IN THE COURT OF APPEAL OF NEW ZEALAND CA 262/96

MEDIUM PRIORITY

BETWEEN ALINGTON GROUP ARCHITECTS

Appellant

A N D ATTORNEY-GENERAL AND MINISTRY OF FOREIGN AFFAIRS

Respondent

Coram: Richardson P
Thomas J
McGechan J

Hearing: 23 October 1997

Counsel: C L Caldwell and R Shah for Appellant
C T Young for Respondent

Judgment: 10 December 1997

JUDGMENT OF THE COURT DELIVERED BY THOMAS J

The question in issue

The primary questions in issue in this appeal relate to the interpretation of a contract. Two questions arise: first, whether following the termination of a contract for architectural services, interest is payable on the payment due to the architect by the respondent from the date of the unilateral termination of the contract or whether there must first be an account rendered in respect of those services followed by a failure to pay within one month, and, secondly, whether the interest awarded should be compound or simple interest.

A third question was introduced during the course of the hearing. That question is whether, assuming interest is not recoverable under the contract until an account has

been rendered, the Court can award interest from the date of termination up to that date pursuant to s 87(1) of the Judicature Act 1908.

Background

The contractual relationship between the appellant, Alington Group Architects Ltd, and the Government, through the Ministry of Foreign Affairs and Trade, dates back to the 1970s. Alington then agreed to undertake the planning and development of the New Zealand High Commissioner's residence in New Delhi. Over the years the project was interrupted, first in 1974 and, again, in 1980. In 1980 the Ministry decided not to proceed with the project. The contract was renewed in 1984, however, and work again proceeded.

The parties negotiated the terms of their agreement over a long period of time and while the work was in progress. Indeed, the final form of the contract was not executed until 9 November 1987.

On 21 November 1988, the Ministry unilaterally terminated Alington's services. Alington was instructed to cease work on the project. The Ministry refused to pay Alington a fee based on any more than a multiplier of eight per cent per annum of the estimated cost of the work. But Alington commenced a proceeding against the Ministry and successfully obtained a judgment in the High Court on 22 August 1996 for fees calculated on the basis of a multiplier of 16 per cent per annum, double that contended for by the Ministry.

The trial Judge, Greig J, held that Alington was entitled to interest pursuant to the contract on the sum found to be due from 12 April 1991, that date being one month after the first account for services had been rendered, at two per cent per month calculated on a simple basis until the date of payment.

As indicated, Alington has appealed against the Judge's findings relating to interest. There is no appeal or cross-appeal in respect of the Judge's substantive decision as to the amount due from the Ministry to Alington.

The relevant terms of the contract

The relevant terms of the contract are to be found in a document entitled "New Zealand Institute of Architects: The Architects Charges". Clause 4.13, under the heading, "Payment due upon Suspension, Abandonment or Termination", in part, reads:

> 4.13 When a project is suspended, abandoned or terminated, before completion of the full service, payment due should be chargeable on a partial service basis for percentage charges and on a proportionate basis for lump sum charges.
>
> If instructed to cease work on a project the architect shall be entitled to payment due and chargeable in accordance with the terms of the this clause...

Clause 4.15, entitled "Overdue Payments", in the Architect's Charges reads as follows:

> 4.15 The architect is entitled to interest at the architect's current bank overdraft rate on all charges due and not paid within 30 days of rendering of the account.

On 9 November 1987, however, the parties signed an agreement in which, under the heading "Time charge", the following clause was inserted in handwriting:

> All fees are charged monthly commensurate with services rendered 2% per month interest is charged on overdue accounts.

The judgment in the Court below

Greig J held that the first claim for payment in respect of the termination was not made until 12 March 1991. It was not until that date that it could be said that a charge was due in terms of clause 4.15. It became overdue in accordance with the terms of that clause a month later, namely, 12 April 1991. The learned Judge therefore rejected

Alington's claim that interest ran from the date when the contract was terminated, and held that the Company was entitled to interest from 12 April 1991 only.

