IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

C.P. 246/93

BETWEEN: THE COMMONWEALTH OF AUSTRALIA as represented by the AUSTRALIAN HIGH COMMISSION of Western Samoa

PLAINTIFF

A N D: TREVOR WAYNE STEVENSON of Taumeasina, and CLARANCE NELSON of Vaoala, Solicitors for and on behalf of the Trustees of the T.W. Stevenson Trust

DEFENDANTS

Counsel: R. Drake for Plaintiff
C.J. Nelson for Defendants

Hearing: 5 October 1993

Judgment: 15 October 1993

JUDGMENT OF SAPOLU, CJ

The plaintiff, the Commonwealth of Australia, as represented bv the Australian High Commission in Apia claims from the defendants Messrs Stevenson and Nelson who are the solicitors for the trustees of the T.W. Stevenson Trust the sum of $6,081.44 being rental advanced by the plaintiff to the defendants under a lease agreement together with interest at 12% per annum. According to the plaintiff's claim, a residental property which belongs to the T.W. Stevenson Trust was occupied by the plaintiff pursuant to a lease agreement with the defendants. As a result of the damage caused by Cyclone Val to the leased property in December 1991, the plaintiff terminated the lease pursuant to the agreement. At the time of termination, the plaintiff had paid in advance to the defendants the sum of $6,081.44 being rental for the period from 6 December 1991 to 31 January 1992. After the termination

of the lease agreement, the plaintiff since May 1992 has been requesting from the defendants a refund of the advanced rent. Then on 23 April 1993, the plaintiff sent a letter of demand to the defendants but there has been no reply from the defendants.

The plaintiff now claims the said sum of $6,081.44 from the defendants together with interest at 12% per annum from May 1992 to the date of judgment for loss suffered in not being able to have the said money for its use. Since the plaintiff filed its claim the defendants have repaid the sum of $6,081.44. So the present proceedings relates only to the interest question. It must also be said that no evidence was adduced in relation to the interest question but counsel simply addressed the question whether the interest claimed is payable in law. Counsel for the plaintiff referred to authorities in support of her argument that interest may be awarded in equity and therefore the Court must grant the interest claimed in this case. Counsel for the defendants referred to the old position at common law and submits that in the absence of an express or implied agreement or evidence of a particular custom or usage of the trade no interest should be awarded in this case.

Dealing first with the argument by counsel for the plaintiff, there is no doubt that interest may be awarded in equity. But the circumstances in which equity awards interest do not apply in this case. In Wallersteiner v Mair (No.2) [1975] Q.B. 373 Lord Denning MR in dealing with the award of interest in equity says at p.388:

> "Equity awards it (interest) whenever money is misused by an "executor or a trustee or anyone else in a fiduciary position "who has misapplied the money and made use of it himself for "his own benefit.... The reason is because a person in a "fiduciary position is not allowed to make a profit out of "his trust : and if he does, he is liable to account for that "profit or interest in lieu thereof".

Buckley L.J. in the same case also deals with the award of interest in equity and says at p.397:

"It is well established in equity that a trustee who in "breach of trust misapplies trust funds will be liable "not only to replace the misapplied principal fund but "to do so with interest from the date of the misapplica- "tion. This is on the notional ground that the money so "applied was in fact the trustee's own money and that he "has retained the misapplied trust money in his own hands "and used it for his own purposes. Where a trustee has "retained trust money in his own hands, he will be "accountable for the profit he has made or which he is "assumed to have made from the use of the money. In "Attorney-General v Alford, 4 De G.M. & G.843, 851 Lord "Cranworth L.C said : 'What the Court ought to do, I "'think, is to charge him only with the interest which "'he has received, or which it is justly entitled to "'say he ought to have received, or which it is so "'fairly to be presumed that he did receive that he is "'estopped from saying that he did not receive it'. "This is an application of the doctrine that the court "will not allow a trustee to make any profit from his "trust. The defaulting trustee is normally charged with "simple interest only, but if it is established that he has "used the money in trade he may be charged with compound "interest. The justification for charging compound "interest normally lies in the fact that profits earned "in trade would be likely to be used in working capital "for earning further profits. Precisely similar equitable

"principles apply to an agent who has retained moneys of
"his principal in his hands and used them for his own
"purposes".

