IN THE SUPREME COURT OF NEW ZEALAND

SC 50/2013
[2014] NZSC 108

BETWEEN	WORLDWIDE NZ LLC Appellant
AND	NZ VENUE AND EVENT MANAGEMENT LIMITED Respondent

Hearing:	20 March 2014
Court:	Elias CJ, McGrath, William Young, Glazebrook and Arnold JJ
Counsel:	M J Fisher and H L Hui for Appellant A C Sorrell and S L Robertson for Respondent
Judgment:	11 August 2014

JUDGMENT OF THE COURT

A **The appeal is allowed. The order of the High Court relating to interest is re-instated.**

B **The respondent is to pay costs of $25,000 to the appellant, plus all reasonable disbursements, to be fixed if necessary by the Registrar.**

B **The order for costs in the Court of Appeal is set aside. If costs cannot be agreed in the Court of Appeal they should be set by that Court in light of this judgment.**

REASONS
(Given by Glazebrook J)

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Introduction

[1] This appeal concerns the circumstances in which interest can be awarded under s 87(1) of the Judicature Act 1908.

Background

[2] Worldwide NZ LLC (Worldwide) and NZ Venue and Event Management Ltd[1] (Venue Management) were parties to a joint venture to construct and operate Vector Arena in Auckland. The joint venture was formed under a deed of trust,[2] with Quay Park Arena Management Ltd (QPAM Ltd) as corporate trustee.

[3] Worldwide held a 25 per cent interest (holding "B" units and shares) in the joint venture and QPAM Ltd. Venue Management and an associated company held a 75 per cent interest (holding "A" units and shares).

[4] On 18 January 2006, a receiver was appointed to the parent company of Worldwide, triggering a pre-emptive right of purchase of its "B" units and shares.

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1 Previously called Jacobsen Venue Management New Zealand Ltd.
2 The Quay Park Arena Management Trust.

This was exercised by Venue Management by letter of 26 April 2006. The letter stated that Venue Management accepts the units as at the date of receivership (being 18 January 2006). It also said that Worldwide "no longer has any rights in respect of the Trust or QPAM [Ltd]".

[5] The trust deed did not set a mechanism for fixing the price of the "B" units and shares. Legal proceedings ensued and, in 2008, the Court of Appeal construed the trust deed as requiring the transaction to occur at fair market value which could, if necessary, be fixed by the Court.[3]

[6] The fair market value for the "B" units and shares was finally fixed by the High Court in a judgment of 24 November 2011.[4] Potter J ordered payment to be made within 28 days of the date of the judgment and also held that interest under s 87(1) of the Judicature Act was payable from 26 April 2006 up to the date of payment on the fair market value that had been determined by the Court.[5]

[7] On appeal against Potter J's judgment, the Court of Appeal held that s 87(1) of the Judicature Act did not apply and no interest was payable.[6] This was because a "debt" under s 87(1) had to be an ascertained or readily ascertainable sum and the fair market value of the "B" shares and units was neither.[7] Further, there was no cause of action arising at the date the pre-emptive rights were exercised. According to the Court of Appeal, all that arose was a contractual obligation on the part of Venue Management to pay for the "B" units and shares once their value was agreed, or, failing agreement, determined by the Court. Before the date set by Potter J for payment, the Court of Appeal considered that any liability was inchoate.[8] In addition, the Court of Appeal held that Worldwide's proceeding was not one "for the

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3 *Jacobsen Venue Management New Zealand Ltd v Worldwide NZ LLC* [2008] NZCA 105 at [40]–[41]. Despite this being an appeal from an interlocutory order, the parties agreed that the interpretation of the trust deed should be adjudicated on by the Court of Appeal: at [8](c). This meant that the Court of Appeal's construction of the trust deed would be binding in subsequent litigation. An earlier argument that Worldwide was estopped from relying on the pre-emption rights had been abandoned soon before the Court of Appeal hearing: at [5].

4 *Worldwide NZ LLC v QPAM Ltd* HC Auckland CIV-2006-404-1827, 24 November 2011 [*Worldwide* (HC)].

5 At [257] and [279].

6 *New Zealand Venue and Event Management Ltd v Worldwide NZ LLC* [2013] NZCA 130 (Harrison, Wild and French JJ) [*Worldwide* (CA)].

7 At [23], [24] and [28].

8 At [40]–[41].

recovery of debt or damages".[9] This was because the proceeding was for a declaratory judgment and Potter J was not asked to, and did not, give judgment in relation to any sum.[10]

[8] On 11 October 2013, this Court granted leave to appeal against the Court of Appeal's decision on the question of whether the Court of Appeal erred in not awarding interest on the value fixed for the "B" units and shares.[11]

Issues on appeal

[9] There are four main issues: first, whether there was a "debt" for the purposes of s 87(1); secondly, whether a cause of action for the recovery of a debt arose, and if so, when; thirdly, whether Potter J's decision was a judgment based on a "proceeding for the recovery of debt or damages"; and fourthly, whether Potter J should have exercised her discretion to award interest from the date the pre-emptive right was exercised.

[10] For convenience, the relevant parts of s 87 of the Judicature Act are set out:

> **87 Interest on debts and damages**
>
> (1) 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:
>
> 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;
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> …

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9 At [42].

