DEBT, DAMAGES AND INTEREST

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Among the more common forms of relief sought in civil claims are the recovery of debt and payment of damages. These are distinct remedies with their own requirements — and also, when prosecuted, their own consequences. The courts treat them differently in a procedural sense, that is, so far as the conduct of a proceeding and the availability of certain procedural rights to parties are concerned. They also differ substantively insofar as their quantification and the awarding of accrued interest are concerned. In analysing two appellate decisions in this paper, I seek to illustrate the consequences of pursuing one pleaded case over another. I also reflect on some practical matters for parties seeking to prosecute or defend such claims.

When the distinction between debt and damages can make all the difference

The decision of the Victorian Court of Appeal in *Yang v Finder Earth Pty Ltd* ('*Yang*') involved determining whether a pleaded case constituted a claim for debt or for damages.[1] The issue arose in the context of a defendant seeking to set aside a default judgment for irregularity. The decision in *Yang* demonstrates how the particular manner of pleading a cause of action, as well as the forms of relief sought, can affect a party's procedural rights. It serves as a reminder of the importance of clear and thoughtful pleading when formulating claims.

There is some interaction between the facts of *Yang* and the operation of court procedure which I discuss below. Before doing so, however, I wish to place the discussion in context by making a few general observations about the law relating to debt and damages.

Debt or damages?

So far as the legal concept of a debt is concerned, in *Spain v Union Steamship Co of New Zealand Ltd* Knox CJ and Starke J held that 'whenever the amount to which the plaintiff is entitled ... can be

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[1] [2019] VSCA 22 ('*Yang*').

ascertained by calculation or fixed by any scale of charges, or other positive data, it is ... liquidated'.[2] In *Rothwells Ltd v Nommack (No 100) Pty Ltd*,[3] and perhaps with greater specificity, McPherson J held that the three ways in which a debt could arise at common law were '(1) by judgment; (2) by deed under seal; and (3) as the quid pro quo for a consideration that was executed'.[4] The first two categories seemingly are clear enough. A circumstance of 'quid pro quo', on the other hand, is something which can arise where an act is done by request, demand or requirement as the price of, or in exchange for, a promise to pay a specified sum.[5]

Damages, on the other hand, are unliquidated. They are awarded to a successful plaintiff subject to assessment, generally by a court. Their quantum is at large. The party seeking damages bears the onus of proving loss and quantifying the damages. Nominal damages, for what (little) they are worth, can be awarded in the absence of loss.[6]

The measure of damages, and whether they are awarded at all, depends on the cause of action and the supporting evidence. Damages for breach of contract, for example, seek to put the plaintiff in a position as if the contract had properly been performed.[7] They are, in that context, compensatory only.[8] Damages for tort, on the other hand, are informed by the concept of *restitutio in integrum* and seek to restore a plaintiff to a position had the wrong not occurred.[9] Damages in that situation can be compensatory but they also can be restitutionary, exemplary and/or punitive. Elsewhere, some statutory causes of action provide for the award of damages such as for misleading and deceptive conduct or unconscionable conduct under the Australian Consumer Law as contained in the *Competition and Consumer Act 2010* (Cth),[10] and equity has its own set of principles regarding the award of damages.

The facts in Yang

The applicant, Mr Yang, was defendant in a County Court proceeding. In their further amended statement of claim, the plaintiffs alleged a series of agreements between the parties whereby one of

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[2] (1923) 32 CLR 138, 142 (citations omitted).

[3] [1990] 2 Qd R 85.

[4] Ibid 87.

[5] Ibid.

[6] See, eg, *Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd* (1938) 61 CLR 286.

[7] *Robinson v Harman* (1848) 1 Exch 850; 154 ER 363, 365 (Parke B).

[8] *Hospitality Group Pty Ltd v Australian Rugby Union Ltd* (2001) 110 FCR 157, 196.

[9] See *Haines v Bendall* (1991) 172 CLR 60, 63.

[10] *Competition and Consumer Act 2010* (Cth) sch 2 s 236.

the plaintiffs, Ms Luo, had lent $700,000 to two companies owned by Mr Yang: 'Finder Earth Pty Ltd' and 'Legendary Landers Pty Ltd'. There were terms of the agreements that the loans were to be used solely in establishing a business for the purpose of obtaining an investment-based migrant visa for Ms Luo. Mr Yang guaranteed and indemnified Ms Luo for the money she lent and for 'any further loss and damage she sustained' in connection with the agreements. The plaintiffs described the arrangement between Ms Luo and Mr Yang as a 'partnership'. The plaintiffs alleged a breach of this arrangement; Mr Yang had 'applied the monies loaned … for purposes other than the partnership' and this conduct constituted 'a breach' of the agreements to lend money.[11]

In terms of the relief sought, the plaintiffs' further amended statement of claim relevantly contained the following:

(a) An allegation that, 'by reason of the conduct alleged, [Ms] Luo has suffered loss and damage being: (a) a loss of $700,000; and (b) [other consequences]'.

(b) An item in the prayer for relief against Mr Yang and/or a company of which he was sole director (but not one of the borrowing companies) for '$700,000 owing to [Ms Luo] under the [agreements]'.

