SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCI 2019 0034

AUSTRALIA KUNQIAN INTERNATIONAL ENERGY CO PTY LTD (ACN 153 835 440)	Appellant
v	
FLASH LIGHTING COMPANY LTD	First Respondent
and	
HAO LIU	Second Respondent
and	
JUN XIAO	Third Respondent
and	
YINAN ZHANG	Fourth Respondent

JUDGES:	KYROU, NIALL and HARGRAVE JJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	24 September 2020
DATE OF ORDER:	24 September 2020
DATE OF JUDGMENT:	29 September 2020
MEDIUM NEUTRAL CITATION:	[2020] VSCA 259
JUDGMENT APPEALED FROM:	[2018] VSC 711 (Robson J); [2019] VSC 42 (Costs) (Robson J)

COSTS – Costs of appeal – Appellant substantially successful – No reason to depart from principle that costs follow the event.

COSTS – Costs of trial – Appellant substantially successful – One aspect of proceeding remitted to Trial Division – Costs of original trial and remitter trial to be determined by remitter judge.

INTEREST – Agreement between appellant and first respondent for sale of first respondent's shares in target company – Agreement required first respondent to pay certain debts owing by target company – First respondent failed to pay debts – Order for specific performance – Whether 'debt or sum certain recovered' for purpose of s 58(1) of *Supreme Court Act 1986* – Whether interest payable at rate fixed under s 2 of *Penalty Interest Rates Act 1983*.

APPEARANCES:	Counsel	Solicitors
For the Appellant	Dr J P Moore QC with Mr G Kozminsky	Clayton Utz
For First and Third Respondents	Mr T Margetts QC with Mr W Thomas	Baker McKenzie
For Second Respondent	No appearance	
For Fourth Respondent	No appearance	

KYROU JA
NIALL JA
HARGRAVE JA:

1 On 17 September 2020, we published our reasons for allowing the appeal by the appellant ('KQ') against an order made by a judge of the Trial Division.[1] That order relevantly gave judgment in favour of the first respondent ('FLC') in its claim against KQ and dismissed KQ's counterclaim against FLC.[2]

2 We adjourned the further hearing of the appeal without making any orders and gave directions for the parties to file submissions on the orders to be made to give effect to our reasons for judgment. In accordance with those directions, KQ and FLC each filed a draft order and written submissions in support of their respective draft orders. At the adjourned hearing on 24 September 2020, the main issues in contention were costs and interest. On that day, we made the order set out at [12] below disposing of the appeal and stated that we would publish reasons concerning costs and interest as soon as practicable. These are our reasons.

Brief summary of reasons for judgment relevant to costs and interest

3 Set out below is a summary of the issues at trial, the judge's findings and our reasons for judgment insofar as they are relevant to the questions of costs and interest. The summary is very brief because it assumes familiarity with our reasons for judgment.

4 Pursuant to an equity transfer agreement dated 27 April 2012 ('ETA') between KQ, FLC and Australia New Agribusiness and Chemical Group Ltd ('ANB'),[3] KQ purchased FLC's 40 per cent shareholding in U&D Mining Industry (Australia) Pty Ltd ('U&D') and a further 11 per cent shareholding held by ANB. The ETA provided

---

1 *Australia Kunqian International Energy Co Pty Ltd v Flash Lighting Company Ltd* [2020] VSCA 239 ('Reasons for judgment').

2 As KQ's counterclaims against the second, third and fourth respondents are not presently relevant, we will not refer to those respondents.

3 ANB was placed into liquidation on 23 August 2016 and was not a party to the Trial Division proceeding.

that the purchase price for the shares was to be determined by a valuation of U&D's principal asset, a 44.5 km^2 coalmining tenement in the Bowen Basin in Queensland ('Tenement').

5 The appointed valuer valued the Tenement at $129,392,400 ('Valuation'). The parties to the ETA adopted a valuation of $129,000,000, resulting in FLC's 40 per cent interest in U&D being valued at $51,600,000 and the additional 11 per cent interest KQ acquired from ANB being valued at $14,190,000.

6 The parties to the ETA proceeded on the basis that it came into force on 8 May 2012. On 11 May 2012, KQ received a transfer of 40 per cent of the shares in U&D from FLC and 11 per cent of the shares in U&D from ANB. On 29 June 2012, KQ paid $14,190,000 to ANB. In September 2012, KQ paid a total of $22,400,000 to FLC.