10 At [42]–[45]. The Court also held, at [49], that any claim for equitable interest was not pleaded and there was in any event no foundation to award it.

11 *Worldwide NZ LLC v New Zealand Venue and Event Management Ltd* [2013] NZSC 97.

Was there a debt for the purposes of s 87(1)?

The position of the parties

[11] An award of interest can only be made under s 87(1) of the Judicature Act in proceedings "for the recovery of any debt or damages".

[12] Worldwide maintains that this case involved a "debt" for the purposes of s 87(1), this being the "fair market value" for the units and shares. In its submission, the Court of Appeal was wrong to hold that a sum of money must be "ascertained" or a sum "immediately and readily ascertainable" to constitute a debt. It says in any event that the sum was ascertainable as at 26 April 2006.

[13] Venue Management supports the decision of the Court of Appeal on this point.

Our approach

[14] To determine the meaning of the words "any debt" under s 87(1) this judgment first traverses the wording of s 87(1). Then we discuss its legislative history, the policy rationale and caselaw on the section and its close equivalents in the United Kingdom, Australia and New Zealand.

[15] Before we begin this discussion, we comment that, where a contract sets the price as "fair market value", while parties may disagree on what that is, the courts have consistently held that there is one "market value"[12] and that this value is capable of determination by objective criteria.[13] Contrary to the position of the

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[12] We recognise that it may be somewhat of a legal fiction that there is only one market price for goods and services. We recognise also that there may be practical difficulties in ascertaining market value, particularly in cases where there is no established market.

[13] See, for example, *Money v Ven-Lu-Ree Ltd* [1989] 3 NZLR 129 (PC) at 133 (in the context of a discussion of whether an agreement for sale at a valuation was capable of constituting a binding agreement even where the machinery established by the parties to ascertain the valuation has failed) and a recent discussion of market value by the United Kingdom Supreme Court in *Benedetti v Sawiris* [2013] UKSC 50, [2013] 3 WLR 351 at [100] and [102]. See also *Wellington City Council v Body Corporate 51702* [2002] 3 NZLR 486 (CA) at [29] where the Court of Appeal saw market price as an "objectively ascertainable price … even if the Court is the only implicitly agreed or default arbiter of the price". We also refer to the comment by the Court of Appeal in *Liebherr Export - AG v Ellison Trading Ltd* CA174/03, 29 June 2004 at [52]: "The price was to be a fair and reasonable one. In our view, this requires the price to be objectively reasonable. As this is the case, a court can step in to fix the price if the parties are

Court of Appeal, therefore, the "fair market value" for the "B" units and shares can be seen as readily ascertainable, if indeed that is a requirement of s 87(1), the issue we now examine.

The wording of s 87(1)

[16] The word "debt" can be one of wide import. There is nothing in s 87(1) that explicitly qualifies the word "debt" to require it to be ascertained or readily ascertainable. Indeed, the fact that the term "debt" is coupled with the term "damages" would suggest that it was not intended that the word "debt" be interpreted in a restrictive sense. By their nature, damages are not "ascertained" until judgment. This suggests that immediate ascertainment is not fundamental to the jurisdiction under s 87(1).

Legislative history

[17] The current wording of s 87(1), save for subsequent minor amendments, was introduced by s 3(1) of the Judicature Amendment Act 1952. This amendment essentially adopted s 3(1) of the Law Reform (Miscellaneous Provisions) Act 1934 (the United Kingdom Act), which in turn implemented the recommendations of the Law Revision Committee Report of March 1934 (UK). The Report described the previous state of the law:[14]

> [3] When a plaintiff makes a money claim for a debt or for damages, interest from the date when the cause of action accrued can only be recovered in [specified] cases.
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> …
>
> [4] There are however a very large number of claims for debt and for damages which are still subject to the old common law rule that interest cannot, in the absence of express agreement, be recovered. …

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not able to do so. The term 'reasonable price' is used in s 10(2) of the Sale of Goods Act and s 11(1) of the Consumer Guarantees Act. Parliament must, therefore, have considered that the courts were capable of assessing such a price".

[14] Law Revision Committee *Second Interim Report* (March 1934) (UK). The specified cases referred to by the Law Revision Committee covered contract claims where there was an express or implied term for payment of interest, where there was a statutory provision allowing interest, or where the Court of Chancery considered it equitable to award interest: see [3].

[18] The Law Revision Committee went on to recommend that:

> [8] We have come to the conclusion that the time has come when the old and rigid Rule should now be altered.
>
> The courts, including all appellate tribunals, should have the power to award interest in every case in their discretion where it is not already provided for by statute, or by the contract, or otherwise.
>
> In practically every case a judgment against the defendant means that he should have admitted the claim when it was made and have paid the appropriate sum for damages.
>
> …
>
> [9] … There seems, however, to be no reason for a different rule [in cases where general damages are given].
>
> To take as an extreme example, a libel action in which the defendant is held liable. The Court is in effect deciding that he has defended the case wrongly and without sufficient grounds. He ought, that is to say, to have admitted the claim when made and have offered a proper sum by way of damages. In any event the Court will have a discretion which can be exercised in cases accordingly where it would be unreasonable to award interest.

