

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
TECHNOLOGY, ENGINEERING AND CONSTRUCTION LIST

Not Restricted

S ECI 2018 00137

JOHN BEEVER (AUST) PTY LIMITED (ACN 006 337 113)

Plaintiff

v

PAPER AUSTRALIA PTY LTD (ACN 061 583 533)

Defendant

JUDGE: LYONS J
WHERE HELD: Melbourne
DATE OF HEARING: 28 November 2018
FURTHER SUBMISSIONS: 15 and 22 March 2019
DATE OF JUDGMENT: 30 August 2019
CASE MAY BE CITED AS: John Beever (Aust) Pty Ltd v Paper Australia Pty Ltd (No 2)
MEDIUM NEUTRAL CITATION: [2019] VSC 575

BUILDING AND CONSTRUCTION - Interest - Entitlement to interest in period before judgment in proceeding to recovery unpaid portion of undisputed payment claim under s 16(2)(a)(i) of the *Building and Construction Industry Security of Payment Act 2002* (Vic) (the 'Act') - Whether entitlement to interest pursuant to s 12(2) of the Act or ss 58 or 60 of the *Supreme Court Act 1986* (Vic) - Whether entitlement to interest pursuant to s 12(2) of the Act inconsistent with ss 58 and 60 of the *Supreme Court Act 1986* (Vic) - Entitlement to interest pursuant to s 12(2) of the Act established - *Building and Construction Industry Security of Payment Act 2002* (Vic) ss 9, 12, 14, 15, 16, 23(1)(c), 28I, 28R and 47 - *Supreme Court Act 1986* (Vic) ss 58 and 60.

APPEARANCES:

	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr J A F Twigg QC with Mr N J Phillipott	Champions Lawyers
For the Defendant	Mr J Gurr	Corrs Chambers Westgarth

HIS HONOUR:

Introduction

1 In this proceeding, I delivered reasons for judgment on 5 March 2018.¹ I determined that the plaintiff ('John Beever') was entitled to summary judgment against the defendant ('Paper Australia') for a claim for work done in May 2014 in the sum of \$166,229.01 (the 'May claim') and for work done in June 2014 in the sum of \$185,467.20 (the 'June claim'), both of which were served on 11 August 2014. I asked the parties for further submissions on the issues of interest and costs. These reasons deal with those two issues.

2 For the reasons that follow, I have concluded that:

- (1) John Beever is entitled to interest pursuant to s 12(2) of the *Building and Construction Industry Security of the Payment Act 2002* (Vic) (the 'Act') in relation to the May claim and the June claim from 23 September 2014 until judgment; and
- (2) Paper Australia should pay 75% of John Beever's costs of this application and of the proceeding on a standard basis.

The interest issue

3 The issue between the parties is whether pre-judgment interest in respect of a proceeding issued under s 16(2) of the Act is to be calculated in accordance with s 12(2) of the Act or, alternatively, ss 58 or 60 of the *Supreme Court Act 1986* (Vic) (the 'SCA' and the 'SCA interest provisions'). The difference is important because if s 12(2) of the Act applies, the rate of interest and the period of time over which it is payable is set out under the Act. By contrast, if either of the SCA interest provisions applies, the Court has a discretion to determine not only the rate of interest but the period of time over which it is payable.

¹ *John Beever (Aust) Pty Ltd v Paper Australia Pty Ltd* [2019] VSC 126 (the 'earlier reasons'). In these reasons, I have adopted the terms defined in the earlier reasons.

4 In this case, John Beever claims interest only pursuant to s 12(2) of the Act in relation to the May claim and the June claim from 23 September 2014. It makes no claim for interest under the SCA. Paper Australia disputes that John Beever is entitled to interest under the Act, submitting that interest ought to be determined pursuant to s 60 of the SCA in relation to the May claim and the June claim from 23 July 2018 when this proceeding was served on it or, alternatively, from 15 June 2018 when this proceeding was issued.²

The law

5 Neither party was able to refer me to any authority which has considered the entitlement to interest pursuant to a judgment entered in accordance with s 16(2) of the Act or its interstate equivalents. As a result, the issue turns on the construction and application of provisions of the Act and of the SCA.

6 The High Court has made plain that the task of statutory construction is to construe the language of the relevant provision consistently with the language and purpose of all of the provisions of the statute containing the provision.³ As the High Court stated in *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd* in construing the meaning of a section of the NSW equivalent of the Act:

Close attention to the structure of the Act puts the language of s 13(1) in perspective. The Act gives effect to the object stated in s 3(1) by the cumulative means sketched out in s 3(2) and (3). As foreshadowed in s 3(2), Pt 2 confers a statutory entitlement to a progress payment. As foreshadowed in s 3(3), Pt 3 builds on Pt 2 by establishing a procedure for recovery of a progress payment to which an entitlement exists. The two parts, however, are not hermetically sealed.⁴

7 These comments apply with equal force to the Act in Victoria.

8 Further, it is also important to bear in mind:

² I did not understand Paper Australia to dispute the date of 23 September 2014 as the date from which interest accrued if interest pursuant to s 12 of the Act applied.

³ *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355, 381-2 [69]-[71], 384 [78] (McHugh, Gummow, Kirby and Hayne JJ).

⁴ (2016) 260 CLR 340, 359-60 [58] (Kiefel, Bell, Gageler, Keane and Gordon JJ) (*'Lewence'*).

- (1) section 35(a) of the *Interpretation of Legislation Act 1984* (Vic) (the 'Interpretation Act'), which provides in summary that a construction of a provision of a statute that would promote the purpose or object underlying that statute shall be preferred to a construction that would not promote that purpose or object;
- (2) sections 35(b)(i) and 36(2A) of the Interpretation Act, which provide that a court may have regard to the headings of sections in the interpretation of a provision of a statute; and
- (3) section 35(b)(ii) and (iii) of the Interpretation Act, which provides in summary that extrinsic material, namely reports of proceedings in any house of Parliament and explanatory memoranda, may be used as aids in the construction of statutory provisions.

9 There are difficulties which arise where one provision in a statute appears inconsistent with another provision in another statute. In such cases, the Act which is later in time usually prevails. In this regard, I refer to the statement of Griffith CJ in *Goodwin v Phillips*:

... where the provisions of a particular Act of Parliament dealing with a particular subject matter are wholly inconsistent with the provisions of an earlier Act dealing with the same subject matter, then the earlier Act is repealed by implication. It is immaterial whether both Acts are penal or both refer to civil rights. The former must be taken to be repealed by implication.⁵

10 I agree with the learned authors of *Statutory Interpretation in Australia* that the word 'repeal' is not truly appropriate in this context: rather, the later and more specific Act displaces or supersedes the earlier.⁶ This will occur by necessary implication when the two Acts are so inconsistent or repugnant that they cannot stand together.⁷ Such a finding will not be lightly made as there is a strong presumption that the legislature did not intend to contradict itself.⁸ However, it seems clear that 'the more

⁵ (1908) 7 CLR 1, 7 (Griffith CJ).

