[SUPREME COURT]

FOTI and Others v BANQUE NATIONALE DE PARIS (No 2)

Legoe J

1, 8 May; 4 October 1989

Interest — Whether judgment for plaintiffs for lost hedging contract profits "a judgment for the payment of damages, compensation or any other pecuniary amount" — Whether defendant entitled to interest on counterclaim — Supreme Court Act 1935, s 30c.

The plaintiffs claimed to be entitled to interest on a judgment entered by Legoe J (reported (1989) 54 SASR 354); the defendant claimed interest on the judgment on the counterclaim. The parties agreed that the amount of lost hedging contract profits to which the plaintiffs were entitled was $A1,103,987.39. The plaintiffs argued that s 30c of the *Supreme Court Act* 1935 raised a presumption in favour of the payment of interest on the lost hedging contract profits, calculated at domestic interest rates and payable in Australian dollars. The defendant claimed interest on the judgment on the counterclaim for 7,365,240.00 Swiss francs.

Held: (1) *On the plaintiffs' claim for interest*: (a) the evidence disclosed that if hedging contracts had been entered into at each roll-over period, no moneys would have actually changed hands, as the hedge profits and hedge losses would have been calculated on a running account basis; (b) as the plaintiffs had not been required to repay any of the principal of the loans (due to the interlocutory injunction), the defendant had not at the time of judgment failed to account to the plaintiffs; (c) in these circumstances, the judgment was for a proper accounting by credit of the notional hedging profits. The judgment was not for the payment of damages, compensation or other pecuniary amount, hence the operation of s 30c of the *Supreme Court Act* was not attracted.

(2) *On the defendant's claim for interest*: (a) in the circumstances of the bank continuing to roll-over the principal of the loan at subsequent roll-over periods and the payment by the plaintiffs of the interest and charges provided in the foreign currency loan, the defendant failed to establish that it was entitled to compensation so as to attract s 30c of the *Supreme Court Act*; (b) apart from the interest paid by the plaintiffs under the quasi-contract arrangement since 30 May 1986, the defendant has not established any further entitlement to interest under any of the exceptions to the general common law rule denying interest on debts still due and owing and unpaid.

CLAIMS FOR INTEREST AND COSTS ON JUDGMENTS

J R Mansfield QC and *P A McNamara*, for the plaintiffs.

B T Lander QC and *R J Surman*, for the defendant.

Cur adv vult

4 October 1990

LEGOE J. I handed down reasons for my decision in this matter on 17 March 1989. On 1 May the matter was brought on again for the making

of final orders. There was agreement between the parties that I should fix the amount of damages based on my findings as to the plaintiffs' entitlement. A report of the witness, Ian Butler, dated 27 April 1989, was submitted to me. At that time the basis of Mr Butler's report and the findings that he came to as to the amount of total loss of hedging profits to which the plaintiffs were entitled to on my judgment, was not agreed. The matter was brought on again on 8 May, when both counsel informed me at the beginning of the hearing that it was agreed on the report of Mr Butler that the quantum of damages to which the plaintiff, Mount Barker Supermarket Ltd was entitled to in the light of my findings, was $806,561.86 Australian dollars ($A). In the case of Darvont Pty Ltd there were two separate amounts based on the two loans made to Darvont which came to $A205,609.47 and on the second loan, $A91,806.06. The grand total of these three amounts of hedge profits which the plaintiffs are entitled to on my findings, comes to $A1,103,987.39. This agreed figure is the amount that should be awarded to the plaintiffs in respect of my findings and conclusions set out at 422-429 of my reasons for judgment published on 17 March 1989.

As I directed at 432 of my reasons published on 17 March, I indicated that I would hear counsel as to the parties' entitlement to any interest under the *Supreme Court Act* 1935 as claimed in par 5 of the plaintiffs' claims for relief in the statement of claim. Submissions were addressed to me by both counsel on this question. The plaintiff claims interest on the $1,100,000 (approximately) pursuant to the provisions of s 30c of the *Supreme Court Act*. It was argued that this raises a presumption in favour of interest which is for the defendant to displace. It was submitted that this presumption is normally given effect to in Australian dollar terms and at domestic rates. Counsel submitted that the plaintiffs would be entitled to interest at 15 per cent on the total notional hedging profits as they crystallised at the end of May 1986 from the date of the inter-party summons which was issued on 13 January 1987.

