HIGH COURT OF AUSTRALIA

Hungerfords

Vs.

Walker

(Mason C.J.(1), Wilson(1), Brennan(2), Deane(2) and Dawson(3) JJ.)

9 February 1989

MASON C.J. AND WILSON J.

1. This appeal raises the important question whether, at common law, a court, when awarding damages for breach of contract or negligence, can include in its award damages, assessed by reference to appropriate interest rates, for the loss of the use of money which the plaintiff paid away and lost as a direct consequence of the defendant's breach of contract or negligence. There is the further question whether the presence of s.30c of the Supreme Court Act 1935 (S.A.) ("the Act") inhibits any development of common law principles which would favour an affirmative answer to the primary question. The appellants would be entitled to an award of interest under s.30c in the absence of good cause shown. However, it has not been suggested that the relevant component of the damages awarded to the appellant could be accommodated within the ambit of the power conferred by the section: but cf. Wheeler v. Page (1982) 31 SASR 1, at p 5.

2. The appellants, who are accountants, were the defendants in an action in the Supreme Court of South Australia brought by the respondents. The respondents carried on business under the name of Radio Electrix, selling, hiring and servicing television sets and other electronic goods. In 1982 the business was transferred to Walker Stores Pty Ltd, that company having been incorporated to acquire and conduct thereafter the respondents' business. The appellants were engaged to prepare the partnership and individual income tax returns for the respondents for the years ended 30 June 1974 to 30 June 1981. The partnership paid the income tax of each partner out of its trading account and the amount was debited to the personal account of each partner in the books of the partnership.

3. In the partnership return for the year ended 30 June 1975 the appellants made an error in calculating the amount of depreciation allowable as a deduction. The error was carried through in the returns in succeeding years and it resulted in an overpayment of tax. Radio Electrix made provision in its books for depreciation of assets which exceeded that allowed for tax purposes. To calculate the firm's taxable income it was necessary to add to the profit shown on the firm's books the difference between the depreciation shown in the books and that allowed for taxation. The depreciation shown in the books was accumulated in a "Provision for Depreciation" account. In the first year for which the appellants prepared the returns the calculation of adding the difference back in was done correctly. In the second year the difference between the accumulated provision for depreciation as shown in the books and the accumulated provision for taxation as allowed for tax purposes was added back in. Consequently, the appellants' calculation of the respondents' taxable

income was significantly greater than the correct amount and the respondents paid more tax than was necessary. This error was repeated each year until discovered by another accountant. The respondents were able to recover the overpaid tax for the years ending 30 June 1978, 1979 and 1980, and to amend the return for the year ending 30 June 1981, but the tax paid earlier was not recoverable as the right to recover was statute-barred.

4. The respondents sued the appellants for the loss of the amount of the income tax overpaid in the years ending 30 June 1975, 1976 and 1977, totalling $47,469.62, with compound interest at market rates upon that amount and upon the increased provisional tax which they were required to pay. As an alternative to the claims for interest, the respondents claimed damages at the trial for loss of the use of the money overpaid in these years by way of tax and paid by way of additional provisional tax. They alleged negligence and breach of contract. Bollen J. at first instance found the appellants liable for the negligent discharge of their obligations. He held that the respondents were not entitled, apart from s.30c, to interest by way of damages. That section provides:
"(1) 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.
(2) The interest -
(a) shall be calculated at such rate of interest as may be fixed by the court;
(b) shall be calculated -
(i) where the judgment is given upon an unliquidated claim - from the date of the commencement of the proceedings to the date of the judgment;
or
(ii) where the judgment is given upon a liquidated claim - from the date upon which the liability to pay the amount of the claim fell due to the date of the judgment,
or in respect of such other period as may be fixed by the court;
and
(c) shall be payable in respect of the whole or any part of the amount for which judgment is given in accordance with the determination of the court.
(3) Where a party to any proceedings before the court is entitled to an award of interest under

this section, the court may, in the exercise of its discretion, and without proceeding to calculate the interest to which that party may be entitled in accordance with subsection (2) of this section, award a lump sum in lieu of that interest.
(4) This section does not -
(a) authorize the award of interest upon interest;
(ab) authorize the award of interest upon exemplary or punitive damages;
(b) apply in relation to any sum upon which interest is recoverable as of right by virtue of an agreement or otherwise;
(c) affect the damages recoverable upon the dishonour of a negotiable instrument;
(d) authorize the award of any interest otherwise than by consent upon any sum for which judgment is pronounced by consent;
or
(e) limit the operation of any other enactment or rule of law providing for the award of interest."

5. Nevertheless, Bollen J. held the respondents could recover damages for the loss of the use of the overpaid amounts. In calculating those damages, he accepted "that the (respondents) would have put most of the overpaid tax into the business" and said:

> "I think that had the (respondents) had the overpaid tax for their use at the times of overpayment and thereafter they could and would have used much of it to produce a profit which may fairly be assessed at 10% on that money."

He assessed the damages for the loss of the use of the money by reference to an interest rate of ten per cent per annum and then reduced the sum to account for the possibility that some of the money would not have been put back into the firm. Judgment against the appellants was subsequently entered as follows:

Overpaid Tax	$47,469.62
Loss of Use of Money	69,002.49
Loss of Use in Relation to Payment of Excess Provisional Tax	16,044.60
Biar's Work	3,000.00
(Interest)	1,900.00
Whitbread's Work	4,900.00
(Interest)	3,062.00
	$145,378.71.

The provisions relating to Biar's and Whitbread's work related to the ascertainment of the extent of overpayment of tax and are not relevant for purposes of this appeal.

6. The respondents challenged that award of damages in the Full Court. King C.J., with whom Millhouse and Jacobs JJ. agreed, thought that damage resulting from the loss of the use of the money was "within the reasonable contemplation of the parties within the meaning of the rule in Hadley v. Baxendale" (1854) 9 Ex 341 (156 ER 145) and should be included in the damages award. His Honour accepted Bollen J.'s finding that the money would have been used to pay off the loans bearing the highest interest and that some of the money might have been used in the business in other ways. Given the fact that the business was profitable, King C.J. concluded that, to the extent that the respondents would have devoted the additional funds to the business, "their loss ... could not be less than the rate of interest which they were paying on the (highest interest) loans", this rate being twenty per cent and thus substantially higher than the ten per cent used by Bollen J. in calculating the damage suffered through the loss of the use of the money. Accordingly, King C.J. concluded:

> "(T)he loss occasioned by the overpayments of tax, assuming that all the additional money was devoted to the business, should be measured by compound interest at (the highest interest loan's) rate on the amounts overpaid for the period during which the appellants were deprived of their use. The loss arising from loss of use of the money on that basis to 30th November 1986 would amount to $334,521.64. The loss continued to run until the date of judgment, namely 26th February 1987."

King C.J. reduced that amount on the basis that it could not be inferred that all of the money would have been used in the business. His Honour thought that some of it might have been used "for non-business purposes". His Honour adjusted downward that figure and "estimate(d) the loss arising from loss of use of the money by reason of the overpayments at $270,000" on the footing that the appellants' knowledge of the partnership business and of the circumstances of the partners was such that it was within the reasonable contemplation of the appellants that the loss would result from the negligent preparation of the income tax returns in question. In the result the Full Court allowed the appeal and dismissed the appellants' cross-appeal.

7. The appellants appeal to this Court against, among other things, the award of damages for the loss of the use of money assessed by reference to an annual compound interest rate of twenty per cent. The respondents seek to cross-appeal against the ruling that some of the overpaid amounts would not have been used in the business and the consequential reduction in the award of damages for the loss of the use of money. It is convenient to begin with the appellants' contentions and then to turn to the cross-appeal.

8. Before us Mr Bennett, Q.C., for the appellants, submitted that, where a purely financial loss is inflicted, damages caused by the consequential unavailability of money should not be awarded. This, he asserted, is the first time that a court has awarded damages for loss of use of money caused by a negligently inflicted loss of money. Mr Bennett also argued that, because the legislature has intervened by enacting s.30c, interest should not be awarded otherwise than in accordance with that provision.