⁶ *Statutory Interpretation in Australia*, DC Pearce and RD Geddes 8th Ed at [7.10].

⁷ See, eg, *Rose v Hovic* (1963) 108 CLR 353, 360.

⁸ *Butler v Attorney-General (Vic)* (1961) 106 CLR 268, 276 (Windeyer J).

detailed and elaborate later Act, the more probable it is that it will be held to have impliedly repealed the earlier'.⁹

11 In light of these general principles, I will turn to the relevant legislation.

Relevant legislation

Current provisions of the Act

12 As noted in the earlier reasons, the Act came into force in 2002 and was subject to substantial amendments in 2006 by the Amending Act. As to the purpose and object of the Act, I refer to [44]–[47] of the earlier reasons.

13 The relevant provisions of the Act in force at the relevant time for the purpose of this proceeding incorporate the changes made by the Amending Act. They are set out in [34]–[44] of the earlier reasons.

14 In summary, Part 2 of the Act, headed 'Rights to Progress Payments', is concerned with rights to progress payments for the performance of work or supply of goods and services under a construction contract. In particular, s 9(1) relevantly provides that on and from each reference date under a construction contract, a person who has undertaken to carry out construction work under the contract is entitled to a 'progress payment' under the Act, calculated by reference to that date. A progress payment is calculated in accordance with ss 10, 10A and 11 of the Act. Relevantly, s 10(1)(a) provides that the amount of the progress payment to which a person is entitled in respect of a construction contract is to be the amount calculated in accordance with the terms of the contract.

15 Section 12 then provides for the due date for payment of a progress payment:

12 Due date for payment

- (1) A progress payment under a construction contract becomes due and payable –

⁹ *Statutory Interpretation in Australia*, DC Pearce and RD Geddes 8th Ed at [7.9] relying on *Jennings Industries Ltd v Commonwealth* (1984) 57 ACTR 5, 21 which in turn relied upon *Furnell v Whangarei High Schools Board* [1973] AC 660, 679.

- (a) on the date on which the payment becomes due and payable in accordance with the terms of the contract; or
 - (b) if the contract makes no express provision with respect to the matter, on the date occurring 10 business days after a payment claim is made under Part 3 in relation to the payment.
- (2) Interest is payable on the unpaid amount of a progress payment that has become due and payable in accordance with subsection (1) at the greater of the following rates –
- (a) the rate for the time being fixed under section 2 of the **Penalty Interest Rates Act 1983**;¹⁰ or
 - (b) the rate specified under the construction contract.

16 Part 3, headed 'Procedure for Recovering Progress Payments', provides a procedure for recovering progress payments to which a claimant is entitled under the Act. Division 1 of that Part is headed 'Payment claims and payment schedules'. In summary:

- (1) section 14 provides that a person who is or claims to be entitled to a progress payment (called a 'claimant') may serve a payment claim on a person who, under the construction contract concerned, is or may be liable to make a payment; and
- (2) section 15 provides that a person on whom a payment claim is served (called a 'respondent') may reply to the claim by providing a payment schedule to the claimant.

17 Relevantly, s 15(4) provides that if a respondent does not provide a payment schedule by the earlier of the time specified by the relevant construction contract or 10 business days after service of the payment claim, the respondent becomes liable to pay the claimed amount to the claimant 'on the due date for the progress payment to which the payment claim relates'. This is a reference back to s 12 of the Act.

¹⁰ I will refer to this as the 'penalty interest rate' in these reasons.

18 Sections 16 and 17 respectively provide for the recovery of payment claim where a payment schedule is not served on a claimant in response to a payment claim or is served but not paid. Section 16 provides:

16 Consequences of not paying claimant where no payment schedule

- (1) This section applies if the respondent –
 - (a) becomes liable to pay the claimed amount to the claimant under section 15(4) as a consequence of having failed to provide a payment schedule to the claimant within the time allowed by that section; and
 - (b) fails to pay the whole or any part of the claimed amount on or before the due date for the progress payment to which the payment claim relates.
- (2) In those circumstances, the claimant –
 - (a) may –
 - (i) recover the unpaid portion of the claimed amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction; or
 - (ii) make an adjudication application under section 18(1)(b) in relation to the payment claim; and
 - (b) may serve notice on the respondent of the claimant's intention –
 - (i) to suspend carrying out construction work under the construction contract; or
 - (ii) to suspend supplying related goods and services under the construction contract.
- (3) A notice referred to in subsection (2)(b) must state that it is made under this Act.
- (4) If the claimant commences proceedings under subsection (2)(a)(i) to recover the unpaid portion of the claimed amount from the respondent as a debt –
 - (a) judgment in favour of the claimant is not to be given unless the court is satisfied –
 - (i) of the existence of the circumstances referred to in subsection (1); and
 - (ii) that the claimed amount does not include any excluded amount; and

- (b) the respondent is not, in those proceedings, entitled –
 - (i) to bring any cross-claim against the claimant; or
 - (ii) to raise any defence in relation to matters arising under the construction contract.

19 There are other sections of the Act which are relevant for the purpose of determining the interest issue. As provided for in s 16(2)(a), one option for the claimant is to recover the unpaid portion of the amount claimed as a debt due in a court of competent jurisdiction. The other option is to make an adjudication application under s 18(1)(b) of the Act in relation to the payment claim. It is to that option that I now turn.

20 Section 18 is contained in Division 2 of Part 3 of the Act. That Division is headed 'Adjudication of disputes'. It provides that a claimant may apply for adjudication of a payment claim relevantly if a respondent fails to provide a payment schedule and fails to pay the whole of or any part of the amount claimed by the due date for payment. Sections 19 and 20 provide for the eligibility and appointment of adjudicators. Section 20 then provides for the respondent to lodge with an adjudicator a response to the claimant's adjudication application within a limited period of time. An adjudicator is an experienced and qualified expert in the relevant field, the aim being to provide a quick but independent expert adjudication.

21 Section 23 relates to the adjudicator's determination. Section 23(1) provides:

23 Adjudicator's determination

An adjudicator is to determine-

- (a) the amount of the progress payment (if any) to be paid by the respondent to the claimant (the *adjudicated amount*); and
- (b) the date on which that amount became or becomes payable; and
- (c) the rate of interest payable on that amount in accordance with section 12(2).