As indicated by the Law Revision Committee report, the intent was that the courts should "have the power to award interest in every case in their discretion".

[19] The reports of the speeches in the New Zealand House of Representatives during the passage of the Judicature Amendment Bill make it clear that s 87(1) was intended to adopt s 3(1) of the United Kingdom Act. The following is an excerpt from the speech of the Attorney-General, the Hon Mr Webb:[15]

> The new subsection is in the same terms as the section that was passed in the Law Reform (Miscellaneous Provisions) Act 1934 in the United Kingdom. The only difference is that under the United Kingdom Act no maximum rate of interest is prescribed.
>
> … in short, the Courts are given power to award interest on any debt or damages, but the rate must not exceed 5 per cent. I emphasise that the Court has a discretion.

[20] Given that the aim of the New Zealand amendment was to adopt the United Kingdom position, this means that the legislative policy behind the equivalent United Kingdom provision is highly relevant in the New Zealand context. It is clear

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[15] (29 July 1952) 279 NZPD 584.

that, in the United Kingdom context, the phrase "debt or damages" was intended to be one of wide import.

[21] There is another part of the legislative history that also tells against the Court of Appeal's interpretation. Section 3(3) of the Judicature Amendment Act 1952, which introduced s 87, provided that s 87 of the Judicature Act replaced ss 28 and 29 of the Civil Procedure Act 1833 (UK).[16] Sections 28 and 29 modified the general common law prohibition of awarding interest to a limited extent.[17] Section 28 allowed juries to award interest in certain circumstances, including on "all Debts or Sums certain". That language was not carried over into s 87.

[22] This change in statutory wording, coupled with adoption of the wording of the United Kingdom provision, are strong indications that the term "debt" was not meant to have the restricted meaning given to it by the Court of Appeal in this case.

Policy rationale

[23] The rationale under s 87(1) for the awarding of interest is that the defendant has had the use of money which should have been available to the plaintiff for that period and that the plaintiff should be compensated for that.[18] As the United Kingdom Law Revision Committee Report explained, this same rationale applies to general damages in that the defendant should have "admitted the claim when made and have offered a proper sum by way of damages."[19]

[24] This policy rationale also tells against the restrictive interpretation given to the word "debt" by the Court of Appeal.

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16 Despite the Civil Procedure Act 1833 (UK) 3 & 4 Will IV c 42 being an Act of the United Kingdom, by reason of s 1 of the English Laws Act 1858 it was deemed to be in force in New Zealand. The Law Reform (Miscellaneous Provisions) Act 1934 (UK) also replaced ss 28 and 29 of the Civil Procedure Act: see s 3(2) of the United Kingdom Act.

17 Generally speaking, before then, interest could only be awarded in very limited circumstances at common law. This was the case since the judgment of Lord Mansfield in *Eddowes v Hopkins* (1780) 1 Doug 376, 99 ER 242 (KB).

18 See *Day v Mead* [1987] 2 NZLR 443 (CA) per Cooke P at 452–453 and Somers J at 463. See also Kirby J's comments in *Victorian WorkCover Authority v Esso Australia Ltd* [2001] HCA 53, (2001) 207 CLR 520 at [71].

19 Law Revision Committee, above n 14, at [8]–[9].

Interpretation by the United Kingdom courts

[25] Given that s 87 essentially adopted the United Kingdom provision, caselaw on that provision is highly relevant. The leading case in the United Kingdom on the meaning of s 3(1) of the United Kingdom Act is the decision of the House of Lords in *BP Exploration Co (Libya) Ltd v Hunt (No 2)*.[20] In this case Lord Brandon delivered the leading speech, with Lords Wilberforce, Diplock, Keith and Scarman concurring. Lord Brandon said:[21]

> In my opinion, the words "any debt or damages," in the context in which they occur, are very wide, so that they cover any sum of money which is recoverable by one party from another, either at common law or in equity or under a statute of the kind here concerned. In this connection I adhere to the view with regard to the scope of s 3(1) which I expressed in *The Aldora*. I hold, therefore, that Robert Goff J had power to order the payment of interest on the principal sums awarded by him.

[26] In *The Aldora*,[22] Brandon J (as he then was) had dealt with the question of whether a claim for salvage is a proceeding for the recovery of "any debt or damages" in terms of s 3(1) of the United Kingdom Act. He said:[23]

> I do not think that a claim for salvage is a proceeding for the recovery of damages, and the question is accordingly reduced to this, whether it is a proceeding for the recovery of a debt. As to this it is to be observed that the words used are "any debt," indicating that the net is being spread as widely as possible. *Those words are, as it seems to me, apt to cover sums, whether liquidated or unliquidated, which a person is obligated to pay either under a contract, express or implied, or under a statute. They would, therefore, cover a common law claim on a quantum meruit, or a statutory claim for a sum recoverable as a debt*, for instance a claim for damage done to harbour works under s 74 of the Harbours, Docks, and Piers Clauses Act 1847. (Emphasis added)

[27] Venue Management submits that Lord Brandon's reference to *The Aldora* in his speech in *BP Exploration* does not assist Worldwide given that *The Aldora* was based on a cause of action under admiralty law independently of either contract or statute. We do not accept this submission. His remarks were obviously intended to be a general view on the width of s 3(1) in all contexts and therefore cannot be limited to the admiralty context. Brandon J explicitly held that a claim for sums,

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20 *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1983] 2 AC 352 (HL).
21 At 373 (citation omitted).
22 *The Aldora* [1975] QB 748 (QB).
23 At 751.

liquidated or unliquidated, under a contract is a claim for a debt and he also said that "any debt" extends to "cover a claim for quantum meruit".[24] Further, the comments as to the scope of the section made in *The Aldora* were explicitly approved in *BP Exploration*, which was not an admiralty case.

