On the other hand, if the plaintiff had borrowed money at interest to live on while he was waiting to receive his damages, repayable out of the damages, the fact that the loan was subject to interest would mean that interest under the statute was still payable on it; indeed the interest rate paid by the plaintiff would be relevant in determining what interest rate should be paid under the statute.

[20] The distinguishing feature relied on is really that this was not a case where the plaintiff was paid something by someone else to replace the money unpaid by the plaintiff until it was recovered; rather the position was that the defendant ought to have paid more in the past, and was now being levied the extra amount to make up for the previous shortfall. There was also no requirement to indemnify the other bodies corporate for the monies they had overpaid out of the money recovered by the plaintiff. The position here however was that the other members of the plaintiff had paid more than they ought to have paid if the contributions have been levied in the proportions specified in the Act, and the defendant had not paid as much. To remedy this, there was an extra amount payable by the defendant, and amounts repayable to the other members. But this was not a case where the plaintiff was out of pocket, unless the plaintiff has made the refunds to the others already. In that situation the plaintiff would be out of pocket, but there was no evidence of that put before me, nor was that proposition relied on by the plaintiff in support of the argument that the plaintiff had been kept out of its money.

[21] In *Fire and all Risks Insurance Co Ltd v Callinan* (1978) 140 CLR 427 the court, in a case involving interest in respect of damages for personal injury, held that the court below had correctly applied the principles enunciated in *Ruby v Marsh* (1975) 132 CLR 642 by allowing interest only on that part of damages awarded for loss of earning capacity which represented compensation for those detriments the practical impact of which, in terms of economic loss actually incurred, has already at the date of judgment been experienced by the plaintiff. The court said that there is a need when awarding interest "to pay regard to the distinction which exists between items of detriment already suffered and those to be suffered in the future".

[22] In *McGill v Shield Contractors Pty Ltd* [1998] 2 Qd R 398 the Court of Appeal held that social security payments should be taken into account when awarding interest on damages for past economic loss, even though the payments were not to be taken into account when assessing damages: p 405. This was by application of the principle that interest on damages is recoverable because the injured person has been held out of monies which would have been received but for the wrong done.

[23] In *Hadzigeorgiou v O'Sullivan* [1983] 1 Qd R 55 at 57 the Full Court said that interest then awarded under s 72 of the *Common Law Practice Act* 1867 "ought to be granted unless there are proper reasons for withholding it". In that case it was decided that a difficulty in apportioning loss between past loss and future loss was not a good reason for withholding interest, because it had become a common practice to make such an apportionment, for this and other reasons.

[24] In *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783, Goff J as he then was identified at p 845 the fundamental principle that interest is awarded because the plaintiff has been deprived of the use of the money which was due to him. At p 846 he noted that "interest will generally run from the date of accrual of the cause of action in respect of money then due or loss which then accrues; and in respect of loss which accrues at a date between accrual of the cause of action and judgment, from such date. For convenience, I shall refer to these dates compendiously as the 'date of loss'… ."

[25] His Lordship went on to identify three main groups of cases where a court may depart from that fundamental principle. The first was where in all the circumstances the defendant ought reasonably to have been allowed some proper period of time to assess the plaintiff's claim before the defendant could either tender payment or make provision if money was found to be due, although the mere fact that it was impossible for the defendant to quantify the sum due

until judgment has been given would not generally preclude an award of interest from the date of loss: p 847.[3]

[26] The second group of cases were those where "the plaintiff has been guilty of unreasonable delay in prosecuting his claim [where] the court may decline to award interest for the full period from the date of loss. This may be to encourage plaintiffs to prosecute their claims with diligence, and also because such conduct may lull a defendant into a false sense of security, leaving him to think that the claim will not be pursued against him." The third group were cases where, because of particular circumstances, such as the basis upon which damages were assessed, it would be unjust to award interest from the date of loss.

[27] This decision has been much cited; for example, in *Westpac Banking Corporation v Commissioner of State Revenue* [2004] QSC 19 there was a claim for interest in respect of stamp duty paid but ultimately found not to be payable, and had to be refunded. In that case there was agreement between the parties on the rate of interest, and that interest was payable, the only issue being whether interest should be recovered for the whole period, in circumstances where the commissioner alleged that the applicant had delayed in pursuing its claim. Reference was made to *Batchelor v Burke* (supra) and the decision in *BP Exploration Co (Libya) Ltd v Hunt (No 2)* (*supra*). The decision was mainly concerned with whether interest should be limited because of delay in pursuing the matter and ultimately interest was not so limited.

