award had been made by the arbitrator. It was said that the award of an arbitrator was a condition precedent to the bringing or maintaining of legal proceedings. Section 55 of the Act now provides that such a clause does not operate to prevent legal proceedings being brought or maintained in respect of the matter or a defence being established to legal proceedings brought in respect of the matter. The Court then has a discretion (under Section 53 of the Act) to determine whether there is sufficient reason why the matter should not be referred to arbitration. In summary, there now seems little distinction between "compulsory" and "optional" arbitrations by reason of the provisions of Sections 53 and 55 of the Act.

(d) As mentioned in the section on Dispute Resolution Mechanisms above, the Institute of Arbitrators Australia has introduced rules for the conduct of expedited commercial arbitrations. These rules should, at the very least, be adopted in whole or in part in arbitration clauses in domestic building contracts.

**Summary**

In the Committee's view, ADR processes are appropriate mechanisms to be considered and included in residential building contracts as the preferred dispute resolution mechanism, if not alone then in conjunction with the arbitral process.

The Law Society has recently published an ADR clause for the benefit of its members (a copy of which is attached to this submission). It would be possible for such a clause to be adapted for residential building contracts.

In fact, it is understood that the Master Builders' Association of New South Wales is currently producing a new draft of its industry-standard building contract which contains an ADR clause.

## 10. CHASING A DEBTOR

**- Peter Kelso, Partner, Patterson Houen + Commins, Solicitors, Sydney**

**In this article, Mr Kelso sets out a method of dealing with company debtors using the Companies Code, rather than the tedious debt collecting process of the law.**

The court's interpretation of the law, especially in New South Wales, will make the task of dealing with non-paying company debtors more difficult. However, those who are serious about collecting long-standing debts have probably worked out a process to be set in motion after a set period of days without payment - sending a letter of demand, or getting your solicitor to do so, followed by legal proceeedings: default summons, judgment, the sheriff, garnishment, bankruptcy notice and liquidation.

Probably effective, but, of course, time consuming and therefore costly.

By now most business people have heard of the short cut available to the creditor who is dealing with a recalcitrant company, which is to issue a notice under the companies legislation and bypass the necessity for court action until the winding-up action needs to be heard.

Astute credit managers and mercantile agents have for many years made use of the provision in company legislation which entitles anyone to serve a notice of demand for an outstanding payment on a debtor company, as long as the debt is more than $1000. This is now called a "Section 364 notice" (formerly a "222 notice"); failure to comply with its terms gives the creditor grounds to apply for the winding up of the debtor company. No letter-of-demand/summons/judgment is needed as a preliminary step.

Despite the fact that there have been repeated protests from the supreme courts of each state that they are not to be used as debt-collecting agencies, the procedure is in fact used repeatedly, often successfully, for just that purpose. It is cheaper and quicker, and it does not allow for specious defences to be raised in a delaying fashion by the debtor.

No doubt because of the ease with which this sort of notice can be issued, and because of the drastic consequences that may flow from it, courts, especially in New South Wales, apply a magnifying glass to the actual notice and adopt a strict approach to their dealings with its process.

For example, the court requires that the notice be most exact in naming the debtor company. In a recent case, a notice was rejected because it referred to a debtor company as "Willis Trading Pty Limited" instead of its correct name of "Willes Trading Pty Limited".

But the problem which is most frequently argued before the courts is the overstatement of the amount owed, which can easily happen in the case of running accounts, or where interest is payable. Although the Companies Code is uniform legislation throughout Australia, a different approach to this problem has been taken in different states. In New South Wales, overstatement of the amount means that the notice is ineffective.

This has two results:

- If the debtor company does not comply with the notice, and winding up action has actually begun, the creditor will probably lose, will have to start all over again, and worse still, may have to pay the debtor's legal costs.
- More importantly, a company with smart directors (or a smart lawyer), realising that the notice is incorrect, may just ignore it - rendering the whole exercise rather pointless.

On the other hand, even in New South Wales, an understatement of the amount due will not invalidate the notice. So the moral is, if there is uncertainty about the exact amount of the debt, err on the low side rather than on the high side. Of course, making it too low runs the risk that the debtor will simply make the payment

sought, leaving the hapless creditor to start again for the balance.