22 Division 2A of Part 3 of the Act is headed 'Review of adjudication'. It provides for the review of an adjudication by the respondent or the claimant if the adjudicated

amount exceeds \$100,000 or the amount prescribed for the purpose of the Division. However, a respondent can only review an application in the limited circumstances set out in s 28B of the Act. Relevantly, s 28B(3), (5) and (6) provide that an application can only be made:

- (1) on the ground that the adjudicated amount included an 'excluded amount';
- (2) if the respondent has paid the adjudicated amount other than the excluded amount; and
- (3) if the respondent also paid the excluded amount into a designated trust account.

23 Section 28I relates to the determination of an adjudication review. Section 28I(3) provides that a review adjudicator may substitute a new adjudication determination or confirm the determination that is the subject of the adjudication review. Section 28I(6) then provides:

In determining an adjudication review, the review adjudicator must-

- (a) specify if the review determination varies the adjudication determination and how it varies the adjudication determination; and
- (b) specify any amounts paid to the claimant by the respondent in respect of the adjudication determination; and
- (c) determine any further amount that is to be paid by the respondent to the claimant; and
- (d) determine any amount that is to be repaid by the claimant to the respondent; and
- (e) determine any interest payable in accordance with section 12(2) on the amount referred to in paragraph (c); and
- (f) specify the date on which an amount under paragraph (c), (d) or (e) becomes payable.

24 Division 2B of Part 3 of the Act is headed 'Payment and recovery of adjudicated amounts'. Section 28M provides that a respondent must pay an adjudicated amount on or before the relevant date for payment. Section 28N provides that a respondent

must pay the amount determined by an adjudication review (which I will call the 'review determination amount') on or before the relevant date.

25 Section 28O then provides that, in the event of non-payment of an adjudicated amount or a review determination amount, application may be made to an authorised nominating authority to provide an adjudication certificate in respect of that amount. Section 28Q provides that, if any amount of interest that is due and payable on the amount is not paid by the respondent, the person requesting the adjudication certificate may request the authorised nominating entity to specify the amount of interest payable on the adjudication certificate.

26 Section 28R then provides for the recovery of an adjudication amount or a review determination amount. It relevantly provides:

(1) If an authorised nominating authority has provided an adjudication certificate to a person under section 28Q, the person may recover as a debt due to that person, in any court of competent jurisdiction, the unpaid portion of the amount payable under section 28M or 28N.

...

(8) Nothing in this section affects the operation of any Act requiring the payment of interest in respect of a judgment debt.

27 For completeness, I note that:

- (1) Division 3 of Part 3 provides for a claimant's right to suspend construction work for non-payment;
- (2) Division 4 of Part 3 provides for a claimant who has obtained judgment as a debt in a court of competent jurisdiction to recover unpaid moneys from the principal rather than the respondent; and
- (3) Division 5 of Part 3 relates to the authorised nominating authority, adjudicators and review adjudicators.

28 Finally, Division 6 of Part 3 is headed 'Effect of Part on civil proceedings'. Section 47 of the Act provides in summary that nothing in Part 3 of the Act affects a right that a party to a construction contract may have under the relevant contract, under Part 2

in respect of that contract or in respect of anything done or omitted to be done under that contract.

The 2002 Act and the Amending Act

29 The previous section of these reasons is a summary of the provisions of the Act in force at the relevant time for the purpose of this proceeding. Many of those provisions were amended or introduced as part of a number of changes to the Act made by the Amending Act. For convenience, I will refer to the Act in force before the Amending Act as the '2002 Act'. One of the principal changes brought about by the Amending Act was for an application for adjudication as an alternative to the claimant going to court to recover the unpaid portion of the amount claimed provided for in the new s 16(2)(a)(ii) of the Act. Another was to introduce a procedure for the review of an adjudication in Divisions 2A and 2B of Part 3 of the Act.

30 A further change was the introduction of the new interest provision now contained in s 12(2). Similar provisions were introduced in the new ss 23(1)(c) and 28I(6)(e). As a result, it is appropriate to set out the nature of the changes made by the Amending Act.

31 Relevantly, the Amending Act introduced:

- (1) the current s 12(2) set out above: the 2002 Act contained only the equivalent of the current s 12(1) with no provision for interest;
- (2) the current s 16(2)(a) set out above: the 2002 Act contained only the equivalent of the current s 16(2)(a)(i) with no alternative to pursue an application for adjudication to recover the unpaid portion of the claimed amount;
- (3) the current s 16(4) set out above: if a claimant commences a proceeding, it restricts the respondent from bringing a cross-claim against the claimant or raising any defence in relation to any matter arising under the construction contract;

- (4) the current regime for adjudication applications in s 18 of the Act: the previous regime under the 2002 Act only applied in limited circumstances;
- (5) the new s 23(1)(c) (as part of the new regime for an adjudication application) set out above: the 2002 Act contained only the equivalent of the current s 23(1)(a) and (b), namely that the adjudicator could determine the adjudicated amount and the date on which the amount became payable with no provision for the determination of interest on that amount;
- (6) the new Divisions 2A and 2B in Part 3 as part of the new regime relating to the review of an adjudication, and payment and recovery of adjudicated amounts;
- (7) the new s 28I(6) (as part of the new regime relating to review of adjudication), set out above, which provides for the review adjudicator to determine the interest in accordance with s 12(2); and
- (8) the new s 28R (as part of the new regime and payment and recovery of adjudicated amounts) relating to the review of an adjudication, set out above, which provides for court proceedings to be issued for the unpaid portion of the adjudicated amount or the review determination amount.

32 In relation to s 28R, I note that the Amending Act expressly repealed ss 25 to 27 of the 2002 Act. Section 27 of the 2002 Act related to non-compliance with an adjudicator's determination. Section 27(2) applied when a respondent failed to pay the whole or any of the adjudicated amount. It provided:

In those circumstances, the claimant –

- (a) may recover from the respondent, as a debt due to the claimant, in any court of competent jurisdiction –
 - (i) the unpaid, or unsecured, portion of the adjudicated amount; and
 - (ii) interest at the rate for the time being fixed under section 2 of the **Penalty Interest Rates Act 1983** on the adjudicated amount calculated from the relevant date until judgment is entered in respect of the debt ...

33 Section 28R replaced s 27 of the 2002 Act. By contrast, s 28R does not contain any reference to the calculation of interest on the adjudicated amount or the review determination amount save that s 28R(6) provides that nothing in s 28R affects the operation of any Act requiring the payment of interest in respect of a judgment debt.

34 I have reviewed the Second Reading Speech relating to the Amending Act in the Legislative Assembly on 9 February 2006. Relevantly, the then Mr Minister for Planning, Mr Hulls, stated that:

The main purpose of this bill is to amend the Building and Construction Industry Security of Payment Act 2002 to make it more effective in enabling any person who carries out building or construction work to promptly recover progress payments.