In the House of Lords decision in President of India v La Pintada [1984] 2 All E.R 773 Lord Brandon who delivered the principal speech says :

"Third, the area of equity. The Chancery courts, again
"differing from the common law courts, had regularly
"awarded simple interest as ancilliary relief in respect
"of equitable remedies, such as specific performance,
"rescission, and the taking of an account. Chancery
"courts had further regularly awarded interest, including
"not only simple interest but also compound interest,
"when they thought that justice so demanded, that is to
"say in cases where money had been obtained and retained
"by fraud, or where it had been withheld or misapplied by
"a trustee or anyone else in a fiduciary position".

In Hungerfords v Walker [1989] 171 C.L.R 125, 148 a decision of the High Court of Australia, Mason C.J and Wilson J in their joint judgment say :

"Equity has adopted a broad approach to the award of interest.
"It has long been accepted that the equitable right to
"interest exists independently of statute : Wallersteiner v
"Moir (No.2). Equity courts have regularly awarded interest,
"including not only simple interest but also compound
"interest, when justice so demanded, e.g., money obtained
"and retained by fraud and money withheld or misapplied by
"a trustee or fiduciary : La Pintada".

Thus it is clear from these authorities that circumstances in which equity awards interest, whether it is simple or compound interest, are quite different from the circumstances of the present case. The defendants

in this case were neither executors, trustees or agents for the plaintiff; nor did they hold any other kind of fiduciary position in relation to the plaintiff. There is also no suggestion that the defendants obtained and retained the plaintiff's money by fraud. So interest may not be awarded in equity in this case.

Now the position under English common law for the award of interest seems somewhat difficult. In the case of London, Chatham and Dover Railway Co. v South Eastern Railway Co. [1893] A.C 429 the House of Lords, with reluctance, confirmed the common law rule that in the absence of an agreement or a statutory provision to pay interest, there could be no recovery of interest for damages in contract or tort. That rule came to be interpreted that no interest, whether it is simple or compound interest can be awarded for late payment of a debt or damages, whether it is special or general damages : President of India v La Pintada and Hungersford v Walker. The first judicial inroad into that rule was made by Denning and Romer LJJ in Trans Trust SPRL v Danubian Trading Co. Ltd [1952] 1 All ER 970. In that case Denning LJ said at p.977 :

> "It was said that the breach here was a failure to pay money
> "and that the law has never allowed any damages on that
> "account. I do not think that the law has ever taken up such
> "a rigid standpoint. It did undoubtedly refuse to award
> "interest until the introduction of the Law Reform (Miscella-
> "neous Provisions) Act 1934 : see London, Chatham & Dover
> "Railway Co. v South Eastern Railway Co., but the ground was
> "interest was generally presumed not to be within the
> "'contemplation of the parties'; see Bullen & Leake, 3rd ed.,
> "p.51, note (a). That is, I think, the only real ground on
> "which damages can be refused for non-payment of money. It
> "is because the consequences are as a rule too remote. But
> "when the circumstances are such that there is a special

"loss forseeable at the time of the contract as the conse-
"quence of non payment, then I think such loss may well
"be recoverable".

Romer LJ at p.978 of the same decision then says :

"...I am not, as at present advised, prepared to subscribe
"to the view that in no case can damages be recovered for
"non-payment of money; I agree with Denning L.J that in
"certain circumstances such damages might well be recover-
"able provided that the loss occasioned to the plaintiff
"by the defendant's default was reasonably within the
"contemplation of the parties when the bargain between
"them was made".

