CITATION: *RYKERS & RYKERS v ANDERSON FAMILY SETTLEMENT* [2009] NTMC 049

PARTIES:	ANTHONIUS CORNELIUS RYKERS AND SUSAN RAE RYKERS v ANDERSON FAMILY SETTLEMENT
TITLE OF COURT:	LOCAL COURT
JURISDICTION:	SMALL CLAIMS
FILE NO(s):	20835989
DELIVERED ON:	18 SEPTEMBER 2009
DELIVERED AT:	DARWIN
HEARING DATE(s):	15 SEPTEMBER 2009
JUDGMENT OF:	ACTING JUDICIAL REGISTRAR SMYTH

CATCHWORDS:

DAMAGES – Excessive interest - Whether interest claimed was a genuine pre-estimate of the damage likely to be caused by the defendant's breach

Commercial Arbitration Act (NT), ss 31-32
Small Claims Rules, Rule 25.04
Small Claims Regulations, Reg. 6

Ringrow Pty Ltd v BP Australia Pty Ltd (2005) 224 CLR 656
Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd [1915] AC 79

REPRESENTATION:

Counsel:

Plaintiff:	NA
Defendant:	NA

Solicitors:

Plaintiff:	Self Represented
Defendant:	Self Represented

Judgment category classification:	B
Judgment ID number:	[2009] NTMC 049
Number of paragraphs:	16

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20835989

BETWEEN:

ANTONIUS CORNELIUS RYKERS
First Plaintiff

AND:

SUSAN RAE RYKERS
Second Plaintiff

AND:

ANDERSON FAMILY SETTLEMENT
Defendant

REASONS FOR JUDGMENT

(Delivered 18 September 2009)

Mr SMYTH, ACTING JUDICIAL REGISTRAR:

1. This is a small claim proceeding brought in the small claims jurisdiction of the Local Court.

2. Mr Rykers appeared on behalf of the first and second plaintiffs. Mr Anderson appeared for the defendant, in his capacity as trustee for the Anderson Family Settlement.

3. The plaintiffs carry on business in partnership and run a bob-cat hire company, trading as Brumby Bobcat Hire. The defendant is in the business of the installation of playground equipment, and trades as Forpark Australia S.A.

4. The plaintiffs' claim arises from work done to construct playgrounds at Nightcliff and Marrara, in the suburbs of Darwin, during September and October 2008. The plaintiffs claim a debt of $1232, being the remaining balance for work done in constructing the playgrounds. The plaintiffs had issued an invoice for work done, dated 23 September 2008, in the amount of $3853, and part payment of $2621 was made on 16 December 2008. The plaintiffs also claim interest and disbursements.

5. Apart from the claim for the debt there was also dispute in relation to the cost of excess soft fill sand, used to construct the playground. The defendant had alleged that the plaintiffs, in carrying out the works, had ordered additional sand without authorisation. The additional sand was valued at $825 and the defendant sought to set off that amount. Further there was an additional dispute in relation to damage done by the plaintiff to part of the playground equipment, namely a ladder, whilst construction was underway. The amount claimed by the defendant, again in the nature of a set off, was $660.

6. The matter was heard on 15 September 2009. At hearing the defendant conceded that the plaintiffs had in fact been correct and agreed to pay the plaintiffs' outstanding account, namely $1232, subject to the issue of interest being determined. In turn, the plaintiffs accepted liability in relation to the damaged ladder and offered $400 in full and final satisfaction. The defendant accepted the offer of $400, which was to be applied as a set off to monies awarded to the plaintiffs.

7. The remaining issue was that of interest claimed by the plaintiffs. The plaintiffs claimed interest on the outstanding amounts at the interest rate of 18.5% per month, from November 2008 to judgment.

8. There was no evidence as to where the figure of 18.5% per month was derived. The evidence was that the contract between the plaintiffs and defendant was wholly oral. There was no evidence that is was a term of the

contract that the plaintiff was entitled to charge interest at 18.5% per month in default of payment. The first mention of the default interest rate was in an invoice sent to the defendant on 16 December 2008, some months after the contract had been completed. The plaintiffs have no contractual right to charge 18.5% interest per month in default of payment.

9. As an explanation for the default interest rate the plaintiffs referred me to Part 4 of the *Commercial Arbitration Act* (NT), and in particular sections 31 and 32. I find nothing in that Act to support the plaintiffs' right to charge interest. That Act is concerned with the arbitration of commercial disputes, and the consequences which flow from having a dispute arbitrated by an arbitrator, normally pursuant to a written arbitration clause in a contract. There was no such agreement or arbitration in this matter. In any event, s 31 of the Act provides that an arbitrator may make an order for interest on an amount of money ordered, but any such interest rate "being a rate not exceeding the rate at which interest is payable on a judgment debt of the Supreme Court". The rate which is payable on a judgment debt of the Supreme Court is 10.5% per annum. Section 31 and 32 of the Act are essentially equivalents to the interest provisions found in Part 25 of the *Small Claims Rules*.

