IN THE COURT OF APPEAL OF NEW ZEALAND

CA164/2009
[2010] NZCA 327

BETWEEN	ACCIDENT COMPENSATION CORPORATION Appellant
AND	ROBERT KEARNEY Respondent

Hearing: 15 April 2010

Court: Chambers, Arnold and Baragwanath JJ

Counsel: I G Hunt for Appellant
P J Sara for Respondent

Judgment: 27 July 2010 at 11 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay to the respondent costs for a standard appeal on a band A basis plus usual disbursements.

REASONS OF THE COURT

(Given by Chambers J)

Interest on accident compensation payments

[1] On 13 February 1985, Robert Kearney, the respondent, suffered injuries to his wrist and femur in a motor accident. He was unable to return to work as a saw doctor. He claimed cover under the Accident Compensation Act 1982 (the 1982

Act). The Accident Compensation Corporation accepted his claim. It assessed his earnings at $330.12 a week.

[2] On 31 July 1991, the Corporation terminated Mr Kearney's weekly compensation payments. He did not appeal the decision at that time. In 2003, however, Mr Kearney had for the first time the good fortune to receive legal advice from Mr Sara. Mr Sara advised him that the Corporation's decision to cancel his compensation was unlawful. Following a Review Officer's decision on 11 October 2004, the Corporation accepted that was the case. Mr Kearney thereupon became entitled to backdated weekly compensation from 1 August 1991. That sum was eventually calculated to be $180,326.36, which, after tax was deducted, was paid to Mr Kearney.

[3] In April 2005, Mr Kearney sought interest on the late payment. The Corporation initially determined that no interest was payable. On review, however, that decision was varied. A Review Officer held that interest was payable but only from 19 August 2003 to the date of payment.[1] Mr Kearney was not satisfied. He contended that interest should run from "as and when the weekly payments were due", although he accepted that 1 July 1992 was the earliest date from which interest could run. Mr Kearney appealed to the District Court. Judge Cadenhead upheld the Review Officer's decision.[2]

[4] By leave, Mr Kearney appealed to the High Court. Chisholm J allowed the appeal.[3] He quashed the decision of the District Court, and awarded interest as sought by Mr Kearney. That is to say, interest was payable from the respective dates on which the compensation should have been paid, although not earlier than 1 July 1992. Chisholm J subsequently granted the Corporation leave to appeal to this Court, by decision dated 4 March 2009. The Corporation contends that interest was

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1 The Review Officer found that Mr Kearney had supplied all the financial information to enable the calculation of the backdated compensation by 18 July 2003. The relevant legislation gave the Corporation a month's grace in which to pay.

2 *Kearney v Accident Compensation Corporation* DC Wellington AI420/05, 1 December 2006 [*Kearney DC*].

3 *Kearney v Accident Compensation Corporation* HC Wellington CIV-2008-412-274, 2 October 2008 [*Kearney*].

payable only from the date fixed by the Review Officer and confirmed by Judge Cadenhead.

Issues on the appeal

[5] Mr Hunt, for the Corporation, and Mr Sara, for Mr Kearney, were agreed on the issues we had to determine. Each agreed that interest was payable only if authorised by statute.[4] But they disagreed on which statute governed the position. The first agreed question of law was expressed in these terms:

> Did the High Court err in holding that Mr Kearney's entitlement to interest was to be determined under s 72 of the Accident Rehabilitation and Compensation Insurance Act 1992 rather than s 114 of the Injury Prevention, Rehabilitation and Compensation Act 2001[5]?

[6] Mr Sara contended for s 72, Mr Hunt for s 114. Chisholm J had agreed with Mr Sara's submission. Our conclusion on this issue is not exactly in line with either counsel's submissions. For reasons we shall give, we hold that s 72 governs the period 1 July 1992 to 1 July 1999, s 101 of the Accident Insurance Act 1998 (the 1998 Act) governs the period 1 July 1999 to 1 April 2002, and s 114 governs the period from 1 April 2002. This was the conclusion to which Judge Cadenhead had come.[6] For reasons we shall also give, we find that there is no relevant difference in any of those three provisions. In this regard, our conclusion is the same as Judge Cadenhead's.[7]

[7] The second issue is whether Chisholm J erred in determining that Mr Kearney satisfied the relevant statutory threshold for payment of interest on 1 July 1992 rather than, as the Corporation contended, 19 August 2003.