Then a second judicial inroad into the common rule was made by Brightman LJ in Wadsworth v Lydall [1981] 2 All ER 401. In reply to the defendant's contention that interest cannot be recovered as damages at common law in that case Brightman LJ says at pp405-406 :

"In London, Chatham and Dover Railway Co. v South Eastern
"Railway Co. the House of Lords was not concerned with a
"claim for special damages. The action was an action for
"an account. The House was concerned only with a claim
"for interest by way of general damages. If a plaintiff
"pleads and can prove that he has suffered special damage
"as a result of the defendant's failure to perform his
"obligation under a contract, and such damage is not too
"remote on the principle of Hadley v Baxendale [1854]
"9 Exch 341, [1843-60] All ER 461, I can see no logical
"reason why such special damages should be irrecoverable
"merely because the obligations on which the defendant
"defaulted was an obligation to pay money and not some

"other type of obligation. I derive support for this view "from obita dicta in Trans Trust v Danubian Trading Co. Ltd".

Then in this development of the common law came the decision of the House of Lords in President of India v La Pintada [1984] 2 All ER 73. Lord Brandon who delivered the principal speech of the House of Lords after referring to the judgment of Denning and Romer LJJ in Trans Trust SPRL v Danubian Trading Co. [1952] 1 All ER 970 and the judgment of Brightman LJ in Wadsworth v Lydall [1981] 1 All ER 40 then goes on to say :

"Brightman L.J went on to refer to, and place reliance on "the observation of Denning and Romer LJJ in Trans Trust "SPRL v Danubian Trading Co [1952] 1 All ER 970...

"The distinction which Brightman LJ was there drawing "between general and special damages is the difference between damages recoverable under the first part of the "rule in Hadley v Baxendale [1854] 9 Exch 341, [1843-60] "All ER 461 (general damages) and damages recoverable "under the second part of that rule (special damages).

"On the facts of the case before him Brightman LJ found "that, by reason of special matters known to both parties "at the time of contracting, the two items of special "damages claimed by the plaintiff came within the second "part of the rule. Accordingly, treating the London "Chatham and Dover Railway case as applying only to "damages falling within the first part of the rule in "Hadley v Baxendale (general damages) he saw no reason "why the plaintiff should not recover the two disputed "items of special damages under the second part of the "rule.

"In my opinion the ratio decidendi of Wadsworth v Lydall "[1981] 2 All ER 401, that the London Chatham and Dover

"Railway case applied only to claims for interest by
"way of general damages, and did not extend to claims
"for special damages, in the sense in which it is
"clear that Brightman LJ was using those two expres-
"sions, was correct and should be approved by your
"Lordships. On the assumption that your Lordships
"give such approval, the effect will be to reduce
"considerably the scope of London Chatham and Dover
"Railway case by comparison with what it had in
"general previously been understood to be".

The other members of the House of Lords in President of India v La Pintada approved of this part of Lord Brandon's speech. It thus appear clear that the common law position in England apart from statute is that interest may be recoverable and awarded as special damages under the second part of the rule in Hadley v Baxendale in an action for breach of contract.

Perhaps in order to avoid any misunderstanding of the English position, it must be pointed out that apart from strict common law, there are also statutory provisions contained in the English Administration of Justice Act 1982 which apply to the recovery of interest. There are no similar statutory provisions in this country. So until our Parliament acts, it will be solely for the Courts to develop our law in this area.

In President of India v La Pintada, Lord Brandon also pointed out that there are three areas in which the absence of any common law remedy for damages or loss may arise. His Lordship at p.783 says :

"There are three cases in which the absence of any common
"law remedy for damage or loss may arise, cases in which
"I shall in what follows describe for convenience as
"case 1, case 2 and case 3. Case 1 is where a debt is
"paid late, before any proceedings for its recovery have
"begun. Case 2 is where a debt is paid late, after

"proceedings for its recovery have begun, but before they
"have been concluded. Case 3 is where a debt remains
"unpaid until, as a result of proceedings for its recovery
"being brought and prosecuted to a conclusion, a money
"judgment is given in which the original debt becomes
"merged".

