

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV 2007-404-430

BETWEEN **OMNI MARKETING GROUP, ASIA PTE
LIMITED**
Plaintiff

AND **TRANSACTOR TECHNOLOGIES
LIMITED**
Defendant

Hearing: 26 February 2009 (on the papers)

Judgment: 26 February 2009 at 3.00 pm

JUDGMENT OF WINKELMANN J

*This judgment was delivered by me on 26 February 2009 at 3.00 pm pursuant to
Rule 11.5 of the High Court Rules.*

Registrar/ Deputy Registrar

Simpson Grierson, Auckland (T J Walker/B J Upton)
Bell Gully, Auckland (M J Tingey/J Vizor)

Counsel
Liam McEntegart, Auckland

[1] This is a long running piece of litigation between two commercial parties involving both a substantial claim and counterclaim. It was adjourned, part heard for a second time last year. Following that adjournment the parties were able to reach agreement as to the basis upon which the litigation could be settled. They also agreed that the terms of the settlement agreement were to be incorporated into a Tomlin order. Accordingly on 18 December 2008 I made a Tomlin order in the following terms:

Upon hearing ... counsel on behalf of the plaintiff and counsel on behalf of the defendant and upon the parties having agreed terms of settlement as set out in the schedule to this order, each party paying its own costs, this Court orders that:

- (1) All further proceedings in this action be stayed except for the purpose of carrying the order in the said terms into effect and for that purpose the parties are to be at liberty to apply.

[2] The schedule attached to the order was the settlement agreement between the parties. That settlement agreement provided for a sum to be paid to the solicitors for TTL on or before 31 December 2008, and that after that obligation was performed the parties would file a notice of discontinuance.

[3] In fact, OMG was late in making that payment; payment was not made until 20 January 2009. TTL now refuses to file a discontinuance in accordance with the terms of the settlement. It says it was entitled to interest in the sum of \$1,610 in respect of the late payment, and therefore apportioned part of the payment received to that interest sum. This leaves \$1,610 of the settlement sum outstanding. TTL says it is entitled to interest under s 87 of the Judicature Act 1908 which provides:

In any proceedings in the High Court, the Court of Appeal, or the Supreme Court 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:

[4] TTL seeks judgment that OMG pay interest on the amount due under the Tomlin order. OMG opposes the entry of judgment, and relies on *Hollingsworth v*

Humphrey (The Independent, December 21, 1987, UKCA), as authority for the proposition that interest claimed on an unpaid settlement sum is not enforceable through the summary judgment process available under a Tomlin order unless there is specific reference to the position of interest in the Tomlin Order. In *Hollingsworth*, damages were sought for the late performance of the terms of a settlement agreement, which included an obligation on the defendant to pay an amount of money. The damages were calculated as interest on the amount unpaid from due date until payment. Damages were awarded at first instance but that award was successfully challenged on appeal by the defendant.

[5] I agree that TTL's position in relation to the issue of interest is misconceived. To the extent that the defendant seeks interest to be calculated on the basis that the agreed settlement created a debt, that debt is not the subject of the present proceedings and therefore interest under s 87 cannot be claimed for late payment in these proceedings. Section 87 is not therefore apposite.

[6] Nor can TTL seek interest under the High Court Rules as if the amount due were a judgment debt. The only order made by the Court under the terms of the Tomlin order was the stay of the proceeding pending the carrying into effect of the terms of settlement. The terms of the settlement were not part of the order itself and therefore cannot be directly enforced as a judgment without further order of the court. In any case, the terms of the settlement did not include provision for interest to accrue in the case of late payment.

[7] The Tomlin order did, as is standard, reserve leave to the parties to apply for orders to enforce the terms of the settlement. In *Hollingsworth*, a similar form of order was agreed upon by the parties, whereby the terms of the settlement were not part of the order itself, but were attached as a schedule, and where the proceedings were stayed except for the purpose of carrying the settlement into effect with leave reserved to apply for that purpose. In that case, the Court of Appeal observed that when this form of order is used the only jurisdiction the court has is to make an order for the purposes of carrying into effect the terms of the settlement.

[8] TTL initially sought judgment for the amount outstanding pursuant to the leave reserved, but OMG made payment before the court had the opportunity to give consideration to the entry of judgment for that amount. Again then, there is no judgment upon which interest could commence to run in terms of the High Court Rules.

[9] For these reasons I conclude that TTL is not entitled to the judgment it seeks.

Winkelmann J