HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

VICTORIAN WORKCOVER AUTHORITY & ANOR APPELLANTS

AND

ESSO AUSTRALIA LTD RESPONDENT

Victorian WorkCover Authority v Esso Australia Ltd [2001] HCA 53
13 September 2001
M101/2000

ORDER

1. *Appeal allowed with costs.*

2. *Set aside order of the Court of Appeal of the Supreme Court of Victoria.*

3. *Matter remitted for consideration by the Court of Appeal of the Supreme Court of Victoria, consistently with the reasons of this Court, of any remaining grounds of appeal.*

On appeal from the Supreme Court of Victoria

Representation:

R P Gorton QC with M F Wheelahan for the appellants (instructed by Wisewoulds)

A G Uren QC with G A Lewis for the respondent (instructed by Middletons Moore & Bevins)

CATCHWORDS

Victorian WorkCover Authority v Esso Australia Ltd

Accident compensation – Workers compensation – Section 138 of the *Accident Compensation Act* 1985 (Vic) confers an entitlement to indemnification upon employers or insurers who have paid or are liable to pay compensation – Section 60(1) of the *Supreme Court Act* 1986 (Vic) provides for damages in the nature of interest in respect of any proceeding for the recovery of debt or damages – Whether a proceeding to establish amount of indemnification under s 138 is a proceeding for the recovery of debt or damages.

Words and phrases – "debt or damages".

Accident Compensation Act 1985 (Vic), s 138.
Supreme Court Act 1986 (Vic), s 60.

GLEESON CJ, GUMMOW, HAYNE AND CALLINAN JJ.

Facts

1 The first appellant is the Victorian WorkCover Authority ("the Authority") which was established as a body corporate by s 18 of the *Accident Compensation Act* 1985 (Vic) ("the Compensation Act"). By force of s 64(1) of the *Accident Compensation (WorkCover) Act* 1992 (Vic), which came into force on 1 December 1992, the Authority is the successor in law of the Accident Compensation Commission ("the Commission"), whose property, rights and assets vested in the Authority and whose liabilities became liabilities of the Authority. At various times and pursuant to the Compensation Act, the Authority, its predecessor, the Commission, and the second appellant, FAI Workers' Compensation (Vic) Pty Ltd ("FAI"), made payments to Mr Kazimer Wsol in respect of a back injury he sustained in 1989.

2 Mr Wsol sustained his injury whilst he was an employee of AFCO Industrial Services Group Pty Ltd ("AFCO"). That company, since in liquidation, had been engaged by the respondent, Esso Australia Ltd ("Esso"), to provide, among other things, the services of its employees to perform a variety of tasks on the oil platform in Bass Strait which was known as Kingfish West Oil Platform and was occupied by Esso. Mr Wsol worked on the platform pursuant to that arrangement. He injured his back on 10 January 1989, his condition deteriorated and he has not worked since September of that year.

3 In the period to 30 June 1993, compensation payments, the total of which was in the order of $115,000, were made by the Authority (after 1 December 1992) and its predecessor (before 1 December 1992). FAI was the authorised insurer of AFCO and liable to pay compensation to Mr Wsol pursuant to the provisions of the Compensation Act. In the period from 1 July 1993 to 22 October 1998, a week before the commencement of the trial in the Supreme Court of Victoria, FAI made compensation payments, the total of which was in the order of $220,000.

The trial and the appeal

4 The trial was of an action commenced by the Authority and FAI in 1995. By the Amended Statement of Claim filed on 26 May 1998, the Authority and FAI claimed indemnity under s 138 of the Compensation Act in the specific sums identified in the pleading, being the past payments. They also sought a declaration that Esso indemnify them "to the extent fixed by the Court in respect of future payments". The plaintiffs thus sought both to recoup from Esso the payments already made to Mr Wsol and to establish by a declaration the outer

limit of their entitlement under s 138 to indemnity by Esso in respect of future payments of compensation.

5 Section 138 is headed "***Indemnity by third party***". It confers what it identifies as an entitlement to indemnification in an amount ascertained in accordance with the section upon certain employers or insurers who have paid or may be liable to pay compensation benefits under the statute in respect to an injury or death; if the injury or death was caused under circumstances creating a legal liability in a third party, such as Esso, to pay damages in respect of that injury or death, the section requires the third party, in accordance with the terms of the section, to indemnify the employer or insurer against payments made or to be made.

6 The Authority and FAI alleged that Mr Wsol's injury was caused under circumstances creating a legal liability in Esso to pay damages to Mr Wsol because the accident had been caused by the negligence of Esso. The culpability of Esso thus became an issue in the determination of the entitlement to indemnification. The trial judge (Cummins J) made a finding of negligence against Esso. His Honour apportioned responsibility for the injury sustained by Mr Wsol as to 80 per cent against Esso and as to the remaining 20 per cent against AFCO; he found that there was no contributory negligence on the part of Mr Wsol. In respect of the claim against Esso for indemnity, on 10 December 1998 Cummins J made orders that Esso pay particular sums to the Authority and FAI, and in each case with a specified amount of interest. His Honour also made a declaration as to entitlement of FAI to indemnification by Esso in respect of further payments of compensation.

7 Esso appealed to the Court of Appeal (Winneke P, Tadgell and Chernov JJA)[1]. The Court of Appeal set aside the orders and declaration made by the primary judge and in place thereof substituted the following orders and declaration[2]:

> "(1) that [Esso] pay to [the Authority] the sum of $116,226.22;
>
> (2) that [Esso] pay to [FAI] the sum of $219,000;
>
> (3) that [FAI] be entitled to be indemnified by [Esso]:

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1 *Esso Australia Ltd v Victorian WorkCover Authority* (2000) 1 VR 246.

2 (2000) 1 VR 246 at 259.

(a) for all further payments of compensation made under [the Compensation Act] by [FAI] to the worker, Mr Kazimer Wsol, in respect of the injury caused to him on 10 January 1989; and

(b) up to an amount not exceeding a further sum of $277,795."

The figure of $277,795 represented the "ceiling" for the future indemnity entitlement in FAI. Whether that ceiling will be reached will depend upon future events, in particular upon further payments of compensation to Mr Wsol.

8 However, as a result of the orders made in the Supreme Court, and in the Court of Appeal, there were fixed obligations of Esso to pay stipulated sums to the Authority and to FAI to discharge their entitlements under s 138 to indemnity by Esso in respect of past payments of compensation. One of the grounds of appeal by Esso had been that the trial judge should not have allowed interest upon those sums under s 60 of the *Supreme Court Act* 1986 (Vic) ("the Supreme Court Act"). In this respect, Esso's submissions were accepted and the revised orders made by the Court of Appeal made no allowance for interest on the sums of $116,226.22 and $219,000 which Esso was ordered to pay respectively to the Authority and FAI.

9 In this Court, the Authority and FAI seek to achieve a result whereby the position they achieved at trial is reinstated and provision is made for the payment by Esso of damages in the nature of interest pursuant to s 60 of the Supreme Court Act, calculated on the judgment sums of $116,226.22 and $219,000. The Authority and FAI submit that the Court of Appeal erred in deciding that, within the meaning of s 60(1), the proceeding tried by Cummins J had not been a "proceeding for the recovery of debt or damages".

10 The Court of Appeal accepted submissions by Esso that (i) the action tried by Cummins J had been a claim to enforce an entitlement to indemnity created by statute which, on no view of the authorities, could be comprehended by the words "proceeding for the recovery of debt or damages" as contained in s 60(1) of the Supreme Court Act and (ii) the orders for payment of sums to each of the Authority and FAI were "a necessary incident" of the entitlement to indemnity which was established and the sums were neither a debt nor were they damages.

11 The outcome of the appeal thus turns upon the proper construction both of s 60 of the Supreme Court Act to determine the content of the phrase "any proceeding for the recovery of debt or damages", and of s 138 of the Compensation Act, to identify the nature of the entitlement to indemnity which it creates.

Section 138 of the Compensation Act

12 It is convenient to begin by considering s 138 and the nature of the entitlement it conferred on the Authority and FAI. So far as presently material, in the form it had assumed by the time of the orders made by the trial judge, sub-s (1) stated:

> "Where an injury or a death for which compensation has been paid, or is or may be payable, by the Authority, an authorised insurer, a self-insurer or an employer was caused under circumstances creating a legal liability in a third party to pay damages … in respect of the injury or death, the Authority, authorised insurer, self-insurer or employer is entitled to be indemnified by the third party in accordance with this section."

Sub-section (3) specified that the amount which a third party was required to pay as indemnity under sub-s (1) was the lesser of two amounts. The first, specified in par (a), was:

> "the amount of compensation paid or payable under this Act in respect of the injury or death".

The second, identified in par (b), was the amount calculated in accordance with a formula there set out. One element in the formula was the extent, expressed as a percentage, whereby the act, default or negligence of the third party caused or contributed to the injury or death. Another was:

> "the amount of damages (disregarding the extent, if any, whereby any other person's act, default or negligence caused or contributed to the injury or death) for pecuniary loss and non pecuniary loss which the third party is or would have been liable to pay in respect of the injury or death were it not for the provisions of this Act and the **Transport Accident Act 1986** [(Vic)]".

The amount arrived at by application of the formula is that percentage of the above damages (less certain amounts not presently relevant) for which the third party was responsible.

13 Section 138 has a lineage which commenced with s 6 of the *Workmen's Compensation Act* 1906 (UK) and has analogues throughout the worker's

compensation legislation of the various Australian jurisdictions[3]. In *Tickle Industries Pty Ltd v Hann*[4], an appeal from the Northern Territory, Barwick CJ said that the policy of these provisions was quite clear:

> "[A]n employer who paid the statutory compensation to an injured employee or, in the case of his death, to his dependants, where the injury or death, though occurring in the course of employment, was caused by the wrongful act or omission of another person was to be entitled to be indemnified against the payment of that compensation by that other person."

14 In the present case, Winneke P, who delivered the leading judgment in the Court of Appeal, considered the nature of the entitlement conferred by s 138. His Honour said, with respect, correctly, that it was abundantly clear that[5]:

> "the statutory right of indemnity conferred by the [Compensation] Act upon the person who has paid the compensation is not to be equated to the cause of action which the worker would, but for the [Compensation] Act, have had against the person liable to pay damages to him. This is so notwithstanding the fact that it is an ingredient of the statutory right, sought to be enforced, that the person from whom the indemnity is sought was liable to pay damages to the worker. The claim to enforce the entitlement to indemnity is not a claim in tort. It is a cause of action created by statute for an indemnity against a person liable to pay damages to another: *Tuckwood v Rotherham Corp*[6]."

15 In *Tickle Industries*, Barwick CJ observed that the statutory provision there under consideration did not spell out in full the extent of the obligation to indemnify[7]. A similar comment may be made respecting s 138. A starting point

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3 *Tickle Industries Pty Ltd v Hann* (1974) 130 CLR 321 at 326; *Ex parte Workers' Compensation Board of Queensland* [1983] 1 Qd R 450 at 457. See also *James S Adams and Co Pty Ltd v State Rivers and Water Supply Commission* [1960] VR 542; *Scott v Bowyer* [1998] 1 VR 207.

4 (1974) 130 CLR 321 at 326.

5 (2000) 1 VR 246 at 257.

6 [1921] 1 KB 526 at 540 per Atkin LJ.