[28] As to *BP Exploration* itself, the Court of Appeal in this case distinguished that case on two grounds. First, the Court said that although the awards made pursuant to the United Kingdom provision in that case were "analogous to damages, they were not in respect of debts".[25] The Court thus held that any comment by Lord Brandon as to "any debt" was obiter. Secondly, the Court said that the sums involved in *BP Exploration* were sums certain.[26]

[29] We accept Worldwide's submission that the Court of Appeal erred in distinguishing this case on both points.

[30] As to whether the awards in *BP Exploration* were damages, and not in respect of debts, the Court at first instance in that case explicitly said that an award under the Law Reform (Frustrated Contracts) Act 1943 (UK) was for the recovery of a debt.[27] This conclusion was not challenged in the Court of Appeal or the House of Lords. As a result, Lord Brandon's comments as to the meaning of the word "debt" in the United Kingdom Act in *BP Exploration* cannot be said to be obiter as the Court of

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[24] At 751. Claims for quantum meruit were initially based on actions of indebitatus assumpsit (on the basis of an implied contract). The defendant was required to pay the plaintiff a reasonable value for the services rendered. The implied contract theory has been doubted in *Pavey & Matthews Pty Ltd v Paul* (1987) 161 CLR 221; *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 (HL); and *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 (HL). We make no comment on the basis of the claim. What is clear, however, is that quantum meruit involves claims for reasonable compensation to be paid for services where the level of remuneration has not been agreed and that this compensation is fixed by the courts: see *Harrison v Franich* [2007] NZCA 538 at [32]; and *Benedetti v Sawiris*, above n 13, at [17] per Lord Clarke, Lord Kerr and Lord Wilson. Similarly, under s 10(2) of the Sale of Goods Act, where the price is not fixed under s 10(1), "the buyer must pay a reasonable price". A claim for a reasonable price under s 10(2) is a debt: Andrew Tettenborn (ed) *The Law of Damages* (LexisNexis, London, 2003) at 9. In the current case, the claim was for the "fair market value" of the shares and units to be paid: see discussion above at [15].

[25] *Worldwide* (CA), above n 6, at [31].

[26] At [31].

[27] See *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783 (QB) at 835 where Robert Goff J said "The question, therefore, arises whether a claim to an award under the Act of 1943 is a claim for the recovery of a debt within the meaning of that word as used in the Act of 1934. I have no doubt whatsoever that it is".

Appeal suggested.[28] Instead, his comments are directly on point and, given the clear legislative purpose of adopting the United Kingdom provision, are of very high persuasive authority as to the meaning of the words "any debt" in the statute before us.

[31] Secondly, it is not the case that the sums were certain in *BP Exploration*. The claims under the Frustrated Contracts Act 1943 (UK) required extensive judicial assessment and determination. In fact, at first instance *BP Exploration* required 57 hearing days and involved substantial questions of fact and accounting procedure.[29] As a result, it cannot be said that the sums were ascertained or readily ascertainable in that case.

Australian caselaw

[32] *Victorian WorkCover Authority v Esso Australia Ltd* dealt with the interpretation of the phrase "proceeding for the recovery of debt or damages" in a Victorian provision which is similar to s 87.[30] The High Court of Australia held that "the phrase should be understood as a composite expression. It embraces any proceeding in which a claim for money is made".[31] The majority rejected an argument that the words "proceeding for the recovery of debt or damages" should be coloured by the requirement of a "fixed or certain sum" under the old action for debt.[32]

New Zealand caselaw

[33] The Court of Appeal relied upon various New Zealand authorities from a number of statutory contexts, which held that a debt had to be ascertained or immediately and readily ascertainable. These cases were, however limited to the

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28 *Worldwide* (CA), above n 6, at [31].

29 *BP Exploration Co (Libya) v Hunt (No 2)*, above n 27, at 788–789.

30 *Victorian WorkCover Authority v Esso Australia Ltd*, above n 18. There are some differences between the Victorian provision and s 87 but these are not material for the current issue as to the meaning of the phrase "debt or damages".