9. It is certainly true to say that the common law hitherto has turned its face against awarding interest as compensation for the late payment of damages. It has been considered that the decision of the House of Lords in London, Chatham and Dover Railway Co. v. South Eastern Railway Co. (1893) AC 429 necessarily denied the entitlement of a plaintiff to such an award. What is meant by the expression "late payment of damages" in this context and whether the respondents' claim for loss of the use of money in this case is for the late payment of damages are central questions for decision.

10. This is not the occasion to trace the tortuous path by which the common law of England arrived at the position that interest will not be awarded for the late payment of damages: see Tehno-Impex v. Gebr. Van Weelde (1981) QB 648, at pp 660 et seq. However, it is necessary to mention, if only very briefly, the common law attitude towards interest before Lord Tenterden's Act 1833 (U.K.) made statutory provision for the award of interest in some cases. In mediaeval times religious hostility to usury meant that the law gave little encouragement to the recovery of interest directly or by way of damages for late payment. As late as 1807 the reporter of De Havilland v. Bowerbank (1807) 1 Camp 50 (170 ER 872) commented:

> "It would fortunately be a very difficult matter to fix upon another point of English law, on which the authorities are so little in harmony with each other." (at p 52 (p 873 of ER))

11. Lord Tenterden's decision in Page v. Newman (1829) 9 B. & C. 378 (109 ER 140) confirmed the traditional rule that a creditor was not entitled to interest, in the absence of agreement, when the borrower failed to repay money lent on the due date. Lord Tenterden C.J. said (at p 381 (p 141 of ER)) it would be "productive of great inconvenience" if a rule were adopted that "interest is due wherever the debt has been wrongfully withheld after the plaintiff has endeavoured to obtain payment of it" because "it might frequently be made a question at Nisi Prius whether proper means had been used to obtain payment of the debt, and such as the party ought to have used". His Lordship referred to "the long-established rule" against awards of interest in such cases.

12. Page v. Newman led to the enactment of Lord Tenterden's Act in 1833. Sections 28 and 29 of that Act qualified the common law by granting the court a discretion to award interest on "debts or sums certain" in certain torts and in claims upon policies of insurance.

13. It was against this background that the House of Lords decided in London, Chatham and Dover Railway Co. that the plaintiff could not recover an award of interest on a provisional amount payable under an agreement because there was no debt or sum certain payable by virtue of a written instrument at a certain time within the meaning of s.28 of the Act of 1833. Their Lordships also decided that the plaintiff could not recover interest by way of damages for detention of the debt, the law on that subject, unsatisfactory though it was, having been too long settled to permit of departure. Although Lord Herschell L.C. considered (at p 440) that the ground assigned in Page v. Newman was not "a satisfactory reason for excluding altogether any claim to interest by way of damages in cases where justice requires that it should be awarded", he thought that the course of authority and the fact of limited legislative intervention precluded judicial review of the common law. His Lordship reached this conclusion reluctantly because he thought that the rule should be:

> "when money is owing from one party to another and that other is driven to have recourse to legal

> proceedings in order to recover the amount due to him, the party who is wrongfully withholding the money from the other ought not in justice to benefit by having that money in his possession and enjoying the use of it, when the money ought to be in the possession of the other party who is entitled to its use": at p 437.

The decision stands for the proposition that in England, at common law, in the absence of any agreement or statutory provision for the payment of interest, a court has no power to award interest, simple or compound, as compensation for the late payment of a debt: President of India v. La Pintada Compania (1985) AC 104, at p 115. For a long time the decision was regarded as applying to any form of damages, including special as well as general damages.

14. The same view with respect to the late payment of damages was expressed in this country by Latham C.J. in his dissenting judgment in Marine Board of Launceston v. Minister of State for the Navy [1945] HCA 42; (1945) 70 CLR 518. His Honour said (at p 525):

> "When an action is brought for damages for breach of contract or for tort, the amount of damages is never increased (apart from some statutory provision, e.g., Lord Tenterden's Act) because there has been delay caused by negotiation and litigation or by other circumstances. The loss of the use of the money ultimately awarded as damages is not part of the loss occasioned by the tort or breach of contract itself. It is a loss due entirely to delay in the payment of money ultimately held to be due, and is not recoverable as part of the damages."

See also Starke J., at p 529. The majority did not address the point.

15. Very recently in an action for damages for negligence in failing to take reasonable care in dealing with the plaintiff's request for the arrangement of insurance cover for its ship, this Court rejected a claim by the plaintiff to include in the damages award a sum representing the loss it had suffered by being deprived of the insurance moneys since 1975: Norwest Refrigeration Services Pty. Ltd. v. Bain Dawes (W.A.) Pty. Ltd. [1984] HCA 59; (1984) 157 CLR 149. Gibbs C.J., Mason, Wilson and Dawson JJ. said (at p 162):

> "It (the plaintiff) argues that if the Sonoma had been covered effectively under the fleet policy then it would either have received the sum insured from the insurer in 1975 or if it became necessary to sue the insurer it would probably have received the sum insured plus interest on that sum pursuant to s.33 of the Supreme Court Act 1935 (W.A.). On this basis, Norwest claims that the interest is an integral part of the damages themselves. It is not

> merely a case of seeking interest on a sum assessed as the damages flowing from a tort. In our opinion, however it be put, the argument cannot succeed. At common law, no court could award interest in a case such as this, whether by way of interest on damages or as damages: London, Chatham and Dover Railway Co. v. South Eastern Railway Co. ((1893) AC 429); Riches v. Westminster Bank, Ltd. ((1947) AC 390, at pp 400-402); and cf. Halsbury's Laws of England, 4th ed., vol.12, par 1179."

16. In 1987 the House of Lords expressed a view similar to that taken by Latham C.J. In President of India v. Lips Maritime (1988) AC 395 Lord Brandon of Oakbrook said (at p 425):

> "There is no such thing as a cause of action in damages for late payment of damages. The only remedy which the law affords for delay in paying damages is the discretionary award of interest pursuant to statute."

It followed, in the opinion of their Lordships, that the umpire in that case was wrong when he added to the owner's claim for liquidated damages for demurrage a further damages component, though he was right to award interest (but not compound interest) on the amount of demurrage payable by the charterer as from a date being two months from the completion of discharge. Critical to the decision was the conclusion (at p 424) that "a claim for demurrage sounds in damages rather than in debt", even though the claim is for liquidated damages. The point is that there is a due date for payment of a debt, but no such date in the case of damages. And the parties had by their contract quantified the damages which were payable in the event of breach.

17. At this distance in time it seems somewhat surprising that the argument in London, Chatham and Dover Railway Co. made no reference to the principles enunciated in Hadley v. Baxendale governing the recovery of damages for breach of contract. The explanation no doubt lies in what in 1893 was thought to be the paramountcy of the rules relating to the recovery of interest, so that the recovery of interest stood apart from the general principles governing damages. And we need to recall that until well into the present century the common law set its face against the recovery of pure economic loss in tort. Indeed, Liesbosch, Dredger v. Edison, S.S. (Owners) [1933] UKHL 2 [1933] UKHL 2; ; (1933) AC 449, at p 460, held that impecuniosity giving rise to financial loss was a separate and concurrent cause and too remote from the tort. Loss or damage due to late payment of a debt was not seen as recoverable by way of damages. Such loss or damage was regarded as too remote.

18. It was not until 1952 that it was recognized that loss due to the late payment of a debt or damages might be recoverable in accordance with Hadley v. Baxendale. It was then acknowledged that loss of this kind might constitute special damage within the contemplation of the parties under the second limb in Hadley v. Baxendale. In Trans Trust S.P.R.L v. Danubian Trading Co. Ltd. (1952) 2 QB 297 the Court of Appeal recognized that a failure to pay money would give rise to an entitlement to damages for breach of contract if a special loss was foreseeable at the time of the contract as the consequence of non-payment. Denning L.J. asserted (at p 306) that the ground on

which the law refused interest for late payment of a debt or damages was that interest was "'generally presumed not to be within the contemplation of the parties': see Bullen & Leake, 3rd ed., at p 51". Denning L.J. went on to say:

> "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."

