CV656

NZLR

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

6/1

HIGH PRIORITY

2026

CP.911/91

BETWEEN: DAIRY CONTAINERS LIMITED
Plaintiff

A N D: NZI BANK LIMITED
First Defendant

AND MARAC FINANCIAL SERVICES LIMITED
Second Defendant

AND AMP FINANCIAL INCORPORATED LIMITED
Third Defendant

AND ANZ BANKING GROUP (NEW ZEALAND) LIMITED
Fourth Defendant

AND BANK OF NEW ZEALAND
First Third Party

AND THE AUDITOR-GENERAL
Second Third Party

AND THE NEW ZEALAND DAIRY BOARD
Third Third Party

CP.559/92

BETWEEN: DAIRY CONTAINERS LIMITED
Plaintiff

A N D: THE AUDITOR-GENERAL
Defendant

AND THE NEW ZEALAND DAIRY BOARD
First Third Party

AND D W JOHNSON
Second Third Party

AND N A WILLIAMS
Third Third Party

Hearing: 2 February - 3 May; 1 August - 16 August 1994

Judgment No.2: 22 December 1994

Counsel: Rhys Harrison QC and Michael Ring for Dairy Containers Limited
William Wilson and Christopher Finlayson for ANZ Banking Group
Nathan Gedye and Bruce McClintock for Marac Financial Services Limited
Michael Camp QC and Richard Fowler for the Auditor-General
Alan MacKenzie for New Zealand Dairy Board
Charles Blackie and Brett Jones for D W Johnson
Michael Corry for N A Williams (to abide the decision of the Court)

JUDGMENT NO.2 OF THOMAS J

Solicitors:

McElroys, DX 2098 Auckland, for Dairy Containers Limited
Phillips Fox, DX 8005 Wellington, for Auditor-General
Bell Gully Buddle Weir, DX 8294 Wellington, for ANZ Banking Group
Bell Gully Guddle Weir, DX 9 Auckland, for Marac Financial Services Limited
Rudd Watts & Stone, DX 8023 Wellington, for New Zealand Dairy Board
Brookfields, DX 6 Auckland, for D W Johnson
Corry & Co., DX 166 Auckland, for N A Williams

Introduction

At page 267 of my judgment in this proceeding, I reserved questions of interest and costs for further submissions. Those issues have now been argued.

Counsel for DCL and ANZ (and Marac) indicated that it had been agreed between them that it was appropriate to determine the application for costs by DCL against the Auditor-General and, in that context, consider ANZ's position. Any question of interest and costs as between ANZ and DCL, it was suggested, could be reserved to be dealt with, if necessary, on some other occasion.

I will, of course, adhere to this arrangement as far as is practicable and just.

A. Interest

The issues which fall for consideration are as follows -

(1) What is an appropriate interest rate?
(2) What is the date from which interest should run?
(3) What, if any, are the factors relevant in fixing the interest payable?

(1) The interest rate

DCL seeks interest pursuant to s 87(1) of the Judicature Act 1908 on the judgment sum of $6.851 million at the rate of 11 per cent

per annum. No question of fixing interest at commercial rates arises. During his closing submission at the main hearing Mr Finlayson produced a detailed schedule of interest rates for various types of deposits for the period 1991 to 1994. It appeared then, and was generally agreed, that 11 per cent was the appropriate figure. It was again not disputed at this hearing.

I therefore fix the interest rate at 11 per cent per annum.

(2) The date from which interest is to run

As stated by Somers J in ***Day v Mead*** [1987] 2 NZLR 443, at p 463, justice generally requires interest to run from the date the cause of action arose down to the date of judgment. Interest cannot be charged, however, on the full judgment sum obtained by DCL against the A-G. I found that the Audit Office should have unearthed the fraudulent conduct of DCL's executives by October or November 1986. As at that date DCL's losses would have been recovered. Consequently, the company's claim at that time would have been limited to nominal damages.

In order to ascertain how interest should be fixed, therefore, Mr Harrison adverted to the evidence of Mr A N Frankham, who had been called as an expert witness by the A-G. His evidence was not challenged. Deducting 40 per cent for the contributory negligence found against DCL, the net recoverable loss suffered by the company from 30 September 1987 to 28 August 1988 was $1,458,532, and from 26 August 1988 to 13 July 1989 $5,067,015. Thereafter, interest can run to the date of judgment on the full judgment sum of $6.851 million.