31 At [41] per Gleeson CJ, Gummow, Hayne and Callinan JJ. See also at [101] per Kirby J.

32 At [40], referring to the comments of Brandon J in *The Aldora*, above n 22. Kirby J concurred in that result but for slightly different reasons: at [105].

meaning of the term "debt" in the particular statutory context at issue in those cases. They are not determinative of the meaning of the term in this statutory context.[33]

[34] In supporting the proposition that a debt constitutes a sum ascertained or readily ascertainable, the only case referred to by the Court of Appeal that related to s 87(1) was *Westpac Banking Corp v Nangeela Properties Ltd.*[34] In that case, the proceeds from the sale of a flat had been paid into a company's overdrawn account. Shortly afterwards, the company went into voluntary liquidation. The liquidator gave notice under s 311A(1) of the Companies Act 1955 for the payment to be set aside as a voidable preference. The Bank applied to the High Court for an order that the disposition was not voidable and, in the alternative, that the Bank had altered its position in a manner that brought it under s 311A(7), which would have allowed recovery by the liquidator to be denied.

[35] This case is not authority for the proposition that a debt must be ascertained or readily ascertainable to come within s 87(1). Only Somers J referred to "a liquidated money demand … recoverable by action" and that may not have been intended as general statement of the "characteristics of a debt" but rather as a description of the debt in that particular case.[35] The quantum of the amount repayable (if liability was established) in that case was certain.

Conclusion

[36] The legislative history, policy rationale, caselaw and wording of s 87(1) all lead to the conclusion that the phrase "any debt or damages" should be seen as a composite expression covering all proceedings where a claim for money is made. As a result, the Court of Appeal's conclusion that a sum owing has to be ascertained or readily ascertainable to constitute a debt under s 87(1) is erroneous.[36]

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33 As noted by Lord Fraser in *Marren (Inspector of Taxes) v Ingles* [1980] 1 WLR 983 (HL) at 990, "[t]he meaning of the word debt depends very much on its context".

34 *Westpac Banking Corp v Nangeela Properties Ltd* [1986] 2 NZLR 1 (CA).

35 At 11.

36 As noted above at [15], the sum in the present case was in any event readily ascertainable.

Cause of action?

[37] Under s 87(1) interest can be awarded 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 judgment". Thus, a judge can only award interest from the date when the cause of action arises. We next assess whether there was a cause of action in this case and, if so, when it arose.

The parties' submissions

[38] Venue Management submits that the Court of Appeal was correct to hold that Worldwide's cause of action for the recovery of a debt did not arise unless and until Venue Management failed to pay the value of the shares determined by Potter J within the time frame set in the judgment.

[39] In Worldwide's submission, under the trust deed, as soon as the pre-emptive right was exercised on 26 April 2006, a cause of action arose (for payment of the fair market value of the shares).

Relevant parts of the trust deed

[40] It is convenient at this point to set out the relevant parts of the trust deed. Clause 9.2 states:

> **9.2 Restrictions on "B" Units**
>
> 9.2.1 Except as expressly permitted by clause 9.3, no "B" Unit Holder is entitled to:
>
> (a) sell or Dispose of "B" Units in whole or in part;
>
> (b) sell or Dispose of any Relevant Interest in "B" Units; or
>
> (c) create or grant any options or similar rights over "B" Units.
>
> 9.2.2 A Change in Control is deemed to be Disposal of "B" Units by the "B" Unit Holder upon the occurrence of which the provisions of clause 10 will apply.

[41] Clause 10.1 states:

10.1 Transfer notice

Any "B" Unit Holder who wishes to sell all or any part of its "B" Units to an identified willing third party purchaser **("Purchaser")** on arms' length terms must give notice in writing **("Transfer Notice")** to the Trustee.

[42] Clause 10.2 states:

10.2 Relevant particulars

A Transfer Notice must specify:

10.2.1 the name and address of the Purchaser;

10.2.2 the number of Relevant Units that are the subject of the proposed sale;

10.2.3 the proposed consideration for the sale of the Relevant Units (**"Sale Consideration**");

10.2.4 that the Relevant Units will not on completion of the sale be subject to any Encumbrance.

[43] Clause 10.3 of the trust deed states:

10.3 Acceptance by "A" Unit Holder

The "A" Unit Holder has a right to acquire all or a part of the Relevant Units from the "B" Unit Holder by giving written notice of its willingness to purchase the Relevant Units to the "B" Unit Holder within 10 Business Days after receipt of the Transfer Notice from the Trustee.

[44] Clause 10.4 of the trust deed states:

10.4 Transfer of "B" Units to Purchaser

Any Relevant Units not transferred to an "A" Unit Holder under clause 10.3 may be transferred by the "B" Unit Holder to the Purchaser provided that:

10.4.1 the "A" Unit Holder consents to the transfer of Relevant Units to the Purchaser, such consent not to be unreasonably withheld; and

10.4.2 the terms of sale to the Purchaser are no more favourable to the Purchaser than those set out in the Transfer Notice; and

10.4.3 before registration of the transfer of the Relevant Units, the Purchaser enters into an agreement with the other parties to this Deed containing the same terms and conditions as this Deed amended as reasonably required by the "A" Unit Holder to protect it from any consequences of the transfer.

[45] Clause 10.5 of the trust deed states:

10.5 Role of Trustee

10.5.1 The Unit Holders each appoint the Trustee as their agent to the extent required to give effect to the provisions of this clause 10. The Trustee must give notice to the Transferor of which Relevant Units are to be transferred.

10.5.2 The Trustee will give directions as to the time and place for settlement of the Unit transfers to be effected under this clause 10.