7 (1974) 130 CLR 321 at 326.

is provided by what was said by this Court in *Mallinson v Scottish Australian Investment Co Ltd*[8] respecting an obligation created by the *Commonwealth Conciliation and Arbitration Act* 1904 (Cth). The Court said[9]:

> "The rule applicable here is stated in *Shepherd v Hills*[10] as follows, viz, 'Wherever an Act of Parliament creates a duty or obligation to pay money, an action will lie for its recovery, unless the Act contains some provision to the contrary'; and where the amount is liquidated the action of debt is appropriate (*Hopkins v Swansea*[11]). The obligation is none the less a debt because the statute gives no particular method of enforcing it (*Booth v Trail*[12])."

16 As with the term "charge" in the legislation[13] considered in *Bailey v New South Wales Medical Defence Union Ltd*[14], the use in the Compensation Act of the term "indemnity" invoked an institution of the general law. This was the obligation imposed by contract or by the relation of the parties to save and keep harmless from loss[15]. However, again as in *Bailey*, the statute created incidents of the obligation which differed from those found in the general law. At common law, the party asserting a legal right to indemnity has first to discharge the liability the subject of the indemnity and, having done so, may recover from the indemnifier under the common *indebitatus* count for money paid by the

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8 (1920) 28 CLR 66.

9 (1920) 28 CLR 66 at 70. See also *The Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285 at 305 [40], 313 [65], and the authorities discussed by Sholl J in *Gilchrist v Dean* [1960] VR 266 at 271.

10 (1855) 11 Exch 55 at 67 [156 ER 743 at 747].

11 (1839) 4 M & W 621 [150 ER 1569]; (1841) 8 M & W 901 [151 ER 1306].

12 (1883) 12 QBD 8 at 10.

13 Section 6 of the *Law Reform (Miscellaneous Provisions) Act* 1946 (NSW).

14 (1995) 184 CLR 399 at 445-446.

15 *Halsbury's Laws of England*, 4th ed (reissue), vol 20, pars 345, 347.

plaintiff for the defendant at the defendant's request[16]. It is here that the statutory entitlement to indemnity necessarily departs from the requirement of the common money count that the payments made by the plaintiff have exonerated the defendant from liability. This is because the statutory obligation, in respect of which the entitlement to indemnity is conferred by the section, may be a continuing one to pay compensation to the worker. That continuing obligation may not have been spent at the time action is brought on the entitlement to indemnity.

17 In equity, at least if the obligation to indemnify be construed as one to prevent the plaintiff being called upon to pay in the first instance[17], the indemnifying party may be ordered to pay the money direct to the creditor and so relieve the plaintiff from sustaining that outgoing[18]. In this appeal, no immediate question arises respecting the adaptation to the statutory regime of that form of equitable relief. Nor is there any dispute respecting the utility of the declaratory relief which was given with respect to the upper limit of further indemnity. The declaration was not a mere advisory opinion in the sense discussed in *Bass v Permanent Trustee Co Ltd*[19].

18 Some of the indemnity provisions in worker's compensation statutes have been interpreted as conferring distinct rights of action against the tortfeasor which arise when each compensation payment is made by the employer or insurer and which will succeed if the other conditions laid down in the provision are satisfied[20]. It may be taken, for present purposes, that s 138 is such a provision.

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16 *Crampton v Walker* (1860) 3 El & El 321 at 330-331 [121 ER 463 at 466]; Bullen and Leake, *Precedents of Pleadings*, 3rd ed (1868) at 42, 175; Rath, *Principles and Precedents of Pleading (NSW)*, (1961) at 27-28.

17 *McIntosh v Dalwood (No 3)* (1930) 30 SR (NSW) 332 at 334-335; *Newman v McNicol* (1938) 38 SR (NSW) 609 at 626-627; cf *Woolmington v Bronze Lamp Restaurant Pty Ltd* [1984] 2 NSWLR 242 at 244.

18 *Travers v Richardson* (1920) 20 SR (NSW) 367 at 370-371; *Firma C-Trade SA v Newcastle Protection and Indemnity Association* [1991] 2 AC 1 at 28; cf *Holden v Black* (1905) 2 CLR 768 at 782-783.

19 (1999) 198 CLR 334 at 355-357 [45]-[49].

20 eg *Attorney-General v Arthur Ryan Automobiles Ltd* [1938] 2 KB 16 at 21, 23, 24.

19 However, the other conditions attached to the statutory entitlement may produce the result that a claim under the statute is not simply one to recoup compensation payments already made, by analogy to an action to recover moneys paid at the implied request of the tortfeasor. Rather, it may be that in no case can the amount which the tortfeasor is obliged to pay as indemnity be fixed in advance of the determination of the amount of damages which the tortfeasor is liable to pay to the worker in respect of compensable injury. Section 138 gives rise to such a situation.

20 Both at trial and in the Court of Appeal, s 138 was construed as providing the amount for indemnity in respect of compensation payments made under the Compensation Act up to the date of trial and to indicate a "ceiling" beyond which the indemnity in respect of the total payments of compensation, past and future, could not go. Winneke P noted that this approach was in accordance with the construction of s 138 which the parties accepted and reflected the practice adopted in other claims under s 138[21]. The President observed[22]:

> "Thus, it is said that the words 'the amount of compensation paid or payable under this Act', where appearing in subs (3)(a), should be read as meaning 'accrued and payable'; and that they cannot reasonably contemplate an amount produced by a calculation of all future payments which might be payable to the worker pursuant to the Act. Further, it is said that subs (3)(b) is to be construed as providing a 'ceiling' to the indemnity contemplated by the section – a 'ceiling' produced, as I have said, by the third party's notional liability at common law for pecuniary and non-pecuniary loss, and then reduced in accordance with the third party's share of responsibility for that loss."

Winneke P continued[23]:

> "Construed in this way, it is said, the court can identify, once and for all, an entitlement to indemnity against a negligent third party which will not exceed that party's proportionate responsibility for the worker's notional damages at common law for pecuniary and non-pecuniary loss. If the notional damages at common law, assessed in accordance with subs (3)(b), are less than the amounts of compensation already paid or

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21 (2000) 1 VR 246 at 252.

22 (2000) 1 VR 246 at 252.

23 (2000) 1 VR 246 at 252.

accrued and payable, then the entitlement to indemnity contemplated by the section remains the amount so assessed."

This construction of s 138 should be accepted. The question then is whether the amount which is fixed in this way as the sum to recoup the amount of compensation which already has been paid to the worker attracts the provision in s 60(1) of the Supreme Court Act for an award of damages in the nature of interest.

Section 60 of the Supreme Court Act

21 The point immediately turns upon the phrase "in any proceeding for the recovery of debt or damages" in sub-s (1) of s 60 of the Supreme Court Act. However, it is convenient to set out further provisions of that section. So far as presently material, the section states[24]:

"(1) The Court[25], on application in any proceeding for the recovery of debt or damages, must, unless good cause is shown to the contrary, give damages in the nature of interest at such rate not exceeding the rate for the time being fixed under section 2 of the **Penalty Interest Rates Act 1983** [(Vic)] as it thinks fit from the commencement of the proceeding to the date of the judgment over and above the debt or damages awarded.

(2) Nothing in this section –

(a) authorises the granting of interest on interest;

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24 The effect of sub-ss (3) and (4) of s 60 is to enjoin the Supreme Court not to allow interest in respect of so much of damages awarded as include amounts representing, in the terms of sub-s (3):

"(a) compensation in respect of liabilities incurred which do not carry interest as against the person claiming interest;

(b) compensation for loss or damage to be incurred or suffered after the date of the award; or

(c) exemplary or punitive damages".

Those provisions have no application to the present case.

25 The Court means the Supreme Court of Victoria (s 3(1)).

(b) applies in relation to any sum on which interest is recoverable as of right by virtue of any agreement or otherwise;

(c) affects the damages recoverable for the dishonour of a negotiable instrument;

(d) authorises the allowance of any interest otherwise than by consent on any sum for which judgment is entered or given by consent;

(e) applies in relation to any sum on which interest might be awarded by virtue of section 58 or 59; or

(f) limits the operation of any enactment or rule of law which, apart from this section, provides for the award of interest."

22 Paragraph (f) places s 60 in the context of the broad jurisdiction exercised by the Supreme Court. The Supreme Court is described in s 85(1) of the *Constitution Act* 1975 (Vic) as "the superior Court of Victoria with unlimited jurisdiction". That jurisdiction descends from various sources in addition to that of the courts of common law at Westminster.

23 In its *Second Interim Report*, presented in 1934 ("the 1934 Report")[26], the Law Revision Committee, the membership of which included Lord Wright, reported upon the state of the law relating to the right to recover interest in civil proceedings. Reference was made there to the awards of interest made in Chancery and Admiralty, in contrast to the position at common law. At common law, in the absence of statutory provision, where the plaintiff made a money claim for a debt or for damages, interest from the date when the cause of action accrued could be recovered only under an expressed or implied contractual provision or, in some instances, by the general custom of merchants or the custom of a particular trade or business[27].

24 Paragraph (f) of s 60(2) preserves the general law respecting the circumstances in which interest might be awarded. Thus, in some instances a

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26 Cmd 4546.

27 *Juggomohun Ghose v Manickchund* (1859) 7 Moore Ind App 263 at 282 [19 ER 308 at 315].

court of equity will award compound interest[28]. In other cases, examples of which were given in *Maguire v Makaronis*[29] and *The Commonwealth v SCI Operations Pty Ltd*[30], equitable relief might include an award against the defendant of simple interest, or be conditioned upon the plaintiff paying such interest at a reasonable rate.

25 Paragraph (e) of s 60(2) indicates that awards of interest under s 58 and s 59 fall outside the operation of s 60. Brief reference should be made to these provisions. The legislative history of ss 58, 59 and 60 in Victoria was traced by McInerney J in *The City Mutual Life Assurance Society Ltd v Giannarelli*[31] and, more recently, by Callaway JA in *Braeside Bearings Pty Ltd v H J Brignell & Associates (Boronia)*[32].

26 Section 58 provides that the Supreme Court, on application, must, unless good cause be shown to the contrary, allow interest to a creditor who recovers "a debt or sum certain", from the time when the debt or sum was payable by virtue of some written instrument and at a date or time certain, or otherwise from the time when the demand for payment was made. The result is that, in a case to which s 58 applies, the prohibition in par (a) of s 60(2) upon the granting of interest upon interest does not apply[33]. No reliance is placed by FAI and the Authority upon s 58.

27 Section 59 is descended from s 423 of the *Supreme Court (Common Law Procedure) Act* 1865 (Vic) ("the 1865 Act"). This in turn derived from s 29 of *The Civil Procedure Act* 1833 (UK) ("the 1833 UK Act"). Section 59 of the Supreme Court Act states:

> "(1) The [Supreme] Court, on application in all proceedings for trover or trespass concerning goods, must, unless good cause is shown to

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28 *Hungerfords v Walker* (1989) 171 CLR 125 at 148.

29 (1997) 188 CLR 449 at 475-477.

30 (1998) 192 CLR 285 at 316-317 [75].

31 [1977] VR 463 at 465-467.

32 [1996] 1 VR 17 at 21-22.

33 *The City Mutual Life Assurance Society Ltd v Giannarelli* [1977] VR 463 at 468.

the contrary, give damages in the nature of interest over and above the value of the goods at the time of the conversion.