7 On 27 June 2016, FLC instituted a proceeding against KQ in the Trial Division claiming $29,200,000, being the outstanding balance KQ allegedly owed to FLC under the ETA for its 40 per cent shareholding in U&D. In its defence, KQ relevantly pleaded that the valuer had acted fraudulently and, as there was no valid valuation which determined the price of the shares in U&D, KQ was not liable to make any payment to FLC for those shares. In its counterclaim against FLC, KQ relevantly sought repayment of the amount of $22,400,000 from FLC on the basis that KQ paid that amount under the mistaken belief that it was liable to make the payment under the ETA. In its defence to KQ's counterclaim, FLC relevantly pleaded that it was not liable to repay the amount of $22,400,000 on the basis that it had changed its position on the faith of the payment.

8 The judge found in favour of FLC in its claim against KQ and ordered KQ to pay to FLC the amount of $25,278,431.37, representing the balance of $29,200,000 less an amount of $3,921,568.63, being FLC's share of an amount of $5,000,000 that KQ had paid under a separate funding agreement. The judge did not decide whether the valuer had acted fraudulently. He rejected KQ's counterclaim based on mistake. He made no finding on FLC's defence of change of position, as consideration of that

defence was deferred by consent.

9 In its counterclaim against FLC, KQ also sought an order for specific performance of FLC's obligation under cl 3.5 of the ETA to pay debts of U&D totalling $3,375,000 that were undisclosed when the ETA was entered into.[4] The provisions of the ETA relevant to this part of KQ's counterclaim and the parties' pleadings and submissions in relation to it are discussed in detail below. At this stage, it suffices to say that the judge accepted FLC's submission that the relevant creditors had forgiven the debts and therefore no amount was payable by FLC. The judge overlooked evidence adduced by KQ which showed that debts totalling $3,375,000 had not been forgiven but had been repaid to the relevant creditors by U&D.

10 In our reasons for judgment, we summarised our key conclusions relevantly as follows:

> (a) The judge erred in failing to deal with KQ's defence that the valuer acted fraudulently and that the fraud meant that the Valuation did not fix the purchase price for FLC's 40 per cent shareholding in U&D under the ETA. The judge should have upheld this defence and found that KQ did not have a contractual obligation under the ETA to make any further payments to FLC in respect of the purchase price. Accordingly, the judge erred in giving judgment in favour of FLC in the amount of $25,278,431.37 together with interest on that amount under s 58 of the *Supreme Court Act*.
>
> …
>
> (d) The judge erred in rejecting KQ's claim that it made payments to FLC for its shares in U&D in the mistaken belief that the Valuation had fixed or confirmed the purchase price for FLC's shares in U&D and that the ETA required the making of the payments. Whether the judge was correct in dismissing KQ's counterclaim against FLC will depend on whether FLC is able to establish its defences to KQ's counterclaim based on mistake.
>
> …
>
> (f) The judge erred in failing to find that FLC was obliged to pay the

---

[4] KQ originally relied on the higher sum of $3,377,785, as set out in the particulars to para 28(d) of its final defence and counterclaim (see [22] below). That higher amount is not presently relevant.

amount of $3,375,000 to U&D pursuant to cl 3.5 of the ETA.[5]

11 In our reasons for judgment, we indicated the orders we intended to make and gave the parties an opportunity to review our reasons and make submissions before we made the orders, as follows:

> 315 We will provide the parties with an opportunity to review these reasons and engage in discussions to resolve the litigation. We strongly encourage the parties to do so and are prepared to make an order for judicial mediation before an associate judge of the Court if the parties consent to such an order. If the litigation is not resolved by agreement, we will make orders to the following effect:
>
> (a) The application for leave to appeal is granted.
>
> (b) The appeal is allowed.
>
> (c) The judge's orders giving judgment in favour of FLC and requiring KQ to pay interest and costs be set aside and be replaced by orders dismissing FLC's claim and requiring FLC to pay to U&D the amount of $3,375,000 *together with interest*.
>
> (d) The proceeding be remitted to the Trial Division for determination of FLC's pleaded defences to KQ's counterclaim based on mistake.
>
> 316 We will give the parties an opportunity to make submissions in relation to the costs of the trial and of the appeal.[6]

12 The order we made on 24 September 2020 relevantly provided as follows:

> 1. The application for leave to appeal is granted.
>
> 2. The appeal is allowed.
>
> 3. Paragraphs 1, 2, 3, 4, 7 and 8 of the order of Justice Robson dated 9 April 2019 are set aside and the following orders are substituted:
>
> (1) [FLC's] claim against [KQ] is dismissed.
>
> (2) [FLC] pay to U&D … the sum of $3,375,000 together with interest in the amount of $2,767,823.09.
>
> …
>
> 4. The proceeding is remitted to the Trial Division for determination of the pleaded defences of [FLC] against the claim based on mistake in the counterclaim by [KQ] against [FLC].

