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Supreme Court of New South Wales

Madanat v David [2020] NSWSC 284 (25 March 2020)

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Supreme Court
New South Wales

Case Name:	Madanat v David
Medium Neutral Citation:	[2020] NSWSC 284
Hearing Date(s):	13 March 2020
Date of Orders:	25 March 2020
Decision Date:	25 March 2020
Jurisdiction:	Equity - Applications List
Before:	Robb J
Decision:	The defendants' notice of motion, filed on 8 November 2019, is dismissed.
Catchwords:	CIVIL PROCEDURE — Summary disposal — Dismissal of proceedings COSTS — Solicitor/Client — Recovery — Restrictions on recovery
Legislation Cited:	Legal Profession Act 2004 (NSW) Uniform Civil Procedure Rules 2005 (NSW)
Cases Cited:	Branson v Tucker [2012] NSWCA 310 Daley v Hughes (2014) 86 NSWLR 729; [2014] NSWCA 268 General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125; [1964] HCA 69 Heydon v NRMA Ltd (No 2) (2001) 53 NSWLR 600; [2001] NSWCA 445 Hughes v Geraldine Daley trading as Colin Daley Quinn, Solicitors and Barristers [2013] NSWSC 806

	Lahoud v Lahoud [2010] NSWSC 1297
	Mackowiak v Hagipantelis; Bickhoff v Hagipantelis [2015] NSWSC 1087
	National Australia Bank Ltd v Budget Stationery Supplies Pty Ltd (1997) 217 ALR 365
Texts Cited:	G E Dal Pont, Law of Costs (4th ed, 2018, LexisNexis Butterworths)
Category:	Procedural and other rulings
Parties:	Joanna Madanat (plaintiff / respondent / applicant)
	Suzy David (first defendant / applicant / respondent)
	Fred David (second defendant / applicant / respondent)
Representation:	Counsel: M Castle (plaintiff / respondent / applicant)
	M Dulhunty (first and second defendants / applicant / respondent)
	Solicitors: Firths (plaintiff / respondent / applicant)David Legal (first and second defendants / applicant / respondent)
File Number(s):	2019 / 274481

JUDGMENT

1. By summons filed on 3 September 2019, the plaintiff, Ms Joanna Madanat, commenced these proceedings against the defendants, Ms Suzy David and Mr Fred David.
2. The plaintiff is a former client of the defendants, who are solicitors.
3. On 8 November 2019, the defendants filed a notice of motion that is now before the Court for determination. They sought orders that the proceedings be dismissed pursuant to rule 13.4 of the Uniform Civil Procedure Rules 2005 (NSW) (UCPR), or alternatively that the summons be struck out pursuant to rule 14.28 of the UCPR.

Background

4. In brief, the defendants acted for the plaintiff in compensation proceedings that she commenced, under a conditional costs agreement dated 24 June 2015.
5. Clause 7.1 of that agreement provided that the defendants were entitled to charge professional fees based upon the hourly rates of solicitors of different levels of seniority, together with administrative staff and GST. The clause provided for the defendants to structure their time charging in 6 minute units. The defendants were also entitled to charge for disbursements.
6. The proceedings commenced by the plaintiff were settled at an informal settlement conference that took place on 19 September 2016.