Our analysis

[46] As the Court of Appeal noted in its first judgment, while cl 10.3 on its terms applies in situations where the "B" unit holder wishes to sell its shares to a third party and issues a transfer notice, by virtue of cl 9.2.2 it also applies in a change of control situation.[37] A change in control is treated as an actual disposal of the "B" units and does not trigger the obligation to issue a transfer notice.[38] In the event of a change of control, however, the holder of the "A" units has a right to acquire all or part of the units from the "B" unit holder by giving written notice of its willingness to purchase the units.[39] This transfer takes place at market value, to be fixed by the court if necessary.[40]

[47] Clauses 10.1 and 10.2 (relating to the issuing of transfer notices) and cl 10.4 (which deals with the situation where the pre-emptive right is not exercised) are not relevant in a change of control situation.[41] This leaves cl 10.5 and in particular cl 10.5.2, which provides that the trustee is to give directions as to the time and place of settlement.

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37 *Jacobsen Venue Management New Zealand Ltd v Worldwide NZ LLC*, above n 3, at [34].

38 As the Court of Appeal held in 2006: *Worldwide NZ LLC v QPAM Ltd* CA122/06, 10 November 2006 at [15] and [23].

39 The units and the shares in QPAM Ltd are "stapled" together so a purchase of the units will also encompass a purchase of the shares: *Jacobsen Venue Management New Zealand Ltd v Worldwide NZ LLC*, above n 3, at [10].

40 At [40].

41 At [31].

[48] Although no argument was directed to the effect of cl 10.5, we see it as essentially a machinery provision, to be utilised absent agreement of the parties. In the case of a sale to a third party, the contract would normally set a settlement date and place and we do not consider the trustee could override this without good reason. Clause 10.4 would suggest that settlement would take place at the same time or shortly after the conditions in that clause were met. The same applies to the exercise of pre-emptive rights when a transfer notice has been issued. A settlement date would normally be set by reference to the actual or projected settlement date for the third party sale it replaces.

[49] A change of control results in an immediate deemed disposal. This triggers the right of pre-emption and it seems likely that it is envisaged that the party exercising the pre-emptive right would set the settlement date. The trustee would only need to exercise the power under cl 10.5.2 where that did not occur or in situations where there was good reason to override the settlement directions.

[50] In this case, the notice exercising the pre-emptive rights envisaged immediate transfer of the units with Worldwide no longer having any rights in the units or shares in QPAM Ltd and indicated that the transfer was from the date of the change of control, 18 January 2006.[42]

[51] It seems clear that the trustee did not set a different settlement date. Mr Hines, the finance manager for QPAM Ltd, deposed that he made handwritten alterations to the share register on or about 5 May 2006 recording the transfer of the 25 shares from Worldwide to Venue Management as at 18 January 2006. On 27 July 2006, the share register was changed to reflect that Venue Management held all the shares in QPAM Ltd. It was explained by Mr Hines that QPAM Ltd does not maintain a register of unit holders. However, Mr Hines said that QPAM Ltd has treated Venue Management as the owner of the "B" units since receiving notice of the exercise of pre-emptive rights by letter dated 27 April 2006.

[52] It is implicit, absent express provisions in the trust deed to the contrary, that payment and transfer must occur simultaneously, subject to Venue Management's

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[42] See above at [4].

argument that the time of payment is deferred until the price is set by the court, which we deal with below. The argument that transfer and payment must occur at the same time is reinforced by cl 10.5.2. This clause refers to settlement of the unit transfers. That language must encompass settlement of the obligations of all parties and therefore cover both the transfer of the units and payment.

[53] We now turn to Venue Management's submission that the Court of Appeal was correct to hold in this case that the payment obligation was deferred until the High Court had set the market price. The Court of Appeal, in coming to its conclusion that a cause of action in this case would not arise until Venue Management failed to pay within the 28 days after Potter J's judgment, cited *Body Corporate No 95035 v Auckland Regional Council*.[43]

[54] We accept Worldwide's submission that the Court of Appeal failed to recognise the factual difference between *Body Corporate No 95035* and the current case. *Body Corporate No 95035* concerned a rent review. There was no guarantee that the rent review would result in an increase in rent and it was for that reason that the Court held that no cause of action arose until the arbitrator's award was delivered and resulted in an increase in the rent payable.[44]

[55] That is very different from this case.[45] In practical terms, the market value had to be determined by the Court because the parties were in dispute. This does not mean that it was an inchoate or contingent liability. From the date of exercise of the pre-emptive right, Venue Management was under an obligation to pay the market value of the units and shares to Worldwide. The cause of action arose at that point.

[56] This bears some similarity to the situation in *Westpac Banking Corp v Nangeela Properties Ltd*.[46] In that case, it was held that liability to repay arose not on the making of the order that the preferential payment be set aside but upon the liquidation.[47] As a practical matter the requirement to pay was nevertheless

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43 *Worldwide* (CA), above n 6, at [36]–[40], discussing *Body Corporate No 95035 v Auckland Regional Council* (1993) 6 PRNZ 559 (CA).

44 *Body Corporate No 95035 v Auckland Regional Council*, above n 43, at 564.

45 As Potter J held: *Worldwide* (HC), above n 4, at [273].

46 *Westpac Banking Corp v Nangeela Properties Ltd*, above n 34.