(3) Factors relevant to the determination of the award

Mr Camp, for the A-G, sought a deduction in the interest payable for the alleged delays of DCL in prosecuting its claim. There were, he argued, three areas of culpable delay. The first was the delay in issuing proceedings, the second was the time taken by DCL's needless diversion seeking summary judgment against the banks and, the third, the delay resulting from DCL's unsuccessful attempt to appeal the Court of Appeal's interlocutory decision on the joinder of parties.

It may be instructive, to borrow a favoured judicial phrase, to refer to the basis on which interest is awarded to a successful plaintiff. Awarding interest falls within the scope of the Court's fundamental task to ensure that a successful plaintiff is fully compensated for the damage which it has suffered as a result of the default of the defendant. The principal was reiterated in ***Day v Mead*** (supra, at p 463) in these terms :

> "Next I think the general purpose of the power [s 87(1)] was conferred on the Court was to enable proper compensation to be given to the plaintiff. So long as he is out of the debt or damages the plaintiff is unable to obtain those advantages which possession of the money to which he is entitled would afford him. The corollary is that the defendant who has had the money, but *ex hypothesi* ought not to have had it, enjoys its use; he may have put it out at interest or otherwise have profitably employed it, or, if he needed to borrow in order to pay he has saved the interest he would have incurred in such borrowing."

It is for that reason that interest is generally awarded from the date the cause of action arose, that is, from the date that the plaintiff's entitlement to the debt or damages arises down to the date of judgment. To be a pertinent factor, therefore, the delay must be excessive or be associated with some other conduct on the part of the plaintiff which is unacceptable to the Court (ibid, at pp 463-464).

I do not consider that the delay in this case was excessive or that DCL's conduct of the proceeding was such as to deserve a rebuke from the Court reflected in a reduction of the interest which is required to fully compensate the company. First, the delay following DCL's letter to the A-G dated 9 January 1990 holding him liable for the company's loss and the commencement of the proceeding on 19 June 1991 was neither extraordinary nor inexplicable. Mr Camp pointed out that Mr Glenton, the NZDB executive who had investigated the frauds, had completed his investigation by the end of 1989. Mr Camp claimed that, even making some allowance for the need to obtain advice from experts, the proceeding could have been commenced much earlier in time. The proceeding could possibly have been commenced at an earlier time, but I do not find the delay blameworthy. Without the refinement which the proceeding itself, including the hearing, has brought to the matter, the issues would have been insatiably complex. It is to counsel for the plaintiffs' credit that they produced a statement of claim with detailed particulars which did not require amendment at any time prior to or during the trial. I do not doubt that a considerable amount of time would have been needed to brief counsel and witnesses, obtain advice from and confer with experts, and formulate the claim. The A-G was aware that the proceeding was pending. He was not prejudiced by the delay.

In the second place, however, I am not so sanguine about the delay caused by DCL's excursion into the summary judgment Court. Mr Harrison pointed out that the summary judgment application had no bearing on the progress of DCL's claim against the A-G. The proceedings against the A-G and the banks, he said, were entirely separate. But eventually, of course, the two sets of proceedings were consolidated. Indeed, for some time prior to the consolidation they had been dealt with in tandem. I do not doubt that the proceeding against the A-G would have made speedier progress if DCL had not pursued summary judgment against the banks.

Moreover, in the light of the evidence at the hearing, the application for summary judgment does not seem to have been appropriate. It was a foolhardy venture of the kind which has been frequently disapproved by the Courts. But I think that the Court's disapproval can be recognised in costs rather than interest. For present purposes, DCL's needless excursion into the summary judgment Court does not justify a reduction in the interest which is payable.

The third area of delay which Mr Camp complained about is the delay which occurred while DCL sought leave to appeal the Court of Appeal's interlocutory decision to the Privy Council. One cannot, of course, criticise the company for seeking leave to appeal an interlocutory judgment. The defendant in the ***Kuwait Asia Bank*** case sought and obtained leave to appeal an interlocutory decision - and was successful. In this case, NZDB was anxious to escape any direct involvement, and DCL was merely serving its parent body's interests in exercising its right of appeal. I am not prepared to hold, therefore, that

the inevitable delay attributable to the application for leave to appeal should reduce the interest sum which is payable.