19. Subsequently in Wadsworth v. Lydall (1981) 1 WLR 598; 2 All ER 401 the Court of Appeal, applying what had been said in Trans Trust S.P.R.L., held that a plaintiff was entitled to recover as special damages the loss suffered by him as the result of the failure of the defendant to pay a sum of pounds 10,000 due to him under a contract, the circumstances being that the defendant ought to have known that the plaintiff would need to acquire another farm or smallholding, using the pounds 10,000 payable under the contract for the purpose, and that if the pounds 10,000 was not paid the plaintiff would be compelled to incur expense in arranging alternative finance and paying interest. The Court of Appeal distinguished London, Chatham and Dover Railway Co. on the ground that it was concerned with the first, but not the second, limb in Hadley v. Baxendale. Brightman L.J. said (at p 603; pp 405-406 of All ER) of the action in London, Chatham and Dover Railway Co.:

> "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] EWHC J70 (Exch); [1854] EWHC J70 (Exch); (1854) 9 Exch 341, I can see no logical reason why such special damage should be irrecoverable merely because the obligation on which the defendant defaulted was an obligation to pay money and not some other type of obligation."

20. In La Pintada the House of Lords (at p 127) approved Wadsworth v. Lydall and the distinction drawn by Brightman L.J. between that case and London, Chatham and Dover Railway Co. The House of Lords, though acknowledging the injustices caused by the old common law rule as confirmed by its 1893 decision, concluded that it could not depart from that decision. This was because Parliament had chosen to remedy some of those injustices in certain circumstances and because the rule had been judicially qualified by limiting its application to claims for general, as opposed to special, damages: at pp 129-131.

21. In confining the authority of its earlier decision, the House of Lords opened the way to a logical and principled development of the law of damages on the topic now under consideration. The means by which this initiative was achieved - asserting that the 1893 decision was concerned only with the first limb in Hadley v. Baxendale - enabled the House of Lords to escape from the rigours of stare decisis. London, Chatham and Dover Railway Co. does not confront us quite so starkly, but Norwest Refrigeration presents a similar problem, with which we shall deal in due course.

22. However, for the moment, it is necessary to examine the distinction made by the House of Lords along with the consequence 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 remote, without discriminating between the refinements of Hadley v. Baxendale of which no mention was made. Secondly, and more importantly, 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 foregone, why is he not entitled to recover damages for loss of the use of money when the loss or 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) Ld. v. Newman Industries Ld. (1949) 2 KB 528, at p 539) 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 that loss does not fall within the first limb because it does not arise from "the ordinary course of things" of which the defendant has imputed knowledge: see Victoria Laundry, ibid. To allow a plaintiff to recover special, but not general, damages, is illogical, subverts the second limb in Hadley v. Baxendale from its intended purpose and introduces a new element into the general measure of damages for negligence.

23. If the distinction between the two limbs is to be rigorously applied in claims for damages for loss of the use of money, a plaintiff who actually incurs the expense 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 otherwise. The expense must fall within the second limb of Hadley v. Baxendale in order to be compensable. It cannot fall within the first limb because the defendant cannot be fixed with imputed knowledge of the plaintiff's financial situation and of his need to incur expense by borrowing money. Furthermore, a plaintiff who is not compelled to borrow money by way of replacement of 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 appreciates 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, ex hypothesi, the defendant's wrongful act or omission is the effective cause of that loss, at least if we put Liesbosch, Dredger to one side.

24. In Canada it seems that a plaintiff is entitled to recover interest charges actually incurred on money borrowed on the defendant's default or if the plaintiff owes money to anyone equal to the amount of the claim and is paying interest on it: Waddams, The Law of Damages (1983), ss833; and see Atlantic Salvage Ltd. v. City of Halifax (1978) 94 DLR (3d) 513 where the plaintiff's claim for interest succeeded on the ground that it had been indebted to its bank for a sum exceeding the amount of the claim throughout the period. But it has been acknowledged that it is anomalous to allow interest only to a plaintiff who has an overdraft: Municipal Spraying & Contracting Ltd. v. J. Harris & Sons Ltd. (1979) 35 N SR (2d) 237. If a justification exists for the difference in treatment, it must have its genesis in a policy that encourages recovery of expense actually incurred and discourages or denies recovery of opportunity cost. Yet it is not easy to see any cogent reason for the adoption of such a policy; the award of compensation for opportunity cost would not expose the courts to insuperable problems in fact-finding.

25. Indeed, such a policy would be at odds with the fundamental principle that a plaintiff is entitled

to restitutio in integrum. According to that principle, the plaintiff is entitled to full compensation for the loss which he sustains in consequence of the defendant's wrong, subject to the rules as to remoteness of damage and to the plaintiff's duty to mitigate his loss. In principle he should be awarded the compensation which would restore him to the position he would have been in but for the defendant's breach of contract or negligence. Judged from a commercial viewpoint, the plaintiff sustains an economic loss if his damages are not paid promptly, just as he sustains such a loss when his debt is not paid on the due date. The loss may arise in the form of the investment cost of being deprived of money which could have been invested at interest or used to reduce an existing indebtedness. Or the loss may arise in the form of the borrowing cost, i.e., interest payable on borrowed money or interest foregone because an existing investment is realized or reduced.

26. The requirement of foreseeability is no obstacle to the award of damages, calculated by reference to the appropriate interest rates, for loss of the use of money. Opportunity cost, more so than incurred expense, is a plainly foreseeable loss because, according to common understanding, it represents the market price of obtaining money. But, even in the case of incurred expense, it is at least strongly arguable that a plaintiff's loss or damage represented by this expense is not too remote on the score of foreseeability. In truth, it is an expense which represents loss or damage flowing naturally and directly from the defendant's wrongful act or omission, particularly when that act or omission results in the withholding of money from a plaintiff or causes the plaintiff to pay away money.

27. The truism that there is no cause of action for the late payment of damages is sometimes proffered as a justification for not compensating loss by way of incurred expense and opportunity cost for money paid away or withheld. True, a defendant commits no tort by contesting the plaintiff's claim for damages or for that matter by contesting the plaintiff's claim to recover a debt. But the problem is not concerned with finding a cause of action; rather it is a problem of defining the limits of recoverable damages for an established cause of action. The argument for denying the recovery of incurred expense and opportunity cost in the sense already discussed rests on the more limited proposition that a plaintiff is not entitled to compensation for late payment of damages otherwise than in the form of interest in accordance with the relevant statutory provisions. As a matter of logic and principle, as well as commercial reality, this proposition has little to commend it in the circumstances of the present case.

28. Incurred expense and opportunity cost arising from paying money away or the withholding of moneys due to the defendant's wrong are something more than the late payment of damages. They are pecuniary losses suffered by the plaintiff as a result of the defendant's wrong and therefore constitute an integral element of the loss for which he is entitled to be compensated by an award of damages. Fitzgerald J. made this very point in Sanrod v. Dainford [1984] FCA 154; (1984) 54 ALR 179 when he said (at p 191):

> "(W)hatever may be the position otherwise in respect of damages under the (Trade Practices) Act, I can myself perceive no difficulty in accepting that, when money is paid in consequence of misleading conduct, the loss suffered by that conduct includes not only the money paid but also the cost of borrowing that money or the loss from its investment, as the case may be: cf Frith v. Gold Coast Mineral Springs Pty. Ltd. (1983) ATPR

> 40-339; affirmed (1983) ATPR 40-394; 47 ALR 547. Interest awarded as a component of damages in such circumstances is not for loss of the use of the money awarded as damages, but for loss of the use of the money paid over in consequence of the misleading conduct and is directly related to the misleading conduct."

Notwithstanding that these remarks were made in relation to the payment of money in consequence of misleading conduct, the underlying principle is one of wider application. 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. See also General Securities Ltd. v. Don Ingram Ltd. (1940) SCR 670 (the plaintiff recovered a business loss incurred as a borrower in consequence of the lender's breach of obligation to advance the money) and Pelletier v. Pe Ben Industries Company Ltd. (1976) 6 WWR 640 (damages awarded on a contract to purchase a truck in consequence of the defendant's wrongful dismissal of the plaintiff from his employment). These cases proceed on the proposition that the cost of borrowing money to avoid a loss caused by a breach of contract is recoverable and not too remote.