7. The settlement agreement involved the payment by the defendant in the compensation proceedings of a lump sum of $265,000 inclusive of costs.
8. The first defendant gave evidence that, during the settlement negotiations, she disclosed to the plaintiff that the defendants' legal fees and disbursements were estimated to be $65,000 inclusive of GST. The conditional costs agreement provided in clause 11.4 that, if a settlement of the plaintiff's claim was being negotiated, the defendants would provide her, before settlement, a reasonable estimate of their costs payable by the plaintiff.
9. The first defendant said in her affidavit that the plaintiff said words to her to the effect "I am very happy with that". The plaintiff signed written instructions to the defendants, in which she confirmed that she would settle the matter for the sum of $265,000 inclusive of costs, and that she understood that, from the settlement monies, after all medical and legal costs had been deducted, she would be left with approximately $170,000.
10. On 5 October 2016, the defendants provided to the plaintiff a tax invoice in which they stated that their total costs and disbursements were $65,000. The tax invoice was not in the form of an itemised bill of costs, and was what is generally called a lump sum bill. They also provided a letter accounting for the settlement monies, which showed a deduction of $65,000 for the defendants' costs and disbursements. After other deductions, the balance payable to the plaintiff was stated to be $148,564.08. It appears that the plaintiff may have been entitled to receive an additional amount by way of a partial refund of a payment made to Medicare out of the settlement monies.
11. The plaintiff did not respond in any formal way to the deduction of the $65,000 for the defendants' costs and disbursements until 16 April 2019, when the current solicitors for the plaintiff asked the defendants to send the plaintiff's compensation file to them. The file was sent to the solicitors on 1 May 2019.
12. On 9 May 2019, the plaintiff's solicitors sent a letter marked "without prejudice", in which the solicitors asserted that the maximum amount of costs and disbursements to which the defendants were legally entitled was $22,550 inclusive of GST. The letter demanded repayment of $42,450 plus interest of $6,038.37, giving a total of $48,488.37.
13. On 9 May 2019, the defendants contested the plaintiff's solicitors' assessment of the costs and disbursements that were payable by the plaintiff.
14. The plaintiff's solicitors requested on 9 May 2019 that the defendants provide them with their time costing records or an itemised bill.
15. The plaintiff's solicitors threatened the defendants on 17 June 2019 that the plaintiff would commence court proceedings against them.
16. By open letter written on 18 June 2019, the defendants offered to pay the plaintiff $25,000 in full and final settlement of the dispute. The offer was said to be made on a without prejudice and purely commercial costs saving basis.
17. The plaintiff's solicitors advised the defendants, on 19 June 2019, on a without prejudice basis that, in order to consider the defendants' offer, they would need either an itemised bill or a copy of the defendants' time costing ledger in the plaintiff's matter.
18. The plaintiff rejected the defendants' offer on 21 June 2019. The plaintiff's solicitors' letter rejecting the offer advised that the plaintiff was prepared to settle for the sum of $50,000 inclusive.
19. The defendants rejected the plaintiff's offer on 28 June 2019. Among other things, they pointed out to the plaintiff's solicitor that the plaintiff had not requested an itemised account or applied for her costs to be assessed.

20. The plaintiff's solicitors on 8 July 2019 demanded that the defendants provide an itemised bill within 21 days.
21. On 16 July 2019, the plaintiff's solicitors again threatened that the plaintiff would commence court proceedings, unless the defendants paid the amount demanded, or provided time costing records or an itemised bill.
22. The defendants, on about 23 July 2019, retained a cost consultant to prepare an itemised bill of costs using the defendants' file.
23. Apparently, on 20 August 2019, the defendants sent a letter to the plaintiff's solicitors that included an itemised bill that came to a total of $32,510.50. The covering letter was not included in the court book, but was referred to in the plaintiff's solicitors' letter to the defendants dated 20 August 2019. Nor was the itemised bill included in the evidence. Page 93 of the court book appears to be a single page of the itemised bill. As the Court does not have the covering letter, it does not know the basis upon which the itemised bill was provided to the plaintiff's solicitors.
24. By the plaintiff's solicitors' 20 August 2019 letter, they demanded that the defendants repay $32,489.50, being the difference between the amounts charged of $65,000 "and the maximum you concede you are now entitled to of $32,510.50". The solicitors demanded payment of interest of $5,160.04 from 5 October 2016.
25. The assertion by the plaintiff that the defendants had conceded that they were only entitled to $32,510.50 is reflected in the terms of the plaintiff's summons, in which the plaintiff sought interest on the sum of $32,489.50 "being the amount the Defendants now concede they overcharged the Plaintiff..."
26. By letter dated 27 August 2019, marked "Without Prejudice Save as to Costs", the defendants informed the plaintiff's solicitors as follows:

> We refer to the above matter and enclose herewith our cheque in the sum of $32,510.50.
>
> Your client has no basis for any claim of interest.
>
> Should your client proceed with any action, as threatened in your letter of 20 August 2018, we will strenuously defend any such claim and rely on this letter in support of our application for indemnity costs.

27. The plaintiff's solicitors apparently cashed the defendants' cheque, but they stated in a 28 August 2019 letter to the defendants:

> We refer to your letter dated 27 August 2019 and acknowledge receipt of your cheque in the sum of $32,510.50 by way of refund of costs overcharged. This amount is received as part payment only of our client's claim.
>
> As we have indicated in our letter of 20 August 2019 we will be making an application for assessment of your itemised bill.
>
> In addition, given your letter, you leave us with no alternative other than to proceed with action to recover the outstanding interest due to our client.