(c) An item in the prayer for relief against Mr Yang in his capacity as guarantor for 'an order for such loss and damage owing pursuant to the [guarantee and indemnity]'.

(d) An item in the prayer for relief against Mr Yang in his personal capacity (and without reference to the guarantee and indemnity) for damages.

During the course of the proceeding, the County Court struck out Mr Yang's defence pursuant to a self-executing order. The plaintiffs then entered default judgment for $700,000 plus interest and costs. Mr Yang applied to set aside the default judgment, arguing that it should not have been entered for the lump sum on the basis it ought properly have been pursued as a claim for damages rather than for debt. The primary judge refused Mr Yang's application.[12] It was this refusal that was the subject of Mr Yang's appeal.

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[11] *Yang* (n 1) [15]–[16].

[12] *Finder Earth Pty Ltd v B N & S K Pty Ltd (No 2)* [2018] VCC 288 ('*Finder Earth*').

A matter of civil procedure

The rules of the County Court and of other courts entitle a plaintiff with an undefended claim to enter default judgment.[13] This can occur where a defendant either has not filed an appearance or has failed to file a defence, or where its defence has been struck out (as was the case in *Yang*). The manner in which default judgment is to be entered depends on whether the judgment relates to a claim for debt or for damages. If the former, a plaintiff can in accordance with the court's rules enter final judgment for the amount sought; with the latter, judgment is (merely) interlocutory and the rules expressly provide that the quantum of damages must later be 'assessed'.

Rule 21.03 of the *County Court Civil Procedure Rules 2018*, in substance the same as its predecessor in the *County Court Civil Procedure Rules 2008* (which was relevant to the appeal in *Yang*), includes the following:

> (1) Where a claim is made for the recovery of a debt, damages or any property, whether or not another claim is also made in the proceeding, and the plaintiff is entitled to judgment on that claim against any defendant in accordance with Rule 21.01 or Rule 21.02, the plaintiff may—
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> (a) for the recovery of a debt, enter final judgment against that defendant for an amount not exceeding the amount claimed in the writ or, if the plaintiff has served a statement of claim, the amount claimed in the statement of claim, together with interest from the commencement of the proceeding to the date of the judgment—
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> (i) on any debt which carries interest, at the rate it carries;
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> (ii) on any other debt, at the rates payable on judgment debts during that time;
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> (b) for the recovery of damages, enter interlocutory judgment against that defendant for the damages to be assessed;
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> …
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> (3) Where under paragraph (1) damages or the value of goods are to be assessed, the assessment shall, unless the Court otherwise orders, be made by an associate judge or judicial registrar in accordance with Order 51.

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[13] See, eg, *Supreme Court (General Civil Procedure) Rules 2015* ord 21; *County Court Civil Procedure Rules 2018* ord 21; *Magistrates' Court General Civil Procedure Rules 2020* ord 21 pt 1.

Order 51 provides, among other things, for the assessment of damages to occur and for all matters relating to the attendance of witnesses, production of documents and subpoena of information (where applicable) to occur as they would for conduct of a trial.[14]

The issue on appeal

The issue on appeal in *Yang* was whether Ms Luo had obtained the default judgment irregularly on the basis it should only have been a judgment for damages to be assessed rather than a final judgment for a fixed sum by way of a debt. In seeking to set aside the default judgment as irregular, Mr Yang's submissions primarily were as follows.

First, Mr Yang argued that Ms Luo had not pleaded a claim for a debt in the proceeding and therefore should not have obtained final judgment in the manner she did under rule 21.03. Second, he submitted that the item in the prayer for relief seeking payment of $700,000 from Mr Yang and/or a company of which he was sole director was defective in circumstances where Mr Yang was not party to either of the loan agreements; he was guarantor. Third, Mr Yang submitted that, in determining whether or not to set aside the default judgment for irregularity, the judge should not have attempted to contort the meaning of the pleadings into a debt claim.

Before turning to the Court of Appeal's consideration of these matters, it is useful to first review the primary judge's reasons.

The primary judge's reasons

The primary judge, in refusing Mr Yang's application to set aside the default judgment, noted that 'courts do not take an unduly technical or restrictive approach to pleadings such that, among other things, a party is strictly bound to the literal meaning of the case it has pleaded'.[15] Conceding that Ms Luo's claim could have been better pleaded, the judge went on to state:

> However, *I am satisfied that a basis for a claim by the second plaintiff for the debts* claimed in paragraphs 1 and 2 of the default judgment *is sufficiently revealed on the current pleading read as a whole*. In particular, the drafting deficiency in the prayer for relief in respect of this claim relied on by the second and third defendants, does not preclude the second plaintiff from pursuing judgment in default of defence in the form sought in the default judgment.[16]

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[14] *County Court Civil Procedure Rules 2018* r 51.03.

[15] *Finder Earth* (n 12) [24], citing *Thomson v STX Pan Ocean Co Ltd* [2012] FCAFC 15.

[16] *Finder Earth* (n 12) [26] (emphasis added).