[8] We shall deal with those issues in turn.

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4 *Accident Compensation Corporation v Broadbelt* [1990] 3 NZLR 169 (CA) at 173.
5 That Act has since been renamed the Accident Compensation Act 2001.
6 *Kearney DC* at [12]-[14].
7 *Kearney DC* at [15].

Which statutory provisions apply?

[9] By the time the issue of interest arose, the Accident Compensation Act 2001 (the 2001 Act) was in force. Section 339(1) had repealed the 1998 Act. In turn, s 417(1) of the 1998 Act had repealed the Accident Rehabilitation and Compensation Insurance Act 1992 (the 1992 Act); s 179(1) of the 1992 Act had repealed the 1982 Act. Accordingly, except as provided by transitional provisions to which we will come, the only relevant statute in force was the 2001 Act. In broad terms, Part 11 of the 2001 Act provided for how the Corporation was to deal with those who had been injured prior to the 2001 Act coming into force. Mr Kearney's case was covered by s 355(1):

> A person who has had a claim for cover accepted before 1 April 2002 for personal injury covered by the former Acts continues to have cover, and this Part applies accordingly.

[10] One of the sections in Part 11 is s 371. Because of the importance of that section to this appeal, we set it out in full:

> **371 Interest on late payments of weekly compensation**
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> (1) Despite section 339, section 72 of the Accident Rehabilitation and Compensation Insurance Act 1992 (as continued by section 458 of the Accident Insurance Act 1998) continues in effect to the extent that it requires payment of interest only in respect of calculations made under that Act for any period commencing on or after 1 July 1992 for which weekly compensation is payable.
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> (2) Despite section 339, -
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> (a) section 101 of the Accident Insurance Act 1998 continues in effect as if that section had not been repealed; but
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> (b) section 101 has effect to require the payment of interest only in respect of calculations made under that Act for the period 1 July 1999 to 1 April 2002.

[11] By way of explanation, s 339 of the 2001 Act is the section which repealed the 1998 Act. By the "despite section 339" device, that Act continued in force for the limited purpose specified in s 371. Section 72 of the 1992 Act was the section empowering and requiring the Corporation to pay interest on late payments of compensation under the 1992 Act. Section 101 of the 1998 Act was the equivalent

section applicable for the period that Act was in force, namely 1 July 1999 to 1 April 2002.

[12] There is a further quirk to s 371(1) which requires explanation. That subsection preserved s 72 of the 1992 Act, but only "to the extent that it requires payment of interest only in respect of calculations made under that Act for any period commencing on or after 1 July 1992". The reason for that qualification is this. An issue had arisen under the 1992 Act as to whether s 72 of that Act permitted or mandated the payment of interest prior to 1 July 1992, the date on which the 1992 Act came into force. The Corporation contended it did not, but this argument did not prevail in at least one District Court case.[8] At the time the 1998 Act was before Parliament as a Bill, another case was making its way to the High Court on the same issue.[9] Parliament made its position clear by specifically providing in s 458(b) of the 1998 Act that s 72 of the 1992 Act, which continued in effect as a transitional provision, required the payment of interest "only in respect of calculations made under [the 1992] Act for the period 1 July 1992 to 1 July 1999".

[13] So what s 371 of the 2001 Act makes clear is that interest for the period 1 July 1992 to 1 July 1999 is payable and calculated under s 72 of the 1992 Act and interest for the period 1 July 1999 to 1 April 2002 is payable and calculated under s 101 of the 1998 Act. For the period after 1 April 2002, s 114 of the 2001 Act applies. It follows that we do not accept Mr Sara's submission on this point. The question of law as formulated for us was incorrectly premised: it assumed Mr Kearney's entitlement to interest had to arise *either* under s 72 of the 1992 Act *or* under s 114 of the 2001 Act. In fact, his entitlement to interest arises under *both sections* – and under s 101 of the 1998 Act as well. Each provision applies for a specified period. Section 371 of the 2001 Act is the key to finding one's way through the statutory maze.