47 At 7 per Richardson J, at 9 per McMullin J and at 11 per Somers J.

dependent on the transaction being held by the court to be a voidable preference and on the rejection of the change of position defence. Interest was nevertheless held to be payable from the time of liquidation.[48]

[57] It was always open to Venue Management to have paid its estimate of what was due if it wished to avoid interest accruing (at least on the sum paid). Not doing so meant that Venue Management has had the use of Worldwide's money for the period. The whole purpose of s 87(1) is that it gives the court a discretion to compensate a party in the position of Worldwide for not having had the use of its money from the date payment was due or when the claim for damages arose.[49]

[58] Venue Management next relies on the pleadings. The relevant statement of claim claimed that Venue Management "would be required to pay for the "B" [units and shares] … within a reasonable period of time [(14 days was advanced)] after the fixing or determination of their fair market value". In Venue Management's submission, this means that, on the pleadings, interest should only have run from the time the High Court set for payment of the market price it had determined.

[59] We do not accept this submission. While the pleading described how and when payment should be received, this cannot change the fact that an obligation to pay the market price arose and continued to run from the time the right of pre-emption was exercised. The pleading can be seen as recognising the practicalities of the situation: that payment would not be made until after judgment and that a payment of that magnitude could take some time to arrange. It can also be seen as reflecting the reality that payment had not been made when due and that it is not possible to make retrospective payment. Instead, interest was sought from 26 April 2006, which is the date the pre-emptive right was exercised.

[60] In conclusion therefore, we hold that the cause of action for the payment of the market price arose in this case upon exercise of the pre-emptive right.

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[48] At 7 per Richardson J, at 9 per McMullin J and at 11 per Somers J.

[49] See above at [23].

A proceeding for the recovery of debt or damages?

[61] Under s 87(1), interest can be included in the sum for which judgment is given in any action for the recovery of any debt or damages. In this case, Venue Management submits, and the Court of Appeal held, that the proceedings in the High Court were for a declaration as to the amount payable and not proceedings for the recovery of a debt.

The pleadings

[62] The proceedings were originally brought after the appointment of the receiver to the parent of Worldwide but before the exercise of the pre-emptive right of purchase on 26 April 2006. At that stage, the relief sought was orders under s 174 of the Companies Act 1993 and for the supply of information (in reliance on s 191 of the Companies Act).

[63] After exercise of the pre-emptive right, the proceeding was amended: there was a challenge to the lawfulness of the exercise of the pre-emptive right on the grounds of estoppel and, in the alternative, it was pleaded that Worldwide had the rights of an unpaid vendor which gave it certain rights to participate in the company, pending the payment of the price as determined by the High Court.[50] Various applications and proceedings followed which led to the 2008 Court of Appeal decision referred to above.[51]

[64] The matter finally came before Potter J on a fourth amended statement of claim. The prayer for relief, so far as relevant, was as follows:

> A An assessment and determination by the High Court of the fair market value of the "B" units (including the value of the "B" class shares and/or the Option) as at a valuation date of 26 April 2006 ("the sum payable").
>
> B Interest on the sum payable from 26 April 2006 at the rate of 7.5% per annum under section 87 Judicature Act 1908 ("the total sum payable").

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50 The argument was based on the case of *Musselwhite v C H Musselwhite & Son Ltd* [1962] Ch 964. This argument was rejected by Potter J in *Worldwide* (HC), above n 4, at [306] and there was no appeal against that decision: *Worldwide* (CA), above n 6, at [50].

51 See above at [5].

C Declarations that [Venue Management] is obliged:

(i) to pay the total sum payable by tendering payment in the said amount in cleared funds at the address for service of Worldwide NZ in this proceeding; and

(ii) to make such payment within 14 days of the date of judgment herein.

[65] In the body of the statement of claim it is said:

> It is an implied term of the Unit Trust Deed that in event of a ["]Change in Control" within the meaning of clauses 1.1 and 9.2.2 and in the event of an "A" unit holder exercising its pre-emptive right of purchase the "B" unit holder would be entitled to be paid the fair market value of the "B" units (including the "B" class shares).
>
> …
>
> It is an implied term of the Unit Trust Deed that in the event of an Unit "A" holder exercising its pre-emptive right of purchase consequent upon a Change in Control it would be required to pay for the "B" units (including the value of the "B" class shares and Option) within a reasonable period of time after the fixing or determination of their fair market value. A period of 14 [days] after determination is a reasonable period of time in the circumstances.

[66] We accept that the prayer for relief and the body of the statement of claim could have been more happily worded. However, it is clear that what was sought was not only ascertainment of the fair market value of the units and shares but payment for them, as well as interest from the date the pre-emptive right was exercised. We do not consider that, in this context, there is any material difference between a declaration that a sum must be paid and an order that it be paid.

[67] In *Victorian WorkCover Authority* a similar issue arose.[52] The majority of the High Court of Australia said that "any proceeding for the recovery of debt or damages" includes cases where a claim for money is made, "in contrast to declaratory relief and claims for specific forms of relief".[53] Thus, the majority appeared to be of the view that declaratory relief alone was not enough to engage the section. In that case, however, the payment of money and declaratory relief were sought at the same time. The majority held that the fact that declaratory relief was

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52 *Victorian WorkCover Authority v Esso Australia Ltd*, above n 18.