---

5 Reasons for judgment [314].

6 Reasons for judgment [315]–[316] (emphasis added).

5. [FLC] pay [KQ's] costs of the application for leave to appeal and of the appeal, including any reserved costs.

…

7. The costs of [KQ] and [FLC] of the original trial and the remitter trial be determined by the remitter judge.

…

Costs

13 KQ submitted that, as it was substantially successful in its appeal, the Court should order that FLC pay KQ's costs of the appeal on the basis of the principle that costs follow the event. In relation to the costs of the trial, KQ contended that, on the basis of the same principle, the Court should order that FLC pay KQ's costs save for costs solely attributed to the matters to be remitted.

14 In relation to the costs of the appeal, FLC submitted that the Court should depart from the principle that costs follow the event because KQ had not 'squarely put' fraud on the part of the valuer at trial. According to FLC, if KQ had argued fraud at trial in the same manner it did on appeal, the judge would have made a decision on that issue and this would have obviated the need for this Court to decide the issue. In relation to the costs of the trial, FLC conceded that the Court should order that it pay KQ's costs save for costs solely attributed to the matters to be remitted.

15 In our opinion, there is no proper basis for the Court to depart from the principle that costs follow the event in relation to the costs of the appeal. KQ did 'squarely put' the issue of fraud by the valuer at trial. It pleaded the issue and submitted that the judge should find fraud. The fact that such a finding was put as an alternative to KQ's primary submission that the valuer relied on a report titled 'Coal Resource Assessment Report' did not detract from the judge's obligation to make a finding on KQ's fraud case once he rejected KQ's reliance case. Likewise, the fact that KQ's primary case on appeal was fraud rather than reliance does not justify departure from the principle that costs follow the event.

16 In relation to the costs of the trial, we consider that if the remitter judge upholds FLC's defence of change of position and dismisses KQ's counterclaim against FLC, he or she will be in the best position to decide the costs issue. However, if the defence fails and KQ's counterclaim is successful, we see no reason why the remitter judge would not make an order that FLC pay all of KQ's costs of the trial, consistent with our view and FLC's concession.

17 For the above reasons, we ordered that FLC pay KQ's costs of the application for leave to appeal and of the appeal and that KQ's and FLC's costs of the original trial and the remitter trial be determined by the remitter judge.

Interest

18 KQ sought interest on the amount of $3,375,000 that FLC was ordered to pay to U&D, pursuant to s 58(1) of the *Supreme Court Act 1986* ('SCA').

19 Section 58 of the SCA relevantly provides as follows:

> **58 Interest to be allowed when debts or sums certain recovered**
>
> (1) If in a proceeding a debt or sum certain is recovered, the Court must on application, unless good cause is shown to the contrary, allow interest to the creditor on the debt or sum at a rate not exceeding the rate for the time being fixed under section 2 of the *Penalty Interest Rates Act 1983* … from the time when the debt or sum was payable (if payable by virtue of some written instrument and at a date or time certain) or, if payable otherwise, then from the time when demand of payment was made.
>
> …
>
> (3) A debt or sum payable or a date or time is to be taken to be certain if it has become certain.

20 The provisions of the ETA that are relevant to the issue of interest are as follows:

> Clause 3 Share Transfer
>
> 3.1 [KQ, ANB and FLC] agree that [ANB] and [FLC] will transfer their share interests to [KQ] according to the terms in this agreement, and

[KQ] will pay the Transfer Price Sum to [ANB] and [FLC] according to this agreement. Upon the completion of the transfer, [ANB] and [FLC] will transfer their shares and corresponding shareholder's interests to [KQ] to enjoy.

3.2 [ANB] and [FLC] guarantee that [KQ] will have the full right of disposal in relation to the shares they transfer to [KQ]; the shares so transferred as well as all rights and interests attached to such shares will be transferred to [KQ] free of any pledge, lien or other security interest encumbrances upon the date of the transfer of the shares in this agreement.

3.3 The Transfer Price Sum payable to [ANB] and [FLC] will be handed over to [ANB] and [FLC] by [KQ] within twenty working days after the transfer of the shares, pending the valuation of the shares transferred by a qualified asset valuation body [jointly] appointed by the three parties and this agreement coming into effect.

3.4 The Transfer Price Sum refers to the purchase price of the shares transferred. Its corresponding rights and interests include various shareholder's rights and interests of the transferred shares. Such shareholder's rights and interests refer to all current and potential rights and interests attached to the transferred shares, including fifty-one percent (51%) of all movable and immovable properties of [U&D], as well as tangible and intangible assets, excluding the following: (1) *Any debts/liabilities and other accounts payable of [U&D] not listed in the [U&D] Asset Valuation Report (Undisclosed Debts/Liabilities in short hereafter)* and (2) Shortfall, damage, depreciation or loss in practical value when the existing assets of [U&D] are compared with the itemized schedule in the [U&D] Asset Valuation Report (collectively referred to as Asset Devaluation).