29. Authority provides scant instruction on the ambit of the principle that at common law compensation is not awarded for the late payment of damages. The notion, if not the principle, is perhaps best illustrated by the comments of Dr Lushington in The Amalia (1864) 5 New Rep. 164n. There the question arose whether the party who had negligently caused a maritime collision resulting in the total loss of a Belgian ship was liable in admiralty to pay interest on the damages awarded. The report states that Dr Lushington, after pointing out that restitutio in integrum applied, as it did at common law, entitling the party aggrieved to a full indemnity, observed that:

> "Interest was not given by reason of indemnification for the loss, for the loss was the damage which had accrued, but interest was given for this reason, namely, that the loss was not paid at the proper time. If a man is kept out of his money, it is a loss in the common sense of the word, but a loss of a totally different description and clearly to be distinguished from a loss which has occurred by damage done at the moment of a collision. The principle, therefore, which the Registrar and merchants had acted upon was that ... just stated: viz., to give interest from the time when the loss ought to have been paid for. Thus Lord Stowell expressly stated in the case of The Dundee (2 Hagg.), that he gave interest beyond the value of the damaged ship by reason of detention of payment and not by way of damages. To that principle his Lordship entirely acceded."

The loss, though too remote at common law, was compensable in admiralty. And the loss of which Dr Lushington was speaking was a loss which was due exclusively to the late payment of damages.

30. 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.

31. Once it is accepted that the cost of borrowing money to replace money paid away or withheld is not too remote, it is pointless to insist on a distinction between the award of damages for loss of the use of money in the case of a liquidated claim and the award of such interest in an unliquidated claim. The award of damages in accordance with Hadley v. Baxendale is unrelated to, and free from, any requirement that there is, or should be, any "wrongful" withholding of money, be it a debt or damages.

32. There can be no objection to the recovery of the cost of borrowing as consequential loss by reference to the notion that the loss is one which arises after the plaintiff's cause of action accrues or becomes complete. Such a notion is by no means an absolute bar to recovery for loss arising after that date. It was acknowledged by this Court in Johnson v. Perez (unreported, 6 December 1988) that the rule that damages for breach of contract or tort are assessed at the date of breach or when the cause of action arises is not universal. Wenham v. Ella [1972] HCA 43; (1972) 127 CLR 454 is a striking illustration of a plaintiff recovering loss which accrued after his cause of action became complete. There the plaintiff recovered damages for the loss of income he sustained by reason of the defendant's breach of contract for refusing to transfer income-producing land pursuant to the contract between the parties, the loss being within the contemplation of the parties: see pp 461, 463, 467, 472. In that case the Court took account of the fact that the plaintiff had paid the entire consideration payable by him as purchaser and of the fact that the defendant had had the use of the plaintiff's money. Menzies J. noted (at p 463):

> "In the interval between the breach and judgment, the purchaser would be out of pocket, and the vendor in pocket, by the amount of the return from the land."

The significance of the decision is that by reason of the breach the plaintiff lost income after breach and damages were awarded for that head of loss. Gibbs J. observed (at p 472) that it was immaterial whether the damages came within the first or second limb of Hadley v. Baxendale "or indeed whether both are applicable". There was no suggestion that the plaintiff's loss was to be attributed to the late payment of damages.

33. We turn now to examine the distinction made in Lips Maritime between a claim for interest on a debt and a claim for interest on damages. Properly understood the plaintiff's claim in Lips Maritime was for interest by way of damages for the late payment of damages and as such the claim failed. The demurrage clause liquidated exchange losses according to a stipulated formula. The plaintiff sought interest on the unpaid liquidated losses. A claim for interest on unpaid liquidated losses or damages is of necessity a claim for late payment of damages and one which goes beyond the measure of damages agreed between the parties. Accordingly Lips Maritime is not inconsistent with the award of damages assessed by reference to appropriate interest rates as a component or head of loss in the assessment of a plaintiff's damages.

34. Norwest Refrigeration presents a different problem. The remarks in the joint judgment about the non-award of damages by way of interest at common law were obiter. The plaintiff's claim for interest was based on the statutory provisions, which had been amended during the course of the litigation, not on the common law. Moreover, no reference was made in argument to Trans Trust or to Wadsworth v. Lydall and the decision antedated La Pintada and Lips Maritime. Furthermore, Norwest Refrigeration did not involve a claim for damages for the loss of the use of money paid away or withheld as a result of breach of contract or negligence. For these reasons it is not an obstacle to an award of interest in favour of the respondents.

35. There remains for consideration the argument, reflecting what was said in London, Chatham and Dover Railway Co. and La Pintada, that legislative intervention in the form of s.30c precludes further development of common law principle. We see no reason for construing s.30c in such a way that it forecloses the authority of the courts to award damages in accordance with the principle established by Hadley v. Baxendale and the measure of damages governing claims in tort. The section is not intended to erect a comprehensive and exclusive code governing the award of interest. It is a provision intended to provide a plaintiff with some protection against the late payment of damages. The section does not attempt to regulate the measure of compensation to be awarded for a specific head of loss. The provisions of s.30c(4)(b) and (e) expressly recognize that interest may be recoverable at common law quite apart from the statute.

36. Sub-section (4)(e) states that s.30c "does not limit the operation of any other enactment or rule of law providing for the award of interest" (our emphasis). It would be a strange result if, in the face of this provision, the Court were to hold that the enactment of s.30c precluded the award of damages for loss of the use of money, in accordance with the logical development of fundamental common law principle so as to accord with commercial reality, to a plaintiff deprived of the use of money paid away or withheld as the result of the defendant's negligence or breach of contract. Where a legislative provision is designed to repair the failings of the common law and is not intended to be a comprehensive code, the existence of that provision is not a reason for this Court refusing to give effect to the logical development of common law principle. It would be ironic if a legislative attempt to correct defects in the common law resulted in other flaws becoming ossified in the common law.

37. 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) (1975) QB 373. 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, at p 116. In admiralty, simple interest has been awarded in a variety of cases standing outside the authority conferred by statute. As Sir Robert Phillimore said in The Northumbria (1869) LR 3 A & E 6, at p 10:

> "The principle adopted by the Admiralty Court has been that of the civil law, that interest was always due to the obligee when payment was not made, ex mora of the obligor; and that, whether the obligation arose ex contractu or ex delicto."

See also La Pintada, at p 117.

38. Likewise in Scotland the courts followed the civil law. The principle is that interest is awarded,

as of right, whenever a principal sum of money was "withheld, and not paid on the day when it ought to have been paid", in the words of Lord Westbury in Carmichael v. Caledonian Railway Co. (1870) 8 Macph. (H.L.) 119, at p 131; Riches v. Westminster Bank Ld. (1947) AC 390, at pp 411-412. This principle, like that applied in admiralty, was the one favoured but not adopted by Lord Herschell in London, Chatham and Dover Railway Co. However, the Scottish courts drew a distinction between debt and damages. They awarded interest on a debt from the date of service of the summons and interest on damages only from the date of the judgment. It was only then that the sum was quantified: see the discussion in the judgment of the Court of Appeal, delivered by Lord Denning M.R., in Jefford v. Gee (1970) 2 QB 130, at p 145.

39. We note that the Canadian Federal Court of Appeal has recently stated that in its view there is no longer any reason to retain the common law rule against interest as damages, describing the rule as "a judge-made limitation on the awarding of interest which is clearly no longer seen to be good public policy": Algonquin Mercantile Corp. v. Dart Industries Canada Ltd. (1987) 16 CPR (3d) 193, at p 201.

40. Although the admiralty model has obvious attractions, the common law has steadfastly declined over a very long time to adopt the admiralty approach in awarding compensation for late payment of damages in the general run of cases. But 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 foreseeable loss, necessarily within the contemplation of the parties, which is directly related to the defendant's breach of contract or tort.

41. On this footing the Full Court was correct in awarding damages for the added cost of funding the business with borrowed money as a result of the loss of the use of money overpaid in tax. The award of interest was of necessity compound interest. Simple interest would not reflect accurately the extent of the respondents' loss. Simple interest almost always undercompensates the injured party's true loss. Bowles and Whelan, "Judgment Awards and Simple Interest Rates", (1981) 1 International Review of Law and Economics 111, observe (at p 112):

> "If the plaintiff was expecting payment for a consignment of goods, but did not receive his money, the extent of his loss could be measured approximately by the amount of income that he could otherwise have generated simply by putting the proceeds into a deposit account at a bank. Such a move would attract compound interest, since the bank would automatically add to the account any interest generated. Equally, a plaintiff in a tort action can be thought of as incurring opportunity costs best measured by compound rather than simple rates. Had he received his award immediately upon the damage occurring, it may be assumed that he would have invested it at compound rates in just the same way as would the plaintiff who is suffering from a breach of contract."