In England case 2 and case 3 are now catered for by statute but not case 1. That is under the provisions of the Administration of Justice Act 1982 where the court has discretionary power to award simple interest where a debt is paid late, after proceedings for its recovery have begun but before they have been concluded as in case 2, and where a debt remains unpaid until, as a result of proceedings for its recovery being brought and prosecuted to a conclusion, a money judgment is given in which the original debt becomes merged, as in case 3. Case 1 which relates to a debt being paid late before any proceedings for its recovery have begun remains unaffected by statute. However it is now clear from President of India v La Pintada that even in a case 1 situation, interest may be recovered and awarded as special damages if the claim for interest falls within the second part of the rule in Hadley v Baxendale but interest cannot be awarded as general damage under the first part of that rule.

Now in Australia, the High Court has taken the development of the common law in this area even further in Hungersford v Walker (1989) 171 C.L.R 125. In this case Mason C.J and Wilson J in their joint judgment take strong objection to the distinction drawn by the House of Lords in President of India v La Pintada between the first part of the rule in Hadley v Baxendale as disallowing an award of interest as general damages and the second part of that rule as allowing an award of interests as special damages. In the view of Mason C.J and Wilson J the distinction is contrary to logic, principle and commercial reality. At pp141-142 their Honours say :

"However, for the moment, it is necessary to examine the
"distinction made by the HOuse of Lords with the conse-
"quence that the distinction entails. In the first place,
the distinction is a gloss on London, Chatham and Dover
"Railway Co., which proceeded on the broad footing that
"interest by way of damages was too remate, without dis-
"criminating between the refinements of Hadley v Baxendale
"of which no mention was made. Secondly, and more impor-
"tantly, the circumstances which are now held to attract
"the second limb in Hadley v Baxendale - take, for example,
"those in Wadsworth v Lydall - are very often circumstances
"which in any event would attract the first limb. If a
"plaintiff sustains loss or damage in relation to money
"which he has paid out or forgone, why is he not entitled
"to recover damages for loss of the use of money when the
"loss of damage sustained was reasonably foreseeable as
"liable to result from the relevant breach of contract or
"tort? After all, that is the fundamental rule governing
"the recovery of damages according to the first limb in
"Hadley v Baxendale (see Victoria Laundry (Windsor) Ltd v
"Newman Industries Ltd [1949] 2 K.B 528 at 529) and subject
"to proximity in negligence. The object of the second limb
"in Hadley v Baxendale was to include loss arising from
"special circumstances of which the defendant had actual
"knowledge when the loss does not fall within the first
"limb because it does not arise from the ordinary course of
"things' of which the defendant had imputed knowledge :
"see Victoria Laundry. To allow a plaintiff to recover
"special, but not general damages is illogical [and] sub-

"verts the second limb in Hadley v Baxendale from its
"intended purpose....If the distinction between the two
"rules is to be rigorously applied in claims for damages
"for loss of the use of money, a plaintiff who actually
"incurs the expenses of interest on borrowed money to
"replace money paid away or withheld from him will be
"entitled to recover that cost, so long as the defendant
"was aware of the special circumstances, but not other-
"wise. The expense must fall within the second limb of
"Hadley v Baxendale in order to be compensable. It can-
"not fall within the first limb because the defendant
"cannot be fixed with imputed knowledge of the plaintiff's
"financial money. Furthermore, a plaintiff who is not
"compelled to borrow money by way of replacement money
"paid away or withheld will not be entitled to recover
"for the opportunity lost to him, i.e., lost opportunity
"to invest or to maintain an investment. This is because
"in the ordinary course of things the defendant appre-
"ciates that the plaintiff will replace from his other
"resources the money lost, so that opportunity cost falls
"more readily within the first limb of Hadley v Baxendale.
"How can this difference in treatment be justified? In
"each case the plaintiff sustains a loss and exhypothesi,
"the defendant's wrongful act or omission is the effective
"cause of that loss...."

Their Honours then go on to point out that the fundamental principle of compensation is restitution in integrum, and according to that principle the plaintiff is entitled to full compensation for his loss sustained as a consequence of the defendant's wrong. If the plaintiff's damages are not

paid promptly or his debt is not paid on due date, the loss may arise in the form of investment cost or borrowing cost. It also appears clear from this judgment that compound interest may be awarded in an appropriate case although traditionally the common law did not allow for compound interest.