The judge also held that the $700,000 sought was a 'debt' for the purposes of r 21.03. The judge held that the money was 'a fixed liquidated sum alleged to have been lent by [Ms Luo] under the loan agreements referred to and payable by [Mr Yang] as a debt due pursuant to the [guarantee and indemnity]' and that the fixed sum was simply 'a sub-set of the broader claim for loss and damage' as expressed in the prayer for relief.[17]

On appeal

On appeal, Mr Yang maintained that the claim as pleaded in the County Court was not a claim for recovery of debt under the guarantee and indemnity but rather a claim for damages arising from Mr Yang's alleged misapplication of the loan. As respondents on appeal, the plaintiffs argued that the judge had correctly identified the *essential character* of the pleaded allegation as being a claim for debt. The respondents also argued that although there were gaps in the pleadings the judge was entitled to have regard to other paragraphs in the pleadings in construing the nature of the claim.

In a joint decision, Maxwell P, Tate and Emerton JJA allowed the appeal and ordered that the default judgment be set aside.[18] In so ordering, the Court considered that the foundation of Ms Luo's claim was Mr Yang's guarantee and indemnity but that the money which she had sought to recover was the 'loss and damage' she claimed to have suffered as a result of misapplication of the loan moneys. The statement of claim being a claim for damages rather than for debt, the Court held that the respondent as plaintiffs were not entitled to enter judgment in the manner they did.

The Court held:

> [T]he critical point is that the allegations are all expressed in the language of 'loss and damage suffered by reason of the defendants' conduct'. Far from Luo alleging that Yang is indebted to her under the terms of the guarantee and indemnity, she claims to recover from him *loss and damage which she has suffered 'by reason of the conduct'*, being the misapplication of the loan funds.[19]

The position would have been different, the Court observed, had the pleadings mentioned a debt arising under the guarantee by reason of default under the loan agreement. But this had not been pleaded — 'loss and damage' had been sought instead.

Although not necessarily ruling on the elements that ought be pleaded in order to establish a claim for debt, the Court noted the submission advanced on behalf of Mr Yang that certain allegations of fact

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[17] Ibid [27].

[18] *Yang* (n 1) [5].

[19] Ibid [29] (emphasis added).

were missing from the pleadings which might otherwise have established a claim for debt. These were:

(a) an event of default which rendered the loan amounts repayable;

(b) demand for repayment, and demand for performance of the guarantee and indemnity; and

(c) failure to comply with the demands, whether in repayment of the money or performance under the guarantee and indemnity.

The Court also noted that 'the prayer for relief would have been expected to state, clearly, that Luo was claiming the amount of $700,000 as a debt due under the guarantee and indemnity'.[20]

In allowing the appeal and setting aside the default judgment, the Court concluded:

> It is clear enough that Luo sought to rely on the guarantee and indemnity. Paragraph 31 of the pleading made that clear. But, with great respect to the judge, the 'sums' which Luo sought to recover were those referred to in paragraph 30 as the 'loss and damage' she had suffered by reason of the misapplication of the loan funds. It was, of course, alleged that those sums included the $700,000 but, as counsel for Yang correctly pointed out, it would be a matter for assessment to determine whether she had in fact lost that amount, or some other amount, as a result of the misapplication of the funds.[21]

To what extent should courts take pleadings at face value?

The Court in *Yang* noted the circumstance arising whereby allegations of fact in a claim which proceeds to default judgment are taken to have been admitted by the defendant. The Court held that even in such circumstances 'the specification in the pleading of a precise amount said to be payable' does not shield it from scrutiny as to whether it is a debt or damages.[22] In other words, a court need not necessarily take at face value the particular quality of a claim — whether for debt or for damages — simply because the claim was not challenged in formal pleadings or contested at trial.

In making these observations, the Court referred to the decision in *Arnold v Forsythe* ('*Arnold*').[23] There, the New South Wales Court of Appeal considered a similar situation involving default

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[20] Ibid [26].

[21] Ibid [28].

[22] Ibid [24], citing *Arnold v Forsythe* [2012] NSWCA 18, [48].

[23] [2012] NSWCA 18 ('*Arnold*').

judgment and a subsequent attempt to have the judgment set aside for irregularity. Sackville AJA of that Court, with whom McColl JA and Young JA agreed, said:

> [T]he specification of a precise amount does not convert what is otherwise a claim for unliquidated damages into a liquidated claim … . It is therefore necessary to examine the appellant's statement of claim to determine whether it can be characterised as pleading a claim for a debt or liquidated claim so as to satisfy [the rules governing the entering of default judgment].[24]

As is apparent from the Court's reasoning in *Yang* and from the above quote from *Arnold*, the use of language in pleadings can make all the difference. Even though Ms Luo might truly have intended to recover a debt, her pleadings took on the language of damages: the reference to suffering 'loss and damage', the claim for an order for 'such loss and damage owing' to Ms Luo, and the absence of clear wording to show that it was a debt. It mattered less that she had in certain parts of her pleadings sought to recover a *specific sum* (being the $700,000 lent to Mr Yang's companies) which, ordinarily, could be the subject of a debt.

Can a default judgment be set aside on the basis of deficient pleadings?