The disdain of the common law for interest, especially compound interest, is a "relic from the days when interest was regarded as necessarily usurious" (Ogus, The Law of Damages (1973), p 98).

42. The Full Court in the present matter concluded that the damage sustained by the respondents resulting from the loss of the use of money was "within the reasonable contemplation of the parties" and should therefore be part of the basis on which damages are assessed. It found that had the respondents had the money they would have used it to pay off their most expensive loans or, if the return on the money would have been greater if put into the business, they would have taken that course. Consequently, the Court ascertained the value of the injury arising from the loss of the use of the money, as a minimum, at the rate of the most expensive loans which was twenty per cent and then reduced the resulting figure by twenty per cent in order to accommodate the finding of the trial judge that not all the money wrongly paid away would have been applied in reduction of those loans.

43. Both the appellants and the respondents challenged this approach to the assessment of the respondents' damages. The appellants contended that the Full Court erred in failing to take into account the incorporation of the partnership business in 1982 and that the adoption of twenty per cent interest as the basis of the calculation was unsupported by the evidence and wrong. The consequence of incorporation, so it was argued, was that any loss thereafter was sustained by the company, not the partnership. But, in reality, the incorporation of the company did not put an end to the losses being suffered by the respondents. They individually were required to pay the tax and it was paid on their behalf by the partnership. Their accounts with the partnership were debited so that they individually were the persons deprived of the use of the money thus paid away. They were still without the money which, had they enjoyed the use of it, subject to the findings of fact already mentioned, would have been invested with the company. But whether it would have been lent at interest or used as share capital so as to generate greater profit for distribution by way of dividends to the respondents and the members of their families (as owners of the company) is a matter of speculation. It may not follow that the extent of the respondents' loss after the company took over the business is to be measured by reference to the company's most expensive loans. It might be more appropriate to measure the loss on the basis of opportunity cost by reference to current market rates of interest.

44. For their part the respondents seek special leave to cross-appeal in order to challenge the finding by Bollen J. that some of the lost money would not have been used to pay off the loans or have been invested in the business. The respondents contend that the finding of fact was unsupported by the evidence. However, the finding was endorsed by the Full Court. King C.J. said:

> "While there is every reason to suppose that most of the money would have been devoted to the business, there are insufficient grounds for finding that all of it would have been so used. I think that a fair calculation of the (respondents') loss must take into account the possibility that part of the money would, if available, have been used for non-business purposes. ... There is no firm basis for arriving at the amount of the adjustment. It is a matter of judgement on the sparse material available."

In the light of these observations, the Chief Justice adopted a broad-brush approach and adjusted downward the amount assessed for the loss of the use of the money. It might be said that the finding of fact would not necessarily exclude the prospect of the respondents recovering damages on the basis of opportunity cost.

45. Consideration of these arguments of the appellants and the respondents respectively, with respect to the approach taken by the Full Court to the actual ascertainment of damages, leads us to the view that this Court should not entertain them. As King C.J. pointed out, the materials are sparse. They do not provide a suitable vehicle for the determination of any point of general principle. What is more we do not consider that the appellants' argument about "lifting the corporate veil" does raise a question of general principle. Rather, as it seems to us, the argument calls for an examination, based on facts and inferences arising from inadequate materials, directed to the ascertainment of the loss suffered personally by the respondents. In these circumstances the preferable course is to refuse special leave to cross-appeal and to exclude from the appeal the arguments based on the incorporation of the company.

46. Accordingly, we would vary the grant of special leave to appeal by confining it in the manner indicated, dismiss the appeal, and refuse special leave to cross-appeal.

BRENNAN AND DEANE JJ: We agree with the orders proposed by the Chief Justice and Wilson J. and are in general agreement with the reasons given by their Honours for those orders.

2. There is, in our view, a critical distinction between an order that interest be paid upon an award of damages and an actual award of damages which represents compensation for a wrongfully caused loss of the use of money and which is assessed wholly or partly by reference to the interest which would have been earned by safe investment of the money or which was in fact paid upon borrowings which otherwise would have been unnecessary or retired. On the one hand, there is no common law power to make an order for the payment of interest to compensate for the delay in obtaining payment of what the court assesses to be the appropriate measure of damages for a wrongful act. If such interest is to be awarded at common law, it must be pursuant to statutory authority. On the other hand, there is no acceptable reason why the ordinary principles governing the recovery of common law damages should not, in an appropriate case, apply to entitle a plaintiff to an actual award of damages as compensation for a wrongfully and foreseeably caused loss of the use of money. To the extent that the reported cases support the proposition that damages cannot be awarded as compensation for the loss of the use of a specific sum of money which the wrongful act of a defendant has caused to be paid away or withheld, they are contrary to principle and commercial reality and should not be followed.

3. In the present case, the breach of the duty of care which the appellants owed to the respondents caused overpayments of tax by the respondents. The direct and foreseeable effect of those overpayments was that specific sums of money (i.e. the amounts of the overpayments), which would otherwise have been available to avoid, repay or offset the costs of some of the significant borrowings of the respondents' business, were unavailable to the respondents from the time of the respective overpayments. The injury sustained by the respondents by reason of the loss of the use of the amounts of the overpayments was as foreseeably caused by the breach of the appellants' duty of care as would have been the case if the appellants had wrongfully deprived the respondents of the use of their money by locking it in a foolproof safe and withholding the key. The quantum of damages which represents appropriate compensation for that loss plainly fell to be assessed by reference to (among other things) the rates of interest paid by the respondents upon borrowings

which would probably have been avoided, retired or offset but for the overpayments.

DAWSON J. In 1973 the first three respondents, who are brothers, and the fourth respondent, who is the wife of the first of them, began to carry on a business at Murray Bridge in South Australia under the name of Radio Electrix. The business was that of selling, hiring, and servicing television sets and other electrical appliances. The business was acquired through the brothers' father, who was the managing director of a similar business carried on under the name of Radio Rentals. The Murray Bridge business was a branch of Radio Rentals before it was purchased by the first four respondents. Of the remaining two respondents, the fifth is the mother of the first three respondents and the sixth is the wife of the second respondent. They subsequently became partners in Radio Electrix.

2. The appellants are three firms of accountants which were, in effect, the one continuing firm differently constituted from time to time. It is unnecessary for the purpose of this appeal to differentiate between the appellants. Nor is it necessary to have regard to the differing interests of the respondents in the partnership since they were content to have any judgment made jointly in their favour. It is therefore possible to proceed for convenience upon the basis that there was one cause of action rather than a separate cause in the case of each partner. I should perhaps add at this point that Radio Electrix was incorporated in 1982, the business being carried on thereafter by Walker Stores Pty. Ltd. It will be necessary to refer later to this circumstance.

3. The appellants acted as accountants for Radio Rentals and when the Murray Bridge branch was acquired by the partnership they were engaged by the partnership. One of the functions of the appellants as accountants for the partnership was to prepare its income tax returns and those of the individual partners. This they did each year until 1981. The partnership paid the income tax of each partner in those years out of its trading account and the amount was then debited to the personal account of the partner.

4. In the partnership return for the year ended 30 June 1975 an error was made in the calculation of depreciation as an allowable deduction. Radio Electrix made provision in its own books for the depreciation of assets which was greater than that allowed for taxation purposes. This made it necessary to adjust the profit shown in the partnership books in order to obtain a figure for tax purposes by adding to it the difference between the depreciation calculated for partnership purposes and the depreciation allowed for taxation purposes. This was done correctly on the first occasion in 1974 but in 1975 what was added back was not the difference between the depreciation shown in the books for that year and the depreciation allowed for taxation purposes but the difference between the accumulated provision for depreciation shown in the books and the accumulated provision for depreciation allowed for taxation purposes. The result was that the partnership profit, and the taxable income of each of the partners, were shown in their returns to be greater than they in fact were. The error was repeated in each year thereafter until it was discovered by another accountant engaged by the respondents to advise them upon the incorporation of the business. The respondents were able to amend the relevant returns for the year ended 30 June 1981 and to recover from the Commissioner of Taxation the amounts of tax overpaid for the three preceding years, but they were barred from recovering the amounts overpaid in the years ending 30 June 1975, 1976 and 1977.