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[8] *Unwin v Accident Rehabilitation and Compensation Insurance Corporation* DC Wellington 21/97, 14 February 1997.

[9] Subsequently, the High Court also held that the 1992 Act permitted payment of interest from before 1 July 1992: see *GPB v Accident Rehabilitation and Compensation Insurance Corporation* HC Wellington AP393/97, 23 November 1998 [*GPB*].

[14] Chisholm J did get to s 371. He got there via s 352(a); it seems neither counsel referred him to s 355(1). He said:[10]

> ... section 371(1) applies. Thus the governing section is s 72, subject to the limitation that interest cannot be back-dated beyond 1 July 1992.

[15] With respect, his Honour erred in concluding only s 371(1) applied and that that made s 72 of the 1992 Act applicable for the entire period. First, by virtue of s 355(1), all of s 371 applied, not just s 371(1). Secondly, his Honour overlooked that what subs (1) of s 371 continued in effect was "section 72 of the Accident Rehabilitation and Compensation Insurance Act 1992 (*as continued by section 458 of the Accident Insurance Act 1998*)". Section 458 of the 1998 Act, by para (b), permitted the payment of interest under s 72 only "for the period 1 July 1992 to 1 July 1999". So s 371(1) did not permit the payment of interest from 1 July 1992 to the current day.

[16] The next question, however, is whether there is any substantive difference in the three interest provisions. Mr Sara thought there was. His argument can be succinctly stated. Section 72 of the 1992 Act provided for interest to run from "1 month after the Corporation ... has received all information necessary to enable calculation of the payment". On the other hand, s 101 of the 1998 Act provided interest ran from "1 month after the insurer has received all information necessary to enable the insurer to calculate *and make* the payment".[11] Section 114 of the 2001 Act is in line with s 101 of the 1998 Act.

[17] Mr Sara submitted that the addition of the words "and make" in the 1998 Act were significant. We do not see any significance in the very slight change of wording: almost certainly, it reflects no more than a change of drafting technique. There is nothing in the legislative history of the 1998 Act to suggest that the change in wording was intended to have substantive effect. Mr Hunt suggested that, possibly, the change could be to cover the situation where the Corporation does not know where a claimant is, and so cannot actually "make" the payment to him or her. Even if that is right, there was no suggestion that possibility has any application to

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[10] *Kearney* at [23].
[11] Emphasis added.

the present case. At least for present purposes, the three interest provisions are identical.

[18] Counsel cited to us a number of cases on this first question of law. We find it necessary to refer to only three of them. The first is *Barnett v Accident Compensation Corporation.*[12] Interestingly, both counsel considered this case supported their submissions! The facts in brief were these. Bruce Barnett suffered an injury in 1989. The Corporation did not accept his claim until 1998. The Corporation eventually agreed to pay interest from 12 June 1998. Mr Barnett argued that interest should have been paid from a much earlier date. An issue before Paterson J, on the appeal to the High Court, was whether the claim for interest for the period 1 July 1992 to 12 June 1998 was to be determined under s 72 of the 1992 Act or s 101 of the 1998 Act (that being the Act in force when the issue of Mr Barnett's entitlement to interest was first raised). Paterson J held that s 72 of the 1992 Act was the applicable section, by virtue of s 458 of the 1998 Act.[13] We agree with that conclusion and his reasoning. Paterson J held it was therefore unnecessary for him "to determine whether s 101 of the 1998 Act [was] in different terms from s 72 of the 1992 Act".[14] That was because, of course, the Corporation had already paid interest for the period from 12 June 1998.

[19] The second case is *Robinson v Accident Compensation Corporation.*[15] In that case, Graham Robinson suffered injuries in 1986. He received earnings-related compensation for several years, but the Corporation ceased paying it towards the end of 1988 when he failed to provide further medical certificates. In 2001 the Corporation accepted he should have been receiving earnings-related compensation from 1986 without interruption. At that time, the Corporation paid him compensation, appropriately backdated.[16] Mr Robinson then sought interest.