In rejecting the A-G's arguments for a reduction in interest I have been conscious of the fundamental objective of seeking to ensure that a successful plaintiff is fully and properly compensated. That principle must prevail. The Court of Appeal stressed in ***Day v Mead*** that any established delay needs to be weighed carefully against other factors, such as the fact that the defendant has the opportunity of bringing a case to trial and that he or she will have had the use of the plaintiff's money, or been saved from borrowing at interest in order to pay the plaintiff. There is much to be said for the recommendation in the Law Commission's report issued in May 1994 (see paras 46 to 47) to the effect that an award of interest should not be reduced where the plaintiff delays.

Interest at 11 per cent per annum is therefore awarded to DCL against the A-G on the following basis :

	Loss	***Date***	***Interest***
1.	$1,458,532	30/9/87 to 28/8/88	$145,493.55
2.	$5,067,015	26/8/88 to 13/7/89	$488,654.59
3.	$6,851,000	14/7/89 to 28/11/94	$4,052,976.40

Interest as between the A-G and ANZ, Marac and the third parties

In DCL's proceeding against the A-G, the ANZ is held liable to contribute $1,712,981.25 and Marac $570,993.75. Interest at 11 per cent is awarded on these sums against the respective banks. Interest at 11 per cent is also awarded against Mr Williams and Mr Johnson on the sum of $1,141,987.50.

While I have not been asked to do so by DCL I would, if required, award interest to that company against ANZ and Marac on the same basis. In the case of the banks, I consider that interest should run from the various dates on which they have been held to have converted DCL's cheques.

B. Costs

The issues falling for decision in respect of costs are as follows :

(1) What is the appropriate approach to DCL's request to fix costs against the A-G only, and reserve its rights against the banks?

(2) What is an appropriate basis for awarding costs when the case was essentially about the apportionment of liability?

(3) Determining the question of DCL's costs in the absence of any special factors.

(4) Determining the impact of a Calderbank letter on the question of costs awarded against the A-G.

(5) Should costs be awarded to NZDB at all? If so, how much?

(6) Determining the A-G's costs against Mr Williams and Mr Johnson

Other than as I shall specify, all costs are to lie where they fall.

(1) DCL's request for costs against the A-G

On the basis of the principle that costs follow the event in the absence of exceptional circumstances, DCL is entitled to costs against each of the three unsuccessful defendants, the A-G, ANZ and Marac. As Mr Harrison acknowledged, however, the issue is complicated by virtue of the fact that the judgment sums overlap. The damages awarded against the A-G include the damages awarded against the banks and, up to the extent of the quantum of their liability, vice versa.

In these circumstances, DCL seeks an award of costs against the A-G alone, again reserving its rights against ANZ and Marac. Mr Harrison has elected to pursue the A-G for costs even though the award which he seeks against the A-G would include costs incurred in the proceeding against the banks.

I am not prepared to accede to this course. It would be unfair to the A-G. The A-G would be required to accept responsibility for the cost of DCL's proceeding against the banks, including that part of the hearing in which DCL asserted the liability of the banks and the banks sought to resist being held liable.

It seems to me that there are two courses open to me; either I can fix the costs against both the A-G and the banks, or I can fix costs against the A-G having regard to his share in the responsibility for DCL's loss and leave it to DCL and the banks to negotiate their costs. In the interest of finality, I prefer the former course.

(2) The basis of awarding costs

In this case, however, success is to be measured not so much in terms of liability as in terms of the parties' share in the responsibility for the loss in issue. All things being equal, the allocation of costs should then be as just and equitable as the original apportionment of responsibility. In this case it seems to me that, in broad terms, the percentage of responsibility of each party for the total damage, which I set out in a table at page 266 of my judgment, provides a convenient starting point.

I agree with Mr Harrison's and Mr Wilson's sustained protestations that costs cannot be fixed on that basis alone. To do so would be to fail to recognise the particular factors which should influence my discretion in awarding costs against the A-G. I propose, however, to use the general apportionment as a starting point, bearing in mind that it applies to the total loss of $11,419.875.00 and that the three unsuccessful defendants faced differing levels of exposure to liability.

(3) The quantum of costs

DCL claimed an award of costs above scale. Mr Camp did not oppose an award which departed from the scale. His concession accords with commercial expectations and commercial reality. As I said in ***Development Finance Corporation of New Zealand Ltd v Bielby*** [1991] 1 NZLR 587, at p 596, it is important that the courts do not get

"out of touch" when fixing costs which are intended to be a reasonable contribution to the costs of a successful commercial litigant.