5. The respondents commenced an action for damages against the appellants to recover the income tax overpaid in those years which, in total, came to $47,469.62. They also claimed compound interest at market rates upon the amount overpaid and upon the increased provisional tax which they were required to pay. The respondents alleged that their losses were caused by the appellants' negligence, either in breach of contract or in breach of a duty of care in tort.

6. At trial, a claim, expressed as an alternative to the claim for interest, was made for loss of the use of the money overpaid by way of tax and paid as additional provisional tax. The trial judge, Bollen J., took the view that the law does not permit interest to be awarded as damages, but upheld the alternative claim for loss of use of money. He accepted evidence given by the respondents that they would have put most of the money overpaid back into the partnership business and concluded that had the respondents "had the overpaid tax for their use at the times of overpayment and thereafter they could and would have used much of it to produce a profit which may fairly be assessed at 10% on that money." Upon the basis of simple interest at ten per cent per annum, the trial judge calculated the relevant amounts due to the respondents as at 30 November 1986, as follows:

> Overpaid tax $47,469.62
> Loss of use of money $67,858.53
> Loss of use in relation to payment of excess provisional tax $16,044.60

He recognized the need for additional calculation in relation to the period between 30 November 1986 and the date of judgment and concluded with the following observation:

"No doubt it rather looks as if I have allowed interest as a component of damages but at a lesser rate than sought by the plaintiffs. I have not. I have assessed loss caused by loss of use of money which the plaintiffs should have had. In assessing I have used 10% on that money as a guide, considered and rejected 'deduction' for contingencies and thus stumbled to a result."

7. The respondents appealed to the Full Court of the Supreme Court of South Australia against the award of damages made by the trial judge. The appellants cross-appealed. The Full Court, King C.J., Jacobs and Millhouse JJ., upheld the appeal. The Chief Justice, with whom Jacobs and Millhouse JJ. agreed, reached the conclusion that:

> "... the loss occasioned by the overpayments of tax, assuming that all the additional money was devoted to the business, should be measured by compound interest ... on the amounts overpaid for the period during which the appellants were deprived of their use. The loss arising from loss of use of the money on that basis to 30th November 1986 would amount to $334,521.64. The loss continued to run until the date of judgment, namely 26th February 1987."

8. The rate of interest selected by the Chief Justice was that charged by Mutual Acceptance (Finance) Limited, a company to which the partnership owed substantial funds during the relevant period. That rate was the highest paid by the respondents for borrowed funds and was in excess of twenty per cent per annum. Allowing for the possibility that some of the additional money may not have been put back into the business if it had been available and recognizing that the loss of the use of the money continued to the date of judgment, the Chief Justice estimated "the loss arising from

loss of use of the money by reason of the overpayments at $270,000". This amount was held to be payable by the appellants upon the basis that the appellants' knowledge of the partnership business and the circumstances of the partners were such that it was reasonably within their contemplation that such a loss would result from the negligent preparation of the relevant income tax returns. Accordingly the Full Court allowed the appeal, dismissed the cross-appeal and increased the amount of the judgment. The appellants now appeal from the decision of the Full Court and the respondents cross-appeal upon the basis that the amount allowed for the loss of use of money ought to have been calculated upon the full amount of the tax and provisional tax overpaid. The critical question is whether the respondents were entitled to any award in their favour by way of damages for the loss of the use of the money paid in error to the Commissioner of Taxation.

9. Bollen J. sought to draw a distinction between damages for the loss of use of money and interest upon the money lost, but it is a distinction without a difference in the present context. Interest is merely a method of calculating the cost of money and it could in this case, statutory interest apart, only be recovered by the respondents by way of damages. See Williston, Law of Contracts, 3rd ed. (1968), vol.11, s.1412.

10. In dealing with the question of the respondents' entitlement to damages in the form of interest on the money paid away, it is essential to identify at the outset the nature of the obligation for the breach of which the respondents have claimed damages. Whether arising from contract or tort that obligation consisted of a duty on the part of the appellants to take care: a duty to exercise due care, skill and diligence in the practice of their profession. The appellants do not now question that they were in breach of this duty in each of the years 1975, 1976 and 1977 and that the loss incurred by the respondents in each of those years because of the overpayment of tax and the payment of additional provisional tax was the result of their negligence. Upon each occasion on which overpayment occurred in the relevant years the respondents suffered a wrong for which they now sue and the cause of action for each wrong, whether it be regarded as a breach of contract or a tort, was complete at the time of overpayment. Any further loss caused by the failure to meet the liability to which the cause of action gave rise must, if it is recoverable at all, be recoverable upon some basis other than as part of the cause of action constituted by the negligence of the appellants.

11. The respondents sue for damages for negligence, not for debt. In other words, they sue for compensation for the breach of a duty of care and not to recover a sum of money due and payable. The failure to pay a debt may entail loss in addition to the amount of the debt as a result of the breach of the same obligation as gives rise to the debt itself. Whether or not such further loss is recoverable depends upon whether it is sufficiently foreseeable and therefore not too remote. On the other hand, when, as is ordinarily the case having regard to the course of litigation, damages are not immediately recoverable and additional compensation is sought for the delay, what is claimed are damages for the non-payment of damages, a remedy which the law does not recognize. This is the distinction which was drawn by Latham C.J. (in dissent but not upon this point) in Marine Board of Launceston v. Minister of State for the Navy [1945] HCA 42; (1945) 70 CLR 518, at p 525, when he said:

> "When an action is brought for damages for breach of contract or for tort, the amount of damages is never increased (apart from some statutory provision, e.g. Lord Tenterden's Act) because there has been delay caused by negotiation and litigation or by other circumstances. The loss of the use of

> the money ultimately awarded as damages is not part of the loss occasioned by the tort or breach of contract itself. It is a loss due entirely to delay in the payment of money ultimately held to be due, and is not recoverable as part of the damages."

And in Norwest Refrigeration Services Pty. Ltd. v. Bain Dawes (W.A.) Pty. Ltd. [1984] HCA 59; (1984) 157 CLR 149 Gibbs C.J., Mason, Wilson and Dawson JJ. in a joint judgment drew the same distinction in a case in which the plaintiff sought to recover, in addition to damages for negligence on the part of the defendant in failing to effect insurance cover over its fishing vessel, an amount representing the loss which it suffered by being deprived of the insurance moneys. At p 162 of the joint judgment the majority observed:

"It (the plaintiff) argues that if the Sonoma had been covered effectively under the fleet policy then it would either have received the sum insured from the insurer in 1975 or if it became necessary to sue the insurer it would probably have received the sum insured plus interest on that sum pursuant to s.33 of the Supreme Court Act 1935 (W.A.). On this basis, Norwest claims that the interest is an integral part of the damages themselves. It is not merely a case of seeking interest on a sum assessed as the damages flowing from a tort. In our opinion, however it be put, the argument cannot succeed. At common law, no court could award interest in a case such as this, whether by way of interest on damages or as damages: London, Chatham and Dover Railway Co. v. South Eastern Railway Co. (1893) AC 429; Riches v. Westminster Bank, Ltd. (1947) AC 390, at pp 400-402; and cf. Halsbury's Laws of England, 4th ed., vol.12, par 1179."