[28] In *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1994] 1 WLR 938 there was an amount of money paid under an interest rate swap agreement which it was found the Council did not have authority to enter into, so the agreement was void and the money paid under it was recoverable. The question was whether interest should be paid on the money. At first instance interest was awarded from a date after the cause of action arose, in part because the bank had received an equivalent sum from another organisation under a similar swap arrangement, I assume as a means of hedging its liability, so that the bank was not actually out of pocket until a later time, when the Council stopped making payments under the supposed arrangement: p 947. It was held on appeal however that this was irrelevant to whether interest should be payable, on the basis that this was *res inter alios acta*. This point did not resurface when the matter went on further appeal to the House of Lords, where the House split 3-2 on whether compound interest in equity should be awarded, the majority rejecting that option.

[29] That has some similarity with the situation in personal injury cases where the defendant is insured and it is the insurer which has the use of the money between the time when the cause of action arises and the time when judgment is given rather than the defendant, but this has never been regarded as a ground for refusing to order interest. The position is not quite the same as here, where if money had been paid presumably it would have simply been handed over to the other bodies corporate.

[30] Another example of the exercise of the discretion in a particular way is *Scanlon v McLeay (No 2)* [2018] QDC 59. That was a matter where the applicant sought a declaration that the respondent held certain property on trust in part for the applicant, and for the sale of the property and the provision of proceeds. The applicant was successful to some extent, and sought interest on the amount obtained from the time she had moved out of the property. In that matter her Honour declined to reduce interest because of delay on the part of the respondent, noted that there was no evidence that the value of the property had increased since

the date from which interest was claimed, said that the case was concerned with a property holding trust rather than a money earning trust, and it was not commercial property from which the respondent was making a profit. Accordingly, interest was allowed only at the rate of inflation at 1.8%, rounded up to $4,000. This is an interesting example of a case where the party liable to pay has not in a practical sense had the use of the money to earn income in the interim, although it can be said I suppose that the applicant had neither the benefit of her share of the property nor the use of its value after she moved out. The circumstances are different from those in the present case.

[31] In *Nu Line Construction Group Pty Ltd v Fowler (No 3)* [2014] NSWCA 229 an issue arose about the commencement date of an award of interest by the statute, which the court resolved by reference to the date when the cause of action arose in respect of the repayment of money paid for a purpose which had failed, rather than the date upon which there was a first demand for repayment of that money, some years later.

[32] The principle that interest is compensation for being kept out of money which ought to have been received was applied by the New South Wales Court of Appeal in *Maestrale v Aspite (No 2)* [2014] NSWCA 302. The plaintiff succeeded in an action for negligence against a solicitor in relation to the preparation of his father's will, the effect of which was that, in the distribution of the father's estate, his siblings were entitled to shares which they would not have been entitled to had it not been for the negligence of the solicitor. The plaintiff sought interest from the date when probate was granted of the valid will, on the basis that that was when he suffered damage and the cause of action arose, but the Court of Appeal held that the appropriate date was when he took out a loan in order to pay out the bequests to the siblings which he would have avoided. The court said at [8] that:

> "The time at which the cause of action arises will often provide an appropriate date from which interest should run… However, the facts of the particular case may indicate that pre-judgment interest should be calculated from some later date. In this case, there is a question as to [from what date] the appellant was 'kept out' of his money, and therefore ought to be awarded compensation by way of interest."

[33] It was held that interest was payable only from when the financial loss crystallised, which was when he actually paid his siblings their entitlements under the will, so interest was only payable from then, on the basis that until then he had full use of the money in question: [9]. Although *Batchelor v Burke* (supra) was not cited, the decision appears to be consistent with the principle laid down in that decision.

[34] Another decision on the awarding of interest is *McBride v Christies Australia Pty Ltd (No 2)* [2015] NSWSC 754. In this case the plaintiff purchased a painting which was said to be a genuine painting by a particular artist, but which was found to be a forgery, and sued for damages. The plaintiff had purchased the painting in 2000, but did not discover until 2010 that it was a forgery, when it was to be sold at auction. It was then withdrawn, and it was held that the cause of action did not accrue until that date, presumably on the basis that until then the plaintiff had not suffered any damage.