(2) The [Supreme] Court, on application in all proceedings on any policies of insurance, must, unless good cause is shown to the contrary, give damages in the nature of interest over and above the money receivable."

A satisfied judgment in trover vests the property in the goods[34] and in that sense the damages are compensation for a compulsory purchase. Section 59 has no application to this litigation.

28 Section 60 may be traced to s 422 of the 1865 Act, which was based upon s 28 of the 1833 UK Act. However, s 28 dealt only with interest upon "all Debts or Sums certain" which were recovered in any action. Section 28 and other provisions which repeated its terms received a somewhat limited interpretation in the English courts and the Privy Council[35]. However, it is important to note that this was achieved through the interpretation of the phrases in s 28 "Sums certain" and "payable at a certain Time or otherwise"; it was not achieved by recourse to any particular body of learning concerning the pleading of the actions in debt and in assumpsit in England under the Hilary Term Rules of 1834 and before the *Common Law Procedure Act* 1852 (UK) ("the 1852 UK Act") abolished the need for specifying in the writ the form of action adopted. The distinctions between debt and assumpsit, with particular reference to liabilities arising upon statutes, are detailed by Sholl J in *Gilchrist v Dean*[36]. However, these distinctions do not dictate the construction of s 60 of the Supreme Court Act any more than they did that of s 28 of the 1833 UK Act.

29 Another stream of authority, likewise not determinative of the present case, flowed from the provision in s 25 of the 1852 UK Act. This enabled a

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34 *Seager v Copydex Ltd (No 2)* [1969] 1 WLR 809 at 813; [1969] 2 All ER 718 at 719.

35 *Juggomohun Ghose v Manickchund* (1859) 7 Moore Ind App 263 at 279-280 [19 ER 308 at 314]; *Merchant Shipping Co v Armitage* (1873) LR 9 QB 99 at 114; *London, Chatham and Dover Railway Co v South Eastern Railway Co* [1893] AC 429; *Maine and New Brunswick Electrical Power Co v Hart* [1929] AC 631 at 639-640; *Hungerfords v Walker* (1989) 171 CLR 125 at 137-139, 159-161.

36 [1960] VR 266 at 271. See also Chitty, *Treatise on Pleading*, 7th ed (1844), vol 1 at 110-115, 121-129, 349-352.

plaintiff to specially endorse a writ for a claim "for a Debt or liquidated Demand in Money" and authorised proceedings in default of appearance. The history of the meaning of the phrase "liquidated demand" as it appeared in the Rules of the Supreme Court of Victoria was detailed by Sholl J in *Alexander v Ajax Insurance Co Ltd*[37]. However, this analysis, and the recourse in it to the situation before the 1852 UK Act[38], was without reference to the decision of the English Court of Appeal in *Workman, Clark & Co Ltd v Lloyd Brazileño*[39]. This emphasised that the application of the relevant provision of the English Supreme Court Rules was not denied in a particular case merely because, under the old system of pleading, an action of debt, strictly so called and as distinguished from an action of *indebitatus assumpsit*, would not lie; the phrase "liquidated demand in money" does not take its meaning from the previous forms of pleading.

30 Some assistance in construing s 60(1) may be obtained, by way of analogy, from the decisions dealing with the availability of set-off under the Statutes of Set-off[40], where there were "mutual debts between the plaintiff and the defendant". This requirement of "debts" did not refer merely to a claim that could have been the subject of the old action of debt[41]. Rather, in *Stooke v Taylor*[42], Cockburn CJ said that the plea under the statutes was "available only where the claims on both sides [were] in respect of liquidated debts, or money demands which can be readily and without difficulty ascertained". More recently, in *Stein v Blake*[43], Lord Hoffmann said that this statutory or legal set-off "is confined to debts which at the time when the defence of set-off is filed were due and payable and either liquidated or in sums capable of ascertainment without valuation or estimation". The test formulated by Cockburn CJ encompasses the old indebitatus accounts, including claims in quantum meruit and quantum valebat where goods had been sold or services were performed

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37 [1956] VLR 436.

38 [1956] VLR 436 at 443-444.

39 [1908] 1 KB 968 at 976-977, 978, 980.

40 (1729) 2 Geo II c 22, s 13; (1735) 8 Geo II c 24, s 4.

41 Derham, *Set-Off*, 2nd ed (1996) at 9-11, 12-15.

42 (1880) 5 QBD 569 at 575.

43 [1996] AC 243 at 251.

without the agreement of a price and the claims were disputed on grounds which could easily be resolved in the litigation[44].

31 Further, the expression "[w]here any action is brought to recover a debt or damages" had appeared in O XXX r 1 of the Rules of Court comprising the First Schedule to the *Supreme Court of Judicature Act* 1875 (UK). That Order dealt with payment into court of a sum of money by way of satisfaction or amends and was adopted in various jurisdictions. The provision in the Rules of the Supreme Court 1958 (Tas), O XXIV r 1, was considered by this Court in *Crisp & Gunn Co-operative Ltd v Hobart Corporation*[45]. The Court (McTiernan, Taylor and Windeyer JJ) held that the expression "action to recover a debt or damages" in that Order extended to an action to recover compensation for the compulsory acquisition of land in the exercise of statutory powers. Their Honours stated[46] that the expression in the rule had "a composite significance" and that it "was doubtless intended to cover any action in which a claim for money, as distinct from other specific forms of relief, was made". Thus it was not to the point that because the title of the appellants to relief in the action for compensation did not depend upon proof of any wrongful act, the action was not strictly one for damages[47]. Nor was it correct to equate the phrase "an action to recover a debt", as used in the rule, with the old form of action of debt. Their Honours said[48]:

> "But the rule did not speak of and was never intended to refer to actions of debt; it spoke of an action to recover a debt or damages and the first part of this expression not only covered a field at least as wide as the old common money counts but extended to claims for money sums arising under specialties or statute. It is no answer to this proposition to say that the claim in question here was not for a fixed and certain sum as was requisite in the old action of debt[49]. Further, we cannot fail to observe that

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44 *Aectra Refining and Manufacturing Inc v Exmar NV* [1994] 1 WLR 1634 at 1645-1647 per Hirst LJ, 1648 per Hoffmann LJ.

45 (1963) 110 CLR 538.

46 (1963) 110 CLR 538 at 543.

47 cf *Mario Piraino Pty Ltd v Roads Corporation* [1991] 2 VR 534 at 536.

48 (1963) 110 CLR 538 at 543.

49 *Spain v Union Steamship Co of New Zealand Ltd* (1923) 32 CLR 138 at 142, 145, 158; *Segur v Franklin* (1934) 34 SR (NSW) 67; *Lagos v Grunwaldt* [1910] 1 KB 41.

in *Spencer's Case*[50] the question whether the action was an action to recover a debt or damages passed without question. We have no doubt that O XXIV applied to an action such as the present."

32 This reasoning is persuasive in the interpretation of s 60(1) of the Supreme Court Act. The construction of the expression in question in *Hobart Corporation* as having a composite significance indicates the better construction of s 60(1).

33 The phrase "any proceedings … for the recovery of any debt or damages" appeared in s 3(1) of the *Law Reform (Miscellaneous Provisions) Act* 1934 (UK) ("the 1934 UK Act"). This legislation implemented the 1934 Report. Section 3(2) repealed ss 28 and 29 of the 1833 UK Act. Reference was made in the Report to the limited cases in which interest could be recovered "[w]hen a plaintiff makes a money claim for a debt or for damages" (par 3). The stated objective of the recommendation in the Report (par 8) had been:

> "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."

The phrase in s 60(1) of the Supreme Court Act "any proceeding for the recovery of debt or damages" should be read against this view of the mischief to be addressed.

34 Section 3(1) of the 1934 UK Act[51] conferred a discretion upon the court to make an order for interest and stipulated the commencement of the period as

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50 *Spencer v The Commonwealth* (1907) 5 CLR 418.

51 The sub-section stated:

> "In any proceedings tried in any court of record 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 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 section –
>
> (a) shall authorise the giving of interest upon interest; or
>
> (b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or

(Footnote continues on next page)

being when the cause of action arose; on the other hand, s 60 obliges the Supreme Court to make an order thereunder unless good cause is shown to the contrary and fixes the commencement date as the commencement of the proceeding. Nevertheless, the same expression as that in the 1934 UK Act is used to identify the nature of the proceeding to which the legislation applies. Moreover, the recommendation by the Chief Justice's Law Reform Committee[52] on *Interest on Debt and Damages* (which preceded the 1961 *Report from the Statute Law Revision Committee upon Interest on Judgments*) that the new Victorian legislation should apply "only to common law claims for debt or damages" was not implemented in the terms of the Victorian legislation.

35 What may be a somewhat narrower view of the scope and content of the phrase "any proceeding for the recovery of debt or damages" than that taken in *Hobart Corporation* is indicated by consideration of three English decisions upon the 1934 UK Act. In *The Aldora*[53], Brandon J held that a claim by salvors for remuneration was a claim analogous in nature to a common law claim on a quantum meruit and was a claim for a debt within the meaning of the 1934 UK Act. His Lordship said[54]:

> "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 obliged 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 section 74 of the Harbours, Docks and Piers Clauses Act 1847 [(UK)]."

(c) shall affect the damages recoverable for the dishonour of a bill of exchange."

52 Dated 25 November 1959; see *Braeside Bearings Pty Ltd v H J Brignell & Associates (Boronia)* [1996] 1 VR 17 at 21.

53 [1975] QB 748.

54 [1975] QB 748 at 751.

36 In *BP Exploration Co (Libya) Ltd v Hunt (No 2)*[55], Robert Goff J considered the application of the 1934 UK Act to claims under the *Law Reform (Frustrated Contracts) Act* 1943 (UK). Section 1(2) of that statute provided that sums paid in pursuance of a contract thereafter frustrated were to be recoverable from the payee as money received by the payee for the use of the payer. His Lordship held that, when the court made an order for recovery of money under s 1(2), it had the power to award interest under the 1934 UK Act because the proceedings were for the recovery of a debt. Speaking of s 1(2), his Lordship said[56]:

> "It is clear that a claim under the subsection is a statutory form of the old action for money had and received, though nowadays it would be more appropriate to describe it as a statutory claim in restitution. Now the action for money had and received is one of the old indebitatus counts; and an indebitatus count only lay for the recovery of a debt[57]. One form of the old action for money had and received was the action to recover money paid for a consideration which wholly failed: such an action was certainly an action for the recovery of a debt, and I have no doubt that in a case such as *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*[58] the court had power to award interest."

A claim also was made in *BP* under s 1(3). This stated:

> "Where any party to the contract has, by reason of anything done by any other party thereto in, or for the purpose of, the performance of the contract, obtained a valuable benefit (other than a payment of money to which [sub-s 1(2)] applies) before the time of discharge, *there shall be recoverable* from him by the said other party such sum (if any), not exceeding the value of the said benefit to the party obtaining it, *as the court considers just*, having regard to all the circumstances of the case …". (emphasis added)

37 With respect to s 1(3), Robert Goff J said[59]:

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55 [1979] 1 WLR 783; [1982] 1 All ER 925.

56 [1979] 1 WLR 783 at 835; [1982] 1 All ER 925 at 966.

57 See Bullen and Leake, *Precedents of Pleadings*, 3rd ed (1868) at 36.

58 [1943] AC 32.