Dispute

28. It will now be appropriate to explain how the present dispute came before the Court, and the issues that are required to be determined.
29. On 10 December 2019, the Court not only fixed the defendants' notice of motion for hearing on 13 March 2020, but it also listed the summons by the plaintiff seeking interest, as well as another notice of motion that no longer needs to be considered.
30. At the beginning of the hearing, I raised with counsel the question whether it was an efficient way to deal with the applications that were before the Court, by determining the summary dismissal motion separately and before the application on the plaintiff's summons. There may be an unnecessary risk of error if the Court were required to decide whether the summons should summarily be dismissed, because that would involve a judgment about the degree of strength of the plaintiff's case. If the summons was before the Court in any event, and was ready and could be heard in the available time, the prudent course might be for the Court simply to determine the claim on its merits.
31. Counsel for the plaintiff submitted that the Court should hear the motion for summary dismissal, and if the Court were able to give an immediate judgment, and did not dismiss the summons, the Court should then hear the application on the summons.
32. The Court discerned a problem with this approach, which arose out of the Court's consideration of the affidavits served by the parties and the written submissions of counsel that had been delivered before the hearing.
33. Perhaps understandably, because of the small amount of the claim, the matter had proceeded on the summons without pleadings. Consequently, the issues that may be raised by the claim and the defence had not been identified with precision.
34. It seemed to the Court that the defendants did not accept the premise in the plaintiff's summons, and her solicitors' 20 August 2019 letter, that the defendants had conceded that they had overcharged the plaintiff. Counsel for the defendants confirmed that the defendants did not accept that they had conceded an obligation to repay to the plaintiff the sum of $32,510.50.
35. I will outline briefly the circumstances that gave rise to the defendants' position.
36. The first defendant said in her affidavit that the defendants’ firm does not use time costing. The method used in costing files is on a per folio and per task undertaken basis. The defendants issue lump-sum bills and if there is a dispute then they refer the file to a cost consultant to prepare an itemised bill.
37. At the settlement conference on 19 September 2016, the first defendant negotiated the settlement. However, the matter had been conducted on a day-to-day basis by a named employed solicitor, whose employment was subsequently terminated by the defendants, before they learned of the plaintiff's claim from her present solicitors.
38. The first defendant supervised the employee's conduct of the matter, and relied upon the employee's estimate at the settlement conference that the defendants' costs and disbursements were $65,000 including GST. The first defendant said that an amount of that order appeared to be correct, based upon her experience, and the amount of work that the defendants customarily do early in a matter in order to give their clients the best chance of an early satisfactory settlement.
39. The defendants discovered, after the employed solicitor's services were terminated, and before they knew of the plaintiff's claim, that the employed solicitor did not appear to have made file notes of all attendances, or kept notes of all of the time working on her matters. The defendants discovered that many documents from that employee's matter files had been misfiled.
40. The plaintiff did not request an itemised bill of costs until 9 May 2019, some 2 1/2 years after the 15 October 2016 date of the tax invoice given by the defendants to the plaintiff. The plaintiff did not apply for an

assessment of the costs charged by the defendants within the 12 months stipulated by s 350(4) of the *Legal Profession Act 2004* (NSW) (LPA) (which the parties agreed was the applicable legislation). The claim was not made until after the termination of the employment of the responsible solicitor. The first defendant believed, from her experience, that the defendants' firm must have done more work to get the plaintiff's matter in the position where it could satisfactorily be settled than would only entitle them to $32,510.50. The defendants could no longer consult with the ex-employee, to provide evidence for a greater entitlement to costs than the $32,510.50 contained in the itemised bill of costs prepared by the cost consultant.

41. Accordingly, the first defendant said that the defendants decided to pay the $32,510.50 to settle the claim and to avoid the cost and inconvenience of becoming involved in contested court proceedings.

42. The defendants therefore maintained that there was a live issue about the amount of costs and disbursements to which the defendants were entitled for acting for the plaintiff.

43. I will return below to a consideration of the legal consequences of the defendants having delivered the itemised bill of costs to the plaintiff's solicitors.

44. It also became apparent that there was an issue as to whether the totality of the correspondence, the circumstances in which the defendants paid the $32,510.50, and the acceptance of that sum by the plaintiff's solicitors, constituted an effective compromise of the plaintiff's claim.

45. In these circumstances, I asked that the defendants inform the Court whether or not they were prepared to agree to the Court determining these issues on the basis of the evidence that had been served to date, which on the defendants' part may only have been directed to supporting the summary dismissal motion.

46. If not, then the Court could only deal with the summary dismissal motion.

47. Counsel for the defendants then obtained instructions, and informed the Court that the defendants were not ready to deal with the claim in the summons on a final basis, as they would need to prepare additional evidence.

48. Counsel for the plaintiff advised the Court that the plaintiff did not take issue with the approach that the defendants wished to adopt.

49. Consequently, the Court was required to deal with the defendants' summary dismissal motion, in circumstances where the issues in the proceedings had not been defined by pleadings, and where there were unresolved questions of fact.

50. As I understand the result of the discussion between the Court and counsel for the defendants on this issue, the defendants accepted that the Court could only make an order summarily dismissing the plaintiff's summons if, making an assumption that the plaintiff could establish at a final hearing all of the facts upon which she had based her claim, the plaintiff would nonetheless fail in her claim on the application of relevant legal principles.