[35] A claim by the plaintiff to have been out of pocket from when an excessive price was paid in 2000 was rejected, on the basis that interest could not be awarded for the period prior to the time when the cause of action arose. The judge appears to have accepted the argument that until then the painting was enjoyed in specie, and a financial loss accrued only when the

plaintiff wished to convert the painting into money. Although the expression was not used in the judgment, this was also the point at which it could be said that the plaintiff began to be kept out of some money. It was necessary for the plaintiff to show that no cause of action arose until 2010, otherwise her claim would have been statute barred. I expect the analysis was influenced by the need to produce a decision consistent with the decision in relation to the limitation defence; it is difficult to see why the plaintiff did not suffer a financial loss at a time when she paid X dollars for something that was only worth Y dollars.

[36] In this case, I do not consider that the principle in *Batchelor v Burke* (*supra*) applies so that interest is not payable. In the relevant sense, the plaintiff was kept out of money, because money which in law was payable was not then paid, and that situation has continued. What the plaintiff would have done with the money had it been paid is not relevant; this is not a situation where, as a matter of law, the plaintiff was bound to pay over the money, or where the failure to pay was compensated for with money from another source. It is by no means clear that the other bodies corporate would have a cause of action against the plaintiff just because of the resolution at the general meeting, and I am not prepared to find that the plaintiff is liable to them for interest on the delay in payment to them. Although the position is not the same as in the *Islington* case, it appears that the focus must be on the position of the plaintiff for the purpose of an award of interest by statute. This is not equivalent to a situation where damages are being awarded for loss not yet actually suffered. The best analogy is with a commercial obligation, so prima facie interest should be awarded.

[37] There is also an issue about the rate of interest. This is not a case where there is evidence that the plaintiff has replaced the money payable with funds borrowed at interest, and there is no reason to think that, if the money had been paid sooner, the plaintiff would in fact have used it to earn income, although it would have been open to the plaintiff to have done so. In those circumstances, it is not obvious that interest should necessarily be paid at the normal commercial rate, 10% or more recently the rate specified under the Practice Direction. In the circumstances these rates strike me as generous. This was a matter not specifically raised at the hearing, and in view of that I will allow interest at those rates.

Delay by the plaintiff

[38] The third argument advanced was that interest should not be allowed for the whole period because of delay on the part of the plaintiff in pursuing the claim. I considered the authorities in relation to this issue in *Mr Green Pty Ltd v Broadbeach Bowls & Community Club Inc (No 2)* [2018] QDC 65, and adopt without repeating it what I said there on the subject. I concluded there that the test is whether there has been unreasonable delay caused deliberately by the plaintiff itself which was or could have been the cause of financial detriment to the defendant.

[39] The defendant submitted that no interest should be allowed for the period from 22 November 2012 to 21 July 2018. There were two aspects of this. The first was that no step was taken for 692 days; the second was that the plaintiff had repeatedly failed to comply with orders, including consent orders, for it to produce any expert report.

[40] As to the former, the plaintiff delivered an amended statement of claim on 22 November 2012, along with an amended reply and answer and a Commercial List Statement; in response the

defendant's solicitors said they would seek instructions and review the amended pleadings. The plaintiff said that thereafter there were settlement negotiations between the parties in an attempt to avoid a long and expensive trial, which were carried out without lawyers and which took some time, no doubt because both parties were bodies corporate acting through committees. As well, the negotiations took into account the costs of an earlier dispute, which included an appeal to the Court of Appeal, in which the defendant was unsuccessful.

[41] The court should encourage parties to resolve their differences by negotiation if possible, and it would be inconsistent with that approach to penalise a party in interest because of an attempt to negotiate a settlement. Even so, for no step to be taken for almost two years while negotiations dragged on seems to me to involve far more time than would reasonably be required, even working through committees, for parties to explore fully the possibility of negotiating a settlement. It should be remembered that parties can, and often do, continue to negotiate while preparing for trial, and strictly speaking a desire to negotiate is not a reason for inaction.[4] It was not suggested that there was other useful activity carried out while these negotiations occurred. Some suspension of preparation can be justified by a desire not to run up costs which will be wasted if the dispute is resolved, but a point must be reached where this approach ceases to be a justification for inaction. In this case, in my view that point was passed well before anything more was done, and I will deduct one year from the interest allowed. Since lawyers were not involved, this approach was necessarily taken by the plaintiff itself, it was unreasonable, and it could have been of financial detriment to the defendant, in exposing it to a higher rate of interest than would have been reasonably obtainable by it on the money unpaid if invested.