In assessing DCL's costs I have taken into account a number of considerations. First, I have had regard to the level of scale costs (see ***Morton v Douglas Homes Ltd (No.2)*** [1984] 2 NZLR 620, at p 625, and ***DFC v Bielby*** (supra) at pp 594-595). Mr Harrison submitted a schedule of scale costs on a judgment of $11 million. Excluding Court fees and witnesses' expenses it amounts to $402,480.00. I do not, however, consider that it is appropriate to look at scale costs on a figure of $11 million. DCL succeeded in obtaining judgment against the A-G of $6,851,925 and against ANZ and Marac of $2,391,894.30 and $79,572.45 respectively, and regard is to be had to scale costs on those figures. To the extent that its claim for damages was reduced, DCL did not succeed.

This is not, therefore, a case where the plaintiff has succeeded in a hotly contested dispute as to liability and then been attributed with a relatively minor share of responsibility for its loss, almost as an addendum to the primary issue of liability. As indicated by Smellie J in his earlier interlocutory judgment and the Court of Appeal in its subsequent judgment, and as reiterated in my main judgment, this case was essentially about the apportionment of responsibility between the parties. Determining liability, and the extent of blameworthiness and causative culpability of the various parties, was a necessary step in the exercise of apportioning responsibility. I do not agree, therefore, that DCL should receive costs on the 40 per cent of its loss which it is required to bear in the proceeding against the A-G, or on the 70 per

cent and 85 per cent contributory liability respectively in its claims against the banks.

Secondly, I consider that it is appropriate to have regard to the actual costs incurred by DCL (see ***DFC v Bielby*** (supra) at p 596). Its costs in both proceedings, including GST, are $1.57 million. Legal costs, including both solicitors' and counsel's costs are $1,264,351. It is mete that the A-G and the banks make a reasonable contribution to these costs.

Thirdly, I accept that the case was factually and legally complex. Why else would a judgment of 267 pages be necessary? The factual and legal complexity would have been reflected in the level of legal costs I have just cited, that is, $1.2 million, and in the experts' costs amounting to $305,762.

Having regard to these considerations I consider that, apart from the special factors which I shall shortly mention, the appropriate quantum of legal costs for DCL is $500,000 together with $200,000 for experts' fees and disbursements.

(4) The "Calderbank letter"

DCL and ANZ's counsel contended that the A-G should bear the brunt of the costs as he had single-handedly prevented a settlement being achieved (see ***DFC v Bielby*** (supra) at p 595). DCL and ANZ, it was claimed, anticipated their respective liabilities and were prepared to settle accordingly. The A-G's "obdurate attitude" provided the sole impediment to achieving a sensible compromise.

While I am satisfied that the A-G must accept a greater proportion of the costs than would otherwise be the case, I am not convinced that the proportion should be as high as Mr Harrison and Mr Wilson would have it.

In the first place, a concerted attempt to settle the case was not made until virtually the eve of the trial, that is, 21 December 1993. Negotiations continued into the first week of the trial and beyond. This was far too late in the piece. Responsible counsel will get to the essence of a case long before then and will ensure that their clients are confronting the issues in a realistic fashion. Nevertheless, it does appear that the A-G, more than any of the other parties, failed to realistically contemplate its exposure to liability.

ANZ's solicitors confirmed their position in a letter dated 1 February 1994 marked '*Without Prejudice Except as to Costs*'. The bank indicated that it was prepared to contribute $2.45 million in full and final settlement. The A-G's solicitors responded with an offer for the A-G to contribute $1 for every $2 contributed by ANZ. They recorded that the A-G had already offered to contribute $1.5 million to a settlement. DCL's solicitors advised by letter dated 7 February 1994 that, as the trial was about to commence, the total claim inclusive of interest and costs would be in excess of $17 million. They indicated that DCL would be prepared to accept a total of $11 million plus an allowance for its costs. They added that DCL remained open to reasonable and realistic settlement proposals.

The A-G's reaction was to say that the bank was at risk in conversion for some $6 to $8 million with very little prospect of any diminution for

contributory negligence. The A-G's solicitors understood that DCL's solicitors were in agreement with them on that point. But that was not my decision and I do not consider that the A-G can be excused for adopting an unrealistic attitude simply because he miscalculated what the decision of the Court would be likely to be.

In the result, no settlement was reached. During the course of the trial however, the A-G increased the amount it would contribute to a settlement to $3.5 million. This was apparently done at the close of the plaintiff's case. At this time, perhaps, the disparity between the A-G's optimistic pre-trial expectation as to how its conduct of the audit would be perceived and the perception eventuating as a result of the plaintiff's evidence would have been apparent.