- It is a desirable feature when drawing a notice to include a warning of the effect of disregarding it - there is no special formula of words which must be used, but advice in the notice that winding up proceedings will ensue for non-compliance should be a powerful threat.
- Although not essential, it is preferable for the notice to be signed by the creditor personally, or if the creditor is a company, under the common seal.
- The notice, to be effective, must be served at the registered office of the debtor company. Service can be by ordinary post, but do not assume that the trading address for the debtor is necessarily its registered office. The only way to be sure is to check the records at the Corporate Affairs Commission.

Incidentally, the fact that postal service at the registered office is sufficient is one good reason why every company should ensure that the address of its registered office, as notified to the Corporate Affairs Commission, is up to date. Many a solvent company has actually been wound up without its directors being aware of the fact (until the liquidator knocked at the door), because it or its accountant had failed to notify a change of registered office.

Finally, a warning. If a company is so unlucky, or so unfinancial, as to receive one of these notices itself, it should never be ignored or filed in the too-hard basket. There may be only 21 days in which to do something before unwanted publicity appears in the pages of the Dun and Bradstreet gazette.

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## 11. INTEREST AS DAMAGES

**- Philip Davenport**

**In this article Mr Davenport comments upon the High Court decision in *Hungerfords v Walker*, 9 February 1989, on entitlement to interest as damages. The Full Court of the South Australian Supreme Court's decision in *Hungerfords v Walker* was reported in Item 6 of Issue #1 of the Newsletter. Mr Davenport previously included some comment on the High Court decision in his article entitled "An Arbitrator's Power To Award Interest", see Item 21 in Issue #6.**

***Hungerfords v Walker* is an important case for the industry and will change the manner in which claims are framed, including subcontractors' claims against contractors.**

In the first issue of Australian Construction Law Newsletter, Article 6, a decision of the Full Court of the Supreme Court of South Australia on interest as damages was discussed. On 9 February 1989 in *Hungerfords v Walker* the High Court upheld the award of damages by the South Australian Court. The High Court decision has most important consequences for the construction industry in that it removes some of the doubt which previously existed as to the entitlement of a contractor to recover interest at the overdraft rate being paid by the Contractor.

In the *Hungerfords* case accountants were sued for negligence in preparing tax returns. The negligence caused the client to overpay tax and provisional tax over several years and some of the tax could not be recouped. The client sued the accountants for the amount of tax overpaid and for interest at the rate being paid by the client to a finance company for moneys borrowed to finance the client's business. The rate of interest was high (20% p.a.) and interest was compounded.

It was argued by the accountants that the Court could not award more than simple interest at the rate prescribed by the Supreme Court Act (10% p.a.). The High Court held that the higher rate was recoverable as damages and that the Supreme Court Act did not impose a ceiling on interest. The Act in question was in similar terms to legislation in other States and S.31 of the uniform Commercial Arbitration Act. Hence arbitrators would similarly be able to award interest as damages even though the rate exceeds that prescribed for the purposes of S.31.

There are important qualifications to be borne in mind. Firstly, there must be an amount due at a certain date (e.g. a progress payment) which is not paid or there must be an expenditure incurred at a certain date which is not reimbursed when it should be reimbursed. If the claimant is wrongfully deprived of the use of that money, the claimant incurs damages. The damages are either the expenditure reasonably incurred by the claimant in borrowing money in place of the money withheld or, if the claimant has not borrowed money, "the interest which would have been earned by safe investment of the money" (the words of Brennan & Deane J.J. in the *Hungerfords* case).

Brennan & Deane J.J. refer to a "critical distinction between an order that interest be paid upon an award of damages and an actual award of damages which represents compensation for wrongfully caused loss of the use of money". For example, if a contractor causes nuisance to an adjacent landowner by way of noise, smells and dust, the adjacent landowner may obtain an award of damages and interest under the Supreme Court Act or S.31 of the uniform Commercial Arbitration Act but not interest as damages. There is loss suffered by the claimant but not an actual expenditure of money. The claimant has not been wrongfully deprived of the use of an amount of money. On the other hand, if the noise, smells and dust were to cause the claimant's tenants to evacuate, the claimant may have a loss of income which could be categorised as a loss of use of money and could attract interest as damages.

A claimant cannot for the same period recover interest as damages and interest by statute. Each of the statutes providing for interest (e.g. S.31 of the uniform Commer-