...

At present, claimants can enforce payment only with expensive and time-consuming proceedings in a court or tribunal. The bill provides claimants with the option of applying for adjudication allowing for such payments to be recovered quickly.

...

Furthermore, the bill creates an expedited process for enforcing statutory liability through the courts. This is modelled on the New South Wales system. It applies where a respondent fails to pay an adjudicated amount by the due date. A claimant will be able to request a certificate (stating the adjudicated amount) from the authorised nominating authority, and lodge the certificate in an appropriate court, as an application for judgment debt. This process avoids the time and costs of a court hearing, while also preventing a respondent from delaying payment by raising inappropriate defences and counterclaims.

...

Other minor amendments include the establishment of a right to claim interest from the date that payments first become due and permitting adjudicators to exercise wider discretion.¹¹

Relevant provisions of the SCA

35 Section 58 of the SCA relevantly provides:

58 Interest to be allowed when debts or sums certain recovered

- (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* ... from the time

¹¹ Victoria, *Parliamentary Debates (Hansard)*, Legislative Assembly, 55th Parliament, First Session, Thursday 9 February 2006, 219–20 (Mr Hulls, Minister for Planning) ('*Second Reading Speech*').

when the debt or sum was payable (if payable by virtue of some written instrument and at a date or time certain) or, if payable otherwise, from the time when demand of payment was made.

36 Section 60 of the SCA relevantly provides:

60 Interest in proceedings for debt or damages

- (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.
- (2) Nothing in this section –
 - (a) authorises the granting of interest on interest;
 - (b) applies in relation to any sum on which interest is recoverable as of right by virtue of any agreement or otherwise;
 - (c) affects the damages recoverable for the dishonour of a negotiable instrument;
 - (d) authorises the allowance of any interest otherwise than by consent on any sum for which judgment is entered or given by consent;
 - (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.

37 Further, s 57 provides that, subject to the *Consumer Credit (Victoria) Act 1995* and the National Credit Code, there is no limit to the interest which a person may lawfully contract to pay.

38 In this context, it is important to note that the purpose of an award of interest under the SCA interest provisions is to compensate a plaintiff for having been kept out of his or her money and to deprive a defendant, who has wrongfully retained money

that he or she should have paid to a plaintiff, of the benefit of having had the use of that money.¹²

39 The precursors to the SCA interest provisions (commonly called Lord Tenterden's Act) were introduced in 1833 to give the Court a general power to award interest prior to judgment where there was no right to interest that otherwise existed in law or equity. As noted by the plurality in *Victorian Workcover Authority v Esso Australia Ltd*:

At common law, in the absence of statutory provision, where the plaintiff made a money claim for debt or for damages, interest from the date when the cause of action accrued could be recovered only under an expressed or implied contractual provision, or, in some circumstances, by the general custom of merchants or the custom of a particular trade or business.¹³

40 It is necessary to say something further about the precursors to the SCA interest provisions. In doing so, I have been very much assisted by the judgments of Mason CJ and Wilson J, and of Dawson J in *Hungerfords v Walker*,¹⁴ of the plurality in *VWA v Esso*¹⁵ and of McInerney J in *The City Mutual Life Assurance Society Ltd v Giannarelli*.¹⁶ I have been greatly assisted by reading sections from *Interest Awards in Australia*.¹⁷

41 First, Lord Tenterden's Act arose from the decision in *Page v Newman*¹⁸ in which Lord Tenterden delivered the opinion of the Court of King's Bench in 1829 to the effect that no interest lay on a debt 'secured by written instrument, unless it appears on the face of the instrument that interest was intended to be paid, or unless it be implied from the usage of trade, as in the case of mercantile instruments'.¹⁹ Four years later, Lord Tenterden sponsored the *Civil Procedure Act* (i.e. the Lord Tenterden Act) which became incorporated as ss 28 and 29 of the *Common Law Procedure Act*

¹² *Clarke v Foodland Stores Pty Ltd* [1993] 2 VR 382, 396. See also, eg, *Ruby v Marsh* (1975) 132 CLR 642, 652-3.

¹³ (2001) 207 CLR 520 ('*VWA v Esso*') [23] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

¹⁴ (1989) 171 CLR 125 ('*Hungerfords*') at 136-9 (Mason and Wilson J) and 159-60 (Dawson J).

¹⁵ *VWA v Esso* [21]-[28] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

¹⁶ [1977] VR 463, 465-7.

¹⁷ James Edelman and Derek Cassidy, *Interest Awards in Australia*, (LexisNexis Butterworths, 2003) pp7-9, [Intro.3-Intro.5].

¹⁸ (1829) 109 ER 140.

¹⁹ *Page v Newman* (n 18), 141.

1833. Those provisions are the precursors to ss 58 and 59 of the SCA. They allowed the Court for the first time to award interest in respect of certain claims where no interest was payable at law or in equity. Section 28 provided for a general discretion to award interest on all debts and sums certain:

... from the time when such debts or sums certain were payable, if such debts or sums certain be payable by virtue of some written instrument at a certain time; or if payable otherwise, then from the time when demand of payment shall have been made in writing ...; provided that interest shall be payable in all cases in which it is now payable by law.

42 Second, those provisions first appeared in Victoria as ss 422 and 423 of the *Common Law Procedure Statute 1865* (Vic). Those provisions remained in force including through the *Supreme Court Act 1958* (Vic) (the '1958 SCA') when they became ss 78 and 79 respectively.

43 Third, there were further revisions to the provisions in 1962 as a result of a report prepared by the Victorian Chief Justice's Law Reform Committee in 1960. The report noted that there had been a restrictive interpretation placed on these provisions. This had also been the subject of the Second Interim Report of the UK Law Revision Committee presented in 1934 which recommended that these provisions be re-drafted. By contrast, the report of the Chief Justices' Law Reform Committee concluded that they should remain in force subject to amendment and subject to special provision for awarding interest in respect of the period after commencing proceeding based on similar provisions in Scotland. The result was amendments to 1958 SCA in 1962 which amended ss 78 and 79 and introduced a new s 79A, the precursor to s 60.

44 As to ss 78 and 79, the amendments introduced for the first time the condition in ss 78 and 79 that interest was to be awarded on application 'unless good cause was shown to the contrary'. As to the new s 79A, it allowed the court to award interest on application 'in all actions for the recovery of debt or damages'²⁰ unless good cause was shown to the contrary from commencement of the action until judgment.

²⁰ Emphasis added.

It expressly provided that the new section did not apply in relation to any sum on which interest was recoverable as of right by virtue of any agreement or otherwise, or apply in relation to any sum on which interest might be awarded by virtue of the other sections of the 1958 SCA.