12. These observations do not pass judgment upon the justice of the situation. Indeed, the injustice of requiring a plaintiff always to bear the whole cost of delay attendant upon the commencement and prosecution of litigation has now been recognized by legislation in most jurisdictions in a somewhat more generous way than the legislation referred to by Latham C.J. in the passage above. In South Australia the relevant provision is s.30c of the Supreme Court Act 1935 (S.A.) which is as follows:

> "30c. (1) 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.
(2) The interest -
(a) shall be calculated at such rate of interest as may be fixed by the court;
(b) shall be calculated -
(i) where the judgment is given upon an unliquidated claim - from the date of the commencement of the proceedings to the date of the judgment; or
(ii) where the judgment is given upon a liquidated claim - from the date upon which the liability to pay the amount of the claim fell due to the date of the judgment, or in respect of such other period as may be fixed by the court; and
(c) shall be payable in respect of the whole or any part of the amount for which judgment is given in accordance with the determination of the court.
(3) Where a party to any proceedings before the court is entitled to an award of interest under this section, the court may, in the exercise of its discretion, and without proceeding to calculate the interest to which that party may be entitled in accordance with subsection (2) of this section, award a lump sum in lieu of that interest.
(4) This section does not -
(a) authorize the award of interest upon interest;
(ab) authorize the award of interest upon exemplary or punitive damages;
(b) apply in relation to any sum upon which interest is recoverable as of right by virtue of an agreement or otherwise;
(c) affect the damages recoverable upon the dishonour of a negotiable instrument;
(d) authorize the award of any interest otherwise than by consent upon any sum for which judgment is pronounced by consent; or

(e) limit the operation of any other enactment or rule of law providing for the award of interest."

See also Judiciary Act 1903 (Cth), s.77MA; Federal Court of Australia Act 1976 (Cth), s.51A; Supreme Court Act 1970 (N.S.W.), s.94; Supreme Court Act 1986 (Vict.), s.60; Common Law Practice Act 1867 (Q.), s.72; Supreme Court Act 1935 (W.A.), s.32; Supreme Court Civil Procedure Act 1932 (Tas.), s.165; Australian Capital Territory Supreme Court Act 1933 (Cth), s.53A; Supreme Court Act 1979 (N.T.), s.84; Supreme Court Act 1981 (U.K.), s.35A. But the statutory provision for interest, limited as it is, does not create a cause of action where none existed and, indeed, underlines its absence by the very provision which it makes.

13. The legislation applies in the case of a judgment for a sum of money, whether sounding in debt or in damages. But the difference between debt and damages is crucial in any examination of the position at common law. In cases of debt the obligation upon the part of the debtor is to pay a sum of money and if the creditor suffers any loss in addition to the sum owed, by reason of the failure of the debtor to pay on time, that loss flows from the breach of that obligation, which constitutes the cause of action. Recoverability is limited only by the question of the remoteness of the loss. With damages, the obligation giving rise to the cause of action is different. Taking this case, the obligation on the part of the appellants was to exercise reasonable skill and care in the preparation of the respondents' income tax returns. Any loss suffered by the respondents as a result of the breach of that obligation was payable by way of damages but any delay in the payment of those damages constituted no breach of the obligation to exercise due skill and care. No question of remoteness arises because the loss due to delay in the payment of damages does not flow from the breach, that is to say, forms no part of the respondents' cause of action.

14. Even in cases of debt, the courts have adopted a restrictive approach upon the question of remoteness, an approach which reflects the law's early view of usury. See Atiyah, The Rise and Fall of Freedom of Contract (1979), at pp 65-67, 422-423; Simpson, A History of the Common Law of Contract (1975), at pp 114-117, 510-518.

15. In London, Chatham and Dover Railway Co. v. South Eastern Railway Co. (1893) AC 429 interest awarded by an official referee upon a debt which he found to be due upon account was disallowed by the House of Lords. It thought that it was compelled by authority and the enactment of the Civil Procedure Act 1833 (U.K.) ("Lord Tenterden's Act") to reach that conclusion, but it did so with stated reluctance. The case of Page v. Newman (1829) 9 B & C 378 (109 ER 140) particularly influenced the decision. In that case, decided in 1829, the question in issue was whether interest lay on a debt in the absence of express agreement or trade usage to that effect. Lord Tenterden, delivering the opinion of the Court of King's Bench, held that:

"It is a rule sanctioned by the practice of more than half a century, that money lent does not carry interest. ... we ought not to depart from the long established rule, that interest is not due on money secured by a written instrument, unless it appears on the face of the instrument that interest was intended to be paid, or unless it be implied from the usage of trade, as in the case of mercantile instruments."

(at pp 380-381; ER at p 141)

Only four years later in 1833 Lord Tenterden sponsored an Act which provided, for the first time, for interest on judgments.

16. It was in this context that Lord Herschell L.C. said in London, Chatham and Dover Railway Co. v. South Eastern Railway Co. (at pp 440-441):

> "... one cannot shut one's eyes to the fact that Lord Tenterden, who presided and delivered that judgment, was the author of the statute to which I have been directing the attention of your Lordships under which interest can now be allowed; and when he dealt with the allowance of interest in this statute he certainly introduced language which kept such claims within very narrow limits; speaking for myself, they seem to be too narrow for the purposes of justice. Nevertheless, having regard to the view of the law laid down by the Court of King's Bench in the case which I have just mentioned, and to the statute passed subsequently with obvious reference to it by the Legislature, and the absence since that time of any case in which the doctrine of Lord Mansfield or of Best C.J. has received practical effect in any decision in any of the courts, I do not think it would be possible nowadays to reopen the question, even in this House, and to hold that interest under such circumstances could be awarded."

The decision in London, Chatham and Dover Railway Co. v. South Eastern Railway Co. occasioned no great satisfaction at the time and legislation was introduced in the United Kingdom in 1934 to ameliorate its effect. Section 3(1) of the Law Reform (Miscellaneous Provisions) Act 1934 (U.K.) conferred a discretion upon courts to include in any judgment an award of simple interest from the date upon which the cause of action arose to the date of the judgment in any proceedings for the recovery of any debt or damages, except where interest was payable as of right by virtue of an agreement or otherwise. Provision for interest in one form or another is now to be found in the United Kingdom and Australia in the Acts which I have set out above.

17. There were, however, still gaps in the legislation and one such gap was disclosed in President of India v. La Pintada Compania Navigacion S.A. (1985) AC 104. In that case it was held that the then current United Kingdom legislation, the Supreme Court Act 1981 (U.K.), s.35A, afforded no claim for interest upon a sum paid late but before the commencement of proceedings. Nor, so it was held, did the common law afford any such claim in the circumstances of that case. But the House of Lords took the opportunity to review the decision in London, Chatham and Dover Railway Co. v. South Eastern Railway Co. and, whilst declining to depart from it, explained and limited it in the light of two intervening decisions of the Court of Appeal, Trans Trust S.P.R.L v. Danubian Trading Co. Ltd. (1952) 2 QB 297 and Wadsworth v. Lydall (1981) 1 WLR 598; 2 All ER 401. The limitation placed upon London, Chatham and Dover Railway Co. v. South Eastern Railway Co. was to treat the claim

for interest in that case as having been made under the first limb of the rule in Hadley v. Baxendale (1854) 9 Ex 341 (156 ER 145) and as being too remote under that part of the rule. That is to say, it was held that London, Chatham and Dover Railway Co. v. South Eastern Railway Co. decided no more than that damages for the detention of a debt are, in the absence of special circumstances, beyond the reasonable contemplation of the parties. That, of course, does not preclude the recovery of damages by way of interest if those damages are claimed and proved to arise from special circumstances which are known or ought to be known by the party against whom they are claimed, that is to say, if they fall within the second limb of the rule in Hadley v. Baxendale. The interest claimed in President of India v. La Pintada Compania Navigacion S.A. was not claimed to arise from any special circumstances and was held to be irrecoverable at common law. Whilst recognizing that this result did less than complete justice, the House of Lords took the view that the intervention of the legislature by the modification of the rule laid down in London, Chatham and Dover Railway Co. v. South Eastern Railway Co. precluded any abrogation of that decision by judicial determination.

18. This case, however, lies outside the ambit of the decision in London, Chatham and Dover Railway Co. v. South Eastern Railway Co. The respondents' claim in this case was not for the recovery of a debt but for damages for the breach of a duty of care on three separate occasions. There were, as the Full Court observed, three separate breaches and three separate causes of action. Each of those causes of action was complete at the time money was paid in error as a result of the appellants' failure to take due care in the preparation of the respondents' income tax returns. At that point the loss flowing from the appellants' negligent conduct crystallized and any further loss accruing as a result of the time taken to effect recovery could form no part of any of those causes of action.