Greig J also held that the interest would be charged at two per cent per month. He rejected Alington's claim that the interest should be compounding. He based his decision on the ordinary meaning of the reference to "2% per month" in the agreement, the absence of the word "compound", or "any other term which would indicate that interest was to be carried to the account and then to bear interest thereafter", and the omission of any reference to the word "rests" which, in the past as part of an earlier fiction, allowed for the application of compounding interest. Referring to the House of Lords' decision in ***Westdeutsche Bank v Islington LVC*** [1996] 2 WLR 802, the learned Judge observed that the whole tenor of the law is against compound interest and that this approach is reflected in s 87 of the Judicature Act 1908.

Date of accrual of interest

In order to understand the scope of the argument relating to the date on which interest properly accrues, it is convenient to set out briefly the competing arguments of counsel. The case falls to be dealt with in the terms in which it has been presented to the Court.

Mr Caldwell, who appeared for Alington, advanced three principal arguments in support of his contention that interest accrued as from the date of the termination of the contract. First, he contended that the amount found to be due and payable by Greig J was the amount which was overdue in terms of the contract. The Ministry had staunchly refused to make any further payment. No specific claim, he argued, was necessary and no account had to be rendered in order to attract interest.

Secondly, Mr Caldwell submitted that the fees due to Alington had been disputed by the Ministry prior to, as well as following, the termination, thereby rendering any further request for fees by Alington futile. Alington, he pointed out, had gone to great lengths to counter the reasons given by the Ministry for refusing any further payment at

the time of the termination of Alington's services. In a letter dated 5 December 1988, Alington had said (*inter alia*):

> Irrespective of your letter of 27 May 1988, all claims for payment of fees and disbursements for this project will be made in accordance with the conditions of our engagement ... If your Department persists with the termination of our commission, then our solicitors will be instructed to issue proceedings to recover the profit we would have expected to come from this project and to which we are rightfully entitled.

Basing its stance on the premise that Alington was only entitled to fees based on a multiplier of eight per cent per annum (rejected by Greig J), the Ministry had persisted in claiming it had already paid more than was due. By letter dated 21 November 1988, the Ministry had emphatically repeated the position which it had outlined earlier and firmly advised that, accordingly, "no further payments will be made". Mr Caldwell said Alington could do nothing other than issue proceedings, which it did.

Thirdly, Mr Caldwell pointed out that, as at the date of termination, Alington had already rendered accounts, including significant disbursements to the Ministry, and that these accounts were outstanding. The accounts date back to March 1988. Mr Caldwell sought to utilise them, not to found a claim for payment in respect of those accounts, but in support of an argument to the effect that, as accounts had been rendered and were overdue as at the date of termination, the amount finally found to be due should be regarded as the completion of those accounts.

For its part, the Ministry, through its counsel, Mr Young, submitted that the rendering of an account was a condition precedent to any entitlement to interest. The letter of 5 December 1988, he claimed, was not an account but a letter threatening legal action if the respondent persisted with the termination of the contract. No accounts had been rendered prior to or after the termination for the payments due on termination. The first account for fees payable, he said, was rendered on 12 March 1991 and therefore, in terms of the plain meaning of clause 4.15, it was not until a month after that date that Alington became entitled to interest.

We do not consider the finding made by Greig J that no account had been rendered until 12 March 1991 can be seriously challenged. Nor can the outstanding charges for which accounts had been rendered be elevated or expanded to include the final sum due to Alington as a result of Greig J's judgment. The issue is essentially one of whether, on the correct construction of the contract, interest is payable on termination by virtue of clause 4.15, as modified by the handwritten insertion made on 9 November 1987.

It may be noted that it was not alleged by Alington that interest was payable at two per cent per month on the payment due under clause 4.13 as a matter of necessary implication and not the application of clause 4.15. Both parties accepted that the date on which interest accrues is to be determined on the basis of the interpretation of those two clauses, and the handwritten modification to clause 4.15. The difficulty for the Court is that these provisions do not appear to be directly apposite to the Ministry's liability for the payment of interest following termination.