45 Fourth, it was these section that were re-enacted in the SCA of 1986 as set out above without any significant change save for the rate of interest.

The submissions

46 John Beever seeks interest on the May claim and June claim calculated in accordance with s 12(2) of the Act. It seeks interest on:

- (1) the May claim from 10 business days after it was served on Paper Australia until this proceeding was issued on 15 June 2018 in the sum of \$63,173.86 in [20] and [22] of the statement of claim dated 15 June 2018; and
- (2) the June claim from 10 business days after it was served on Paper Australia until this proceeding was issued on 15 June 2018 in the sum of \$70,485.16 in paragraphs 10 and 12 of the statement of claim.

It also seeks interest from the time the proceeding was issued under the Act in the prayer for relief. No claim for interest is made under the SCA interest provisions.

47 Paper Australia submitted that the interest provided for under s 12(2) of the Act does not apply to an application for judgment under s 16(2) of the Act in respect of the payment claims. This is because s 12(2) provides for interest on the unpaid amount of a 'progress payment under a contract' in accordance with s 12(1). This is in contrast to the language used in s 9(1), which identifies an entitlement to 'a progress payment under this Act'.

48 Rather, Paper Australia submitted that s 16(2)(a)(i) of the Act provides that a claimant may recover the unpaid portion of an undisputed amount claimed in a payment claim 'as a debt due' to the claimant. That is a statutory right or entitlement which a claimant would not otherwise have under the contract. It is

separate from the interest provision in s 12(2), which was in respect of a 'progress payment under a contract'.

49 Paper Australia emphasised that there is no reference to interest in s 16 of the Act at all. As a consequence, it was submitted that the proper source of the Court's power to award interest in respect of a judgment under s 16(2) is either s 58 or s 60 of the SCA.

50 Further, it submitted in the case that:

- (1) section 58 does not apply: first, there is no 'written instrument' which sets the date for payment and second, no demand for payment was made in this case;
- (2) as a result, any interest entitlement must be determined under s 60 of the Act;
- (3) without explanation, John Beever did not issue proceedings in relation to the undisputed payment claims until 15 June 2018, nearly four years after they became due and payable; and
- (4) as a result, there is 'good cause' for the Court to exercise its discretion under s 60 to award interest from 23 July 2018 when this proceeding was served or, alternatively, from 15 June 2018 when this proceeding was issued.

51 In response, John Beever submitted that there was only one kind of 'progress payment' for the purpose of the Act, being a payment which was premised on there being work undertaken under a construction contract. Pursuant to s 12 of the Act, interest is payable in respect of a progress payment from the time specified in s 12(1) and at the rate specified in s 12(2). Further, s 14(1) expressly provided that it was only a person who is or claims to be entitled to a 'progress payment' under the Act who may serve a payment claim on a person who 'under the construction contract' is or may be liable.

52 John Beever submitted that interest under s 12(2) formed part of the payment claim which was, in turn, based on a progress payment. It was the non-payment of that

payment claim that gave rise to the right of recovery in s 16(2)(a)(i) as a debt due so that s 12(2) interest applied to that debt. John Beever submitted that this was consistent with not only the words used in these sections but also the structure and purpose of the Act.

53 John Beever submitted that, reading the Act as a whole, it was not the intention of Parliament to deny a claimant interest calculated in accordance with s 12(2) when judgment is sought under s 16(2)(a)(i) in respect of undisputed payment claims based on progress payments calculated in accordance with s 12 of the Act. Further, John Beever referred to the similar interest provisions in ss 23(1)(c) and 28I(6)(e). It submitted that to calculate interest pursuant to s 12(2) of the Act would result in one uniform interest regime applying under the Act.

54 In relation to the SCA, John Beever noted that for ss 58 or 60 of the SCA to apply, John Beever must first make an application to the Court for interest under those sections. John Beever made no such application in this case. It also noted that at the hearing of the summary judgment application Paper Australia submitted that John Beever was entitled to interest under s 58, not s 60, as it now contends.

55 Finally, John Beever submitted that, if the Court considered it appropriate to assess whether or not there is an inconsistency between the interest provisions under the Act and the SCA (notwithstanding that John Beever makes no claim for interest under the SCA), then:

- (1) there is no inconsistency between the Act and s 58 of the SCA, both requiring the accrual of a date for payment and the lack of any payment before an entitlement to interest arises;
- (2) the only difference between them is the discretion in s 58(1) of the SCA; and
- (3) to the extent that there is an inconsistency, given they are two pieces of Victorian legislation, the later Act should prevail.

56 Paper Australia submitted that there was no inconsistency as, in accordance with its construction of the Act, s 12(2) does not empower a court to award interest in a proceeding brought pursuant to s 18(2)(a)(i) of the Act. However, Paper Australia conceded that if the entitlement to interest under both the Act and one of the SCA interest provisions apply, they could not sit together and the entitlement to interest under the Act would prevail.

57 In my view, the primary issue for determination is: does s 12(2) of the Act, on its proper construction, provide for interest up to the time judgment is entered in proceedings to recover the unpaid portion of the claimed amount under s 16(2)? If it does, it is then necessary to consider whether there is any inconsistency between that construction of the Act and ss 58 or 60 of the SCA (if they apply).

58 I have found both of these question difficult to resolve. This is because Parliament did not expressly provide in s 16 of the Act for interest or the inter-relation between any interest entitlement on undisputed payment claims under the Act and pre-judgment interest under the SCA. As a result, I have focused on the language, structure and purpose of the Act and the SCA interest provisions.

Analysis of the construction of the Act

59 In summary, I have concluded that the Act on its proper construction provides for a specific regime which mandates the time from when, and the rate at which, interest is to accrue on the unpaid portion of an undisputed payment claim sought to be recovered in proceedings pursuant to s 16(2) of the Act i.e. in accordance with s 12 of the Act (the 'interest entitlement under the Act'). I have based this conclusion on the language of the relevant provisions, the structure of the Act, particularly Parts 2 and 3, and their purpose.

60 First, s 16(2) must be read in the context of that section and in the context of Parts 2 and 3 of the Act. The effect of Part 2 of the Act (ss 9 to 13 and headed 'Rights to Progress Payments') is to create rights relating to 'progress payments' and the effect of Part 3 of the Act (ss 14 to 47 and headed 'Procedure for Recovering Progress Payments') is to provide a procedure for enforcing those progress payments.

61 The respective headings of Parts 2 and 3 reinforce this relationship between the two Parts and suggest that they deal with the same entitlement: the entitlement to progress payments. The purpose of those Parts, as set out above, is to secure payment of progress payments with the aid of a statutory mechanism, including by providing for the recovery of undisputed amounts in court proceedings.