10. I note that the plaintiffs had sought to charge the defendant 18.5% per month in default. A rate of 18.5% per annum is high, at least without any justification. However, it would be an understatement to say that 18.5% interest per month was excessive, it amounts to a rate of approximately 547% interest per annum. Even if the plaintiff had been contractually entitled to claim default interest at the rate of 18.5% per month, it would have been a penalty and unenforceable. There was no evidence that the amount charged represented a genuine pre-estimate of the damage likely to be caused by the defendant's failure to pay its account. In *Ringrow Pty Ltd v BP Australia Pty Ltd* (2005) 224 CLR 656 the High Court stated, at 662-663:

“The law of penalties, in its standard application, is attracted where a contract stipulates that on breach the contract-breaker will pay an agreed sum which exceeds what can be regarded as a genuine pre-estimate of the damage likely to be caused by the breach.

The starting point for the appellant was the following passage in Lord Dunedin's speech in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 at 86-87:

2. The essence of a penalty is a payment of money stipulated as *in terrorem* of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage...

3. The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of the breach ...

4. To assist this task of construction various tests have been suggested, which if applicable to the case under consideration may prove helpful, or even conclusive. Such are:

(a) It will be held to be penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach ...

(b) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid ...

(c) There is a presumption (but no more) that it is penalty when "a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage" .

Neither side in the appeal contested the foregoing statement by Lord Dunedin of the principles governing the identification, proof and consequences of penalties in contractual stipulations. The formulation has endured for ninety years. It has been applied countless times in this and other courts. In these circumstances, the present appeal afforded no occasion for a general reconsideration of Lord Dunedin's tests

> to determine whether any particular feature of Australian conditions, any change in the nature of penalties or any element in the contemporary market-place suggest the need for a new formulation. It is therefore proper to proceed on the basis that *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* continues to express the law applicable in this country, leaving any more substantial reconsideration than that advanced, to a future case where reconsideration or reformulation is in issue."

11. The plaintiffs alternatively sought interest under Part 25 of the *Small Claims Rules*. I find that the plaintiffs are entitled to such interest. Rule 25.04 provides:

> 25.04 Interest up to judgment
>
> (1) In a proceeding, the Court may order that interest is to be included in the sum for which judgment is given at the rate it considers appropriate on the whole or a part of the sum for the whole or a part of the period between the date when the cause of action arose and the date of the judgment.

12. The plaintiffs' cause of action arose when the defendant breached the contract by failing to pay the account, rendered by the plaintiffs, when due and payable. A hand written invoice was tendered and dated 23 September 2008, it did not contain payment terms and included work done up to 14 October 2008. I did not receive a satisfactory explanation as to why that invoice included work done after it was apparently issued. Further, a formal tax invoice was issued on 16 December 2008 noting that the defendant's account was 60 days overdue, and requiring payment within 14 days (plus interest). For the purposes of calculating interest I find that the cause of action arose on 17 October 2008 (ie. 60 days prior to 16 December 2008).

13. As noted above, the interest payable is at the rate which the Court considers appropriate. The purpose of an award of interest is to compensate a party for being kept out of money. Pursuant to Rule 25.04 of the *Small Claims Rules*, the Court has a discretion to award the interest and to set the rate. In my opinion an interest rate of 6% per annum, taking into consideration

prevailing commercial interest rates, is appropriate in this matter. For the period 17 October 2008 to 16 December 2008, on the amount of $3853, the plaintiff is entitled to interest in the amount of $38.63. Further, for the period 17 December 2008 to 18 September 2009, on the amount of $1232, the plaintiff is entitled to interest in the amount of $55.89. Total pre-judgment interest amounts to $94.52.

14. The plaintiffs also claim disbursements in the nature of the filing fee ($72), an ASIC company search ($20), a SA business name search ($20) and postage ($4.40). Regulation 6 of the *Small Claims Regulations* provides that:

> "All disbursements reasonably incurred by a party or by a legal practitioner on behalf of a party in proceedings are recoverable as part of the judgment whether or not the disbursements have been claimed in the statement of claim."

15. The disbursements have been reasonably incurred and I would allow them.

16. I therefore make the following orders:

    1. By consent, judgment is given in favour of the defendant against the first and second plaintiffs, on its counterclaim, in the amount of $400.00. Such amount is to be set off against judgment in favour of the plaintiffs.

    2. Judgment is given in favour of the first and second plaintiffs against the defendant, in the amount of $1042.92; such amount comprising the debt of $1232, interest of $94.52, disbursements of $116.40 and a $400 set off, being the amount awarded to the defendant under order 1.

Dated this 18th day of September 2009

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CRAIG SMYTH
ACTING JUDICIAL REGISTRAR