In the first place, clause 4.13 provides for the payment due under the contract where the project has been suspended, abandoned or terminated and the service has not been completed to be chargeable on a partial service basis for percentage charges and on a proportionate basis for lump sum. The second paragraph relates to an instruction to cease work and, while the paragraph as a whole makes it plain that the instruction may eventually result in the work being suspended, it is not clear whether it is intended to apply to the termination of the agreement. It will apply to a termination only if such an instruction is taken to be implicit in the notice of termination. In any event, the clause provides the method by which the payment due will be fixed on termination. It does not in its terms provide that the architect shall be entitled to interest on the payment duly found to be due. To establish that entitlement, Alington turned to clause 4.15.

But on its face, clause 4.15, as modified by the handwritten insertion, does not appear to be directly applicable to the payment of interest following a termination of the agreement. Read together, clause 4.15 and the handwritten insertion are in the

nature of a machinery provision relating to the non-payment of the regular fees which Alington proposed to render monthly. Consequently, clause 4.15, as modified, means that the architect is entitled to interest at the rate of two per cent per month on all charges due (the fees being intended to be charged monthly commensurate with services rendered), which are not paid within 30 days of the account being rendered.

It cannot be said, however, that the parties assumption that clause 4.15, as modified, applies to payments due following termination is unduly strained. But if this is so, interest will only begin to accrue 30 days after an account has been rendered. The clause both defines the architect's entitlement to interest under the contract and fixes the time at which interest will begin to run. As at that time, the Ministry are aware of the quantum of the charges which it is claimed are outstanding and know that interest will be due to the architect at the rate of two per cent per month if it does not pay those charges within 30 days.

Although it may seem extremely technical in the circumstances for the Ministry to insist that an account had to be rendered in respect of the amount in dispute following the termination when it had already firmly indicated it would not pay any further sum, there would seem to be no way of escaping the plain meaning of clause 4.15. Alington has not pleaded an estoppel against the Ministry which would preclude it from taking advantage of the fact an account had not been rendered. Nor, as already indicated, has it pursued an implied term to the effect that the two per cent per month interest would be paid as from the date of termination (or 30 days thereafter) in the event of the amount outstanding being in dispute. In the result, interest could not begin to run until an account had been rendered and remained unpaid for 30 days.

In our view, therefore, Greig J was correct in holding that interest under the contract on the outstanding monies due to Alington is to be calculated as from 12 April 1991 until the date of payment at the rate of two per cent per month.

Interest under s 87(1)

Although its argument cannot be lightly dismissed, we consider that Alington must also fail in respect of its claim for interest under s 87(1) of the Judicature Act 1908 for the period 21 November 1988, when the contract was terminated, until 12 March 1991, when an account was rendered and the contractual provision took effect. This claim was first raised during the course of the hearing. Counsel were given a full opportunity to address the issue, including, if so required, further time within which to respond to it. Both Mr Caldwell and Mr Young availed themselves of this opportunity, and written submissions were duly received.

Section 87(1) of the Judicature Act reads as follows:

> **87. Power of Courts to award interest on debts and damages** - (1) In any proceedings in [[the High Court or Court of Appeal]] for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate, not exceeding [[the prescribed rate]], as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:
>
> Provided that nothing in this subsection shall -
>
> (a) Authorise the giving of interest upon interest; or
>
> (b) Apply in relation to any debt upon which interest is payable as of right, whether by virtue of any agreement, enactment, or rule of law, or otherwise; or
>
> (c) Affect the damages recoverable for the dishonour of a bill of exchange.