62 Second, central to Parts 2 and 3 is the 'progress payment', being a payment to which a person is entitled under s 9 and which is premised on there being work undertaken under a 'construction contract'. This is contained in Part 2 of the Act. This is consistent with:

- (1) the reference to 'under a construction contract' in paragraphs (a) and (b) of the definition of 'progress payment' in s 4; and
- (2) s 9(1) itself, which is premised on work undertaken 'under a construction contract'.

63 This is also consistent with the comments of the High Court in *Lewence* that the Act seeks to provide a statutory mechanism securing payment of an amount claimed to be payable 'in partial or total discharge of an obligation to pay for work ... imposed by the contractual force of a construction contract'.²¹

64 Third, in Part 2, s 12(1) provides the time when a 'progress payment under a construction contract' becomes due and payable. Section 12(2) then provides the mechanism by which the unpaid party is to be compensated for non-payment by the due date, i.e. interest. It sets out the rate of interest to apply on the unpaid portion of a progress payment that has become due and payable under s 12(1), namely the contractual rate or the rate for the time being fixed under s 2 of the *Penalty Interest Rates Act 1983* (the 'penalty interest rate'), whichever is the greater.

65 It is true that s 12(1) does not refer to a 'progress payment under the Act'. However, I consider that there is only one kind of progress payment under the Act, being the

²¹ *Lewence* (n 4) [66].

progress payment under Part 2 which can be recovered under Part 3. I note in passing that s 12(1)(b) provides that, if the relevant construction contract makes no express provision, a progress payment becomes due and payable on the date occurring 10 business days after a payment claim is made under Part 3 in relation to the payment. This creates a further link between the progress payment in s 9(1) in Part 2 and the payment claim in s 14 in Part 3.

66 Fourth, s 14(1) provides that a person referred to in s 9(1) who is or may be entitled to a progress payment may serve a payment claim on a person who 'under the construction contract' is or may be liable. Thus, the prerequisite for serving a payment claim is the entitlement (or the claimed entitlement) to a progress payment under s 9(1) in Part 2.

67 As I have noted, s 12 in Part 2 also provides for interest to be claimed on that progress payment. Thus, the words used in, and the structure of, the Act would appear to indicate that the interest which applies to the progress payment is to be the same as that which applies to the payment claim.

68 This is consistent with the new ss 23(1)(c) and 28I(6) introduced by the Amending Act, which respectively provide for interest to be calculated in the same way pursuant to an adjudication or a review of an adjudication. This is confirmed by the Second Reading Speech set out above, which noted that the amendments were to 'include the establishment of a right to claim interest from the date that payment first became due'.²² I am conscious that the other references to s 12(2) in ss 23(1)(c) and 28I(6)(e) relate only to the determination on interest at a stage before proceedings are issued, in determining the adjudicated amount and the review determination amount. However, they indicate an intention for consistent interest provisions at different stages under Part 3 of the Act.

69 Fifth, s 15(4) relevantly provides that, if a respondent does not provide a payment schedule to the claimant at all or within the specified time, the respondent becomes

²² Second Reading Speech (n 11), 220.

liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates. That due date is to be determined in accordance with s 12(1) of the Act, being either the date specified in the contract or, if the contract makes no express provision, 10 business days after a payment claim is made. Of course, s 12 also provides the mechanism by which a party is to be compensated for non-payment, being the interest mandated under s 12(2).

70 Construing these provisions in Parts 2 and 3 together, in light of the comments of the High Court in *Lewence* set out above, it seems clear that a claimant is entitled to interest under s 12 of the Act on a payment claim based on the underlying progress payment.

71 I now turn to s 16 of the Act. Section 16(1) provides that s 16 applies only if the respondent becomes liable to pay the claimed amount to the claimant under s 15(4) and fails to pay the whole or part of the claimed amount on or before the due date for payment of the progress payment to which the claim relates. Again, that date is determined by reference to s 12. In that event, s 16(2)(a)(i) provides that a claimant may recover the unpaid portion of the claimed amount from the respondent as a debt due to the claimant in any court of competent jurisdiction.

72 Thus, it is the failure to serve a payment schedule and then to pay any part of the claimed amount on or before the due date for payment of the progress payment to which the claim relates, determined by reference to s 12, that enables the claimant to recover that amount under s 16(2)(a)(i). In my view, this highlights the importance of the progress payment as the basis for the payment claim in Part 3 and for the due date for payment in Part 3 to be determined under s 12. It also highlights the significance of the respondent's failure to make payments by the due date specified in s 12(1) (and which is to be compensated by the interest mandated under s 12(2)) for the purpose of s 16.

73 Section 16(2) itself provides that, if the circumstances set out in s 16(1) apply, the claimant:

- (a) may –
 - (i) recover the unpaid portion of the claimed amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction; or
 - (ii) make an adjudication application under section 18(1)(b) in relation to the payment claim; and
- (b) may serve notice on the respondent of the claimant's intention –
 - (i) to suspend carrying out construction work under the construction contract; or
 - (ii) to suspend supplying related goods and services under the construction contract.

74 Before dealing with the words of s 16(2)(a), it is important to note the particular nature of the proceeding which a claimant may commence under that section. Section 16(4)(a) provides that the claimant is entitled to judgment if the Court is satisfied that the circumstances referred to in s 16(1) exist and the claimed amount does not include any 'excluded amount' (as defined in s 10B of the Act). Section 16(4)(b) then provides that the respondent is not entitled in those proceedings to bring a cross claim or to raise a defence in relation to any matters arising under the construction contract.

75 This is a very great departure from ordinary proceedings for the recovery of outstanding payments. It highlights the particular nature of the regime enacted for the recovery provided by Part 3 of the Act. Of course, as noted above, s 47(3) provides that in any subsequent proceeding arising from rights under a construction contract, the court or tribunal must, depending on the outcome of that proceeding, allow for any amount paid under this Part or make restitution of amount so paid.

76 As to the words of s 16(2)(a), it is true, as Paper Australia contends, that s 16(2)(a)(i) does not refer to interest. It is also true that s 16(2)(a)(i) refers to recovering that sum 'as a debt due'. Paper Australia relies on these matters to conclude that the interest provisions of ss 58 or 60 of the SCA should apply to determine how interest should be awarded in a proceeding under s 16(2)(a)(i) for the unpaid portion of an undisputed payment claim.

77 However, in my view, Paper Australia's contention ignores other relevant provisions of the Act, which I have referred to above, to the effect that:

- (1) there is one progress payment as defined by the Act in Part 2;
- (2) the Act mandates that the date for payment in s 12(1) and the interest rate which applies for non-payment by that date pursuant to s 12(2) of the progress payment and the payment claim on which it is based; and
- (3) the progress payment is recovered via a payment claim and, if that payment claim is not disputed and all or part of it remains unpaid, by proceedings for recovery under s 16(2)(a)(i) in Part 3 of the Act for the unpaid portion thereof, if the claimant chooses to do so.