3.5 *[ANB] and [FLC] should be responsible for all Undisclosed Debts/Liabilities (if exist).*

3.6 Attachments to the agreement — Debts/Liabilities listed in the Asset Valuation Report will be the responsibility of [U&D].

…

Clause 6 Format of Transfer & Valuation

6.1 According to the Agreement of Intent signed by [KQ, ANB and FLC], the parties will engage Henan Gold Stone Mining Tenement Valuation Company Limited to carry out the valuation of [the Tenement].

6.2 [KQ, ANB and FLC] agree to the specific price of this share transfer on the basis of the value in the Tenement Valuation Report reviewed and confirmed by the State-Owned Asset Supervision & Administration Commission of Henan Province China and the principle of fairness.

6.3 [KQ, ANB and FLC] confirm the share value of [the Tenement] is AUD 129,000,000.

…

Clause 8 Implementing Share Ownership Change in [U&D's Tenement]

…

8.2 According to the Agreement of Intent signed by [KQ, ANB and FLC], [KQ and ANB] have engaged Henan Gold Stone Mining Tenement Valuation Company Limited to carry out the valuation of [the Tenement], and all three parties will accept the valuation report on the [Tenement] by Henan Gold Stone Mining Tenement Valuation Company Limited.

8.3 After the signing of the Agreement of Intent by [KQ, ANB and FLC], [KQ] has paid AUD 5,000,000 of deposit to [U&D]. Upon this agreement coming into effect, the AUD 5,000,000 paid by [KQ] previously will be converted into the share transfer payment.[7]

21 It was common ground that no 'Asset Valuation Report' of U&D was in existence when the ETA was entered into on 27 April 2012 or came into force on 8 May 2012.

22 KQ's final defence and counterclaim relevantly pleaded the following:

28. On or about 27 April 2012 (when the [ETA] was entered into):

…

(d) U&D had liabilities of $25,398,104.

PARTICULARS

The liabilities of U&D on or about 27 April 2012 included: (i) $140,000 owing to Apollo Fertiliser (which was subsequently repaid by U&D); (ii) $390,000 owing to Lion Glass (which was subsequently repaid by U&D); (iii) $3,550,932 owing to Yinan Zhang (of which $2,845,000 was subsequently repaid by U&D); and (iv) other liabilities of $2,785 (which was subsequently repaid by U&D) ((i) to (iv) together, totalling $3,377,785 in liabilities repaid by U&D, **the Liabilities Claimed**). The liabilities of U&D on or about 27 April 2012 also included an amount owing to ANB (being $7,078,648) (which was subsequently agreed not to be payable), an amount owing to FLC (being $9,235,739) and an amount owing to KQ (being $5,000,000).

…

---

[7] Emphasis added, underlining in original. As we stated at [21], [178] and [310] of the reasons for judgment, the English translation of the ETA was somewhat clumsy.

38A. Further or alternatively, it was a term of the [ETA] that FLC and ANB would be obliged to repay any undisclosed debts or liabilities of U&D as at the date of the Agreement (which was on or about 27 April 2012).

PARTICULARS

Clause 3.5 of the [ETA].

38B. The Liabilities Claimed were undisclosed debts or liabilities of U&D as at the date of the [ETA].

38C. In the premises, FLC is obliged to repay the Liabilities Claimed to U&D (**Liabilities Obligation**).

38D. In breach of the Liabilities Obligation, FLC has not repaid the Liabilities Claimed to U&D.

38E. By reason of FLC's breach of the Liabilities Obligation, KQ has suffered loss and damage.

PARTICULARS

The loss and damage is 51% (being the proportion of KQ's shareholding in U&D) of the Liabilities Claimed and of the use of that money. Further particulars may be provided before trial.

…

43. Further or alternatively, KQ seeks specific performance of the Liabilities Obligation referred to in paragraph 38C above.[8]

23 FLC's final defence to counterclaim relevantly pleaded the following:

28. It denies the allegation in paragraph 28 thereof and says further that:

…

(d) as to the allegations in paragraph 28(d) thereof to the effect that U&D had liabilities of $25,398,104, it denies the allegations therein;

…

38A. It denies the allegations in paragraph 38A thereof and says further that:

(a) Article 3.4 of the [ETA] provided that the transfer price (as defined) does not include, relevantly, all the debts and other payables of U&D which are not disclosed (**Undisclosed Debt**) in the asset appraisal report (**Appraisal Report**);

---

[8] Bolding in original.