[42] The other matter relied on was the plaintiff's delay in obtaining expert evidence, in the form of a report from an accountant, Mr Lytras. He was engaged, or retained, to prepare a report in July 2015 but no report was actually forthcoming from him until July 2018, when it was delivered in two parts, the second two days before the trial was listed to begin. There had been consent orders on 4 August and 15 December 2015 and orders of Andrews DCJ of 19 May 2016 and myself of 15 December 2017 fixing times for the service of any expert reports by the plaintiff, none of which had been obeyed.

[43] Mr Lytras was briefed with 47 lever arch folders on 9 March 2018, apparently delayed because of a desire to include documents obtained on third party disclosure from the expert retained by the defendant, and the chair of the defendant, who had also at times been involved in the administration of the plaintiff. It is not apparent to me why a report on what money expended by the plaintiff had actually been spent on should require such documents, rather than the financial records of the plaintiff, which it should have itself. The timing of this was not explained, except for the bold assertion that Mr Lytras had said he wanted to receive all those documents at one time, an attitude which should not have been indulged. It was argued for the plaintiff that the need to serve an expert's report arose only after a third report by the defendant's expert Mr Hains was served on 8 December 2017.

[44] The difficulty with the plaintiff's argument in relation to the timing of the Lytras report arises from the content of that report. That report was presented in two parts, the first part commencing at p 6891 of volume 19 of exhibit 1. On p 6894 Mr Lytras summarised his instructions which were to provide expert opinion in relation to two matters:

(a) A levy adjustment, if any, applicable to Cathedral Village and the other Cathedral Place subsidiary bodies corporate; and

(b) A response to the report of Mr Daniel Hains dated 8 December 2017.

[45] That particular report dealt with the first part. It emerges from p 6897 however that the first matter which Mr Lytras was instructed to investigate was whether the sum of $168,715 was an accurate adjustment of the body corporate levies between 2004 and 2007 based on the incorrect proportion of lot entitlements used. In other words, to investigate whether the plaintiff had levied the right amount by the process relied on in its statement of claim. Yet there was no issue about this between the plaintiff and the defendant, the defendant's defence being based on the idea that the whole system of dividing up costs was wrong. There was never any application to amend that part of the statement of claim which sought recovery of the amount in fact levied by the plaintiff, and in written submissions at the end of the trial, at para 106, 107, the plaintiff specifically identified the amount claimed as the unpaid levies referred to in the further amended statement of claim, together with interest and costs, in accordance with the plaintiff's pleading.

[46] In no sense did this aspect of the report respond to anything said in the third Hains report. Indeed, what Mr Lytras himself said about the third Hains report was that it "consolidated the opinions in the Hains 2011 report and the Hains 2015 report and represents Mr Hains final opinion on the issues identified."[5] In fact what Mr Lytras concluded in the first part of his report at p 6898 was that the amount by which the defendant had been undercharged in the years 2004 to 2007 was quite different from the amount claimed by the plaintiff in the proceeding, as it happens a lot more.

[47] The plaintiff did not rely on this evidence at the trial, and it is difficult to conclude that this report by Mr Lytras was anything other than wasted paper. Apart from being relevant to the question of costs, this seems to me to demonstrate clearly that there was no justification whatever in providing these instructions to Mr Lytras at that stage in the proceeding, in March 2018. In effect, 8 years after the plaintiff has sued to enforce a levy which was made on a particular basis, it finally thought of reconsidering the basis upon which the levy had been struck in the first place. That is extraordinary behaviour, and certainly not the sort of conduct which provides any justification for delay of the trial; Mr Lytras was being asked to waste time considering something which was not in issue in the proceeding as it stood.