51. Before I deal with the defendants' claim for an order for the summary dismissal of the plaintiff's summons, I will mention three subsidiary matters.

52. First, much of the correspondence between the defendants and the plaintiff's solicitors was marked either "without prejudice" or "without prejudice save as to costs". Counsel for the plaintiff submitted that the parties had mutually waived any legal privilege that they had in respect of these communications, as they had all referred to them in their evidence. Counsel for the defendants did not contest this submission, and I will proceed upon the basis that all such communications were admissible.

53. Secondly, the plaintiff's claim was put on the basis of a common law claim for money had and received, by reason of the overpayment by the plaintiff of the amount of costs and disbursements payable by the plaintiff to the defendants under the conditional costs agreement, and that the plaintiff was entitled to interest on the amount of the overpayment. That was either because the common law recognised generally a

'freestanding' right to interest on money wrongly withheld, or, alternatively, that the entitlement to interest arose under an exception to a general principle that the common law did not permit the recovery of interest, if such a general principle existed, which the plaintiff refuted.

54. It is not clear why, that being the basis of the plaintiff's claim, the proceedings were commenced in the Equity Division. That is because the claim was not put on the basis that the defendants owed fiduciary duties to the plaintiff, which entitled the plaintiff to the remedy of account, in which the defendants may be required to pay equitable compensation to the plaintiff equivalent to interest for any wrongful withholding of the plaintiff's funds.

55. Finally, the amount of the plaintiff's claim in this Court, which the plaintiff's solicitors quantified as being $5,160.04 as at 20 August 2019, but which will increase with the effluxion of time, is relatively minuscule in comparison to the $500,000 judgment provided for in rule 42.34 of the UCPR. That is the minimum amount of a recovery in this Court that will give rise to an entitlement of a successful plaintiff to its costs, without a favourable exercise of discretion by the Court that the commencement and continuation of the proceedings in this Court, rather than the District Court, was warranted.

Consideration

56. I am satisfied that the proper order for the Court to make is to dismiss the defendants' notice of motion, on the basis that the present is not a proper case for the summary dismissal of the plaintiff's claim.

Relevant rules

57. The primary relief sought in the defendants' notice of motion was that the plaintiff's claim be dismissed under rule 13.4 of the UCPR. That rule provides:

> (1) If in any proceedings it appears to the court that in relation to the proceedings generally or in relation to any claim for relief in the proceedings—
>
> (a) the proceedings are frivolous or vexatious, or
>
> (b) no reasonable cause of action is disclosed, or
>
> (c) the proceedings are an abuse of the process of the court,
>
> the court may order that the proceedings be dismissed generally or in relation to that claim.
>
> (2) The court may receive evidence on the hearing of an application for an order under sub-rule (1).

58. The defendants' argument was based on the submission that no reasonable cause of action was disclosed within the meaning of rule 13.4(1)(b) of the UCPR.

59. That claim was based upon the argument that, because the defendants had simply paid the plaintiff the sum of $32,510.50, without there being any admission that the defendants were indebted to the plaintiff for that amount, and without there being any order of a court that that amount be paid, there was no entitlement to interest as a matter of law.

60. The defendants submitted that, if the plaintiff had taken the alternative course of seeking an itemised bill of costs, and had proceeded to an assessment of those costs under the LPA, she would not have been entitled to any interest on any overpayment, as the LPA does not contain any provision that creates an interest obligation in those circumstances.
61. A suggestion was made on behalf of the defendants that the plaintiff's claim was vexatious, because she had claimed interest as a substitute for her real motivation, which was to claim that the defendants had wrongfully advised her to settle her claim, without first seeking a psychological component to her damages.
62. Although it may be that the defendants have a subjective view that the plaintiff was motivated by this extraneous consideration, the evidence before the Court was wholly inadequate to support a finding by the Court that the plaintiff's proceedings were vexatious. The argument was only faintly put. If the plaintiff has a legitimate claim for payment of interest, then her motivation for pursuing the claim is entirely immaterial to the Court.
63. The defendants did not put any argument that the plaintiff's claim involved an abuse of the process of the Court.
64. The defendants made an alternative claim in their notice of motion that the summons be struck out pursuant to rule 14.28 of the UCPR. But that rule is not applicable, as it only permits the Court to strike out the whole or any part of a pleading. There are no pleadings. Part 14 of the UCPR applies to proceedings commenced by statement of claim and to proceedings in which a statement of claim has been filed: see rule 14.1.