(b) fairly and reasonably construed, Article 3.5 of the [ETA] provided that ANB and FLC shall be liable to pay all the Undisclosed Debt (if any) to U&D; and

(c) Article 3.6 of the [ETA] provided that the debt listed in the Appraisal Report shall be borne by U&D.

38B. It denies the allegations in paragraph 38B thereof and says further that the Liabilities Claimed did not constitute debts and other payables of U&D within the meaning of Article 3.4 of the Agreement.

38C. It denies the allegations in paragraph 38C thereof and refers to and repeats the allegations in paragraph 38B hereof.

38D. It denies the allegations in paragraph 38D thereof and says further that by reason of the allegations in paragraphs 38A to 38C hereof, FLC is and was at all material times under no obligation to make payment of the Liabilities Claimed to U&D or at all.

38E. It denies the allegations in paragraph 38E and says further that:

(a) it refers to and repeats the allegations in paragraph 38D hereof;

(b) alternatively to subparagraph (a) hereof, if (which is denied) FLC has breached the Liabilities Obligation, then any loss and damage resulting from that contravention has been suffered by U&D, not KQ;

(c) further to subparagraph (b) hereof, KQ does not have standing to claim the loss and damage allegedly suffered by U&D (if any, which is denied) by reason of the alleged contravention by FLC of the Liabilities Obligation.

…

43. FLC denies the allegation in paragraph 43 thereof …

…

50. Further to the allegations in paragraph 43 thereof, if (which is denied) FLC is subject to an obligation to make payment to U&D of the Liabilities Obligation, then FLC says further that if (which is denied) KQ were otherwise entitled thereto, relief by way of specific performance ought not be granted for the following reasons:

(a) the Liabilities Obligation is in substance alleged in paragraph 38C thereof to be owed [to] U&D, and accordingly KQ does not have standing to enforce any such obligation for and on behalf of U&D whether by way of decree of specific performance or otherwise;

(b) alternatively to subparagraph (a) hereof, damages are an adequate remedy;

(c) alternatively to subparagraphs (a) and (b) hereof, by reason of

> KQ's failure to make payment to FLC of all of the FLC Purchase Price, KQ does not have clean hands and is not thereby entitled to a decree of specific performance.[9]

24 At trial, KQ tendered various financial records to establish that U&D was indebted in the sum of $25,398,104 as at 27 April 2012 and that it had subsequently repaid debts totalling $3,375,000. FLC contended that the debts had been forgiven and therefore they were not 'Undisclosed Debts/Liabilities' in respect of which it was under an obligation to make payments pursuant to cl 3.5 of the ETA. The judge accepted FLC's contention. He did not deal with KQ's evidence that debts totalling $3,375,000 had not been forgiven but had been repaid by U&D to the relevant creditors.

25 This Court found that the meaning and effect of cl 3.5 of the ETA were clear: to the extent that U&D had any debts and liabilities which were not disclosed in an 'Asset Valuation Report', FLC and ANB were responsible for paying for them.[10] The Court held that the judge erred in overlooking the evidence of repayment of debts totalling $3,375,000 and concluding that the entire indebtedness of $25,398,104 had been forgiven.[11] Accordingly, the Court determined that KQ was entitled to an order that FLC specifically perform its obligation under cl 3.5 of the ETA to pay to U&D the amount of $3,375,000.[12]

26 KQ submitted that the requirements of s 58(1) of the SCA for an award of interest on the judgment sum of $3,375,000 were satisfied in the present case. According to KQ, the judgment sum was made up of debts or sums certain that U&D owed to creditors as at 8 May 2012 (when the ETA came into force) and FLC had an obligation under the ETA to pay those amounts. KQ relied on the analysis of the majority in this Court's decision in *Carbone v Melton City Council*[13] of the meaning of

---

9 Bolding in original.

10 Reasons [310].

11 Reasons [312].

12 Reasons [313].

13 [2020] VSCA 117 ('*Carbone*').

the phrase 'a debt or sum certain' in s 58(1) of the SCA. Initially, KQ sought interest totalling $2,767,823.09 calculated at the rates for the time being fixed under s 2 of the *Penalty Interest Rates Act 1983* ('PIRA') from the dates that U&D had paid the relevant debts to its creditors. However, at the hearing on 24 September 2020, KQ sought interest totalling $2,864,575.15 calculated at those rates from the earlier date of 8 May 2012.