As can be seen from a perusal of the subsection, interest may be awarded on a judgment sum for any debt or damages not exceeding a prescribed rate providing that interest is not payable as of right. In other words, the Court's jurisdiction to award interest cannot displace the position which has been agreed or which may exist by reason of any enactment, rule of law, or otherwise. It was Mr Young's contention that clause 4.15, as modified, excluded the Court's jurisdiction under s 87(1). We feel constrained to recognise the force of this argument.

If, as Alington has contended from the outset, clause 4.15 is applicable to any sum due on termination, it is difficult not to hold that interest under the agreement is

"payable as of right" in terms of s 87(1)(b). The "right" accrues when an account has been rendered and has been outstanding for more than 30 days. The necessary implication is that interest does not run until that time. Thus, the application of s 87(1) is precluded. It could not be seriously argued, for example, that interest could be awarded under subs (1) for the period from when the account for the charges was first rendered until the 30 days had expired and interest started to run under clause 4.15. Why should there be any difference in respect of the period between the termination and the rendering of the account? In our view, the same considerations must apply. Clause 4.15 provides Alington's "right" to interest and that right excludes reference to s 87(1) for any period prior to interest becoming due under that clause. We suspect that it was considerations such as these that led Alington and its legal advisers to opt from the outset to seek to recover interest under the agreement rather than relying on s 87(1).

In ***Day v Mead*** [1987] 2 NZLR 443, Somers J excluded the possibility of interest being awarded under s 87(1) where the transaction between the parties involves an agreement to pay interest at a rate as great as or exceeding the statutory rate down to such time as the debt or damages are paid or merge in the judgment. The learned Judge then said (at 463): "Whether it would apply where the contractual rate is less than the statutory rate may be left until the question arises". With respect to the learned Judge, we do not consider that the question need be left open. Whether the interest rate specified in the contract is greater or less than the statutory rate is not the issue. The pertinent question under s 87(1)(b) is whether interest is payable as of right in relation to the debt in issue under the agreement. The section does not contemplate an award of interest where a right to interest already exists. Parliament clearly intended the parties will as expressed in their contract to prevail. See also ***Degman Pty Ltd (In Liq) v Wright*** [1983] 2 NSWLR 348, at 352-353; and ***Bans Pty Ltd v Ling*** (1995) 36 NSWLR 435, at 437-438.

Alington's claim for statutory interest under s 87(1) therefore fails.

Simple or compound interest?

Mr Caldwell argued that the words "2% per month interest is charged on overdue accounts" indicated interest calculated on a compound basis. The agreement, he pointed out, did not stipulate interest on a per annum basis. Accordingly, for each month that the principal sum remained unpaid, interest would be charged at two per cent per month. The sum then outstanding would be the total of the principal, plus the interest charged, so that when another month went by with no payment, the two per cent would be charged on the total then outstanding and that total would include the interest from the previous month. Mr Caldwell contended that this was not only the natural and ordinary meaning of the words but that it recognised the economic impact on Alington of not having access to the money as it fell due. In this respect the Ministry had the benefit of the money while Alington suffered the detriment of not having it. The real cost to Alington in 1988 would have been 30.89 per cent expressed in annual terms. At a compound rate, the rate of two per cent would equate to 26.89 per cent, expressed annually.

Mr Caldwell also referred to the phrase "the architect's current bank overdraft rate" in clause 4.15. In this respect, he contended, the practice of compounding interest has long been recognised as banking practice. There can be no question, he argued, but that the "architect's current overdraft rate" means interest compounding on a monthly basis. An average bank overdraft charge of 30.89 per cent over the four years preceding the termination led Mr Alington to conclude that the two per cent compounding charge was four per cent less than the average bank overdraft charge.

Mr Young supported the Judge's finding on this point and again asserted that the plain meaning of the clause indicated that interest would be calculated on a simple basis. The reference, he said, is simply to a rate, not to the application of that rate on a compounding basis. The reference to the interest being charged "per month" was pertinent only to fix the time when a cause of action would arise and did not indicate that interest should be paid on a compound basis. It was, he said, open to the parties to

have agreed that interest be paid on a compound basis, but they had not done so. Mr Young also pointed out that clause 4.15 had been "modified" to exclude the reference to the "architect's current bank overdraft rate". Finally, he rejected as irrelevant evidence from Mr Alington that the figure of two per cent per month was inserted in the handwritten addition to avoid complications caused by fluctuating interest rates at the time.