59 [1979] 1 WLR 783 at 836; [1982] 1 All ER 925 at 966-967.

> "The closest analogy is a quantum valebat or quantum meruit claim; there, the cause of action arises when the goods are sold and delivered, or the services rendered, though the quantification of the recoverable sum may not be known until the court gives judgment. Now the old quantum valebat and quantum meruit counts were superseded by the indebitatus counts[60]; they too were actions for the recovery of a debt – the amount of the debt being deemed to be certain, on the ground that it was capable of being ascertained. … In my judgment, a claim under section 1(3) of the Act of 1943 is, in general terms, a statutory quantum meruit claim. It is, therefore, an action for the recovery of a debt, and the court has power under [the 1934 UK Act] to award interest".

Appeals to the Court of Appeal[61] and to the House of Lords[62] were dismissed. The House of Lords[63] approved and applied the decision in *The Aldora*[64]. It held that Robert Goff J had had the power to order the payment of interest on the principal sums he awarded.

38 In the meantime, the English Court of Appeal had held in *In re F P and C H Matthews Ltd (In Liquidation)*[65] that a claim by a liquidator to recover a fraudulent preference under the *Bankruptcy Act* 1914 (UK) was a proceeding for the recovery of a debt within the meaning of the 1934 UK Act. The Court rejected the argument that the nature of the liquidator's right was purely statutory, that the only way the matter could come before the court was for a declaration, that the payment of money was consequential and that, as a result, there was no debt within the meaning of the 1934 UK Act[66].

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60 See Bullen and Leake, *Precedents of Pleadings*, 3rd ed (1868) at 35.

61 *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1981] 1 WLR 232; [1982] 1 All ER 925.

62 *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1983] 2 AC 352.

63 [1983] 2 AC 352 at 373.

64 [1975] QB 748 at 751.

65 [1982] Ch 257.

66 See the argument of counsel [1982] Ch 257 at 265.

Conclusions

39 The Authority and FAI, as their preferred submission, contend that the reasoning in the English decisions respecting the construction of the 1934 UK Act is applicable to s 60 of the Supreme Court Act. That submission should be accepted, but is not necessarily determinative of this appeal in their favour.

40 The meaning given by Brandon J in *The Aldora*[67] to the term "debt" in the 1934 UK Act is inconsistent with the proposition that what is identified in s 60 is an action for a fixed and certain sum as was required by the old action of debt. Section 60 should be construed without such a limitation to its scope.

41 However, Esso submits that, even if the reasoning in the English cases be accepted, the result is to exclude a negative without indicating in any positive sense the content of the phrase "any proceeding for the recovery of debt or damages" in s 60. That criticism may be well founded, but is not decisive of the outcome of this appeal. This is because the phrase should be understood as a composite expression. It embraces any proceeding in which a claim for money is made, in contrast to declaratory relief and claims for specific forms of relief such as mandatory injunctions, charging orders and orders for specific performance. The circumstance that relief of that description is sought in addition to a money claim does not deny the application of s 60 in respect of that money claim. The phrase in s 60 is not "in any proceeding *only* for the recovery of debt or damages"[68]. Thus, the claim in this litigation for declaratory relief to determine the "ceiling" did not take the case outside s 60 with respect to the money claims which were made.

42 Some of the cases in which interest might be awarded at general law and independently of statute may not answer the description of a proceeding for the recovery of debt or damages. An account of profits or order for the payment of equitable compensation may be examples. However, as indicated earlier in these reasons, par (f) of s 60(2) preserves the operation of the general law in such cases. It is unnecessary to consider whether the reasoning of the House of Lords in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*[69] applies to s 60. That reasoning would suggest that, in a case where an order is

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67 [1975] QB 748 at 751.

68 cf *Moon v Dickinson* (1890) 63 LT (NS) 371 at 372.

69 [1996] AC 669.

made under s 60, equity, in its auxiliary jurisdiction, may not supplement the statute by providing for compound interest. Here, the statute in terms (par (a) of s 60(2)) provides that nothing in it authorises the granting of interest on interest.

43 Finally, Esso referred to various sections in the Compensation Act, of which s 138 is not one, which do provide for payment of interest in respect of various obligations and liabilities created by the statute[70]. It was then submitted that these provisions amount to an exhaustive statement as to any legislative entitlement to interest with respect to any entitlements created by the Compensation Act. The result is said to be to oust what would otherwise be any operation of s 60 of the Supreme Court Act[71].

44 In support of that proposition, Esso referred to *Kartinyeri v The Commonwealth*[72]. In that case there was some consideration of the effecting of statutory amendment by implication where, although the later statute contains no textual identification of the earlier law, actual contrariety is clearly apparent. The provisions in the Compensation Act which stipulate for interest do so in each case with respect to particular obligations and liabilities that the statute has created. There is no contrariety between s 60 and a provision in the Compensation Act which does not itself provide for interest. Nor is the present case, as was that considered in *Kartinyeri*, one where an earlier law is amended by a later statute which does not identify the first text but produces the need to conflate the two texts to arrive at the combined legal meaning. Rather, the submission that is made in this case seeks to expand notions of implied repeal by the adoption of principles developed in a quite different context. That is the "covering the field" doctrine established in the decisions of this Court for the operation of s 109 of the Constitution.

45 One further submission of Esso requires consideration. The point is made that, at the time the payments of compensation were made by the Commission, that is to say between 10 January 1989 and 1 December 1992, s 138 was in a different form to that indicated earlier in these reasons as its form at the date of trial. However, in its earlier manifestation, s 138 did not differ in any respect

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70 Sections 33A(3), 92(7), 92A(12), 92C(7), 114D(5), 114E(1), 129F(4), (5), (8), (9), 129G(11), (12), (14), 152(2), 249A(1), (2).

71 cf *The Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285 at 320 [85].

72 (1998) 195 CLR 337 at 353-354 [9]-[10], 369 [48], 375-376 [66]-[69].

which would require any different result in the application of the reasoning adopted earlier in these reasons with respect to the legislation[73].

Orders

46 The appeal should be allowed with costs.

47 Whilst the Court of Appeal was in error in deciding that it was not open to make any award of interest under s 60, there remains for consideration by the Court of Appeal further submissions by Esso. It remains to be determined if the trial judge was in error in awarding interest at the rates which he did or whether, in the light of the assessment by the trial judge of notional damages, his order amounted to an award of compound interest contrary to par (a) of s 60(2) of the Supreme Court Act[74].

48 Consequently, the matter should be remitted for consideration by the Court of Appeal, consistently with the reasons of this Court, of any remaining grounds of appeal and of any appropriate variation to its orders made on 19 April 2000 and authenticated on 15 May 2000.

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73 Before 1 December 1992, s 138 stated:

> "Where any injury or a death for which compensation has been paid by the Commission, a self-insurer or an employer … was caused under circumstances creating a legal liability in a third party to pay damages in respect of the injury or death, the Commission, the self-insurer or the employer is entitled to be indemnified by the third party for such proportion of the amount of the compensation paid as is appropriate to the degree to which the injury or death was attributable to the act, default or negligence of the third party … but the liability of the third party under this section shall not exceed the amount for which, but for this Act, the third party would be liable to pay to the worker."

74 (2000) 1 VR 246 at 258.

49 KIRBY J. The issue in this appeal[75] is whether a statutory authority and an insurer, obliged to pay compensation under the *Accident Compensation Act* 1985 (Vic) ("the Accident Compensation Act"), are entitled to recover from a third party legally liable within the meaning of that Act, an amount of damages in the nature of interest.

50 The foundation for the recovery of such interest was said to be the *Supreme Court Act* 1986 (Vic) ("the Supreme Court Act"), s 60(1). That sub-section allows for recovery of damages in the nature of interest upon an application made in any proceedings in the Supreme Court of Victoria for "the recovery of debt or damages". The Court of Appeal held that the proceedings here in question, although in the Supreme Court and upon an application, were not for the "recovery of debt or damages" but for the recovery of a particular variety of statutory indemnity. The statutory authority and the insurer, by special leave, have appealed to this Court. They claim reversal of the judgment of the Court of Appeal and restoration of the interest which they were awarded at trial.

The facts

51 Esso Australia Ltd ("the respondent") was the occupier of an oil platform in Bass Strait. It contracted with a company to provide employees of that company to perform work on the platform for the respondent. The respondent agreed to provide accommodation on the platform for such employees. Pursuant to this arrangement an employee, Mr Kazimer Wsol, was present on the platform. On 10 January 1989, he fell from a bunk and injured his back. The resulting injuries caused him to be severely incapacitated. He made a claim for compensation. Under the Accident Compensation Act, Victorian WorkCover Authority ("VWA") (the first appellant) and FAI Workers' Compensation (Vic) Pty Ltd ("FAI") (the second appellant) were obliged to make payments of compensation to Mr Wsol in respect of his injuries. By the time the present action was tried, it was agreed that compensation of approximately $115,000 had been paid by VWA and approximately $220,000 by FAI.

52 The appellants commenced proceedings in the Supreme Court against the respondent alleging that it was liable to indemnify them, in accordance with s 138 of the Accident Compensation Act, in respect of the payments made by them to or on behalf of Mr Wsol. The appellants also sought a declaration in respect of future payments. Their claims were based on the contention that the injuries suffered by Mr Wsol had occurred "under circumstances creating a legal liability" in the respondent to pay damages.

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75 From a judgment of the Supreme Court of Victoria (Court of Appeal): *Esso Australia Ltd v Victorian WorkCover Authority* (2000) 1 VR 246 ("*Esso*").

53 The respondent denied liability. The matter went to trial. The primary judge (Cummins J) found that the respondent was negligent in the circumstances occasioning Mr Wsol's injuries. His Honour apportioned responsibility as to 80% against the respondent and as to the remaining 20% against Mr Wsol's employer. He found that there was no contributory negligence on the part of Mr Wsol. In respect of the compensation paid by the appellants to the date of the judgment, the primary judge ordered the respondent to pay VWA interest of $7,206.66 in addition to the sum paid by way of indemnity. He also ordered the respondent to pay FAI interest fixed at $80,600.22 in addition to the amount ordered to be paid as indemnity for the compensation paid to Mr Wsol.

54 In relation to future payments of compensation, the primary judge made orders that were altered by the Court of Appeal. That aspect of the Court of Appeal's decision is not challenged in this Court. Nor is this Court concerned with a challenge in respect of the primary judge's apportionment of blame between the respondent and Mr Wsol's employer[76]; the calculation of the amounts of the respective indemnities recoverable under the statutory formula; or a concurrent dispute decided with the present matter[77]. The substantial agreement about the facts facilitates the consideration by this Court of the questions of statutory interpretation that alone have to be resolved.

The applicable legislation

55 The two statutory provisions that need to be considered are s 138 of the Accident Compensation Act and s 60 of the Supreme Court Act.

56 At the relevant time, s 138 of the Accident Compensation Act provided:

"Indemnity by third party

(1) Where an injury … for which compensation has been paid … by the Authority, an authorised insurer, a self-insurer or an employer was caused under circumstances creating a legal liability in a third party to pay damages … the Authority, authorised insurer, self-insurer or employer is entitled to be indemnified by the third party in accordance with this section.

…

(3) the amount which a third party is required to pay as indemnity under sub-section (1) is the lesser of –

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76 *Esso* (2000) 1 VR 246 at 253-254 [20]-[21].

77 *Victorian WorkCover Authority v Coats Paton Pty Ltd* (2000) 1 VR 246.