The issue which the Court addressed in *Yang*, and which formed the basis for its decision to set aside the default judgment, was whether the judgment had been obtained for a debt or for damages — the procedural difference between the two being discussed earlier in this paper. Given the Court's decision to set aside the default judgment, it was unnecessary for it to consider the alternative submission which Mr Yang advanced, namely that the pleadings did not disclose a cause of action for recovery of a debt. Their Honours therefore left the issue for resolution on another occasion, stating:

> Whether a judge asked to act under r 21.03 must — in addition to determining the true character of the claim — decide whether the claim is *properly pleaded* is a question which should await an occasion in which it falls for decision.[25]

Despite the Court of Appeal deferring the question to another day, I make the following observations. A similar question was raised in *Arnold* and, like in *Yang*, it was unnecessary for the Court to determine. Sackville AJA, with whom the other appeal judges agreed, observed in obiter that 'had it been necessary to do so, I would have concluded that the pleading defects constituted an irregularity and that the Court's power in r 36.15(1) [of the New South Wales *Uniform Civil Procedure Rules 2005*] to set aside the default judgment was attracted'.[26] In addition to the ability to set aside a default

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[24] Ibid [48] (citations omitted).

[25] *Yang* (n 1) [32] (emphasis added).

[26] *Arnold* (n 23) [80].

judgment by the parties' consent, the New South Wales *Uniform Civil Procedure Rules 2005* r 36.15(1) provides:

> A judgment or order of the court in any proceedings may, on sufficient cause being shown, be set aside by order of the court if the judgment was given or entered, or the order was made, irregularly, illegally or against good faith.

In expressing his Honour's view in obiter, Sackville AJA noted the decision in *Fenato v Chief Commissioner of State Revenue* ('*Fenato*').[27] There, the Chief Commissioner of State Revenue had obtained a default judgment for unpaid land tax and interest despite the pleadings having omitted certain key details including the fact of service of land tax notices. The Court, in setting aside the default judgment, held that the deficiencies in the pleadings constituted an irregularity. Sackville AJA understood the decision in *Fenato* as reflecting a court's discretion to set aside a judgment for irregularity and that whether it should occur in light of any pleading deficiency was a matter of degree: 'The significance of such a failure may depend on the nature of the material facts omitted and whether the pleading, despite the omission, sufficiently identifies the case pleaded against the defendant.'[28] On the facts before his Honour, Sackville AJA noted that 'the omissions in the statement of claim went to the very foundations of the respondents' cause of action against the appellant' and that, were it necessary to have done so, this would have been a sufficient basis to set aside the default judgment in reliance on *Fenato*.[29]

There is no equivalent provision to r 36.15 in the rules of Victorian courts. So far as the County Court's rules are concerned, r 21.07 simply states: 'The Court may set aside or vary any judgment entered or given in accordance with this Order'. Whereas a default judgment irregularly obtained can be set aside as of right,[30] a court's decision to set aside a default judgment regularly obtained is discretionary. In Victoria, it is generally the case that in order to succeed in setting aside a default judgment regularly obtained a defendant must among other things provide an explanation for the default and demonstrate an arguable defence.[31] Despite the differences in practice between the states, were the issue to be agitated in Victoria it would be entirely possible for a court to adopt the position recorded (in obiter) in Arnold. That being said, I expect the courts' desire to achieve the overarching purpose as expressed in the *Civil Procedure Act 2010* (Vic) s 7(1) — the 'just, efficient, timely and cost‑effective resolution of the real issues in dispute' — might bear upon such a decision.

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[27] (2010) 78 NSWLR 20.

[28] *Arnold* (n 23) [83].

[29] Ibid [84].

[30] *Chitty v Mason* [1926] VLR 419

[31] *Kostokanellis v Allen* [1974] VR 596.

Conclusion

The decision in *Yang* contains some useful pointers for how appropriately to plead an action for debt or, as the case may be, an action seeking damages. It also bears a stern reminder for those preparing pleadings; as the Court stated:

> The case is … instructive for those preparing statements of claim. If for any reason the contingency of judgment in default is to be anticipated, the pleader must take care to ensure that any claim for the recovery of a debt is clearly pleaded as such. As in every case, care must be taken to ensure that all of the material facts necessary to establish the cause(s) of action are pleaded.[32]

Suing for interest on a 'debt or sum certain'

A person who succeeds in recovering a 'debt or sum certain' in a proceeding is entitled to interest on that amount unless there is good cause to the contrary. But what qualifies as a 'debt or sum certain'? If a party sues for an amount in the form of compensation and receives it before determination of the proceeding, has the party 'recovered' that amount? And what might constitute 'good cause … to the contrary'? The Victorian Court of Appeal addressed these concepts in the case of *Carbone v Melton City Council* ('*Carbone*').[33]

A note about the award of interest

Part 5 Division 7 of the *Supreme Court Act 1986* (Vic) ('*Supreme Court Act*') governs the award of interest in civil proceedings.[34] There are four sections in that division, two of which relate to claims for debt and damages. Relevant to the decision in *Carbone* is s 58.[35] It provides:

> (1) If in a proceeding a debt or sum certain is recovered, the Court must on application, unless good cause is shown to the contrary, allow interest to the creditor on the debt or sum at a rate not exceeding the rate for the time being fixed under section 2 of the *Penalty Interest Rates Act 1983* or, in respect of any bill of exchange or promissory note, at 2% per annum more than that rate from the time when the debt or sum was payable (if payable by virtue of some written

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[32] *Yang* (n 1) [7].