78 Further, in my view, the words 'as a debt due' do not in and of themselves have the effect of changing the interest entitlement of a claimant under s 16(2) in respect of pre-judgment interest on the unpaid portion of an undisputed payment claim. Counsel for the parties did not refer me to any authority which provides that the words 'as a debt due' have any particular or specific meaning. A debt is a sum of money due from one person to another by agreement or otherwise. In their context in s 16, I consider the words 'as a debt due' indicate the nature of the claim that can be brought by the claimant in a court of competent jurisdiction, namely, not a claim for damages but a claim for a 'simple' debt due in circumstances where the matters in s 16(1) have been satisfied. The 'simple' nature of the claim, the matters to be proved and the limited matters which can be raised by way of defence is further emphasised by the provisions of s 16(4) set out above.

79 I note in passing that Sholl J in *Gilchrist v Dean*,²³ in dealing with the distinctions between debt and assumpsit, concluded that an action for debt would lie for liabilities arising from statute for a liquidated sum and that this categorisation had

²³ [1960] VR 266.

been applied to treat such a claim for a liquidated sum arising from a statute as a 'debt' for the purpose of the statute of limitations.²⁴

80 As a result of all of these matters, I have formed the view that the Act on its proper construction provides a specific regime under Parts 2 and 3 of the Act which mandates the time from when the interest is to accrue and the rate at which interest is to accrue in respect of proceedings under s 16(2)(a) to recover the unpaid portion of an undisputed payment claim. That regime also mandates the particular nature of the proceeding issued which may be issued under that section.

81 I am conscious that the effect of this construction of the Act is that the Court can exercise no discretion as to the interest to which a claimant is entitled on the unpaid portion of the undisputed payment claim recovered in a proceeding under s 16(2)(a) of the Act. In this case, John Beever waited until 15 June 2018, nearly four years, before it issued this proceeding for the May claim and the June claim in respect of work done in mid-2014. Such a delay is inconsistent with the purpose of the Act to provide for the speedy recovery of progress payments.

82 Based on my conclusions in the earlier reasons, John Beever was entitled to judgment in accordance with the Act from late September 2014. It is true that Paper Australia has had the benefit of the use of the amount of the unpaid May claim and July claim since that time. Of course, the rate of interest that is to apply in this case under s 12(2) is the penalty interest rate. However, in this context, it is noteworthy that Paper Australia have had the benefit of the constructions work, did not serve a payment schedule under s 15 of the Act disputing the amounts claimed in the payment claims but still has not paid those amounts.

83 As a result, I remain of the view as to the proper construction of the Act set out above. Thus, a claimant is entitled to interest determined in accordance with s 12(2) of the Act in proceedings issued pursuant to s 16(2)(a)(i) of the Act.

²⁴ Ibid, 271.

Analysis of the Act with SCA interest provisions

- 84 The construction of the Act I have adopted raises the issue of whether the interest entitlement under the Act is inconsistent with the operation of the SCA interest provisions.
- 85 As noted above, Paper Australia conceded that if both the interest entitlement under the Act and one of the SCA interest provisions apply, they could not sit together and the interest entitlement under the Act would prevail.
- 86 Based upon my construction of the interest entitlement under the Act, I do not consider that the SCA interest provisions apply. This is for two reasons. First, each of ss 58 and 60 is expressed to apply 'on application' of the successful plaintiff. John Beever has only made application for interest pursuant to the Act. It submitted that, as no application has been made under either of these provisions of the SCA, there is no inconsistency with the interest entitlement under the Act. I agree with that submission.
- 87 Second, I consider that the legislative purpose or object of the SCA interest provisions and their precursors was for them only to apply if there was no entitlement to interest at law (including under statute) or in equity. As set out above, these provisions were intended to be remedial in nature to overcome the deficiencies in the law. This is reflected expressly in s 60(2)(d) and (f). Section 60(2)(b) provides that nothing in s 60 applies in relation to any sum on which interest is recoverable as of right by virtue of any agreement or otherwise. Section 60(2)(f) provides that nothing in s 60 limits the operation of any enactment or rule of law which, apart from this section, provides for the award of interest.
- 88 I note that s 60 is the very provision which Paper Australia submitted should apply in this case. However, consistent with language ss 60(2)(b) and (f) and authority,²⁵ the provisions expressly provide that interest at law and under contract are to apply.

²⁵ *NRMA Insurance Ltd v Tatt* (1989) 92 ALR 299 ('NRMA'), 315 (McHugh JA with Hope and Samuels JJA agreeing); *VWA v Esso* (n 13), [24] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

89 The situation in respect of s 58 is less clear. While s 58 also only applies 'on application', it does not contain an equivalent of ss 60(2)(b) and/or 60(2)(f). However, in my view, consistent with the remedial nature of the SCA interest provisions and their precursors, I consider that s 58 does not apply where the entitlement to claim interest at a particular rate is provided for at law including by statute or in equity.

90 In the event that I am wrong, it may be that s 58 of the SCA has some application in proceedings for recovery under s 16(2) of the Act. This is notwithstanding that Paper Australia submitted that it does not apply in this case. Under s 58, the interest may run, subject to the discretion, from one of two points in time until judgment:

- (1) from the time when the debt or sum was payable (if payable by virtue of some written instrument and at a date or certain time) (the 'first alternative'); or
- (2) if payable otherwise, then from the time when demand of payment was made (the 'second alternative').

91 In my preliminary view, there are real question about whether an act of Parliament is a written instrument for the purpose of the first alternative.²⁶ Regardless, it may be that a demand may be served in respect of the unpaid portion of an undisputed payment claim before the issue of proceedings pursuant to s 16(2) of the Act that enlivens the second alterative.

92 However, if s 58 were to apply, I agree with the concession of Paper Australia that it is inconsistent with the interest entitlement under the Act. This is because, under the interest entitlement under the Act, there is no discretion as to the period of time during which interest runs or the rate of interest (which may exceed the penalty interest rate). By contrast, s 58 of the SCA provides a discretion, both as to the period of time during which interest is to run and as to the rate of interest up to a maximum of the penalty interest rate. While I am conscious that the time from

²⁶ As noted in [73] of the written submissions dated 15 March 2019, counsel for Paper Australia submitted that 'written instrument' was more apt to describe an *inter partes* written document but had not found authority that it includes Acts of Parliament.

which interest may run under the first alternative is consistent with Act (if the Act is a 'written instrument'), the effect of s 58 is to give the court a discretion to vary that time if good cause is shown to the contrary.