In the second place, notwithstanding Mr Harrison's submission to the contrary. I am not certain that, even if the A-G had adopted a realistic approach to his potential liability, a settlement would have been achieved. Mr Harrison was looking for a total sum, inclusive of interest of $11 million. The ANZ's offer, and any realistic offer of the A-G and Marac, again inclusive of interest, would not have approached that sum. But no doubt all parties would have become more receptive and flexible as the cost of undertaking a lengthy trial became more immediate. I therefore tend to agree that the attitude of the A-G inhibited DCL and ANZ from structuring a compromise which would have resolved the various claims and rendered the costs of the hearing unnecessary. But it is not possible to put the issue higher than that the A-G must accept a significant degree of responsibility for inhibiting a belated settlement from occurring.

I believe that, because of this factor, the costs to be recovered by DCL should be increased to $750,000.

Of this sum I consider that the A-G should be liable for $585,000, ANZ for $125,000, and Marac liable for $40,000 respectively. I am also prepared to increase the contribution DCL receives to its experts' costs to $250,000. Of this sum the A-G is to pay $167,500, and ANZ and Marac $62,500 and $20,000 respectively.

I have recognised the A-G's attitude in inhibiting a settlement by allowing a smaller proportion of the costs against ANZ and Marac than would otherwise be the case. I have also had regard to the fact that their exposure to liability and the consequent judgments against them were for a lesser sum and that they recovered a contribution from the A-G. In addition, I have had some regard to the strange amendment to the A-G's cross-claim against ANZ made at the outset of the trial seeking a further $2 million, approximately, in damages. Nothing more was heard of this cause of action. As Mr Wilson said this would appear to be a clear example of a meretricious amendment designed simply to put pressure on ANZ.

(5) The claim for costs by NZDB

Mr MacKenzie sought costs against all three defendants who joined it in this proceeding. Scale costs amount to $620,114.00.

I do not propose to award substantial NZDB costs. They will largely lie where they fall.

I have decided to award NZDB limited costs for a number of reasons.

In the first place, I refer to the relationship of NZDB and its subsidiary, DCL. As Mr Parker was wont to put it, they shared the same pocket. Equally certainly, they regularly wore the same hat. The close relationship between DCL and its parent company was fully described in my main judgment. The closeness of the relationship was borne out by Mr MacKenzie's revelation that NZDB had directed DCL to appeal the Court of Appeal's interlocutory decision to the Privy Council and had then paid the costs which their Lordships had awarded against DCL. Moreover, as Mr MacKenzie advised, both parties shared the same insurer.

Secondly, while I do not suggest for one moment that NZDB succeeded on what might be described as a technical defence, its case lacked that element which is universally attractive; the merits. As the employer of the directors of DCL it must accept responsibility, both in reality and in commercial practice, if not in law, for the directors' dereliction of their duty to oversee the management of DCL. NZDB escapes liability as an undeserving litigant.

Thirdly, I consider that the costs which I have awarded DCL represent a reasonable contribution to what is ultimately the one interest and one pocket. Much, if not all, of NZDB's case was directed to exonerating the employee-directors of DCL and establishing the liability of the A-G and the banks. That was precisely what DCL set about doing. Moreover, while I do not question the wisdom of separate representation, five counsel in total were, I believe, more than necessary to represent the joint interest of these two parties.

Additional work was required because of NZDB's participation in the proceeding, and that can be acknowledged in the costs which I fix.

I have therefore decided to allow the sum of $100,000 as costs to NZDB. It is also entitled to disbursements as follows :

(a)	Fees of Court	$595.00
(b)	Witnesses fees and allowances	$29,996.30
(c)	Agency charges	$7,399.90
(d)	Payment of costs awarded by High Court	$350.00
(e)	Travel and accommodation expenses of counsel	$53,956.91
(f)	Copying and miscellaneous charges	$16,070.97
		$108,369.08

(6) Costs as between A-G and Mr Williams and Mr Johnson

The A-G is entitled to costs and disbursements as against Mr Williams and Mr Johnson. I award costs of $50,000 against Mr Williams and $32,500 against Mr Johnson, together with such disbursements as may be agreed or otherwise approved by the Registrar. Mr Williams is also to pay $25,000 to the A-G in respect of the costs which he is required to contribute to the cost of DCL's experts. Mr Johnson is liable for $17,500.