[33] (2020) 60 VR 539 ('*Carbone*').

[34] The provisions of div 7 apply to all inferior courts in Victoria: *Supreme Court Act 1986* (Vic) s 33.

[35] Two other provisions in div 7, ss 57 and 59, are relevant to the recovery of interest in proceedings but are beyond the scope of this paper's discussion. Section 57 governs both the maximum interest rate that parties may include in a contract and the rate a court will allow where a party has not agreed to an interest rate. Section 59 allows a court to award damages in the nature of interest in actions for trover or trespass to goods and in actions under an insurance policy.

> instrument and at a date or time certain) or, if payable otherwise, then from the time when demand of payment was made.
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> (2) Subsection (1) does not authorise the computation of interest on any bill of exchange or promissory note at a higher rate than the rate for the time being fixed under section 2 of the *Penalty Interest Rates Act 1983* if there has been no defence pleaded.
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> (3) A debt or sum payable or a date or time is to be taken to be certain if it has become certain.

Section 58, in summary, permits a court to award interest in a proceeding where the plaintiff has:

(a) claimed a 'debt or sum certain'; and

(b) 'recovered' that debt or sum certain in the proceeding.

Section 58 states that interest is to be calculated from the time the debt or sum certain was 'payable' which, among other bases, includes the time at which the plaintiff makes a demand for payment. (Issuing a writ when commencing a proceeding does not constitute a 'demand'.[36]) If a party satisfies the conditions in s 58, a court has limited discretion to refuse to award interest; it must do so unless there is 'good cause … to the contrary'.

Elsewhere in pt 5 div 7, a different mechanism for the award of interest exists in s 60. It states:

> (1) The Court, on application in any proceeding for the recovery of debt or damages, must, unless good cause is shown to the contrary, give damages in the nature of interest at such rate not exceeding the rate for the time being fixed under section 2 of the *Penalty Interest Rates Act 1983* as it thinks fit from the commencement of the proceeding to the date of the judgment over and above the debt or damages awarded.
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> (2) Nothing in this section—
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> (a) authorises the granting of interest on interest;
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> (b) applies in relation to any sum on which interest is recoverable as of right by virtue of any agreement or otherwise;
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> (c) affects the damages recoverable for the dishonour of a negotiable instrument;
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> (d) authorises the allowance of any interest otherwise than by consent on any sum for which judgment is entered or given by consent;

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[36] *Saunders v Nash* [1991] 2 VR 63, 68.

(e) applies in relation to any sum on which interest might be awarded by virtue of section 58 or 59; or

(f) limits the operation of any enactment or rule of law which, apart from this section, provides for the award of interest.

(3) If the damages awarded by the Court or jury include or if the Court in its absolute discretion determines that the damages awarded include any amount for—

(a) compensation in respect of liabilities incurred which do not carry interest as against the person claiming interest;

(b) compensation for loss or damage to be incurred or suffered after the date of the award; or

(c) exemplary or punitive damages—

the Court must not allow interest in respect of any amount so included or in respect of so much of the award as in its opinion represents any such damages.

(4) The Court may request a jury to specify in its verdict any amount included in the verdict in respect of the matters referred to in subsection (3).

Sections 58 and 60 appear similar in some respects. Both, for example, cap the rate of interest awardable and both require the court to make an order 'unless good cause is shown to the contrary'. As the Court of Appeal said in *Chong v CC Containers Pty Ltd* ('*Chong*'),[37] both provisions

> have the beneficial purpose of providing for the award of interest to compensate parties who have been obliged to institute proceedings to recover a money sum and who in the meantime have been kept out of moneys which they could otherwise have used or upon which they could otherwise have earned interest.[38]

The Court noted in *Chong* that despite the shared qualities the provisions 'are not intended to overlap'.[39] There are, to my mind, a few key differences in their application.

First, as s 60(2)(e) provides, s 60 is a residual provision and does not apply to sums on which interest may be awarded under ss 58 or 59.

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[37] [2015] VSCA 137 ('*Chong*').

[38] Ibid [256] (citations omitted).

[39] Ibid (citations omitted).