It is also clear from this judgment that the real question is not the late payment of damages as there is no action for the late payment of damages but whether the plaintiff has suffered pecuniary loss as a consequence of his money being paid away or withheld due to the defendant's wrong. At page 144 and page 145 of their judgment, their Honours say :

> "Incurred expense and opportunity cost arising from paying "money away or the withholding of moneys due to the defen- "dant's wrong are something more than the late payment of "damages. They are pecuniary losses suffered by the "plaintiff as a result of the defendants wrong and there- "fore constitute an integral element of the loss for which "he is entitled to be compensated by an award of damages... "The point is that the loss of the use of the money paid "away is so directly related to the wrong that the loss "cannot be classified simply as due to the late payment "of damages".

Their Honours then continued on to say :

> "The cost of borrowing money to replace money paid away or "withheld, in consequence of the defendant's breach of "contract or negligence, is directly related to the wrong "and is not too remote in the sense in which the common "law regarded the loss attributable to late payment of "damages as being too remote. We reach this conclusion "more readily, knowing that legal and economic thinking "about the remoteness of financial and economic loss "have developed markedly in recent times. Likewise, "opportunity cost should not be considered as being too "remote when money is paid away or withheld".

Then finally their Honours at p.149 say :

> "....we see no reason for allowing the reluctance of the
> "common law to extend to cases where the defendant's
> "breach of contract or negligence has caused the plaintiff
> "to pay away or the defendant to withhold money and, as a
> "result, the plaintiff has been deprived of the use of
> "the money so paid away or withheld. The recovery of
> "compensation for the loss may be ascribed to the operation
> "of the second limb in Hadley v Baxendale. However, we
> "would prefer to put it on the footing that it is a fore-
> "seeable loss, necessarily within the contemplation of the
> "parties, which is directly related to the defendant's
> "breach of contract or tort".

Brennan and Dean JJ in their joint judgment expressed general agreement with the joint judgment of Mason C.J and Wilson J. However they were a little more cautious. In their view unless there is statutory provision, there is no common law power to award interest upon an award of damages. On the other hand, they accept that a plaintiff is entitled to an award of damages as compensation for a wrongful and foreseeably caused loss of the use of money and such loss is to be assessed wholly or partly by reference to the rates of interest paid by the plaintiff on unnecessary borrowing due to the wrong committed.

For the purpose of the present case, it is important, as it appears from Hungersford v Walker already discussed on the common law position, that the plaintiff must show that as a result of a breach of contract or a tort, it has suffered loss as a consequence of paying money away or the withholding of money from it. This means that evidence of a breach of contract or commission of a tort and the consequential loss resulting therefrom should have been adduced. There has been no such evidence and I did not understand the defendants to be admitting all the allegations in the

statement of claim. In fact no evidence was conceded or called in this case. It really places the Court in an awkward situation. Submissions by both counsel were merely directed towards the question of whether interest can be awarded in law in this case. The answer to that question is that on the principles enunciated in President of India v La Pintada and further developed by Hungersford v Walker this Court has power to make an appropriate award of interest at common law. But in order to make such an award, the Court must be satisfied on evidence adduced that an award ought to be made.

Clearly opportunity cost arising from paying money away or the withholding of moneys due to a defendant's breach of contract or tort is recoverable provided the loss is a foreseeable one, necessarily within the contemplation of the parties, and is directly related to the defendant's breach of contract or tort. But in this case, the defendants do not concede any of the allegations relating to the interests claim and there is no evidence before the Court that the plaintiff would have invested its money in an interest earning investment, or has incurred borrowing costs because of its money being withheld by the defendant, or would have simply locked its money in a non-interest earning safe. In the absence of any evidence the Court is also unable to draw any inferences one way or the other.

The claim for interest is therefore dismissed.

There is a claim for costs by the plaintiff. Even though the defendants have refunded the sum of $6,081.44 which was advanced rent paid by the plaintiff, that refund was only made after the plaintiff's action was filed in Court. The plaintiff has incurred costs for instituting these proceedings and is entitled to costs. I fix those costs for the plaintiff at $300.

T F M Sapolu

CHIEF JUSTICE