27 Attached to KQ's written submissions dated 23 September 2020 was a table setting out how the amount of $2,767,823.09 was calculated. The rates of interest in the table, fixed under s 2 of the PIRA ('PIRA rates'), ranged from 10.5 per cent applicable as at 24 May 2012 (being the first day upon which interest has been claimed) to 10 per cent applicable as at 1 February 2017 (being the most recent date upon which the PIRA rates have been adjusted). In the period commencing from 24 May 2012, the lowest rate was 9.5 per cent applicable as at 1 June 2015 and the highest rate was 11.5 per cent applicable as at 3 February 2014.

28 FLC submitted that no interest should be awarded on the judgment sum of $3,375,000 for two reasons. First, on the proper construction of cl 3.5 of the ETA, FLC's obligation to pay U&D's undisclosed debts/liabilities had not yet arisen because that obligation only crystallises when a valid valuation determines the price payable for FLC's shares in U&D. Secondly, KQ did not prove that undisclosed debts/liabilities totalling $3,375,000 were due and payable by U&D. FLC contended that, if the Court is persuaded to award interest, it should do so by reference to commercial rates rather than the PIRA rates. FLC sought leave to prepare and file an affidavit and submissions identifying the appropriate rates to be applied by the Court.

29 On the issue of the proper construction of cl 3.5 of the ETA, FLC relied on the fact that cl 3.4 referred to the 'Undisclosed Debts/Liabilities' in the context of describing the 'Transfer Price Sum' for the shares in U&D to be acquired by KQ. FLC argued that cl 3.4 required that the amount of those debts and liabilities be

treated as an adjustment to the price payable for the shares fixed by a valuation of the Tenement. Accordingly, so it was said, as the invalidity of the Valuation meant that the price payable for the shares had not yet been determined, the requirement that FLC 'be responsible' for those debts and liabilities in the form of an adjustment to the price fixed by a valuation had not yet arisen. FLC argued that, if the Court decides to award interest to U&D, it should do so pursuant to s 60 of the SCA from the date of KQ's counterclaim. Section 58 was said not to apply because 'the time that the debts become due and payable has not yet been determined, and has not yet even arisen under the operation of the [ETA]'.[14]

30 On the issue of proof of the undisclosed debts/liabilities, FLC submitted that KQ had not adduced evidence at trial to establish that U&D owed debts totalling $3,375,000 to creditors. According to FLC, 'before the Court can make a determination as to when the sums became certain, there needs to be completion of the asset valuation report under the [ETA], or consideration of the evidence of when each of those amounts became due and payable'.[15]

31 On the issue of the interest rate to be adopted by the Court, FLC submitted that the Court could take judicial notice of the current official cash rate determined by the Reserve Bank of Australia ('RBA') and current commercial rates. FLC contended that PIRA rates have been significantly higher than commercial rates and therefore an award of interest in favour of U&D based on the PIRA rates would be unjust because it would result in a windfall gain to U&D and impose a penalty upon FLC. That was said to constitute a good reason for not awarding interest at the PIRA rates. FLC did not adduce any evidence as to commercial or market rates since 8 May 2012. As we have already stated, it sought leave to prepare and file an affidavit identifying appropriate rates to be applied by the Court.

32 FLC did not make any submissions on the meaning of the phrase 'debt or sum

---

14 Transcript of Proceedings (24 September 2020) 20.8–20.10.

15 Transcript of Proceedings (24 September 2020) 21.15–21.19.

certain' in s 58(1) of the SCA. Further, although FLC took issue with the premises underpinning KQ's calculations of interest — namely whether the obligation to pay interest had crystallised, the quantum of the undisclosed debts and the appropriateness of the PIRA rates — it did not challenge the accuracy of KQ's calculations based on those premises.

33 We reject FLC's submission that its obligation under cl 3.5 of the ETA to pay for U&D's undisclosed debts/liabilities has not yet crystallised because the purchase price for FLC's shares in U&D has not yet been determined by a valid valuation. This submission was not put by FLC at trial or at the hearing of the appeal. In any event, this submission is incorrect for the following reasons:

(a) Clause 3.4 of the ETA does not link FLC's obligation to pay for U&D's undisclosed debts/liabilities to KQ's obligation to pay the purchase price for FLC's shares in U&D. In particular, cl 3.4 does not provide that the purchase price is to be adjusted to take into account the amount of the undisclosed debts/liabilities. Rather, cl 3.4 reinforces the statement in cl 3.2 that the shares in U&D being acquired by KQ are to be free from encumbrances, by making it clear that the 'rights and interests attached to the transfer of shares' include any debts and liabilities set out in an Asset Valuation Report but not any debts and liabilities which are not set out in such a report. The evident purpose of cl 3.4 is to ensure transparency in relation to the asset backing of the shares in U&D.