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[12] *Barnett v Accident Compensation Corporation* HC Auckland AP64/SW02, 5 December 2002.
[13] At [35].
[14] At [35].
[15] *Robinson v Accident Compensation Corporation* [2007] NZAR 193 (CA).
[16] At [4].

Eventually, the Corporation paid him interest from 1 July 1992.[17] Mr Robinson, however, contended that he should also get interest for the period 15 January 1987 to 30 June 1992.

[20] In this Court, Mr Robinson argued that his entitlement to interest should be evaluated under s 72 of the 1992 Act, as interpreted in *GPB*. This Court held, however, that s 72 applied only in its modified form, in accordance with s 458 of the 1998 Act. Section 458(b) reversed the effect of *GPB*.[18] Our present decision is consistent with the reasoning in *Robinson*.

[21] Another interesting feature of *Robinson* is that this Court accepted that s 72 of the 1992 Act, s 101 of the 1998 Act, and s 114 of the 2001 Act all used "materially the same language", with the consequence that a decision as to the meaning of s 72 had application beyond s 72.[19] That is consistent with the view we have expressed above at [16]-[17].

[22] For the sake of completeness, we should note that there is one passage in *Robinson* which, in retrospect, we consider was not quite right.[20] We said:

> It is clear from the structure of the 1998 Act that s 101 is intended to apply to claims for cover for injuries arising after 1 July 1999. It is not intended to apply to claims falling within the scope of the transitional provisions in Part 13.

[23] That was not correct. Section 101 of the 1998 Act could apply to pre-1 July 1999 claims for cover. Section 458 of the 1998 Act dealt with interest calculations for the period 1 July 1992 to 1 July 1999. Section 101 of that Act was the mechanism by which interest was paid after 1 July 1999. Section 458 could not be called in aid because of its cut-off date of 1 July 1999. It should be observed that in *Robinson* there was no issue before the Court relating to the post-1 July 1999 period; the erroneous sentences quoted were, therefore, merely obiter dicta.

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[17] At [6].
[18] At [27].
[19] At [35].
[20] At [29]. Two of the current panel were part of the panel in *Robinson*.

[24] The third case is *McLean v Accident Compensation Corporation*.[21] This was another case in which an injured person was seeking to have interest paid from before 1 July 1992. Jacqueline McLean had been injured in 1990. She received weekly compensation until 31 May 1991. In 1995, a Review Officer directed the Corporation to reinstate Ms McLean's weekly compensation from 31 May 1991. The question of interest did not arise until June 2002. By that time the 2001 Act was in force. Counsel for Ms McLean developed exactly the same argument Mr Robinson had raised. That is to say, the applicable law was s 72 of the 1992 Act, as interpreted in *GPB*. Judge Barber rejected that submission. His analysis was exactly in line with ours in these reasons for judgment.[22] Stevens J subsequently declined special leave to appeal to the High Court, holding that he agreed entirely with Judge Barber's reasoning.[23]

From what date should interest run?

[25] As we have said, Mr Kearney suffered his injuries in February 1985. The Corporation granted him cover under the 1982 Act. He became entitled to earnings-related compensation under s 59 of that Act. Mr Kearney's loss of earning capacity was calculated under s 59(2). It was determined by deducting from the amount of his relevant earnings (defined under the Act as the earnings he would have received but for the personal injury) what he was in fact able to earn as an (injured) employee or self-employed person.

[26] In 1987 Mr Kearney commenced a three year training programme to become a pastor. He received $70 a week through the church for part-time work. The Corporation supported this with make-up pay.

[27] On 8 February 1990, the Corporation wrote to Mr Kearney. Among the matters covered in that letter was advice that he would not be required to supply any medical certificates from then on. That was because the Corporation was satisfied that his 1985 injuries were permanent. Mr Kearney was not going to be able to

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[21] *McLean v Accident Compensation Corporation* DC Whangarei AI289-06, 2 July 2007.
[22] At [23]-[30] and [49].

return to his previous occupation as a saw doctor. The focus of the Corporation from that point on was retraining.

[28] On 30 November 1990, the Corporation wrote to Mr Kearney, saying it would pay weekly compensation only to the end of his internship. The Corporation considered Mr Kearney would then be fit to work in a vocation with no injury barrier. As a consequence, it ceased paying weekly compensation on 31 July 1991.