Second, s 60 is concerned with calculation of interest from the date of commencement of a proceeding until the date of judgment. Section 58, on the other hand, calculates interest from potentially an earlier point in time, namely from the time a debt or sum certain was payable (or the time payment was demanded) until the time of the court's order. As the Court of Appeal noted in *Chong*:

> The legislature clearly intended to distinguish between cases where a debt has become payable prior to the initiation of a proceeding for its recovery (in which case, s 58 will be enlivened if its requirements are met), and one in which the obligation to pay has not so crystallised at an earlier time (in which case, s 60 will be enlivened if its requirements are met).[40]

Finally, '[w]here there is no written instrument or a demand for payment, interest cannot be awarded under s 58 for a debt or a sum certain, but the plaintiff may be entitled to interest under s 60'.[41] What constitutes a 'demand' for payment will depend on the facts of the case,[42] but some guiding principles were expounded in the New South Wales Supreme Court decision in *Re Colonial Finance, Mortgage, Investment & Guarantee Corporation Ltd.*[43] There, Walker J said:

> [T]here must be a clear intimation that payment is required to constitute a demand; nothing more is necessary, and the word 'demand' need not be used; neither is the validity of a demand lessened by its being clothed in the language of politeness; it must be of a preemptory character and unconditional, but the *nature of the language is immaterial provided it has this effect*.[44]

Accordingly, in determining whether something constitutes a 'demand' a court will tend to look to the *effect* of the communication — that it be 'preemptory … and unconditional' — rather than purely its particular use of words or its tone, whether polite or terse.

Besides the differences between the provisions, I note the following about one of the exceptions in s 60. Section 60(2)(d) has the effect that nothing in s 60 'authorises the allowance of any interest otherwise than by consent on any sum for which judgment is entered or given by consent'. In *Minister for Energy, Environment & Climate Change v Megson*,[45] the Court of Appeal held that this exception effectively allows a plaintiff which seeks to recover money, and where there has been consent to

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[40] Ibid (citations omitted).

[41] Ibid [258].

[42] *AJ Lucas Drilling Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2019] VSCA 310, [180].

[43] (1905) 6 SR (NSW) 6.

[44] Ibid 9.

[45] [2019] VSCA 19.

judgment for some of that money, to apply for interest on the portion not consented to. The Court held that while

> it is tolerably clear that s 60(2)(d) is directed to ensuring finality in litigation where the parties have reached agreement in a proceeding and caused judgment to be entered or given by consent without the need for adjudication by the Court … where there has been agreement between the parties as to only *a part of a claim*, that purpose is not defeated by giving the parties the opportunity to seek an award of interest on the overall sum of compensation that is determined, including on the agreed amounts.[46]

The facts in Carbone

The applicants were registered proprietors of a large plot of land in Victoria. In June 2010, they entered into a contract for sale of part of that land to a developer which was to be settled subject to registration of a plan of subdivision. The subdivision entitled the local council, Melton City Council, to acquire part of the land. Subdivision was approved in 2011 and registered in 2012.

In June 2013, the Council offered to compensate the applicants provided they execute a deed of release and indemnity in favour of the Council. The applicants rejected the Council's offer and refused to execute the deed. In August 2013, they demanded the Council pay the compensation it had already offered as an advance on the total amount of compensation they considered was owed to them, together with interest. However, because the Council persisted with its requirement for a deed and the applicants refused the parties were unable to negotiate an outcome.

In February 2014, the applicants commenced a proceeding claiming compensation under the *Land Acquisition and Compensation Act 1986* (Vic) ('*LAC Act*'). They also claimed interest pursuant to s 58. It was only after commencement of the proceeding that the Council paid the applicants, unconditionally, the amount it initially had offered. The applicants acknowledged payment of this compensation and amended their statement of claim to seek the difference between it and the full amount to which they considered they were entitled in restitution.

At trial, the judge dismissed the applicants' proceeding;[47] the judge held that the applicants were not entitled to compensation beyond what the Council had paid and nor any interest. The judge held that s 58 did not apply to sums of compensation paid pursuant to the *LAC Act* on the basis such compensation was not a 'debt or sum certain'. The judge also held that the amount which the Council agreed to pay the applicant during the course of the proceeding was not an amount which the applicants 'recovered' in the proceeding for the purposes of s 58.

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[46] Ibid [107]–[108] (Emerton JA, Tate JA and Almond AJA agreeing) (emphasis added).

[47] *Carbone v Melton City Council* [2018] VSC 812.

The applicants applied for leave to appeal on the sole ground the trial judge had erred in dismissing their claim for interest under s 58. The Council filed a notice of contention seeking to uphold the trial judge's decision on the basis there was 'good cause' to refuse to award interest in any event.

On appeal

The Court of Appeal, constituted by Tate, Kyrou and Niall JJA, considered the parties' submissions. Tate and Kyrou JJA (Niall JA dissenting) in a joint judgment allowed the appeal and ordered the Council to pay the applicants interest pursuant to s 58.

Looking first to the legislative intent behind the provision, their Honours considered that s 58 should be construed in a way that reflects its two-fold 'beneficial purpose', namely:

(a) 'to compensate a party who has been obliged to take proceedings to recover a money sum and who in the meantime has been kept out of moneys which could otherwise have been used or upon which interest could have been earned';[48] and

(b) 'to encourage the early resolution of litigation'.[49]

It was through the lens of this 'beneficial purpose' that their Honours addressed the question of the applicants' entitlement to interest on the compensation they had been paid. Addressing the elements of s 58, their Honours held the following.

Was the compensation a 'debt or sum certain'?