19. The matter may be tested by asking what would have been the situation if the appellants' error had been discovered on each occasion immediately after it had been made and the money overpaid by the respondents had been promptly repaid to them by the appellants. There could be no question that such repayment would have met the full measure of the respondents' damage. The measure of damages flowing from a tort or breach of contract does not expand according to the length of time taken to obtain an award or effect recovery. No doubt the time taken to effect recovery may occasion further loss by reason of a plaintiff's being kept out of money which is due to him. But that further loss stems not from the tort or, save in cases of debt, from the breach of contract but from the delay in payment. Nor is it to the point to say that the plaintiff is entitled to full restitution. That only provokes the question "full restitution for what?" and the answer must be for the tort or breach of contract and not for delay in recovery. No doubt it is just also to provide for compensation for delay in recovery if that delay is not due to any fault on the part of the plaintiff and that is precisely what has been done by legislation in a specific manner. It would be a fundamental error both in logic and principle for this Court to attempt to achieve the same end by somehow incorporating in the original cause of action a head of damages intended to compensate, not for future losses flowing from the tort or breach of contract, but for failure to pay those losses already incurred as a result of the tort or breach of contract.

20. An analogous situation occurred in President of India v. Lips Maritime Corporation (1988) AC 395 where an umpire in arbitration proceedings had awarded both demurrage and damages for the late payment of the demurrage. The damages for late payment were calculated by reference to the depreciation in sterling between a time determined by the umpire to be the time at which demurrage ought to have been paid and the date of the award. But as Lord Brandon of Oakbrook observed, at pp 424-425:

"Once it is recognized that a claim for demurrage sounds in damages rather than in debt, it becomes apparent that the two concepts, first, of a contractual date for the payment of such damages, and, secondly, of a claim for damages for breach of contract in not paying them by such date, have no basis in law. As I said earlier an owner's cause of action for demurrage, being one for damages, albeit liquidated damages, accrues de die in diem from the moment when the ship is detained beyond the stipulated lay days. There is no such thing as a cause of action in damages for late payment of damages. The only remedy which the law affords for delay in paying damages is the discretionary award of interest pursuant to statute. It follows that the umpire's decision in the present case, in dealing with the owner's claim in respect of demurrage, to add the damages element to the demurrage element, was wrong in law ..."

21. It has been said that as a matter of general principle damages should be assessed as at the date of the wrong: see Wenham v. Ella [1972] HCA 43; (1972) 127 CLR 454, per Gibbs J. at p 473. The exceptions to the principle - for example, in personal injury claims - throw some doubt upon the extent of its generality, but there can be no doubt about its application in this case. There is no basis for the selection of any other time for the assessment of damages. That is not to say, however, that when damages are assessed as at the time of the wrong, foreseeable future losses which flow from the wrong, and not merely from delay in compensating for the wrong, may not be included in any award. Thus in Wenham v. Ella, which was a case in which damages were awarded for breach of a contract to procure the transfer of a part interest in an income-producing parcel of land, an amount for loss of profits as well as the value of the interest in the land was included in the damages. Moreover, the quantification of future losses may be made by reference to events which have occurred between the time when the cause of action arose and judgment upon the basis that actual facts are preferable to speculation: Willis v. The Commonwealth [1946] HCA 22; (1946) 73 CLR 105, at p 109. Damages so assessed nevertheless form part of the loss flowing from the breach and are not damages for delay in the payment of damages.

22. The distinction between foreseeable future losses and loss due to delay in the payment of damages is fundamental. As I have said, to draw the distinction is not to deny the justice of compensation for delay in the payment of damages. The legislature has recognized this in South Australia by making provision for compensation in s.30c of the Supreme Court Act. Even in the absence of this section precedent would have constituted a considerable obstacle in the way of this Court making its own provision. I have described the sort of difficulties which would be encountered in Trident General Insurance Co. Ltd. v. McNiece Bros. Pty. Ltd. [1988] HCA 44[1988] HCA 44; ; (1988) 62 ALJR 508, at p 532 [1988] HCA 44; ; 80 ALR 574, at p 613. The difficulties are, however, insuperable having regard to the presence of s.30c. That section makes detailed provision for compensation by way of interest in a way which must necessarily prevail over any solution at common law. Under the section the right to interest is liable to be defeated by good cause shown and no compound interest is to be awarded. The interest claimed by the respondents in this case is compound interest and it is claimed as an absolute right. I am unable to see how the

Court, even if it were otherwise able to do so, can grant such a claim in the face of the statute. True it is that the statute says in sub-s.(4)(e), that s.30c does not "limit the operation of any other enactment or rule of law providing for the award of interest" but the plain matter of fact is that there was no enactment or rule of law providing for the award of interest of the kind claimed by the respondents at the time s.30c came into force. It is surely one thing to interpret sub-s.(4)(e) as preserving existing remedies. It is quite another thing to construe it as authorizing, in effect, the amendment of the section by the provision of remedies patently inconsistent with the legislative intent. It might at once be observed that similar provision was to be found in s.28 of Lord Tenterden's Act which, it would seem, was directed to preserving the right, at that time, to recover interest in accordance with trade usage, a right referred to in Page v. Newman. That provision was not thought sufficient to justify the award of interest in London, Chatham and Dover Railway Co. v. South Eastern Railway Co., notwithstanding the House of Lords' preference for that result. Similarly, I do not think that s.30c(4)(e) can justify departure from established principle in a manner inconsistent with the remainder of the section. There is nothing to indicate that the paragraph was intended to be anything more than a saving provision.

23. This case may serve as an illustration of the distinction between foreseeable future losses and loss due to delay in the payment of damages. The loss by reason of the overpayment of income tax could, and could only, be measured at the time of overpayment by reference to the amount overpaid. It contained no element of future loss. On the other hand, the loss arising from the payment of additional provisional tax could not be measured solely by reference to the additional amount paid. The payment of provisional tax constitutes a payment on account of an income tax liability yet to be assessed. Even if an extra amount is paid in error, that amount will be brought into account when income tax is assessed in the following year. Yet that amount is lost to the taxpayer during the intervening time and he is entitled to be compensated for the loss if it is the result of another's negligent conduct. It is a future loss in the sense that it runs from the time of payment of the additional provisional tax until that payment is offset against liability to tax in the following year. The respondents are therefore entitled to damages in respect of the amount of provisional tax paid in error in each of the years 1975, 1976 and 1977. The proper measure of compensation upon the findings of fact in the courts below is appropriately interest upon each of the amounts involved between the time of payment and the time that income tax assessed in the following year became due and payable. No question of compound interest arises since the period involved in each instance is not significantly more or less than a year. The appropriate rate of interest is the commercial rate expressed upon an annual basis. The commercial rate of interest may be taken to be that paid by the partnership to Mutual Acceptance (Finance) Limited from time to time upon loans made by that company to the partnership during the relevant period. It was not suggested before us that if interest were to be paid for the loss of use of money, that was an inappropriate rate.

24. It follows from what I have said that, apart from interest upon the amounts of provisional tax paid in error, the respondents are not entitled at common law to damages for loss of the use of the amounts overpaid in the years 1975, 1976 and 1977 as a result of the negligence of the appellants. The respondents are, of course, entitled in the absence of good cause shown to an award of statutory interest pursuant to s.30c of the Supreme Court Act.

25. A further question raised by the appellants' grounds of appeal is whether the Full Court was in error in assessing damages by failing to take into account the incorporation of the partnership business in 1982. Any loss sustained by the respondents ceased to accrue, it was said, when the partnership business passed to the company. For the reasons given above, the incorporation of the partnership business can have no relevance in the calculation of the respondents' damages. Any loss

recoverable by the respondents had been sustained by them before 1982. It is unnecessary to consider the point further.

26. I would allow the appeal, refuse special leave to cross-appeal and set aside the judgment of the trial judge and the Full Court. I would remit the matter to the trial judge to enable him to enter judgment by way of damages in the sum of the amounts of income tax overpaid in the years 1975, 1976 and 1977 together with an amount by way of damages for the loss of the additional provisional tax in those years calculated in accordance with these reasons and for interest determined in accordance with s.30c of the Supreme Court Act.

ORDER

Grant of special leave to appeal varied by excluding therefrom grounds (p), (q), (r) and (s) referred to in the Notice of Appeal.

Appeal dismissed with costs.

Application for special leave to cross-appeal refused with costs.