Section 30c(1) of the *Supreme Court Act* provides:

> "Unless good cause is shown to the contrary, the court shall, upon the application of a party in favour of whom a judgment for *the payment of damages, compensation* or any other pecuniary amount has been, or is to be, pronounced, include in the judgment an award of interest in favour of the judgment creditor in accordance with the provisions of this section."

Subsection (2) provides for the basis of the calculation of interest and in (2)(b)(ii) it is provided that where judgment is given upon a liquidated amount, then the interest shall be calculated from the date upon which the liability to pay the amount of the claim fell due to the date of judgment, or in respect of such other period as may be fixed by the court. Pursuant to subs (3) the court may, in its discretion, award a lump sum in lieu of that interest. By subs (4) of s 30c it is provided that the section does not either authorise the award of interest upon interest; or authorise the award of interest upon exemplary or punitive damages; nor apply in relation to any sum upon which interest is recoverable as of right by virtue of an agreement or otherwise; nor affect the damages recoverable upon the dishonour of negotiable instrument; nor authorise the award of any interest otherwise than by consent upon any sum for which judgment is pronounced by consent;

nor limit the operation of any other enactment or rule of law providing for the award of interest.

Counsel for the defendant submitted that the plaintiffs are not entitled to interest on this amount. Counsel submitted that the purpose of the section is to compensate plaintiffs for being kept out of compensation for losses already suffered and to discourage defendants from delaying settlement of claims: see *Wheeler v Page* (1982) 31 SASR 1 at 4, per King CJ; and *Batchelor v Burke* (1981) 148 CLR 448. Counsel submitted that the award of damages to the plaintiff is to compensate the plaintiffs against losses incurred in foreign exchange dealings between March 1985 and May 1986. On the evidence, submitted counsel, it is clear that the plaintiffs have not been obliged to meet those losses to the date of judgment. The plaintiffs have not been kept out of these moneys, submits counsel for the defence. That loss, it is said, will not occur until the principal sum is brought back on shore when the plaintiffs must repay the principal. So, submits counsel for the defence, the plaintiffs have not had to pay any extra interest in the meantime. The interest that they have been paying is at the SIBOR rate plus 1.5 per cent in Swiss francs, the same rate as before 1 September 1986, to which date the loan was extended by agreement or perhaps, more accurately, by concession on behalf of the defendant bank. It is submitted that the fluctuating rate of exchange between Swiss francs and Australian dollars at various times throughout the period of the loan and afterwards, is not relevant as the defendant has not been shown to be negligent in relation to the hedging of exchange rates in relation to interest. Consequently the defence submit that no interest should be awarded.

In my judgment, certain matters should be clearly understood relating to hedge contracts in general and the defendant's breach in particular before determining the entitlement (if any) to interest in this case.

(1) The hedge contracts which should have been put in place by the defendant bank were separate contracts to the loan agreement itself: see generally R Edwards and R Weston, *International Trade Finance* (1986), Ch 8, pp 114-122. Those hedge contracts were separate contracts to be entered into separately in respect of each roll-over period. In this case on my findings, there were six periods and therefore six contracts. This is clearly stated in the very useful summary prepared by Mr Butler showing the method of calculating the hedge profits or losses for any one period. As he points out, all hedge agreements are written to the forward dates of each roll-over. He then goes on to explain how the spot rate and the forward rate are calculated and the formula accepted and used by foreign exchange dealers to arrive at a hedge profit or hedge loss at the end of the roll-over period. From his summaries it appears that there would have been a hedge profit made by the plaintiffs in each of the six periods, except the period 31 December 1985 to 27 March 1986, when there would have been a hedge loss. Accordingly, Mr Butler has taken this into account as a necessary method of calculating the grand total at the end of the relevant period which was 30 May 1986, that is to say, the date upon which the loan agreement expired. This is clear from Mr Butler's summary.

Total Loss Hedging Profits ($A)

		Darvont	Mt Barker	Darvont II
1.	15/3/85 - 1/4/85	33,403.96	131,053.98	14,951.20
2.	1/4/85 - 28/5/85	45,859.71	179,893.18	20,522.99
3.	28/5/85 - 30/9/85	62,548.72	245,358.89	27,991.60
4.	30/9/85 - 31/12/85	62,100.96	243,602.44	27,791.22
5.	31/12/85 - 27/3/86	(19,514.05)	(76,547.45)	(8,732.86)
6.	27/3/86 - 30/5/86	21,210.17	83,200.82	9,491.91
	Total	205,609.47	806,561.86	91,816.06

(2) It is clear from the evidence of the experts in relation to these hedging contracts, that no money actually changes hands during the course of the hedging contracts when they are put in place by the hedge contractor who, in this case, would have been the plaintiffs' banker in relation to this foreign currency loan. Accordingly, the hedge profits and hedge losses would be calculated on a running account basis. This will depend on the particular hedge contract actually entered into by the parties: see *International Trade Finance* (supra), pp 118-119, where a precedent for a borrowers hedge contract is set out.