53 At [41].

sought in addition to a claim for money meant the case was a "proceeding for the recovery of a debt or damages".[54]

[68] We also refer to *Westpac Banking Corp v Nangeela Properties Ltd*, where Somers J said that "[t]he formality of an action … should not be allowed to obscure the reality of the position".[55] In that case, the initial notice by the liquidator did not seek payment following the setting aside of the disposition. However, at the hearing at first instance, the liquidator had also sought orders for payment and interest. All judgments in the Court of Appeal in that case treated the proceedings as being for the recovery of a debt.[56]

[69] The reality in this situation is that Worldwide was seeking payment of the market price and thus was seeking a judgment for the recovery of that sum.

Discretion

[70] Under s 87(1) a judge has discretion to award interest on debt or damages from the time that the cause of action arose up until the date of the judgment.

Submissions of the parties

[71] Venue Management submits that the discretion should have been exercised in its favour. It says that it did not have the full use of the units and shares in the interim period because it had undertaken not to sell them pending payment of the price.[57] It also submits that it is relevant to the exercise of the discretion that, up until just before the 2008 Court of Appeal decision,[58] Worldwide had been asserting that Venue Management was estopped from exercising its pre-emptive right. Even before Potter J, Worldwide was still asserting a continuation of certain rights. In its oral submissions, Venue Management also submitted that the manner in which

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54 At [41]. Kirby J did not specifically address this point.

55 *Westpac Banking Corp v Nangeela Properties Ltd*, above n 34, at 11 per Somers J. See also the comments of Richardson J at 6, albeit in a slightly different context.

56 At 6–7 per Richardson J, at 9 per McMullin J, and at 11 per Somers J.

57 Or without putting $4.125m in a trust account (that being the amount Worldwide had initially paid for the units and the shares).

58 *Jacobsen Venue Management New Zealand Ltd v Worldwide NZ LLC*, above n 3.

Worldwide litigated caused considerable delays and meant that the discretion under s 87(1) should not have been exercised in its favour.

[72] Worldwide says that Venue Management did have full use of the shares. Further, Worldwide was not denying Venue Management's ownership rights. In the High Court, it was merely asserting an unpaid vendor's lien.

Our assessment

[73] We accept Worldwide's submission that the claim for an unpaid vendor's lien did not amount to a denial of Venue Management's ownership rights. While the estoppel argument did do so, ultimately it was withdrawn. In any event, neither the undertaking nor the estoppel argument interfered with Venue Management's ability to enjoy the benefit from and the use of the units and shares, apart from the restrictions on sale. The finding of the High Court was that the joint venture had been managed since April 2006 to the exclusion of Worldwide.[59]

[74] Further, from the time of the exercise of the pre-emptive right, Venue Management should have paid the market price for the units and shares. From that time, therefore, Venue Management has had the use of that money as well as the use and enjoyment of the "B" units and shares and Worldwide has not had the use of the money owing to it or of the "B" units or shares.

[75] Turning to the litigation delays, we are not in a position to assess the level of fault for the extended period of litigation. However, for these purposes, even assuming that some level of fault lay with Worldwide, this was not a case of Worldwide sleeping on its rights.[60] Worldwide had all along asserted its right to be paid the market value for the shares if its estoppel argument did not succeed.

[76] In the circumstances and in terms of the rationale behind s 87, Potter J was entitled to exercise her discretion to award interest as compensation for Worldwide

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59 *Worldwide* (HC), above n 4, at [321].

60 For example, compare *Commercial Helicopters Ltd v Attorney-General* HC Hamilton CP37/93, 8 March 1994; *Volk v Hirstlens (NZ) Ltd* [1987] 1 NZLR 385 (HC); and *Equiticorp Industries Group Ltd (in stat man) v The Crown (No 3) (Judgment No 51)* [1996] 3 NZLR 690 (HC).

being kept out of its money, despite the estoppel and other arguments made by Worldwide and the protracted litigation period.

Conclusion, result and costs

[77] A summary of the conclusions of the Court are as follows:

(a) Under s 87(1) of the Judicature Act, a sum of money owing does not have to be ascertained or readily ascertainable to come within the section;

(b) When Venue Management exercised its right of pre-emption, a cause of action arose for payment to Worldwide of the market price of the "B" units and shares;

(c) The fourth amended statement of claim, while not happily worded, was seeking judgment for the recovery of a debt and not solely declarations; and

(d) Potter J was entitled to exercise her discretion to award interest under s 87(1) from 26 April 2006.

[78] For those reasons, the appeal is allowed. The order of the High Court relating to interest is re-instated.

[79] Costs of $25,000 are awarded to the appellant plus usual disbursements (to be set by the Registrar if necessary).

[80] The order for costs in the Court of Appeal is set aside.[61] If costs cannot be agreed in the Court of Appeal, they should be set by that Court in light of this judgment.

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[61] Potter J ordered costs to lie where they fell in the High Court (*Worldwide* (HC), above n 4, at [327]), and there is no reason to disturb that order.