[29] Both sides now accept that the Corporation's decision in that respect was unlawful. In 1991, the Corporation had no power to cease paying compensation because it considered there was another occupation which in its view its client could undertake. What mattered under the law as it then stood was whether the client could return to his or her pre-accident employment. Mr Kearney could not return to his pre-accident employment as a saw doctor because of his injuries. In those circumstances, he was entitled to ongoing weekly compensation or make-up compensation to the level of his previous earnings.

[30] As Chisholm J found, there was and is "no suggestion that further medical or financial information was required to justify the continuation of weekly payments" as at 31 July 1991.[24] The reason payments ceased was simply the Corporation's erroneous interpretation of the Act. In terms of s 72 of the 1992 Act, Mr Kearney was entitled to "payment of compensation based on weekly earnings" as at 31 July 1991 (and at all times thereafter). The Corporation failed to pay that compensation, even though at that time they had "all information necessary to enable calculation of the payment".

[31] It is true that, by the time Mr Kearney's entitlement to compensation was sorted out in 2004, the Corporation did not have all the information it required. In particular, it lacked financial information as to what Mr Kearney had in fact been earning between 1991 and 2004. We agree with Mr Hunt that that information was needed before the calculation of backdated compensation could be made. But who

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[23] *McLean v Accident Compensation Corporation* HC Auckland CIV-2007-485-2653, 2 May 2008 at [37].

[24] *Kearney* at [35].

was to blame for that state of affairs? Solely the Corporation, because it had in effect wrongly removed Mr Kearney from its books back in 1991.

[32] The structure of the accident compensation scheme is this. Those who are injured by accident and who lose earnings as a consequence are entitled to receive earnings-related compensation from the Corporation as a substitute for the income they would otherwise have earned. The compensation is payable on a weekly basis. Since 1992, Parliament has decreed that the Corporation should have to pay interest if it is late in paying compensation. That is fair: after all, claimants are dependent on this compensation to live. But Parliament qualified the Corporation's obligation in one respect. If the Corporation did not have all the information it needed to enable calculation of the payment, the obligation to pay interest did not arise until such information was forthcoming. In our view, it was implicit in that qualification that the Corporation would ask for information it needed in a timely way. Accident victims could not be expected to mind-read or to search through the immensely complicated legislation themselves. Parliament would not have countenanced a regime whereby the Corporation sat by, requested nothing, and then later attempted to take advantage of the qualification to its obligation to pay interest on late payments. Still less could Parliament have intended the Corporation to be able to represent to an accident victim it (wrongly) did not need any further information, and then later be able to take advantage of that error. In short, Parliament would not have envisaged a situation where the Corporation sought to benefit from its own wrong.[25]

[33] We do not overlook the fact that Mr Kearney delayed in seeking to review the Corporation's 1991 decision. Under s 101(2) of the 1982 Act, he should have applied to review the Corporation's decision within a month after receiving notice of it. But, that same subsection also empowered the Corporation to extend time for making an application for review.[26] The Review Officer did extend time for applying. Obviously, the Review Officer considered Mr Kearney had a reasonable excuse for his delay in applying to review the 1991 decision. Once such extension

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[25] *Salt v Governor of Pitcairn and Associated Islands* [2008] NZCA 128, [2008] 3 NZLR 193 at [90].

[26] That subsection continued to apply to Mr Kearney in 2003 when he eventually did apply to review the 1991 decision : see s 391(1) of the 2001 Act.

had been granted, the application thereafter proceeded as one deemed to be made in time.

[34] Mr Hunt's argument on this question concentrated on rebutting Mr Sara's contention that Mr Kearney's actual earnings between 1991 and 2004 were irrelevant to a "calculation of the payment". We agree with Mr Hunt that those earnings were not irrelevant. But to our mind, in agreement with Chisholm J, that is beside the point. It would be quite wrong if the Corporation were to rely on its own failings to escape its liability for interest.