(3) If the principal sum had been repaid on 30 May 1986 according to the two year limit of this loan agreement, which I found to exist between the parties, and the defendant bank did not account by giving to the plaintiffs the necessary credit in this regard, then I would agree that the plaintiffs held a judgment for *the payment* of damages, compensation or other pecuniary amount. But in the circumstances as I have been notified at the hearing on 8 May, the defendant bank not only granted the plaintiffs an extension until September 1986, but that on and from that date when the loan agreement itself was terminated, the defendant bank has continued to roll-over the loans at the subsequent roll-over dates. In addition, the plaintiffs have continued to pay (and are fully paid up) the amount of SBIOR interest which is due to the defendant bank pursuant to the foreign currency loan agreement at each roll-over date. There has never been any repayment of principal by the plaintiffs because of the interlocutory injunctions granted by von Doussa J in January and February of 1987.

In the light of this somewhat unusual situation and not entirely for the reasons which have been advanced by counsel for the defendant, I have come to the conclusion that the plaintiffs have not established that they are entitled to interest pursuant to s 30c of the *Supreme Court Act*. My judgment for the plaintiffs was not for the payment of damages, although damages are the normal remedy for a breach of a duty of care. In the circumstances of this case the plaintiffs' entitlement was for a *proper accounting* by way of credit as a result of the hedging profit, which they would have made if the hedge contracts had been put in place as I found the defendant was duty bound to advise and put in place for the plaintiffs during the relevant periods of roll-over. Nor is this credit entitlement, in my judgment, compensation, nor is it any other pecuniary amount. In conclusion then, the final order that I should make in this regard is that the plaintiffs should be given a credit of $1,103,987.39 offset against the amount of principal that the plaintiffs must

repay pursuant to the orders on the counterclaim. It is an accounting credit. I attach as a schedule to these reasons, Mr Ian Butler's calculations which clearly show the methods of accounting for the hedge profits and loss at the time the plaintiffs are required to repay the principal pursuant to these final orders.

Although it was not claimed specifically nor argued, I am of the opinion that the plaintiffs have not established a right to interest by way of damages. See generally B Kercher and M Noone, *Remedies* (1983), pp 117-121 and *Halsbury's Laws of England* (4th ed, 1980), Vol 32, pars 106 and 108.

The defendant's claim for interest

By my judgment, the defendant is entitled to be repaid the principal sum owing at the end of the loans, namely, Swiss francs (CHF)5,379,968.20 by the plaintiff Mount Barker and Swiss francs (CHF)1,985,271.80 against the plaintiff Darvont Pty Ltd (for its two loans). The defendant claims that interest should be awarded in addition to these two amounts at the appropriate rate pursuant to the provisions of s 30c of the *Supreme Court Act* on and from the date of issue of the inter party summons.

Without repeating the submissions that were put to me in this regard, I refer to the circumstance that the defendant bank has allowed the foreign currency loan to extend to September 1986 and on and from the termination of the loan by the defendant bank, the defendant bank has continued to roll-over the principal amount at the subsequent roll-over periods. The defendant bank has continued to receive the interest due pursuant to the foreign currency loan and to receive the 1.5 per cent charge which is provided for in the foreign currency loan itself. In these circumstances, I consider that the defendant has failed to establish that it is entitled to compensation under the provisions of s 30c of the *Supreme Court Act*. It has not been put out of its money by any act on behalf of the plaintiffs. In my judgment, the provisions of s 30c of the *Supreme Court Act* do not apply in these circumstances. I would reject the defendant's claim for interest as well. There is no right to any further interest than the quasi-contract arrangements in existence since 30 May 1986 imply: see *Halsbury's Laws of England* (4th ed, 1980), Vol 32, par 108, point (2). The defendant has been paid its interest in this regard. It is not entitled to any more. The defendant has not established any of the exceptions to the general common law denying interest on debts still due and owing and unpaid.

[The judge then dealt with the matter of costs and other matters which are not reported.]

Solicitors for the plaintiffs: *Floreani Coates & Co.*

Solicitors for the defendant: *O'Loughlin Robertson.*

W PAUL WHITE