(a) the amount of compensation paid or payable under this Act in respect of the injury or death; and

(b) an amount calculated in accordance with the formula –

$$[A - (B + C)] \times \frac{X}{100}$$

where –

X is the extent, expressed as a percentage, whereby the third party's act, default or negligence caused or contributed to the injury …;

A is the amount of damages … for pecuniary loss and non pecuniary loss which the third party is or would have been liable to pay in respect of the injury … were it not for the provisions of this Act …;

B is the amount recovered or recoverable by the Authority, the authorised insurer, the self-insurer or the employer … from the Transport Accident Commission …;

C is the amount paid by the third party in respect of the injury … to the worker … under any settlement of, or judgment in, an action by the worker … against the third party.

(4) Judgment against or settlement by a third party in an action by a worker … in respect of an injury … referred to in sub-section (1) does not eliminate or diminish the right of indemnity given by this section, except to the extent provided in this section."

57 I have included the detail of the foregoing formula because of the reliance placed by the respondent on the particularity of the provision for the statutory indemnity afforded by s 138 of the Accident Compensation Act. The applicable terms of s 60 of the Supreme Court Act appear in the reasons of the other members of the Court[78]. There is no need for me to repeat them.

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78 Reasons of Gleeson CJ, Gummow, Hayne and Callinan JJ ("the joint reasons") at [21]-[22].

58 The mention in s 60(2)(e) of the Supreme Court Act of ss 58 and 59 concerns provisions governing the award of interest[79]. By s 58(1) of that Act the Supreme Court is obliged, in a proceeding in which "a debt or sum certain is recovered", to allow interest to the creditor unless good cause is shown to the contrary. By s 58(3) a debt or sum payable or a date or time is to be taken to be certain "if it has become certain". By s 59, on applications "in all proceedings for trover or trespass concerning goods", the Supreme Court is required, unless good cause is shown to the contrary, to give "damages in the nature of interest over and above the value of the goods at the time of the conversion" (s 59(1)). A specific provision is made for "all proceedings on any policies of insurance". This requires the Court, unless good cause is shown to the contrary, to give "damages in the nature of interest over and above the money receivable" (s 59(2)).

The decision of the Court of Appeal

59 The reasons for the decision of the Court of Appeal were given by Winneke P[80]. His Honour recorded the submission of the respondent as being that "the proceeding before the judge was not one 'for the recovery of debt or damages', but rather was a claim to enforce an entitlement to indemnity created by statute which, on no view of the authorities, could be comprehended by the words 'proceeding for the recovery of debt or damages' as contained in s 60(1) of the Supreme Court Act"[81]. Winneke P concluded that this submission was correct. After referring to the structure of s 138 and the "statutory scheme" for indemnity by negligent third parties, his Honour went on[82]:

> "So analysed it can be seen, in my opinion, that the statutory entitlement to indemnity conferred by the section is not to be equated with the concept of a right to recover debt or damages within the meaning of s 60 of the Supreme Court Act. The person who is seeking to enforce his entitlement is not bringing proceedings to recover 'debt or damages'. Rather he is enforcing a statutory right which is sui generis and which, if established, will have as one of its incidents a right to call for payments already made in partial satisfaction of those rights."

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79 See joint reasons at [25]-[27].

80 Tadgell JA and Chernov JA agreed without separate reasons: *Esso* (2000) 1 VR 246 at 259 [32], [33].

81 *Esso* (2000) 1 VR 246 at 256 [26].

82 *Esso* (2000) 1 VR 246 at 257 [27].

60 Winneke P acknowledged that s 60(1) of the Supreme Court Act should be given a "broad meaning" which comprehended "claims for recovery of damages or compensation in a far wider field than actions to recover damages in tort or contract"[83]. He accepted that interest had been held to be recoverable, both in Australia and in England, in respect of certain statutory claims[84]. However, he concluded those cases to be distinguishable from the particular statutory indemnity provided by s 138 of the Accident Compensation Act. To categorise the action brought under that section as one "to recover debt or damages" would, in his Honour's opinion, have "distorted" the real character of such proceedings[85]. He contended that this conclusion was supported both by the absence of any judicial authority upholding such an entitlement and by particular provisions in the Accident Compensation Act allowing for the payment of interest, which entitlement was missing from the language of s 138.

The issues

61 Having regard to the confined grounds of appeal and to a notice of contention filed on behalf of the respondent, two issues have to be decided:

(1) Does the proceeding brought by the appellants in the Supreme Court of Victoria for recovery of the indemnity provided by s 138 of the Accident Compensation Act fall within the phrase "any proceeding for the recovery of debt or damages" in s 60 of the Supreme Court Act?

(2) If the answer to that question is in the affirmative, is a different conclusion required by consideration of the terms in which s 138 of the Accident Compensation Act is expressed, in so far as that section (unlike others in that Act) omits to make provision for a right to interest and constitutes, in effect, (as it was suggested) a code providing exclusively the indemnity recoverable by law?

Statutory construction and legislative purpose

62 Many of the submissions of the parties in this Court, and apparently in the Court of Appeal, were addressed to decisions of courts in Australia and overseas

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83 *Esso* (2000) 1 VR 246 at 258 [28].

84 He referred to *Crisp & Gunn Co-operative Ltd v Hobart Corporation* (1963) 110 CLR 538; *Borg Warner (Australia) Ltd v Zupan* [1982] VR 437; *Lumley Life Ltd v IOOF of Victoria Friendly Society* (1991) 36 FCR 590 and *Mario Piraino Pty Ltd v Roads Corporation* [1991] 2 VR 534.

85 *Esso* (2000) 1 VR 246 at 258 [28].

thought to cast light on the foregoing issues. It was appropriate to call to notice the observations of judges concerning identical statutory language or language sufficiently similar to warrant attention. As will be shown, by reference to earlier statutory provisions for the award of interest, s 60 of the Supreme Court Act has a long history.

63 However, it is important when a task of statutory interpretation is presented, to recognise the primacy of the duty of the decision-maker to give effect to the language of the legislature that has enacted the provision in question, so as to carry into effect the purpose of the lawmakers, as such purpose emerges from the provisions enacted. There is a modern tendency to concentrate on judicial exposition of legal concepts in preference to analysis of statutory provisions that contain the applicable law. This tendency should be resisted[86].

64 Judicial elaboration, analysis of the history of legislation and scrutiny of parliamentary debates and antecedent materials are often useful to the task of statutory interpretation. But they are adjuncts to the primary duty of the person with the obligation of interpretation of the statute, to construe its words viewed in their context and for the purpose for which the provision in question appears to have been enacted.

65 The Court of Appeal did not make this mistake. The reasons of Winneke P indicate, quite clearly, that his Honour approached the task as one of elucidating the disputed phrase in s 60(1) of the Supreme Court Act. He analysed the operation of that phrase in its relation to s 138 of the Accident Compensation Act, affording the statutory indemnity. It being common ground that there was no binding authority directly on the point, Winneke P correctly referred to the arguments of the parties, and the authorities which they had cited. But he did not elevate these considerations to an importance they did not deserve.

66 Given the issues that were before the Court of Appeal, it is perhaps surprising that that Court's attention was not drawn to the decision of this Court in *The Commonwealth v SCI Operations Pty Ltd*[87] ("*SCI*"). That case contained the most recent analysis by this Court of the approach to be taken to problems of the kind under consideration. There, as here, there was an issue as to the proper construction of a particular statutory scheme for the recovery of sums paid and its relationship to a general statutory provision for the award of interest by the court

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86 cf *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue* (2001) 181 ALR 307 at 319 [46]-[47], 320 [51].

87 (1998) 192 CLR 285.

in which the proceedings were brought[88]. Some of the issues in the present appeal bear similarities to those considered in *SCI*.

67 Taking the two statutory provisions principally in question in this appeal, and considering their meaning and operation together, the entitlement of the appellants to the recovery of interest would appear to be established in the language of those provisions, especially having regard to their apparent objectives. The Accident Compensation Act did not provide expressly for a particular means to be used by a party claiming the statutory indemnity provided by s 138, whereby the indemnity sum could be recovered. However, obviously enough, it was intended that such recovery would be enforceable. Any other view of s 138 would render it impotent in the face of resistance on the part of the third party found to be liable. Therefore, the Accident Compensation Act clearly envisaged an action at common law for the recovery of the money sum found to be payable. But is the proceeding to recover such sum one that can be described as "for the recovery of debt or damages"?

68 To answer that question, looking no further than the provisions of s 60 and the accompanying sections (ss 58 and 59)[89] in the Supreme Court Act, it is strongly arguable that interest, as contemplated by s 60, would be payable on the amount recovered by way of indemnity. That amount would certainly be calculated in accordance with s 138 of the Accident Compensation Act. Although not, when the proceedings were commenced, a liquidated "sum certain", it would ultimately be a sum apt to be reduced to a sum of money suitable for the calculation of "damages in the nature of interest" at the rate fixed in accordance with the governing legislation[90]. It would not fall within the particular provisions of s 59, nor would it fall outside s 60(1) by virtue of any of the exclusions in s 60(2). The "proceedings" being in "[t]he Court" referred to in s 60(1) (namely the Supreme Court of Victoria) and an "application" for interest having been made in those proceedings, the provisions of s 60(1) were, on the face of things, engaged. At least, this was so unless a narrow construction were given to the phrase "the recovery of debt or damages".

69 In considering whether a narrow construction should be given to that phrase, it would be relevant to take into account at least three considerations. First is the obligatory language ("must") in which the entitlement to interest is expressed. Secondly, the beneficial purpose of providing, with particularity

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88 *Federal Court of Australia Act* 1976 (Cth), s 51A.

89 See joint reasons at [21]-[27] where the terms of these sections are set out or described.

90 *Penalty Interest Rates Act* 1983 (Vic), s 2.

(ss 58 and 59) and then more generally (s 60), for the award of interest to compensate parties who have been obliged to take "proceedings" to recover a money sum and who in the meantime have been kept out of moneys which they could otherwise have used or upon which they could otherwise have earned interest. Thirdly, on its face, s 60 is one to be given a broad construction because it appears as a general part of the applicable legislation enacted for the award of interest in Supreme Court proceedings. Of their nature, such proceedings will cover an extremely wide variety of types and subject matters. Especially by juxtaposition with the particularity of ss 58 and 59 of the Supreme Court Act, the general provisions of s 60 are obviously intended to have a broad application. All of these are reasons why, applying orthodox canons of statutory construction, the phrase "proceeding for the recovery of debt or damages" would not be given a narrow meaning.

70 To this reasoning, particular to the language of the legislation in question, might be added considerations of a more general kind concerning the interpretation of statutory provisions affording entitlements to interest. Long before the statutory indemnity provided by the Accident Compensation Act was enacted, questions arose in the United Kingdom about the application of statutory entitlements to interest upon sums recovered under express or implied contracts of indemnity. The Court of Appeal of Ireland, for example[91], allowed interest in such a case. In *Ex parte Bishop; In re Fox, Walker & Co*[92] it was held that the very purpose of an "indemnity" was to put the person who is to be indemnified in the same position "as if the act against which he is to be indemnified had been done by the person who is to indemnify him at the time when it ought to have been done". In other words, there was nothing antithetical in an indemnity to the notion of the recovery of interest. On the contrary, the provision of interest tends to further the purpose of such an indemnity.