[35] There is no dispute now that Mr Kearney should have been receiving compensation, week by week, from 1991. He did not. The subsequent lump sum payment in part compensates him for the Corporation's error – but only in part. He was not paid when he should have been paid; that is the very purpose of the interest provision. In order to get that interest, Mr Kearney, on Mr Hunt's argument, would have had to send in, presumably annually, proof of what he had in fact been earning so that, if and when he did ever establish his entitlement to ongoing compensation, he would be able to show he had continued to provide relevant financial information throughout. There is an air of unreality about that suggestion. The present situation has similarities with those cases where an insurer wrongly repudiates liability under a policy and then later asserts that the insured failed to comply with obligations to keep the insurer informed and to seek the insurer's consent while leaving the insured to battle on on his or her own.[27]

[36] We accept that the cases on this topic do not speak with one voice. But there are a number where the conclusion to which we have come was either the stance adopted by the Corporation itself or what courts determined. For example, in *Robinson*, the Corporation paid Mr Robinson interest from 1 July 1992.[28] Other cases consistent with our conclusion are *McLean*,[29] *Druce v Accident Compensation*

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[27] For a recent example in the insurance context, see *DA Constable Syndicate 386 v Auckland District Law Society Inc* [2010] NZCA 237 at [77]-[105].

[28] *Robinson* at [6].

[29] At [3].

Corporation,[30] *Walters v Accident Compensation Corporation*,[31] and *Lethbridge v Accident Compensation Corporation*.[32]

[37] There is one case on this topic which we consider we should deal with in greater detail, as Mr Hunt strongly relied on it and it may seem at first blush contrary to our conclusion. That case is *Wardle v Accident Rehabilitation and Compensation Insurance Corporation*.[33] In that case, Mark Wardle lodged a claim for accident compensation cover arising out of exposure to chemical sprays in 1992. The Corporation declined the claim, but eventually, in January 1999, the Accident Compensation Appeal Authority granted cover. At that time, the Corporation sought particulars of Mr Wardle's pre-accident earnings and of the sickness benefit of which he had been in receipt for six years. The last of the information the Corporation needed was received on 24 August 1999.[34] The issue before Gendall J was whether interest should have started to run from a date one week after the incapacity arose, namely 12 September 1992, as Mr Wardle submitted, or from one month after the financial information was received, namely 24 September 1999, as the Corporation contended.[35] The Judge found in the Corporation's favour.

[38] We are not sure from the report what financial information Mr Wardle had supplied when he made his claim in 1992. If at that time he supplied all the financial information necessary to enable calculation of the compensation, then we think, with respect, the decision was wrongly decided. If, on the other hand, he did not supply the information at that time, then *Wardle* can be distinguished from the current case. In the present case, the Corporation did have all the information it needed at the time

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30 *Druce v Accident Compensation Corporation* DC Wellington AI48/01, 3 July 2001 at [11]-[13].
31 *Walters v Accident Compensation Corporation* DC Huntly AI38/02, 28 March 2003 at [2] and [18].
32 *Lethbridge v Accident Compensation Corporation* DC Wellington AI281/99, 13 July 2001.
33 *Wardle v Accident Rehabilitation Compensation Insurance Corporation* HC Wellington AP134/2002, 18 October 2002.
34 At [3].
35 At [10].

it wrongly stopped paying compensation. It never thereafter sought the information from Mr Kearney until after the review officer's decision on 11 October 2004.

[39] For the reasons given above, we agree with Chisholm J that interest should run from 1 July 1992.

Result

[40] We dismiss the appeal.

[41] Chisholm J ordered interest to commence on 1 July 1992. He added:[36]

> Although I assume that there will be no difficulty in calculating interest, I will take the precaution of reserving leave to apply further should the need arise.

[42] We are not aware of whether the interest calculation has ever been done. If there are difficulties in calculating interest, that should be resolved in the High Court. Chisholm J's formal order can stand, even though he considered that the interest calculation for the entire period was to be calculated under s 72 of the 1992 Act. For reasons we have already given, the interest calculation is in fact to be done under three different statutory provisions: s 72 of the 1992 Act, s 101 of the 1998 Act, and s 114 of the 2001 Act. But since there is no difference in any of those three provisions, the net effect is identical to what his Honour ordered.

Solicitors:
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[36] *Kearney* at [38].