The applicable test

65. The Court could not hold that the plaintiff's claim is "obviously untenable": *General Steel Industries Inc v Commissioner for Railways (NSW)* [1964] HCA 69; (1964) 112 CLR 125 at 129; [1964] HCA 69. I do not accept the defendants' submission that there is clearly no legal basis for the claimed entitlement in the plaintiff to interest, even if she succeeds in proving the facts upon which she relies to establish her claim.

Summary of conclusions

66. I will not decide in these reasons the general question whether, at common law, there is a ‘freestanding’ right to interest in a claim for money had and received, where it is established that the money has been unjustly retained by the defendant. This is not an appropriate case for such a contentious question to be positively decided.
67. I am satisfied that there is a substantial likelihood that the Court that decides these proceedings on a final basis will find that the general entitlement to interest contended for by the plaintiff exists, and that a finding to that effect will be upheld on appeal, to require the application for summary dismissal itself to be dismissed.
68. Further, a number of grounds may be able to be established by the plaintiff at the final hearing to justify her claim for interest, even if that is only as an exception to a general common law rule that interest is not payable. That possibility is sufficient to justify the dismissal of the defendants' notice of motion. If the plaintiff succeeds on any established basis for the entitlement to be paid interest, the need to decide the general question of principle may not arise. In that event, a decision by the Court on the general question may be obiter. That is an additional reason for the Court not to decide the general point of principle on a summary dismissal application, in respect of which the submissions of counsel have been of great assistance to the Court, but they have not, in the circumstances, been entirely comprehensive.

Existence of general law claim

69. There was an issue between the parties as to whether the only course open to the plaintiff to recover the alleged overpayment of costs to the defendants was to initiate a costs assessment under the LPA, as the defendants contended, or whether the plaintiff was correct in her submission that the alternative course that she had pursued, of seeking to enforce her common law rights in this Court, was a properly available alternative.
70. In principle, I prefer the submission by the plaintiff that the plaintiff's entitlement to claim interest from the defendants, on any overpaid costs and disbursements, can be pursued at general law, in respect of any right or cause of action that may be recognised by law.
71. In *Branson v Tucker* [2012] NSWCA 310 at [1], [84]-[106] and [122] the Court of Appeal, in my opinion, authoritatively established that the costs assessment provisions now under consideration do not provide a complete and exclusive code as to how legal costs may be assessed. See also *Mackowiak v Hagipantelis; Bickhoff v Hagipantelis* [2015] NSWSC 1087 per Garling J at [111]-[114].
72. It is to be noted that, while the entitlement of the parties to a legal retainer to contest costs issues arising out of the retainer, by seeking general law remedies in a court of competent jurisdiction, may require judicial determination of complex costs questions, *Branson v Tucker* at [95] sanctions the referral of such questions to appropriately qualified referees under UCPR Part 20.

Existence of 'freestanding' right to interest

73. It will now be appropriate to refer to the authorities that consider the question of whether, and if so in what circumstances, the common law recognises a general standalone right to the payment of interest on a claim for money had and received, where it is shown that the defendant has unjustly retained the plaintiff's money.
74. I will put aside for the moment the defendants' submission that the absence of a right in the plaintiff to receive interest in the present circumstances, if she had proceeded to an assessment under the LPA, justifies a conclusion that there is no general right to such interest at common law.
75. Mason P considered this issue in *Heydon v NRMA Ltd (No 2)* (2001) 53 NSWLR 600; [2001] NSWCA 445 at [14]- [16]. Beazley JA and Ipp AJA agreed with the then President.
76. His Honour analysed in detail the conflicting authorities at common law as to whether the claim to interest as a general standalone right existed, or it did not.
77. By extracting part of his Honour's judgment in *National Australia Bank Ltd v Budget Stationery Supplies Pty Ltd* (1997) 217 ALR 365 (, Mason P concluded at 605-606:

> The justice of the claim to interest was recognised in *London, Chatham* itself, where Lord Herschell LC acknowledged that 'the party who is wrongfully withholding the money from the other ought not in justice to benefit by having the money in his possession and enjoying the use of it' ((at 437). See also *Marine Board of Launceston* (at 525) per Latham CJ). Unfortunately, the Lord Chancellor and the other Law Lords felt constrained in *London, Chatham* from giving effect to the injustice they recognised, citing *Page v Newman* and the negative implication deriving from the limited intervention of Parliament in Lord Tenterden's Act of 1833, s 28. The Lord Chancellor thus recognised the unjust enrichment, but felt practically powerless to remedy it. In my view we should not feel similar restraint in the light of developments stemming in Australia from *Pavey & Matthews Pty Ltd v Paul* [1987] HCA 5;