(b) The ETA refers to two distinct reports, the Asset Valuation Report in cls 3.4 and 3.6, and the valuation report referred to in cls 6.2 and 8.2. It is clear from cls 6.1, 6.2 and 8.2 that the task of the valuer was to value U&D's Tenement rather than U&D's shares. The existence and quantum of any undisclosed debts/liabilities were not relevant matters for the valuer. It is also clear from cls 6.2 and 8.2 that the price payable for the shares would be based on a valuation of the Tenement. The ETA did not provide for an adjustment to the price based on undisclosed debts/liabilities.

(c) Clause 8.3 of the ETA provides for an adjustment to the price payable for the shares in U&D on account of the payment of $5,000,000 that KQ had previously made under a funding agreement. That clause indicates that where the ETA required such an adjustment, it made express provision for it. No such express provision was made in relation to the undisclosed debts/liabilities.

34 FLC should have made its submission that KQ did not prove the existence or quantum of the undisclosed debts totalling $3,375,000 during the hearing of the appeal rather than as part of its contentions regarding costs and interest. In any event, the submission is devoid of merit. As we explained at para 304 of our reasons for judgment, at trial, KQ tendered parts of U&D's books of account and bank statements which showed that it was indebted in the amount of $25,398,104 as at 27 April 2012 and that it had subsequently repaid debts totalling $3,375,000. Although FLC contended that all the debts had been forgiven, it did not adduce any evidence to impugn the accuracy of those parts of U&D's books of account or bank statements that recorded the debts totalling $3,375,000 and the repayment of those debts by U&D.

35 Further, under s 1305(1) of the *Corporations Act 2001* (Cth), U&D's books of account were 'admissible in evidence in any proceeding and … prima facie evidence of any matter stated or recorded in [them]'. In *Australian Securities and Investments Commission v Rich*, Austin J stated that the phrase 'prima facie' within the meaning of s 1305(1) is to be interpreted as follows:

> All other things being equal, the fact that a matter is stated in a book kept by a company is sufficient to prove that matter in civil proceedings. That does not reverse the onus of proof in the proceedings in any general way, but it means that the tendering of the book is evidence of the matter recorded in it, and that matter will be thereby proven unless other evidence convinces the tribunal of fact to the contrary, on the balance of probabilities.[16]

36 As FLC had not adduced any evidence to impugn the accuracy of those parts

---

16 (2009) 236 FLR 1, 82 [396]; [2009] NSWSC 1229.

of U&D's books of account and bank statements that recorded the debts totalling $3,375,000 and the repayment of those debts, KQ had discharged its onus of establishing that U&D owed the debts making up the amount of $3,375,000 claimed by it and that U&D had subsequently paid those debts to the relevant creditors. The fact that there was no Asset Valuation Report meant that those debts were 'Undisclosed Debts/Liabilities' under cl 3.4 of the ETA and that FLC was liable to pay them under cl 3.5.

37 It follows that, contrary to FLC's contention, interest is payable under s 58(1) of the SCA rather than s 60(1).

38 It is not necessary for us to decide whether the undisclosed debts/liabilities totalling $3,375,000 were 'debts' within s 58(1) of the SCA. That is because we are satisfied that they are 'sums certain'. In accordance with the analysis of that phrase by the majority in *Carbone*,[17] those debts and liabilities were sums certain because they were capable of precise quantification by reference to U&D's books of account and were of a nature that did not require any form of valuation, estimation or assessment by a court. On the proper construction of cl 3.5 of the ETA, FLC and ANB had a joint and several obligation to pay the debts and liabilities 'at a date or time certain', namely, when the ETA came into force on 8 May 2012. The requirement in s 58(1) that the sum certain is recovered in a proceeding is also satisfied because the amount of the debts/liabilities was claimed by KQ in its counterclaim and this Court gave judgment for that amount.

39 We are unable to accept FLC's submission that interest should not be awarded at the PIRA rates.

40 The principles relating to the rate of interest to be applied to an award of interest under s 58(1) of the SCA may be summarised as follows.