[48] Mr Hains said in respect of the 2017 report that the effect of his analysis was that the amount overcharged to the defendant between the years 1999 and 2010 totalled $238,285.[6] This was actually $8,434 *less* than the amount determined in his second report in 2015. In other words, the effect of the final report was to *reduce* the amount which the defendant was claiming it had been overcharged initially over this period by 3.4%. From the point of view of the plaintiff therefore this report was more favourable than the second report. Yet it follows from what I was told that the plaintiff was prepared to allow the second report to go unanswered, but then considered that the third report needed challenging. That proposition in my view is patent nonsense. The provision of the third Hains report provided no new justification for obtaining expert evidence in response to that which had existed since 2015.

[49] In the circumstances it is difficult to believe that the decision apparently taken in early 2018 to obtain an expert report from Mr Lytras was anything other than a delaying tactic. The plaintiff had a motive to seek to delay these proceedings: it had a bylaw which it was seeking to enforce under which it was entitled to interest to the rate of 30% per annum on unpaid levies, which is now vastly in excess of commercial interest rates, even under the practice direction. In the event I found that the plaintiff was not entitled to recover interest on that basis, for reasons given in the previous judgment. Even if that does not provide the true explanation for this process, which as I noted earlier appears to have been carried out as inefficiently as possible, I

consider that the plaintiff, having decided in 2015 not to obtain expert evidence to counter the Hains 2015 report, and then three years later changing its mind and delaying the trial for 6 months while an expert report was obtained, amply justifies an exercise of discretion, even on the very limited basis which the authorities indicated as appropriate, to deny interest to the plaintiff in respect of the resulting delay. This is all the more so because this process in itself was delayed because the expert was first investigating, at some length and in some detail, a matter which was not a relevant matter for investigation in the context of this proceeding,

[50] I might add that I have looked at Mr Lytras' report and it suggests that the defendant had actually been undercharged on the basis of the analysis of expenditure which he had undertaken. It is obvious to me, as explained in my earlier reasons, that the defendant has in fact been overcharged substantially, and the only conclusion I can come to is that Mr Lytras' report must be based on assumptions which I would reject. As it happened, I was never taken to it in submissions, and did not consult it in the course of preparing my earlier reasons, but it would plainly have been of no assistance to me if I had done so. The true position frankly is that no part of the Lytras report was worth having; but that really provides an unnecessary additional reason for disallowing interest in respect of the period of delay associated with obtaining it.

[51] In my opinion this trial should have proceeded on 29 January 2018 rather than on 23 July 2018, and it was only the deliberate or inefficient obstruction of the plaintiff that caused that delay. Accordingly I propose to disallow interest during this period. It is therefore reasonable to disallow interest during both of the specific periods the defendant raised in its submissions, although that does not justify disallowing interest for the entire time between November 2012 and July 2018, even if the plaintiff failed to comply with various directions as to time limits during that period. It was only ever obliged to disclose an expert's report it was proposing to rely on.

[52] According to the court calculator, interest at the default rate of 10% until 19 April 2013, and thereafter at the rate determined under the practice direction, from 20 June 2010 to 29 October 2019 comes to $123,407.62. From that however must be deducted interest during the two periods for which I would not allow it. The first is a period of 12 months between late 2013 and late 2014, for most of which interest under the practice direction ran at 6.5%, which for one year comes to $11,937.78. I also disallow interest for 6 months in 2018, when the practice direction interest rate was 5.5%, which comes to $5,050.60. Hence the total amount of interest I will allow under the statute comes to $106,419.24.

[53] There will therefore be judgment that the defendant pay the plaintiff $290,077.44 including $106,419.24 by way of interest.

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[1] The defendant's argument for the grant of an injunction to restrain the plaintiff from enforcing the recovery of the contributions had echoes of the common injunction granted by Chancery to restrain a plaintiff from enforcing a common law right in the common law courts, something abolished by the *Judicature Act* 1873 (Eng) s 24(5).

[2] *Interchase Corporation Ltd v Grosvenor Hill (Qld) Pty Ltd (No.3)* [2003] 1 Qd R 26 at [59].

[3] His Lordship referred to authorities in the Admiralty jurisdiction in support of this approach.

[4] It does not modify the implied undertaking in Rule 5, in the absence of court ordered ADR: Rule 321.

[5] Exhibit 1, volume 19, p 6896, para 1.16.

[6] Exhibit 1, volume 14, p 4527, para 2.11.

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