> (1987) 162 CLR 221. The particular categories of cases involving awards of interest at common law to which I have referred strongly support such a development. No longer are we troubled about juries being confused by having to compute interest in these matters. And the notion that the existence of a limited statutory remedy to award interest should restrain the incremental and principled development of the common law in this area (though still current in the United Kingdom) (see *President of India v La Pintada Compania Navigacio SA* [1985] AC 104 at 130; *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] UKHL 12; [1996] AC 669 at 717, 718–719, 740–741) has been repudiated in Australia (see *Hungerfords* (at 147–148)).
>
> In *State Bank of New South Wales Ltd v Commissioner of Taxation* [1995] FCA 1652; (1995) 62 FCR 371 at 378–381, Wilcox J referred to some of these developments. He held that 'in ordering a payment of money by way of restitution, a court has power to include something by way of interest, where this is necessary to do justice between the parties' (at 660). Indeed he went further and awarded interest with respect to a discrete sum that had been 'retained' but repaid before proceedings were instituted (see (at 656, 663)). In *SCI Operations Pt Ltd v Commonwealth* (1996) 69 FCR 346, Beaumont and Einfeld JJ indicated concurrence with Wilcox J in *State Bank*. I would do likewise."

78. However, it would appear that what his Honour said at [14]-[16] may have been obiter. The question before the Court was whether a party who pays the amount of the judgment of a court against the party is entitled to interest on the amount paid, if the judgment is subsequently set aside and an order made for the repayment of the judgment sum. Mason P said at [17]: "The present situation is one of the established categories where interest has been awarded at common law, apparently without question..."

79. Ward J (as her Honour then was) considered this issue in *Lahoud v Lahoud* [2010] NSWSC 1297 where, after considering the authorities at length, her Honour concluded:

> [148] As is apparent from the above review of the relevant cases, there is certainly authority which supports a claim in restitution of the kind which has been brought by the Victor Lahoud interests. Relevantly, while I place weight on the seriously considered dicta of McHugh and Gummow JJ in *SCI*, in the absence of a definitive ruling by the High Court on this issue Mason P's decision in *Heydon* remains binding authority on me and supports the availability of a claim for interest on the basis of restitutionary principles notwithstanding that the claim brought is "free-standing" in the sense referred to in SCI. (I refer in this regard to the guidance given in *Australian Securities Commission v Marlborough Gold Mines Ltd* [1993] HCA 15; (1993) 177 CLR 485, at 492; *Gett v Tabet* (2009) 254 ALR 504; [2009] NSWCA 76; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, as to the precedential weight of appellate dicta, as discussed in *Ying v Song* [2009] NSWSC 1344, from [14].)
>
> [149] Therefore, had I otherwise been satisfied as to the factual foundation for the restitutionary claim made for interest by the Victor Lahoud interests, I would have followed the reasoning of Mason P in *Heydon* and that of Lord Walker in *Sempra* and allowed the claim for interest at the commercial interest rates claimed. However, it is not necessary for me to make any final finding of that kind, since I am not satisfied that the retention of the funds by Joseph Lahoud

> over the period from February 2001 at least up to a reasonable time for payment from the time of the audit in August 2010 amounts to an “unjust” enrichment (though it clearly has been an enrichment).

80. The effect of her Honour's finding at [149] that she was not satisfied that the retention of the funds over the period amounted to an 'unjust' enrichment, so that the general principle did not apply, may mean that her Honour's reasoning was also obiter.
81. The observations made by Ward J at [148] support the conclusion that a trial judge of this Court should follow the unanimous statement of principle by the Court of Appeal in *Heydon v NRMA Ltd (No 2)*, even if it was made in obiter. These authorities clearly establish, however, that the Court could not properly summarily dismiss the plaintiff’s claim on the ground that it is clear that the legal principle contended for by the plaintiff does not exist. The better view clearly is that the principle does exist.
82. I note also that in *Hughes v Geraldine Daley trading as Colin Daley Quinn, Solicitors and Barristers* [2013] NSWSC 806 at [84], Davies J recognised an entitlement to interest on overpaid legal costs on the basis of the judgment in *Heydon v NRMA Ltd (No 2)*.
83. Although the decision of Davies J was reversed by the Court of Appeal in *Daley v Hughes* (2014) 86 NSWLR 729; [2014] NSWCA 268, which had the result that his Honour's order for interest could not stand, that was for technical reasons that had the effect that an appeal did not lie to the Supreme Court in the circumstances of the case. The Court of Appeal did not comment adversely on the reasoning of Davies J on the substantive issue.
84. It is not necessary for this Court to delve into the precedential weight of Davies J's reasoning on this summary dismissal application.