71 Inflation erodes the value to parties kept out of their moneys of the sum ultimately recovered in proceedings in a court. This is why Lord Wilberforce explained that statutory interest on judgments was intended to do no more than to "compensate [the party successful in litigation] for being kept out of [the] 'real' value" of money[93]. Especially in commercial transactions, between parties well able to use funds found to be owing to their financial advantage, the provision of interest pursuant to statute is the fulfillment of the general legislative purpose to

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91 *In re Swan's Estate* (1869) IR 4 Eq 209 referred to in *Ex parte Bishop; In re Fox, Walker & Co* (1880) 15 Ch D 400 at 422 per Cotton LJ.

92 (1880) 15 Ch D 400 at 422 per Cotton LJ.

93 *Pickett v British Rail Engineering* [1980] AC 136 at 151; cf *Coughlan v Westminer Canada Ltd* (1994) 127 NSR (2d) 241.

provide the power and duty to courts to award such interest[94]. Therefore, on the face of things, the provision to the appellants of interest upon the sum recovered by them in the present proceedings in the Supreme Court would represent no more than the fulfillment of the general objective of enacting the provisions of s 60 as part of the Supreme Court Act.

72 It follows then that the preferable construction of the words "proceeding for the recovery of debt or damages" is one that would include a proceeding to recover the statutory indemnity for which s 138 of the Accident Compensation Act provides. Any other view of s 60 of the Supreme Court Act would needlessly confine its operation and frustrate the achievement of the purpose exhibited by its language. Unless a closer examination of s 138 of the Accident Compensation Act required the conclusion that that section was an exhaustive statement of the recovery to which the statutory authority and the insurer were entitled under that Act against a third party, it would follow that the ordinary meaning of the words used in s 60 would apply. The appellants would be entitled to interest. The appeal would have to be allowed.

73 To meet the foregoing conclusions, based simply on the language and apparent purpose of s 60 of the Supreme Court Act, the respondent advanced four basic arguments, which I will now set out.

The arguments of the respondent

74 *Proceedings not for "debt" or "damages"*: The respondent first submitted that the proceedings which the appellants had brought against it were not "for the recovery of debt or damages". They were not for the recovery of a "debt" because, at the time the proceedings were commenced, the amount payable upon the statutory indemnity provided by s 138 of the Accident Compensation Act was not known or ascertained. The amount payable was still dependent upon such ascertainment. It required the interposition of a judgment in relation to various considerations as to liability. Those considerations included the resolution of issues concerning whether there was contributory negligence on the part of the worker and whether there should be contribution on the part of some other third party also liable and, if so, in what proportions.

75 The respondent submitted that the reference to "debt" in s 60 of the Supreme Court Act took its meaning from its context. That meaning was one referable to the proceedings of a court. In that context, the word was to be given

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94 *Panchaud Freres SA v R Pagnan & Fratelli* [1974] 1 Lloyd's Rep 394 at 411 per Lord Denning MR; *New Brunswick Telephone Co Ltd v John Maryon International Ltd* (1982) 43 NBR (2d) 469 at 526-527 per La Forest JA; 141 DLR (3d) 193 at 238-239.

a technical meaning. Such a meaning was derived from the long history of the action on the writ of debt at common law[95]. Such proceedings were not at large. They were constituted by "an action for a sum certain"[96]. Because until the issues of entitlement were finally settled, the recovery by the appellants on the indemnity provided by s 138 of the Accident Compensation Act was uncertain, the proceedings could not be described as being "for the recovery of debt".

76 Nor, according to the respondent, could they be described as for the recovery of "damages". The worker might be entitled to damages against the respondent in an action of tort. A claimant for indemnity under a contract might describe the proceedings as for "the recovery of damages". But what the appellants had initiated were proceedings of a different character. According to this argument, damages were either liquidated or unliquidated. Cases concerned with contractual indemnities were therefore distinguishable from those involving indemnity under a statute such as that in question here. The respondent argued that, in its context, the phrase "debt or damages" was addressed to those concepts, as conventionally understood in legal proceedings. True, the words were not confined to the recovery of damages in a common law action. They would extend to the recovery of equitable damages[97]. But they did not extend to recovery of the indemnity for which s 138 of the Accident Compensation Act provided.

77 *Statutory indemnity is sui generis*: The respondent next supported the Court of Appeal's conclusion that proceedings brought in the present case were to be treated as "sui generis"[98]. According to this argument, the proceedings amounted, in effect, to the enforcement of a particular statutory cause of action[99]. Just as, for other purposes, such a statutory cause of action had been held to fall outside the traditional concept of an action in contract or tort[100] so, in the present context, it fell outside the scope of a "proceeding for the recovery of debt or damages". It was no more, nor less, than what it purported to be, namely a proceeding to recover a money sum ascertained by reference to a rather detailed statutory provision. The Accident Compensation Act might have provided expressly for the recovery or compensation entitlements as a "debt", or for that

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95 Simpson, *A History of the Common Law of Contract* (1975) at 53.

96 *Crisp & Gunn Co-operative Ltd v Hobart Corporation* (1963) 110 CLR 538 at 543.

97 cf *Mario Piraino Pty Ltd v Roads Corporation* [1991] 2 VR 534 at 536.

98 *Esso* (2000) 1 VR 246 at 257 [27].

99 cf *Accident Compensation Commission v Haynes* [1992] 1 VR 691.

100 *Borg Warner (Australia) Ltd v Zupan* [1982] VR 437 at 442.

matter as "damages". Yet Parliament had refrained from doing this[101]. To attempt to squeeze the statutory indemnity into the ordinary connotation of the words "debt or damages" would be to distort those words, not to apply them.

78 *The Victorian interest provision is distinct*: The respondent next pointed to the peculiarities of the provisions for the recovery of interest in the Supreme Court Act. It contrasted those provisions with the broader formulation used in the interest recovery provisions applicable in other superior courts in Australia[102]. Generally speaking, these provisions appear in terms similar to those appearing in s 51A(1) of the *Federal Court of Australia Act* 1976 (Cth). That sub-section was considered in *SCI*[103]. The sub-section provides (relevantly):

> "In any proceedings for the recovery of any money (including any debt or damages or the value of any goods) in respect of a cause of action that arises after the commencement of this section, the Court or a Judge shall, upon application, unless good cause is shown to the contrary, either:
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> (a) order that there be included in the sum for which judgment is given interest …; or
>
> (b) without proceeding to calculate interest … order that there be included in the sum for which judgment is given a lump sum in lieu of any such interest."

79 The respondent submitted that provisions such as this, describing the qualifying "proceedings" as being "for the recovery of any money", stood in marked contrast to s 60 of the Supreme Court Act. In the former, the reference to proceedings for "any debt or damages" appears as no more than an illustration of the kinds of proceedings with which the provision is concerned. In the case of the Victorian section, on the other hand, the traditional language of "debt or damages" has been retained. It would have been open to the Victorian Parliament, so the argument ran, to copy provisions such as those of s 51A of the *Federal Court of Australia Act*. It had refrained from doing so. The consequential inference was that the entitlement to interest in Victoria was a more limited one. The fact that the proceedings were for the recovery of a

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101 cf *Chippendale Printing Co Pty Ltd v Commissioner of Taxation* (1996) 62 FCR 347 at 353.

102 *Supreme Court Act* 1970 (NSW), s 94; *Supreme Court Act* 1995 (Q), s 47; *Supreme Court Act* 1935 (SA), s 30C; *Supreme Court Civil Procedure Act* 1932 (Tas), s 34; *Supreme Court Act* 1935 (WA), s 32; *Supreme Court Act* 1933 (ACT), s 69; *Supreme Court Act* (NT), s 84.

103 (1998) 192 CLR 285. The sub-section is set out at 295 [9], 299 [21], 314-315 [68].

money sum was not sufficient. Instead, traditional criteria had been retained. These should be given their traditional meaning.

80 *Provisions for interest expelled the general power*: Finally, in support of its notice of contention, the respondent advanced an argument founded in the canon of construction *expressio unius est exclusio alterius*[104]. According to this argument the general provisions in s 60 of the Supreme Court Act had to be read as subject to the special and particular provisions of s 138 of the Accident Compensation Act[105]. The respondent relied upon the proposition that where a statute creates a novel right, the remedy provided by the statute is, on the face of things, exclusive of other entitlements under the general law[106].

81 The principle which the respondent invoked for this argument is sometimes explained in terms of the suggestion that particular provisions enacted to deal with a special case are to be regarded as "a code". Where this is shown, those provisions cover the entirety of the recovery that may be enforced by proceedings at law to the exclusion of other, more general provisions[107]. To decide whether a particular law, by its language and purpose, excludes the operation of remedies of general application, it is necessary to pay close attention to the scheme and apparent purpose of the particular provisions. From them the decision-maker may derive a conclusion that those provisions represent the entirety of the law on the relief that is to be afforded. Alternatively, the decision-maker may conclude that the particular provisions may be read in conjunction with other provisions of general application.

82 From time to time different judges, looking at the same legislative provisions, reach different conclusions on such questions. They do so because

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104 Express mention of one thing implies the exclusion of the other; cf *Roughley v New South Wales; Ex parte Beavis* (1928) 42 CLR 162 at 198; *Houssein v Under Secretary of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88 at 94; *State Bank (NSW) v Commonwealth Savings Bank* (1984) 154 CLR 579 at 582-583; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 575.

105 *SCI* (1998) 192 CLR 285 at 326-327 [97.4].

106 cf *Doe d Murray, Lord Bishop of Rochester v Bridges* (1831) 1 B & Ad 847 at 859 [109 ER 1001 at 1006]; *Josephson v Walker* (1914) 18 CLR 691 at 701; *Mallinson v Scottish Australian Investment Co Ltd* (1920) 28 CLR 66 at 70-71; *North Wind Pty Ltd v Proprietors – Strata Plan 3143* [1981] 2 NSWLR 809 at 811-812.

107 cf *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150 at 162; *Chippendale Printing Co Pty Ltd v Commissioner of Taxation* (1996) 62 FCR 347 at 365.

they see the scheme of the legislation differently[108]. Just as one person may see the glass as half full and another see it as half empty. The only way such controversies can be resolved in a case such as the present is by examining the entirety of the legislation in issue and deriving from such examination a conclusion as to how each provision operates and whether the general provisions can apply consistently with the application of the particular provisions. A judgment is called for.

83 In the present case, the respondent submitted, in effect, that the detailed provisions of s 138 of the Accident Compensation Act amounted to a code for the recovery of the statutory indemnity there provided. Elsewhere in that Act, the Victorian Parliament had provided, in terms, for the recovery of interest on specified sums[109]. The express provision for interest in such cases indicated sufficiently that Parliament had turned its attention to the subject matter of interest. If it had intended interest to be payable upon the recovery made in proceedings to enforce the statutory indemnity provided by s 138 of the Act, it would have said so explicitly. Having failed to do so in s 138, it should be inferred that the contrary was meant and s 60 of the Supreme Court Act should be read down accordingly.

The legislative history

84 It is convenient to deal separately with the issue as to whether proceedings to recover the indemnity provided for in s 138 of the Accident Compensation Act are a "proceeding for the recovery of debt or damages" and the alternative proposition that s 138 comprehensively states the indemnity that may be recovered and, by inference, excludes the additional recovery of interest.