In the following paragraphs we express the concluded views of two members of the Court, the third member being dubitante, but being content to have judgment delivered.

The question whether the interest payable under clause 4.15 is to be simple or compound interest is to be approached without reference to any predisposition the Courts may have demonstrated in favour of simple interest as against compound interest. It is purely one of contractual interpretation. The agreement is to be interpreted so as to give effect to the meaning intended by the parties. Hence, any such "presumption" in favour of simple interest is out of place in determining the meaning of the words in issue.

Mr Caldwell is correct in submitting that the terms of s 87(1) of the Judicature Act do not necessarily support the conclusion that the whole tenor of the law is against compound interest. By virtue of subs (1)(a) of that section, the giving of interest upon interest is expressly precluded. Parliament presumably thought it necessary to make such a prohibition express so that the phrase "... interest at such rate, not exceeding the prescribed rate" in the substantive part of subs (1) would not be construed as authorising compound interest. Nor can anything be read into the fact that Parliament has expressly prohibited an award of compound interest. Such a restriction may well have been thought appropriate when conferring a discretion on the Court to award interest where the parties have not agreed upon the interest payable or there is no statute or other rule of law governing the situation. Perceptions of what Parliament may or may not have intended in enacting s 87, however, can have no bearing on what is essentially a question of interpreting a contract. That question in this case is what the

parties meant by the clause 4.15, as modified, and the answer is to be arrived at by the application of the ordinary principles of contractual interpretation without the application of some sort of predisposition or presumption against compound interest.

Looked at purely as a question of interpretation, clause 4.15 can be seen to contemplate the accrual and payment of compound interest.

In the first place, it is difficult to give any sensible meaning to the requirement that the interest is to be two per cent per month if it was not intended to attract interest on interest. If it had been intended to be simple interest the parties could have simply provided for interest at the rate of 24 per cent per annum. The express reference to interest on a "per month" basis indicates the intervals at which interest is to be calculated on overdue accounts. When calculated the amount then outstanding and overdue will include the sum equal to interest at two per cent on the original account for the previous month. Monthly calculations will continue to compound the interest for so long as the account is unpaid. It would be pointless to calculate the interest on a monthly basis if interest was to relate only to the original account.

Further support for this construction can be derived by postulating what would happen if the Ministry were to pay the amount of the account, say, after three months, but refuse to pay any interest on that sum. At a simple rate the outstanding interest due would not attract any further interest. It is difficult to accept that the parties intended this result. Compound interest, on the other hand, would mean that the unpaid interest would itself continue to attract interest for each month that it remained unpaid.

In the second place, the phrase, "the architect's current bank overdraft rate" confirms that the parties intended the interest to be charged to be compound rather than simple interest. In the handwritten revision, two per cent per month was substituted for the current rate to provide greater certainty and simplicity in the administration of the contract. Such specificity eliminates the need to ascertain and convert the bank's current overdraft rate every time an account is unpaid for a period longer than 30 days. Clearly the purpose of the provision is not simply to provide an incentive for the

Ministry to pay the architect's account promptly, but to pass the cost of the money from the architect to the Ministry who would have the use and benefit of it pending payment. Yet, the parties would not succeed in transferring the cost of the money to the Ministry unless the rate is calculated on a compound basis.

These reasons point to the interest payable under clause 4.15 being compound interest at the rate of two per cent per month. Such is the decision of the Court.

The appeal therefore succeeds in part. The appellant is entitled to costs of $3,500 together with such disbursements as, failing agreement, may be approved by the Registrar.

Thomas J

Solicitors
Buddle Findlay, Wellington for Appellant
Crown Law Office, Wellington for Crown