Existence of established right to claim interest

85. A separate and sufficient reason to dismiss the defendants' summary dismissal application is found in the following extract from the judgment of Mason P in *Heydon v NRMA Ltd (No 2)* at [15], which relevantly is part of the extract from *National Australia Bank Ltd v Budget Stationery Supplies Pty Ltd* set out by the President in that paragraph:

> ... But there have always been streams of cases of undoubted authority which simply walked around any such general principle. Some involve restitutionary obligations, although this does not appear to be the basis upon which the ‘*London, Chatham* principle’ was bypassed. Thus, interest at common law has been awarded for money had and received, where the facts would have supported an equitable claim for account (*Bayne v Stephens*)...

86. As the defendants, as the solicitors for the plaintiff up to the time when they received the plaintiff's settlement monies, and deducted their costs and disbursements, owed a fiduciary duty to the plaintiff, the plaintiff has an arguable case that she has an equitable claim against them for an account. That claim could be based upon the argument that the defendants misled her on 19 September 2016, when they gave her the $65,000 estimate of their costs and disbursements, and that they wrongfully deducted the $65,000 from her settlement money on 5 October 2016. If the Court were to accept that, in those circumstances, the plaintiff had an equitable claim for an account, the accepted exception to the asserted absence of a general ‘freestanding’ right to interest identified by Mason P would apply, and the plaintiff would be entitled to the interest that she claims on that basis.

87. Furthermore, and proceeding upon the possibility that the plaintiff may actually make an equitable claim in these proceedings, the plaintiff may seek to support the claim in the summons. That is on the basis that the defendants, as her fiduciaries, were liable to account to her, and that she is entitled to equitable compensation, in the nature of interest, in respect of the portion of the costs and disbursements that she paid which may be found to have been an overpayment.

Absence of right to interest under Legal Profession Act (2004)

88. The defendants submitted that the plaintiff should not be entitled to interest on any overpayment of legal fees that she may establish was made to the defendants because, had she asked for an itemised bill of costs and applied for an assessment of those costs under the LPA, she would not have received interest. That is because the LPA does not empower costs assessors to add an interest component where they find that a client has already paid to a law practice more than the amount of the costs that are assessed as being payable.

89. It will be convenient to deal first with the defendants' premise that the plaintiff would not have become entitled to an interest payment had she applied for an assessment of the costs that she was obliged to pay to the defendants.

90. The plaintiff made a submission that, properly understood, the LPA does not exclude a right to interest. Accordingly, she submitted that there cannot be found in the LPA a statement of legislative policy that any client who is entitled to a repayment in respect of overpaid costs and disbursements to the client's solicitor is not entitled to be paid interest on the overpayment.

91. The reason given for this submission is that s 368 of the LPA relevantly provides:

> (1) On making a determination of costs referred to in Subdivision 2 or 3 of this Division, a costs assessor is to issue a certificate that sets out the determination.
>
> ...
>
> (4) In the case of an amount of costs that has been paid, the amount (if any) by which the amount paid exceeds the amount specified in any such certificate may be recovered as a debt in a court of competent jurisdiction.
>
> (5) In the case of an amount of costs that has not been paid, the certificate is, on the filing of the certificate in the office or registry of a court having jurisdiction to order the payment of that amount of money, and with no further action, taken to be a judgment of that court for the amount of unpaid costs, and the rate of any interest payable in respect of that amount of costs is the rate of interest in the court in which the certificate is filed.
>
> ...

92. The plaintiff submitted that the effect of the costs assessment process, as between client and law practice, is that the costs assessor performs an administrative function whereby the fair and reasonable amount of costs is determined. Upon completion of the determination, the costs assessor is required to issue a certificate that sets out the determination.

93. If, in the present case, the plaintiff had made an application for an assessment of the fair and reasonable costs payable to the defendants, and the costs assessor had issued a certificate for an amount less than the plaintiff had paid, then s 368(4) of the LPA would have been the applicable provision. Unlike the situation in respect of costs that have not been paid, which is dealt with in s 368(5), the plaintiff would not have been able to recover by filing the certificate in the registry of the appropriate court, and then enforcing the certificate on the basis that it was taken to be a judgment of that court.

94. The course that the plaintiff would have been required to take would be to institute proceedings in an appropriate court to recover the debt created by s 368(4) of the LPA, being a debt equal to the difference between the amount paid and the amount specified in the costs assessor's certificate as the amount properly payable.

95. If the plaintiff had pursued her claim to enforce the debt to judgment, then, the plaintiff submitted, the rule applicable to the power of the relevant court to order that interest be paid on the outstanding debt would be attracted, in the same way as would apply to any other claim for debt made in that court.

96. Consequently, the plaintiff submitted, even though the LPA itself did not create a separate entitlement to interest, such an entitlement would naturally arise under the statute that governed the power of the court in which proceedings to enforce the debt were prosecuted to order that interest to be paid on the debt.