Tate and Kyrou JJA noted, as a starting point, that an amount of compensation cannot be a 'debt or sum certain' if it needs to be assessed by a court. However, their Honours held that 'the mere fact that a further calculation is required may not, in the particular circumstances of a case, alter the characterisation of a claim as being one for a debt or sum certain'.[50] Their Honours also noted: 'The phrase "debt or sum certain" is not confined to sums whose quantum is agreed. It includes a sum for which, although the precise amount has not been agreed, is *capable of ascertainment without valuation or estimation*'.[51]

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[48] *Carbone* (n 33) 549, citing *Victorian WorkCover Authority v Esso Australia Ltd* (2001) 207 CLR 520, 546.

[49] *Carbone* (n 33) 549, citing *Ruby v Marsh* (1975) 132 CLR 642, 652–3.

[50] *Carbone* (n 33) 550.

[51] Ibid (citations omitted) (emphasis added).

On the facts before them, their Honours considered that the compensation which the applicants sought, and which the Council agreed to pay, was a 'sum certain' and became so when the applicants demanded payment of the Council's offered amount in August 2013. This was because, at that time, 'both parties accepted that, whatever the amount of compensation that was payable to the applicants, it would be not less than the fixed sum [which the Council had offered]'.[52] Their Honours noted that the compensation could be characterised as a debt or sum certain notwithstanding the Council's insistence that the applicants execute a deed of release and indemnity before paying the amount — which condition may have suggested that the amount was not 'certain' or had not crystallised as a 'debt' — because, in the circumstances, there was no legal basis for the Council to impose such a requirement.

Had the compensation been 'recovered' in the proceeding?

In order for s 58 to apply, it was not enough for the applicants to show that the amount the Council offered to pay, and which the applicants agreed to accept, was a 'debt or sum certain'; the amount also needed to have been 'recovered' in the proceeding. A quirk of the applicants' case was that they received compensation after issuing proceedings and before judgment. As stated above, they amended their statement of claim after they received the Council's payment in order to seek a higher amount in accordance with the principles of restitution.

Tate and Kyrou JJA held that, consistent with the beneficial purpose of s 58(1), it was not necessary that judgment for that or some other amount of compensation have been entered in the proceeding in order for the amount to have been 'recovered'. Their Honours cited the decision of the Supreme Court in *Melbourne & Metropolitan Board of Works v Bevelon Investments Pty Ltd* ('*Bevelon*') as authority on this point.[53] The Council sought to distinguish that earlier case on the basis the applicants did not include in their final pleadings a claim for the amount which the Council ended up paying. In rejecting this submission, their Honours noted that the following sequence:[54]

(a) The applicants had at all times pleaded that they were entitled to the value of the land and that the (true) value exceeded the amount the Council paid.

(b) In the trial judge's view, the amount the Council paid was not unfair compensation.

(c) The trial judge's view meant that 'the judge implicitly accepted that the Council correctly assessed the value of the [land] at the [amount the Council paid]'.

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[52] Ibid 559.

[53] [1977] VR 473.

[54] *Carbone* (n 33) 562.

(d) Because of (c):

(i) the applicant's claim included the sum which the Council paid; and

(ii) the trial judge's decision was 'consistent with the proposition that the applicants were entitled to that sum'.

It mattered less, therefore, that the applicants had not included in their pleadings the specific amount which they ultimately 'recovered' in the proceeding; the Court of Appeal was able to infer the recovery of the amount by reference to the circumstances of the case holistically.

In holding that the amount had been 'recovered' in the proceeding below, their Honours found a connection between the proceeding and the Council's payment, stating:

> The Council had no legal basis to resist payment of the amount unconditionally prior to the commencement of the proceeding and capitulated shortly after that commencement. Accordingly, *there is a clear causal relationship between the proceeding and the payment of the amount*. The Council would not have paid the amount unconditionally if the applicants had not commenced the proceeding and the promptness with which the payment was made after that commencement indicates that *the proceeding was the sole reason for the payment*.[55]

Their Honours considered that '[t]he purpose of s 58(1) is to provide redress in those circumstances'.[56]

<u>When had the compensation been 'payable'?</u>

The calculation of interest under s 58 is to run from the time at which the debt or sum certain becomes 'payable'. The provision states that the amount can become payable when demand for payment is made or when it is payable according to some instrument.

Tate and Kyrou JJA noted that s 58(1) 'presupposes that the debt or sum certain that is recovered in a proceeding was payable before the commencement of the proceeding' otherwise the plaintiff could not be a 'creditor' for the purposes of s 58.[57] Their Honours held that, for the purposes of calculating the interest payable, the amount of compensation in the present case was 'payable' from the date of the applicants' demand in August 2013. This was so notwithstanding that the *legal obligation* to

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[55] Ibid 561–2 (emphasis added).

[56] Ibid 559.

[57] Ibid 552, citing inter alia *Chong* (n 37) 476.

compensate the applicants arose earlier when the part of the subdivision vested in the Council. Their Honours noted:

> [T]he amount [which the Council initially offered and ultimately paid] was payable before the commencement of the proceeding. That is because, prior to that commencement, there was no dispute between the Council and the applicants that at least that amount was payable. The only reason why the Council refused to pay the amount was its insistence, without any legal basis, that the applicants execute the Deed.[58]

It is apparent, then, that the amount became 'payable' when there was some agreement — albeit subject to a (mistaken) condition on one party's behalf — as to the particular amount that could be paid as distinct from the time when an obligation arose to pay some unspecified amount.