93 Further, the Act mandates that, if contractual interest exceeds the penalty interest rate, the contractual rate is to apply. By contrast, s 58 imposes a maximum of the penalty interest rate, which rate is also subject to variation if good cause is shown to the contrary. I note in passing that it might be argued that s 57 has some application in this context.

94 John Beever submitted that any inconsistency should be resolved because the Act is later in time than s 58 of the SCA and thus prevails, relying on *Horvath v Commonwealth Bank of Australia*.²⁷ In my view, the time at which the Act came into effect does not alone determine this issue. Rather, based on the principles referred to above, in my view, the Act prevails because it is a specific piece of legislation, passed after the SCA, which provides a particular regime under Parts 2 and 3 of the Act. Relevantly, that regime provides for the recovery of the unpaid portion of a payment claim under s 16(2) including the interest entitlement under the Act as set out above.

95 In this context I have considered whether both the Act and s 58 of the SCA can be read together. For example, it is possible that the provisions in the Act could be read to apply only to the time of issue of proceedings under s 16(2)(a)(i). However, in my view, the operation of s 58 in that limited way would defeat the purpose of the particular and detailed regime under the Act for recovery of the unpaid portion of the payment claim in s 16(2)(a)(i). Consequently, consistent with Paper Australia's concession, I consider that the operation of s 58 of the SCA to proceedings under s 16(2)(a)(i) of the Act is displaced or superseded by the interest entitlement under the Act.

96 For completeness, when I sought further submissions on these issues, I referred the parties to the decision of Beach J in *Manchester Unity Total Care Building Society v*

²⁷ [1999] 1 VR 643, 655 [29] (Ormiston JA).

MGICA Ltd ('Manchester Unity').²⁸ In that case, his Honour considered whether an insured was entitled to interest under s 57 of the *Insurance Contract Act 1984 (Cth)* (the 'ICA') or s 58 of the SCA in circumstances where, if interest under s 58 applied, the insured would recover significantly more than under the ICA.

97 Beach J concluded that the interest provision under the ICA only applied to the time prior to the issuing of proceedings, based on the Australian Law Reform Commission Report into Insurance Contracts pursuant to which s 57 was then enacted. In these circumstances, Beach J concluded that s 57 of the ICA did not purport to override the operation of the SCA.

98 Based on my construction of the Act, I cannot and have not concluded that the interest entitlement under the Act applies to pre-litigation interest only. Further, the decision in *Manchester Unity* appears inconsistent with the reasoning in *NRMA*. In that case, notwithstanding McHugh JA concluded that s 57 of the ICA applied as of right, his Honour went on to conclude that there was inconsistency between s 57 of the ICA and the NSW equivalent of s 60. He said:

The evident person purpose of s 57 is to lay down a code for the payment of interest on insurance claim. The section fixes the rate of interest payable and specifies the period for which interest is payable by reference to specific criteria. It is hardly conceivable that the Federal Parliament intended that insurers could be made liable by State legislation to pay interest on a claim in respect of a period other than that which results from the application of the criteria specified in s 57(2). It is equally inconceivable that Federal Parliament intended that the state legislation could fix a rate of interest different from that prescribed under s 57(3) for a period calculated in accordance with s 57(2). I think that s 57 states completely, exhaustively and conclusively the law on the subject of interest payable for periods during which a person has been kept out of insurance moneys to which he has is entitled. If it does, then a State law purporting to authorise the fixing of a different rate of interest is invalid.²⁹

99 Of course, both the SCA and the Act are state legislation so questions of invalidity do not apply. But the reasoning of McHugh JA applies with equal force to support my conclusion that the operation of s 58 of the SCA to proceedings under s 16(2)(a)(i) of

²⁸ (1991) 6 ANZ Insurance Cases 61-062.

²⁹ *NRMA* (n 25), 315.

the Act is displaced or superseded by the interest provisions in the regime under the Act.

100 As a result, John Beever is entitled to interest under the Act, payable at the penalty interest rate, in respect of the May claim and the June claim from 23 September 2014.

101 Although it was not argued before me, I wish to point out that the construction of the Act I have adopted is not inconsistent with the operation of s 101 of the SCA in respect of interest on the judgment debt. This is for two reasons. First, s 101 is mandatory in its terms i.e. 'Every judgment debt carries interest at the [penalty interest rate] from the time judgment was given ...'. Second, the regime which Parliament adopted under Part 2 and 3 of the Act relates to the right to recover the unpaid portion of the claimed amount as a debt due in a court of competent jurisdiction and the nature of that proceeding: it does not address the position in respect of interest after judgment. This is consistent with common law that claims for interest merge on judgment in the absence of a special provision.³⁰

102 For completeness I note that this conclusion is consistent with s 28R(6) of the Act. Although there is no equivalent in s 16, given the similar nature of these provisions, it would be a very odd result for judgment entered under s 28R of the Act to be subject to the operation of s 101 of the SCA and the judgment entered under s 16 of the Act not to be subject to the operation of that provision.

The cost issue

103 John Beever submitted that it is entitled to its costs of this application for summary judgment and of the proceeding. I note that there were few steps taken between the issuing of the proceeding on 15 June 2018 and the issuing of this application on 23 August 2018.

104 By contrast, Paper Australia submitted that there were four discrete aspects of John Beever's application for summary judgement and in this proceeding: the May claim, the June claim, the July claim and the claim for interest under the Act to the

³⁰ See, eg, *Interest Awards in Australia* (n 17), 142-3 [7.7].

date of judgment. John Beever has failed in establishing the July claim. Accordingly, it cannot be said that John Beever has been entirely successful in this application. As a result, in its submissions dated 15 March 2019, Paper Australia submitted that if John Beever were successful on the interest issue, the appropriate order is that John Beever is entitled to 75% of its costs on a standard basis.

105 In response, John Beever submitted that the ordinary rule, that a party who is substantially successful will have all of its costs of the proceeding paid by the unsuccessful party, should apply in this case. It submitted that the determination of the interest question should not impact the award of costs nor the percentage recoverable by John Beever.

106 In my view, while John Beever has been substantially successful, there should be some reduction for their failure in respect of the July claim. I consider that an appropriate reduction is that proposed by Paper Australia, namely a reduction of 25%. In this regard, I generally agree with the breakdown of the issues in this proceeding submitted by Paper Australia. This is particularly so as the interest issue has been dealt with separately and with the assistance of further detailed submissions in March 2019. In all the circumstances, I consider 25% represents a fair, albeit imprecise, estimate of the costs associated with the determination of the July claim.

107 I request that the solicitors for John Beever prepare a minute of proposed orders in accordance with these reasons.