97. Although this aspect of the plaintiff's submission is correct, as far as it goes, it appears that the debt created by s 368(4) of the LPA would only come into existence on the date of the issue of the certificate by the costs assessor. That may be a considerable time after the client has paid the costs and disbursements that have been shown to be an overpayment by the assessment conducted by the costs assessor. The LPA does not create a right to interest, and the statute that grants the court for the period in which the debt is enforced the power to order that interest to be paid will naturally only authorise interest from the date the debt comes into existence to the date of judgment, and separately perhaps, interest thereafter until payment.

98. If this reasoning is correct, there is validity in the defendants' submission that, at least for the period between the overpayment of the costs and disbursements and the issue of the certificate by the costs assessor, the LPA does not make provision for the payment of interest, and s 368(4) does not have the effect that interest is payable, because that is the result of the application of the law governing the power of the court in which the client seeks to enforce the debt created by s 368(4) of the LPA to order that interest to be paid on the debt.

99. It may therefore be, that there is some scope for the defendants to argue that the plaintiff should not be entitled to interest on any overpaid costs and disbursements under any general law right of recovery. That is because of a legislative policy found in the LPA that interest is not recoverable through any process established by that Act until the point of time when the certificate is issued by the costs assessor.

100. However, the defendants did not develop, on the summary dismissal application, the argument as to why the manner of operation of the LPA should constrain the ordinary operation of any applicable general law principles, which give the plaintiff a right to recover any overpayment made to the defendants, if those principles would otherwise permit the plaintiff to recover interest as well.

101. Even though the defendants may have established that, as the plaintiff has not yet applied for an assessment of the costs payable to the defendants, she will not become entitled to interest up until this point of time by operation of the LPA, the defendants have not addressed the issue of why that circumstance, if correct, should deny the plaintiff a right to receive interest under any other available general law action that would give her that right. The question whether the effect of the LPA is relevant to, and should lead to the denial of a right to, interest under general law principles, is itself a highly controversial question that requires the dismissal of the defendants' application for summary dismissal of the plaintiff's claim.

Conclusion

102. For these reasons, I dismiss the defendants' notice of motion filed on 8 November 2019.

Significance of existing itemised bill of costs

103. It will be appropriate for the Court to make some observations concerning the availability to the defendants of the case that they wish to make in these proceedings. That is, they are, in fact, lawfully entitled to a greater payment for their costs and disbursements than the amount of $32,510.50 stated in the itemised bill of costs that they delivered to the plaintiff's solicitors.

104. The defendants do not have a right, at large, to simply ignore the first itemised bill of costs and seek by evidence to prove that they are entitled to a larger amount than is stated in the bill of costs. There are legal consequences in lawyers delivering a formal bill of costs to their clients. This issue is dealt with by G E Dal Pont, *Law of Costs* (4th ed, 2018, LexisNexis Butterworths) at [5.56]-[5.62]. This is not an appropriate occasion for the Court to consider the issue in detail. Dal Pont explains at [5.56] that, at general law, a lawyer who delivers a bill of costs without preserving the right to withdraw or alter it upon a valid condition, is bound by it. The author then considers a number of exceptions that may arise under relevant rules, or by leave of the court, or where the bill has been delivered subject to a condition that it may be changed. It is not known whether any of these exceptions may apply. That is particularly so in relation to the possible reservation of a right to change the bill of costs that was delivered. As explained above, the relevant covering letter was not in evidence.

105. So far as the quantification of the costs and disbursements to which the defendants are entitled is concerned, that may already finally be proved by the itemised bill of costs that has been delivered, if the defendants do not establish a right to vary that bill. It seems that the plaintiff has acted on these principles in asserting that the defendants have conceded the amount that they have been overpaid by the plaintiff.

Relevance of UCPR rule 42.34

106. It will be necessary for the Court to hear the parties on the issue of the costs of the notice of motion, and in particular whether rule 42.34 of the UCPR has any application to the costs of interlocutory applications in cases where the application of the rule might deny the plaintiff her costs of the proceedings, even if ultimately successful.

107. During the course of the hearing, I invited the parties, and in particular the plaintiff, to consider the possible consequences of the application of rule 42.34, and whether the Court should be invited to make an order transferring these proceedings to another court.

108. If the proceedings are to continue in this Court then, if the parties wish, I will make case management orders before standing the proceedings into the Registrar's list. In that event, the parties should consider whether a less formal manner of identifying the issues in dispute will be effective rather than that the Court make an order that the proceedings continue on pleadings.

Order

109. The Court's order is:

The defendants' notice of motion filed on 8 November 2019 is dismissed.

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