85 As to the first issue, it is permissible, where an ambiguity is said to arise in legislation (as here in the meaning of "proceeding for the recovery of debt or damages"), to have regard to the history of the provision, in case that history assists in the resolution of the ambiguity.

86 The provisions of the Supreme Court Act for the recovery of interest in proceedings in that Court are but the latest of a long line of statutory provisions, beginning in England and copied in Australia (including Victoria). The starting

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108 eg *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 at 161 per Lord Keith of Kinkel noted *Chippendale Printing Co Pty Ltd v Commissioner of Taxation* (1996) 62 FCR 347 at 356. See also *SCI* (1998) 192 CLR 285 at 324-328 [96]-[100]; cf at 316-317 [72]-[76].

109 Accident Compensation Act, ss 33A(3), 92(7), 92A(12), 92C(7), 114D(5), 114E(1), 129F, 129G, 152 and 249A.

point is an appreciation that, in respect of interest, "equity followed a different path to the common law"[110]. Equity "held itself entitled, when making a money decree, to award interest where justice required such an award"[111]. Interest might also be recovered in Admiralty[112]. However, the common law did not provide for interest on recovery. The source of its resistance appears to have been the mediaeval view that interest was immoral because usurious. Attempts by judges of the common law to overcome this resistance did not prevail[113]. Ultimately, however, such attempts occasioned an Act of the United Kingdom Parliament in 1833[114]. That Act afforded power to the common law courts to award interest upon a "sum certain" in specified circumstances, upon the value, at the time of their conversion, of goods the subject of an action in trover or trespass and upon moneys payable under a policy of insurance[115].

87 The operation of this Act in England was, in turn, the subject of a report by the Common Law Commissioners in 1851[116]. That report led to the *Common Law Procedure Act* 1852 (UK). This introduced provisions for default judgment on specially endorsed writs[117]. Such writs were to be available only for claims for "a debt or liquidated demand in money".

88 The foregoing innovations were copied in the Australian colonies. Their overall aim was to address the practical problem, revealed by the Common Law Commissioners, that "upwards of 98 per cent [of claims in the common law courts] were in respect of well-known and admitted demands"[118]. The object of

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110 *SCI* (1998) 192 CLR 285 at 316 [74].

111 Victoria, Chief Justice's Law Reform Committee, *Report of Sub-Committee on Interest on Debt and Damages* (1959) at 1 citing *London, Chatham and Dover Railway Co v South Eastern Railway Co* [1893] AC 429 at 440 per Lord Herschell LC.

112 *The Aldora* [1975] QB 748 at 751.

113 *Riches v Westminster Bank Ltd* [1947] AC 390 at 400 per Lord Wright.

114 *Civil Procedure Act* 1833 (UK) (3 & 4 Will IV c 42, ss 28 and 29). Also known as Lord Tenterden's Act.

115 cf *Alexander v Ajax Insurance Co Ltd* [1956] VLR 436 at 444.

116 *Alexander v Ajax Insurance Co Ltd* [1956] VLR 436 at 443.

117 *Griffiths' Practice Under the Judicature Acts*, 2nd ed (1877) at 209-210 noted *Alexander v Ajax Insurance Co Ltd* [1956] VLR 436 at 443 per Sholl J.

118 *Alexander v Ajax Insurance Co Ltd* [1956] VLR 436 at 443.

the reforms was therefore to discourage delay in the payment of debts, to remove the financial incentives for such delay and, as it was hoped, to clear the lists both by the provision of the recovery of judgment in default of an appearance and a sworn defence and by the imposition of interest in the cases specified, where judgment was ultimately recovered.

89 So far as interest was concerned, the provisions in the *Civil Procedure Act* 1833 (UK) were, with some minor variations, copied in the *Common Law Procedure Act* 1865 (Vic)[119]. An unbroken chain of Victorian legislation re-enacted those provisions[120]. They provided the general source of ss 57, 58 and 59 of the present Supreme Court Act. A common feature of this line of legislation was the expression of the power of the Court, or a jury, to award interest in permissive terms ("may"). The inclusion of the interest as part of the "damages" is doubtless explained by the fact that, in most actions at common law, well into the twentieth century, the trial of disputed issues of fact, including as to interest, would be had before a jury. In such a case it would be for the jury to assess whether the damages awarded by their verdict should include an amount for interest.

90 Whereas the Victorian legislation continued the basic scheme of the *Civil Procedure Act* 1833 (UK) into the *Supreme Court Act* 1958 (Vic), in England the narrow interpretation of the former led, in 1934, to a report by the Law Revision Committee[121]. This, in turn, led to the adoption in that country of the *Law Reform (Miscellaneous Provisions) Act* 1934 (UK). That Act provided for the award of interest in a broader range of cases than contemplated by the 1833 Act[122]. It was in such provision that the phrase "proceedings … for the recovery of any debt or damages" was introduced[123].

91 Despite the enactment of this reform in England, the same provisions were not, at first, adopted in Victoria. However, in 1959 the Victorian Chief Justice's Law Reform Committee considered the matter. In the report of its sub-committee on *Interest on Debt and Damages*[124], that Committee recommended

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119 28 Vict No 274, ss 422 and 423.

120 *Supreme Court Act* 1890 (Vic), ss 224 and 225; *Supreme Court Act* 1928 (Vic), ss 77, 78 and 79; *Supreme Court Act* 1958 (Vic), ss 77, 78 and 79.

121 Law Revision Committee, *Second Interim Report* (1934).

122 *Law Reform (Miscellaneous Provisions) Act* 1934 (UK), s 3(1).

123 *BP Exploration Co (Libya) Ltd v Hunt [No 2]* [1983] 2 AC 352 at 373.

124 Victoria, Chief Justice's Law Reform Committee, *Report of Sub-Committee on Interest on Debt and Damages* (1959).

against repeal of the provisions based on the *Civil Procedure Act* 1833 (UK). Instead, it proposed the addition of a new section of the *Supreme Court Act* 1958. Its proposal was clearly influenced by the United Kingdom statute of 1934. A feature of the 1959 report was that it illustrated the distance that had been travelled towards the general acceptance by the judiciary and legal profession that parties recovering a money sum in proceedings in the Supreme Court were ordinarily entitled to interest on the sum recovered, calculated from the commencement of proceedings until the entry of judgment[125].

92 In 1961 the Chief Justice's Committee's recommendations were reviewed by the Statute Law Revision Committee of the Parliament of Victoria[126]. That Committee affirmed the "general view" that the courts should have a greater power than had previously existed to award interest on judgments. This conclusion was explained as "based on a belief that 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 ought not in justice to benefit from having that money in his possession and enjoying the use of it, when it ought to be in the possession of the other party"[127].

93 Legislation to enact the foregoing recommendation was passed by the Victorian Parliament in 1962[128]. A new s 79A was introduced into the *Supreme Court Act* 1958. That section departed in one relevant respect from the recommendation of the Chief Justice's Committee. That body had proposed that the new section should provide for recovery where "a party becomes entitled to a *common law judgment* for the recovery of any debt or damages"[129]. The reference to "a common law judgment" was deleted from the section as enacted. The obvious purpose of the deletion was to broaden the class of cases to which the new section would apply. Thus, it would apply, in terms, to equitable damages as well as to damages at common law.

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125 Victoria, Chief Justice's Law Reform Committee, *Report of Sub-Committee on Interest on Debt and Damages* (1959) at 6.

126 Victoria, Statute Law Revision Committee, *Report upon Interest on Judgments* (1961).

127 Victoria, Statute Law Revision Committee, *Report upon Interest on Judgments* (1961), par 6.

128 *Supreme Court (Interest on Judgments) Act* 1962 (Vic); see *Mario Piraino Pty Ltd v Roads Corporation* [1991] 2 VR 534 at 536.

129 Victoria, Chief Justice's Law Reform Committee, *Report of Sub-Committee on Interest on Debt and Damages* (1959) at 6 (emphasis added).

94 The legislative history[130] therefore supports the conclusion that the Victorian Parliament set out to enlarge significantly the power of the Supreme Court to award interest[131]. The same inference is reinforced by the enactment of the *Supreme Court Act* 1986. The previous sections were re-enacted to appear as ss 57-60 of that Act. However, in the place of the permissive "may" the obligatory "must" was substituted. This change confirms the conclusion that Parliament's purpose was to protect those deprived of money sums by requiring, relevantly, the Supreme Court, in proceedings before it where application was made for that purpose, to add to any judgment interest accrued from the commencement of the proceedings to the date of judgment "over and above the debt or damages awarded"[132].

95 This review of the legal history supports the conclusion which the appellants invited this Court to draw. The phrase "debt or damages" came into Victorian statute law as a consequence of legislative reforms, adopted first in the United Kingdom and later in Victoria, for the explicit purpose of enlarging the recovery of interest on money judgments. Given this history, it would be contrary to the apparent purpose of the legislature, in adopting such successive reforms, to impose on the phrase "debt or damages" a narrow or limited interpretation. Only a broad construction of the phrase would carry into effect the purpose of the statutory amendments enlarging the entitlement to interest on money judgments.

Judicial authority on "debt or damages"

96 A long line of judicial authority holds that an action to recover a liquidated sum owing from one person to another, in accordance with a statute, was available on the writ of debt. Where an Act obliged a party to pay another a sum of money, the other could, at common law, bring an action for the recovery of that sum as a debt[133]. The basis of this entitlement was often traced to a

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130 The use of legislative history was not contested in the proceedings; cf *Braeside Bearings Pty Ltd v H J Brignell & Associates (Boronia)* [1996] 1 VR 17 at 21 per Callaway JA.

131 *Mario Piraino Pty Ltd v Roads Corporation* [1991] 2 VR 534 at 536.

132 *Supreme Court Act* 1986, s 60(1).

133 *Lowe v Peers* (1768) 4 Burr 2225 at 2229 [98 ER 160 at 162] per Lord Mansfield noted by Sholl J in *Alexander v Ajax Insurance Co Ltd* [1956] VLR 436 at 440-441. See also *Booth v Trail* (1883) 12 QBD 8 at 10; *Mallinson v Scottish Australian Investment Co Ltd* (1920) 28 CLR 66 at 71; *Gray v Gundowda Pty Ltd* [1968] 1 NSWR 521 at 523.

dictum of Holt CJ[134] to the effect that it would be absurd for legislation to give a party a right to a sum of money but to afford no legal remedy against, nor impose any enforceable legal duty on, the other party in respect of that sum. This line of authority was but one of a number that earned for the action of debt the description of "marvellous" flexibility[135] and praise for its "remarkably wide" ambit[136].

97 The cases that support these propositions do not, of course, establish that, in proceedings such as the present, the statutory indemnity provided by s 138 of the Accident Compensation Act amounted to a "debt" in the traditional sense of a sum certain or a sum lacking any material uncertainty[137]. But the relevance of this line of authority is that it contradicts the basic proposition of the respondent's argument that an action for recovery of a sum provided pursuant to a statutory right was, of its nature, different from an action for debt and necessarily to be treated as sui generis. This is not the way that the common law long treated actions based upon statutory entitlements to money sums. If the money sum provided were certain, or if it were readily ascertainable in accordance with a statutory formula, it would (absent some contrary indication of the statute) found an action for debt[138].