41 The purposes of s 58(1) of the SCA include compensating a plaintiff for being

---

17 [2020] VSCA 117, [45]–[47].

kept out of his or her money[18] and encouraging a defendant to settle early.[19] The PIRA rates may contain a 'penalty element'.[20] Although it is not one of the purposes of s 58(1) to punish a defendant, by authorising awards of interest at the PIRA rates, s 58(1) recognises that such awards may have a punitive effect.[21]

42 Section 58(1) of the SCA does not mandate application of the PIRA rates unless good cause to the contrary is shown.[22] Rather, it designates those rates as the maximum rates that may be applied, leaving the Court with a discretion to apply lower rates. Nevertheless, the practice in Victoria is to treat the maximum rate as the starting point for the exercise of the discretion.[23] Where a defendant contends that the facts and circumstances of the case warrant adopting a lower rate, evidence is required as to an appropriate lower rate.[24] Mere reliance by a defendant in broad terms on the fact that the PIRA rates are higher than market rates is not in itself a sufficient reason to apply a lower rate.[25]

43 In accordance with the above principles, we have treated the PIRA rates as the starting point for determining the rates to be applied in the present case. We were not satisfied on the basis of the submissions made by FLC that we should depart from that starting point. Those submissions amounted to no more than a proposition that the PIRA rates should not be adopted because they were significantly higher than market rates. However, the mere fact that the PIRA rates are higher than market rates — which has been the case over recent years — has never been treated as sufficient in itself for not adopting the PIRA rates. In order for

---

18 *MBP (SA) Pty Ltd v Gogic* (1991) 171 CLR 657, 663; [1991] HCA 3.

19 *Grincelis v House* (2000) 201 CLR 321, 328–9 [16]; [2000] HCA 42.

20 PIRA s 2(2)(b); *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd [No 3]* [2003] VSC 244, [46], [60], [67]–[70] ('*Johnson Tiles*').

21 *Clarke v Foodland Stores Pty Ltd* [1993] 2 VR 382, 396–7 ('*Clarke*').

22 *Clarke* [1993] 2 VR 382, 389.

23 *Johnson Tiles* [2003] VSC 244, [64]; *Hartley Poynton Ltd v Ali* (2005) 11 VR 568, 618 [107]; [2005] VSCA 53 ('*Hartley Poynton*'); *Amcor Ltd v Barnes [No 2]* [2019] VSC 849, [73]–[84].

24 See, eg, *Johnson Tiles* [2003] VSC 244, [75].

25 *Hartley Poynton* (2005) 11 VR 568, 617–18 [106]; [2005] VSCA 53.

the Court to depart from the starting point of the PIRA rates, the party liable to pay interest must adduce some evidence — or point to evidence adduced by another party — indicating that the circumstances of the case warrant a lower rate being adopted.

44 In the present case, FLC was on notice since 17 September 2020 — by virtue of para 315(c) of our reasons for judgment (set out at [11] above) — that we intended to make an order awarding interest on the judgment sum of $3,375,000. Despite this, FLC did not file any evidence in support of its contention that we should not adopt the PIRA rates. Instead, it submitted that we can take judicial notice of the RBA's current official cash rate and current commercial rates.

45 We are prepared to assume, without deciding, that we can take judicial notice of the RBA's current official cash rate and the current PIRA rate and of the fact that the current PIRA rate is significantly higher than some rates that first tier banks are paying for bank deposits and charging for some types of loans (such as housing loans). However, 'commercial' or 'market' lending rates are not uniform. They vary depending on matters such as the identity of the lender and borrower, the quality of the security offered (if any) and the degree of risk involved. Accordingly, the Court cannot take judicial notice of the availability (and relevance to this case) of any particular market lending rates in the absence of evidence, particularly in the light of the lengthy period for which interest is payable (since 2012).

46 We also note that, having regard to the principles set out at [41]–[42] above, the mere fact that there is a significant differential between market rates and the PIRA rates is not sufficient, without additional evidence relating to this particular case, to warrant a departure from the PIRA rates. In the present case, FLC had ample opportunity to adduce evidence but failed to do so. We did not consider it appropriate to delay making final orders to give FLC a further opportunity to file an affidavit identifying 'appropriate' rates.

47 For the above reasons, we accepted the calculations of interest in the table

attached to KQ's submissions dated 23 September 2020, which resulted in a total interest sum of $2,767,823.09. That table included interest on the relevant undisclosed debts from the date that the debts were paid by U&D.

48 There is some merit in KQ's revised interest sum of $2,864,575.15, which included interest from the earlier date of the commencement of the ETA (8 May 2012). That is because it can be said that the undisclosed debts/liabilities were payable by FLC by virtue of 'some written instrument' (namely, the ETA) and therefore, in accordance with s 58(1) of the SCA, interest was payable 'from the time when the debt or sum was payable' under that instrument. However, we did not adopt the revised interest sum because it would have been unfair to FLC to require it to pay interest on debts owing by U&D which it had not yet paid and in respect of which it was not yet out of pocket. That unfairness constituted 'good cause … to the contrary' for the purpose of s 58(1).[26]

49 For the above reasons, we ordered that FLC pay to U&D interest in the amount of $2,767,823.09.

---

[26] *Clarke* [1993] 2 VR 382, 394.