When does something 'become certain'?

Section 58(3) provides, somewhat cryptically: 'A debt or sum payable or a date or time is to be taken to be certain if it has become certain.' In construing the expression '[to] become certain', Tate and Kyrou JJA cited the earlier decision of the Court of Appeal in *Aqua-Max Pty Ltd v MT Associates Pty Ltd*.[59] There, the Court said that even if questions of fact or law need to be resolved something can still be considered 'certain' for the purposes of s 58.[60] The Court stated:

> The facts are the facts and the law is the law: there may be difficulty in finding the one or in stating the other, but, *unless it is impossible in a given case to find the facts which have to be determined, the necessary certainty exists*. In other words, it is not difficulty but impossibility which will prevent its being said that the date or time at which the sum was payable has become certain.[61]

In other words, it will be no answer to an allegation that something is a 'debt or sum certain' simply to say that the amount is not abundantly clear. This is consistent with the Court's views in *Carbone*, mentioned earlier in this paper, that something can be a debt or sum certain provided it 'is capable of ascertainment without valuation or estimation'.

Was there any 'good cause' to deny interest?

The Court being satisfied on appeal that the applicants had 'recovered' an amount in the proceeding below which constituted a 'debt or sum certain', the onus was on the Council to show 'good cause' as

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[58] *Carbone* (n 33) 562.

[59] (2001) 3 VR 473.

[60] Ibid 497–8.

[61] Ibid 498 (emphasis added).

to why interest should not be awarded under s 58. Tate and Kyrou JJA observed that '[t]he purpose of the discretion to refuse an award of interest [on the basis of there being good cause] is not to punish the plaintiff but, in a proper case, to relieve the defendant against any injustice'.[62]

As the Council had not argued at trial that there was 'good cause' to disallow any award of interest pursuant to s 58, Tate and Kyrou JJA decided not to determine the point on appeal. Their Honours did observe in obiter, however, that in circumstances where the Council had delayed payment of the amount for nearly two years and had imposed conditions on payment without a legal basis — thereby depriving the applicants of their compensation (or the ability to earn interest on that amount) for that period — there was no 'good cause' to refuse to award interest.[63] There was, it seems, a certain quality in the Council's actions which the Court could not countenance as being 'good cause'.

The dissenting judgment

Niall JA, dissenting, focused on the applicants' pleaded case. Noting that the applicants had received compensation before amending their claim to seek an additional amount, his Honour held that there was not a close enough connection between the basis for payment and the applicants' (amended) pleaded case.[64] The applicants had therefore not 'recovered' the amount which the Council paid. Unlike Tate and Kyrou JJA, his Honour chose not to follow the decision in *Bevelon* as referred to above.[65]

His Honour also held that what the applicants had been paid was not a 'sum certain' because it was for an amount less than what they ultimately sought in their amended statement of claim; his Honour held:

> The sum certain referred to in s 58 is not a payment along the way in a finite amount; were it so, every part payment on account of damages would be a sum certain. *The sum certain is the sum sought in the claim, not a component part of it*. I would not construe the phrase 'sum certain' as including a sum of at least a defined amount.[66]

Niall JA's dissenting view can be summarised in the following quote from earlier in the judgment where his Honour said:

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[62] *Carbone* (n 33) 553 (citations omitted).

[63] Ibid 564.

[64] Ibid 568.

[65] Ibid 575.

[66] Ibid 577 (emphasis added).

> It is not possible to recover a debt or sum certain in a proceeding where the plaintiff does not make a claim for a debt or sum certain. Equally, it is not open to characterise a payment received after a proceeding has commenced as a debt or sum certain, without regard to the nature of the cause of action and the relief sought in the proceeding.[67]

While the dissent is a compelling one, I do think the majority had appropriate regard to the 'nature of the cause of action and the relief sought' — I note in particular the reasoning of the majority with respect to the question of whether the amount was 'recovered' in the proceeding (see above) and the way in which the applicants' decision in August 2013 to accept the Council's offered amount effectively crystallised the *minimum* sum they stood to receive in the proceeding. I also think an overly technical approach to applying s 58 risks undermining what otherwise should be the 'beneficial purpose' of the provision.

Comment

The decision to award interest to the applicants in *Carbone* turned on the particular facts of the case. Those facts included, perhaps most notably, the way in which the applicants were paid only after commencing a proceeding a sum which the Council previously had offered to pay.

More broadly, the decision shows the Court of Appeal's willingness to construe s 58 favourably for a plaintiff in accordance with the provision's underlying 'beneficial purpose' and to look beyond a technical reading of pleadings when determining an entitlement to interest. Finally, and for that reason, the Court's decision illustrates the high hurdle a defendant will need to overcome in persuading a court that there is 'good cause' to deny interest.

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[67] Ibid 566.