98 In the present case, a number of imponderables had to be removed before the amount payable by the respondent under the statutory indemnity was ascertained. These included the determination of whether the respondent was under a legal liability to pay damages to Mr Wsol, whether any other person, such as Mr Wsol's employer, caused or contributed to his injury and whether there was any contributory negligence on the part of Mr Wsol himself. When the "proceedings" were commenced, they could not aptly have been described as "an action to recover a debt" because, until the foregoing issues were determined, the amount payable was unascertained[139]. In this Court, the appellants appeared,

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134 *Anon* 6 Mod 26 at 27 [87 ER 791 at 791] noted *Hopkins v The Mayor etc of Swansea* (1839) 4 M & W 621 at 634 [150 ER 1569 at 1575].

135 Simpson, *A History of the Common Law of Contract* (1975) at 73.

136 Simpson, *A History of the Common Law of Contract* (1975) at 73.

137 *City Mutual Life Assurance Society Ltd v Giannarelli* [1977] VR 463 at 468.

138 *Luckie v Bushby* (1853) 13 CB 864 at 877-878 [138 ER 1443 at 1448] per Jervis CJ noted *Alexander v Ajax Insurance Co Ltd* [1956] VLR 436 at 441.

139 cf *Spain v Union Steamship Co of New Zealand Ltd* (1923) 32 CLR 138 at 145; *Crisp & Gunn Co-operative Ltd v Hobart Corporation* (1963) 110 CLR 538 at 543; *Coughlan v Westminer Canada Ltd* (1994) 127 NSR (2d) 241 at 309.

ultimately, to accept this proposition. But they advanced alternative arguments to overcome it.

99 First, they submitted that the proceedings were for the recovery of "damages". In *Mayne on Damages*[140], "damages" are defined in their generality as "the pecuniary satisfaction obtainable by success in an action". This definition is described as "intentionally wide to bring within [its] scope … actions for the price of goods, amounts payable under policies of insurance, dividends in bankruptcy and other cases where money is recovered otherwise than as compensation for a wrong". The author acknowledged that "lawyers generally distinguish … between debt and damages". But the author accepted that "where under a contract, instrument *or statute* a person is entitled to a sum certain, either ascertained or capable of being ascertained, the sum constitutes a debt and can be recovered as such; but failure to pay a debt when due is a wrong and an action may be framed either for the debt or for damages"[141].

100 There is internal evidence, within s 60(1) itself, that a broad concept of "damages" is adopted in the sub-section. Thus the component of interest is treated there (as in ss 59(1) and 59(2)) as an aspect of "damages". This tends to confirm that "damages" in the context of these provisions is not to be given a narrow construction, confined to monetary recompense for a civil wrong. It has a broader meaning.

101 Secondly, the appellants emphasised that the word "damages" was not to be read in isolation. It was part of the combined expression "debt or damages". That phrase connoted a composite idea. Support for this proposition is found in the reasoning of this Court in *Crisp & Gunn Co-operative Ltd v Hobart Corporation*[142] about a provision of the Rules of the Supreme Court of Tasmania[143]. The rules provided for the consequences of a payment into court "in an action to recover a debt or damages". The issue was whether that phrase was broad enough to extend to an action to recover compensation for the compulsory acquisition of land in the City of Hobart. The trial judge had held that it was not, concluding that it was not a debt because "an action for debt" was only available "for a sum certain" and not for "an assessment of

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140 11th ed (1946) at 1 cited *F & K Jabbour v Custodian of Israeli Absentee Property* [1954] 1 WLR 139 at 144; [1954] 1 All ER 145 at 150.

141 Footnote in *Mayne on Damages*, 11th ed (1946) at 1 cited *F & K Jabbour v Custodian of Israeli Absentee Property* [1954] 1 WLR 139 at 144; [1954] 1 All ER 145 at 150 (emphasis added).

142 (1963) 110 CLR 538.

143 1958, Order XXIV, r 1.

compensation"[144]. He also considered that the action was not one to recover "damages", because the landowner's title to relief did not depend upon proof of any wrongful act on the part of the Corporation. In this Court, McTiernan, Taylor and Windeyer JJ said[145]:

> "It may be conceded that the action was not strictly an action for damages but the expression used in the rule has a *composite significance* and, having regard to its history, was doubtless intended to cover any action in which a claim for money, as distinct from other specific forms of relief, was made."

102 A similarly wide view of the composite phrase was accepted by Brandon J in *The Aldora*[146] and by Robert Goff J in *BP Exploration Co (Libya) Ltd v Hunt [No 2]*[147] in construing s 3(1) of the *Law Reform (Miscellaneous Provisions) Act* 1934 (UK)[148]. That sub-section permitted a court to order the payment of interest "[i]n any proceedings tried … for the recovery of any debt or damages". The question in *BP Exploration* was whether a proceeding claiming an award of a just sum under s 1(3) of the *Law Reform (Frustrated Contracts) Act* 1943 (UK) fell within the phrase. Robert Goff J had "no doubt whatsoever" that it did[149]. The parallels to the present case are obvious.

103 In explaining his opinion, Robert Goff J said that "a claim under the subsection is a statutory form of the old action for money had and received" which was available in an action to recover money paid for a consideration which had wholly failed and the kind of relief afforded by the statute of 1934[150]. He regarded it as untenable that interest would have been payable on the judgment before, but not after, the passage of the Act of 1934. He affirmed the view that a "broad interpretation"[151] should be given to s 3(1) of that Act. He concluded that

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144 *Crisp & Gunn Co-operative Ltd v City of Hobart* [1962] Tas SR 77 at 109 per Crawford J.

145 (1963) 110 CLR 538 at 543 (emphasis added).

146 [1975] QB 748 at 753.

147 [1979] 1 WLR 783 at 836-837; [1982] 1 All ER 925 at 967.

148 The terms of s 3(1) are set out in the joint reasons at [34], n 51.

149 [1979] 1 WLR 783 at 835; [1982] 1 All ER 925 at 966.

150 [1979] 1 WLR 783 at 835; [1982] 1 All ER 925 at 966.

151 [1979] 1 WLR 783 at 837; [1982] 1 All ER 925 at 967.

a proceeding for an award under the statute was therefore a proceeding "for the recovery of a debt"[152].

104 Appeals against Robert Goff J's decision were dismissed successively by the English Court of Appeal[153] and the House of Lords[154]. By this time Brandon J had become Lord Brandon of Oakbrook. Giving the reasons of the Law Lords, he remarked[155]:

> "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 section 3(1) which I expressed in *The Aldora*[156]. I hold, therefore, that Robert Goff J had power to order the payment of interest on the principal sums awarded by him."

105 It is not necessary to decide whether the proceedings brought by the appellants for the recovery of the indemnity afforded by s 138 of the Accident Compensation Act were, within s 60(1) of the Supreme Court Act, proceedings for the recovery of "debt". I am inclined to the view that they were not, given the evaluative decisions that remained to be made by the Court before the sum payable was eventually ascertained. But within the authority both of this Court and of the English courts mentioned, the words "proceeding for the recovery of debt or damages" are to be given a broad construction and to be viewed as expressing a composite idea. Within that explanation of the phrase afforded by Robert Goff J and by Lord Brandon, with which I agree, the application by the appellants for interest on their recovery under s 138 of the Accident Compensation Act fell within s 60 of the Supreme Court Act. Subject to what follows, it therefore authorised the primary judge to award interest.

The indemnity was not exclusive of interest

106 Is the foregoing conclusion incompatible with a proper understanding of s 138 in the context of the provisions of the Accident Compensation Act, viewed

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152 [1979] 1 WLR 783 at 837; [1982] 1 All ER 925 at 967.

153 *BP Exploration Co (Libya) Ltd v Hunt [No 2]* [1981] 1 WLR 232 at 245; [1982] 1 All ER 925 at 985.

154 *BP Exploration Co (Libya) Ltd v Hunt [No 2]* [1983] 2 AC 352.

155 [1983] 2 AC 352 at 373 (emphasis added).

156 [1975] QB 748 at 751.

as a whole? To some extent, the answer to this question depends upon a detailed analysis of the section considered in its context. To some extent, it depends upon an impression as to whether s 138 states exhaustively and exclusively the indemnity recoverable by parties such as the appellants.

107 The best argument for the respondent's contention in this regard was that the provisions of s 138 of the Accident Compensation Act are detailed and highly particular. So indeed they are. It would have been open to Parliament, in adopting the formula that it did, to have added, expressly, an element for interest. As Winneke P pointed out, it was left to the statutory authority and the insurer to choose their own time for the bringing of proceedings for the recovery of the statutory indemnity[157]. Theirs was an entitlement separately provided for by legislation. It was not identical to the entitlements of the injured worker. To this extent, the appellants were not necessarily being kept out of their money wrongfully.

108 On the other hand, it must be expected that, in many cases, the payment of the indemnity will be clear-cut, liability will be obvious and the need to bring proceedings unnecessary. The incentive to prompt payment, which the obligation of interest affords, therefore still has relevance. There is no fundamental incompatibility to adding that incentive, by way of s 60 of the Supreme Court Act, to the entitlements that otherwise accrue under s 138 of the Accident Compensation Act. Indeed, the commercial character of the transaction between employers and their insurers (on the one hand) and between a third party and the worker (on the other), illustrated by the present case, adds to the impression that the payment of interest, as recompense for depriving a party of an entitlement that can only ultimately be enforced by the bringing of proceedings, is compatible with the scheme of the two Acts, read together.

109 But are the specific provisions in the Accident Compensation Act for the payment of interest an indication that where Parliament considered interest should be paid it said so expressly? The appellants acknowledged several sections where a provision for interest is made. However, each of those sections relates to an entitlement to interest that arises independently of the commencement of court proceedings. Where, to recover the indemnity provided by s 138, an employer, insurer or self-insurer is obliged to commence court proceedings, it is not incompatible with the Accident Compensation Act to give that party the benefit of an entitlement to interest that belongs to any other party successfully bringing like proceedings in the Supreme Court. On the contrary, the same considerations of policy that lay behind the original enactment of the *Civil Procedure Act* 1833 (UK) support the availability of interest. Such interest tends to promote speedy resolution and settlement of proceedings by depriving

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157 *Esso* (2000) 1 VR 246 at 256-257 [27]-[28].

parties of the incentives for delay. It affords recompense to those forced into proceedings for the consequent delay in the recovery of judgment to which they are ultimately held to be entitled.

Conclusions and orders

110 The preferable construction of the legislation therefore sustains the award of interest made by the primary judge. The legislation supports that award.

111 Before the Court of Appeal the respondent had grounds of appeal contesting the calculation of interest. In the conclusion which the Court of Appeal reached, it was unnecessary for that Court to consider the contest as to the rates of interest and as to whether the award made conflicted with s 60(2)(a) of the Supreme Court Act[158]. The respondent is entitled to have those matters determined. The appellants accepted that, to some extent, the respondent had been entitled to succeed before the Court of Appeal. It was therefore entitled to its costs of the issue upon which it had succeeded, which is undisturbed by the appeal to this Court. It can be left to the Court of Appeal to dispose of the costs of the proceedings before it, including of the proceedings now remitted for final determination.

112 The appeal should be allowed with costs. The judgment of the Supreme Court of Victoria (Court of Appeal) should be set aside. The proceedings should be remitted to the Court of Appeal so that remaining issues can be determined and orders made conformably with the decision of this Court. The costs of the proceedings in the Court of Appeal should be disposed of by that Court.

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158 *Esso* (2000) 1 VR 246 at 258 [30].