

# KQ NEWSLETTERS

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## The Interest Principal

Most commercial litigants assume that an award of interest naturally follows a judgement or award of a principal amount. Their assumption is usually well founded, however there are circumstances in which a claimant can be denied interest if their position is not carefully made out.

Given the potential size of the interest award, the pleadings, evidence, and submissions should be carefully framed to ensure the maximum potential for recovery

To that end the choice of the Consumer, Trader and Tenancy Tribunal ("CTTT") is a case in point, following a recent award in which our client (builder) was successful against a homeowner for an award in excess of \$300,000.00

Our client prepared a contract with a homeowner before beginning work on a home building project. Unfortunately, because he didn't comply with certain statutory requirements he couldn't rely on that contract when claiming overdue payments. Nevertheless, the applicant succeeded in recovering those payments as a quantum meruit; i.e. by claiming that the works were an "unjust enrichment" of the homeowner.

Having succeeded in the principal claim, our client expected to be awarded interest. Unfortunately, the Tribunal Member did not share that expectation, initially expressing a reluctance to make such award.

Generally, a claim for overdue payments will be made pursuant to a contract, which details how interest is to be determined. Of course, as our client could not rely on the contract, that argument was not available.

Alternatively, in any NSW court a claimant may rely on section 100 of the Civil Procedure Act, which permits a judge a general discretion to award interest. The Civil Procedure Act does not apply in the CTTT, which is governed by the Consumer Trader And Tenancy Tribunal Act, and which does not confer an inherent power in the Tribunal to award interest on damages.

The common law position is dictated by the High Court in *Hungerfords v Walker*. That case is generally considered authority for the principal that a court (or tribunal) may make an award for "a wrongfully and foreseeably caused loss of the use of money." That award is (effectively) interest, expressed as a separate head of damage rather than as a component of the principal. Of course, as a separate head of damage, the claim for *Hungerfords* Interest must be separately pleaded and proven; e.g. the claimant must lead evidence demonstrating the amount of the loss and that it was foreseeable.

The legal nature of claims in quantum meruit was considered by the High Court decision in *Pavey and Mathews v Paul*. Although in that case the Court did not consider the question of interest, it found that the amount of compensation a person is to be awarded in quantum meruit "is an amount which constitutes, in all the relevant circumstances, fair and just compensation for the benefit or enrichment actually or constructively accepted."

Surely, if X has failed to pay Y, X has "constructively" accepted the use of Y's money and can be presumed to have benefited as a result. Following the principles expressed by the High Court's in *Pavey & Mathews v Paul*, Y should be entitled to "fair and just compensation" for conveying a benefit to X. Such compensation can best be described as interest.

This is the argument which the Tribunal Member accepted in our example, awarding interest for the Applicant at the Supreme Court rate.

The interest component of any claim should not be an after thought. It should be considered even before proceedings are commenced. This is particularly so in more complex matters in which it becomes more likely that significant time will pass before the matter is brought to conclusion. The choice of forum when commencing any action should factor in the ability to claim interest and whether there is an inherent jurisdiction conferred upon that forum by statute or whether reliance must be placed on an entitlement in contract or at common law. Given the potential size of the award, the pleadings, evidence, and submissions should be carefully framed to ensure the maximum potential for recovery.

**KQ LAWYERS HAVE EXPERTISE IN COMMERCIAL AND CONSTRUCTION LITIGATION. IF YOU WOULD LIKE FURTHER INFORMATION PLEASE VISIT OUR WEBSITE, EMAIL **ROBERT KALDE** OR **PAUL QUINN**, OR CONTACT US ON 02 4862 2020.**

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