Interest on costs

By Phillipa Alexander

Are you maximising your clients' entitlements to interest on costs? Interest on costs is regarded as compensatory and not punitive. If your client is out of pocket because they have paid costs or disbursements to your firm throughout the course of the matter, or your firm's costs have been paid from the judgment moneys, your client may be entitled to claim interest on those costs from an opposing party against whom a costs order is made, from the date the costs were paid by your client to the date the party:party costs are reimbursed.

In NSW, ss101(4) and (5) of the *Civil Procedure Act* 2005 (NSW) empower the Supreme Court, District Court and Local Court to make discretionary orders for interest on party:party costs and this interest may accrue from a date prior to the date of the costs order.

Up until the decision in *Zepinic v Chateau Constructions (Australia) Ltd (No. 2)*,[1] successful applications had been made:

- at the time of the application for the costs order, as in *Kirkpatrick v Kotis*;[2] or
- after an application for assessment had been filed and prior to issue of the certificate of determination, as in *Roads and Traffic Authority v Cremona (No. 3)*[3] and *Australian Development Corporation Pty Ltd v White*;[4] or
- after the costs had been assessed and a certificate of determination had been issued but before registration of the certificate of assessment, as in *Grogan v Thiess Contractors Pty Limited & Anor*.[5]

In *Lucantonio v Kleinert (Costs)*,[6] Brereton J confirmed:

> 'It is clear that an interest order under *Civil Procedure Act* s101(4) can be made after the costs order has been made, so long as it is made before there is a judgment for costs effected by registration of the certificate of assessment…'

An application made after the registration or filing of the certificate of determination failed in *Timms & Ors v Commonwealth Bank of Australia & Ors (No. 3)*[7] as Beazley JA held that as an application for interest is not a separate or independent cause of action, it must be made and determined before the entry of judgment for costs. The court took this date to be the filing of the costs assessor's certificate of determination, at which time a final judgment in the amount of the assessed costs was obtained.

However, in *Zepinic*,[8] McColl AJ refused to make an order for interest on costs on the basis that she considered the application to be incompetent, as it had not been made at the time the costs order was made by Tobias JA on 10 May 2010 or within 14 days after the costs order, as permitted by Uniform Civil Procedure Rule 36.16. The application for interest on costs was not filed until 29 May 2013, after the assessment of the costs of a number of related proceedings had been determined.

In a detailed consideration of the relevant law, McColl AJ relied on the comment made by Handley AJA in *Drummond & Rosen Pty Ltd v Easey & Ors*[9] at [49] that:

> 'the power in s101(4) must be exercised by the Court and under UCPR Pt 36 r16 it must be exercised in the substantive judgment, or on a motion filed within 14 days thereafter'.

McColl AJ considered that for the purposes of UCPR 36.16, the date of the judgment was the date the costs order was made by the Court and not the date the costs assessor's certificate of determination was filed to take effect as a judgment.

In *Spedding v Nobles; Spedding v McNally (No. 2)*,[10] the Court of Appeal (per Basten JA, Beazley JA and McColl JA agreeing), approved the decision of the Full Court of the Federal Court in *Flower & Hart v White Industries (Qld) Pty Ltd*.[11] This decision had accepted that no power to award interest on costs could derive from s43 of the *Federal Court of Australia Act* 1976 (Cth), being the equivalent of the general costs power in s98 of the *Civil Procedure Act* 2005 (NSW). The Court held that as an applicant cannot have a cause of action in relation to costs until after the judgment, s100 of the *Civil Procedure Act* 2005 (NSW) cannot found an order for interest on costs.

White J, in *Short v Crawley (No. 45)*,[12] considered *Spedding*[13] to be inconsistent with *Timms*,[14] and is authority for the proposition that:

> 'The claim for interest on costs cannot merge in the general order for costs because it was not "the very right or cause of action claimed or put in suit", and was not the "same cause of action" as was determined by the final costs orders.'[15]

White J considered that while the decisions carried great weight, he was not bound by the judgments of Beazley JA in *Timms*,[16] McColl JA in *Zepinic*[17] or the first sentence of paragraph [49] of the judgment of Handley AJA in *Drummond*.[18] White J stated:

> 'In *Zepinic*, McColl JA did not, with respect, analyse why the claim for interest on costs was barred because the costs order of Tobias JA was a final order, except to say that, like an order for costs, such an order must be sought at the time of judgment or within any time limited by UCPR, r36.16 (at [82]). But why? Her Honour may have read UCPR, r36.16(3) as if it provided that there is power to vary an order unless the order has determined a claim for relief, rather than that there is such a power except to the extent that a claim for relief is determined[19].'[20]

White J considered that the power in s98(3) of the *Civil Procedure Act* 2005 (NSW) to make an order *'as to costs'* must mean more than *'a costs order'*. His Honour held that a claim for interest on costs is a claim *'as to costs'* within the meaning of s98(3) and the additional power to make the order is not found in UCPR 36.16. White J held the Court did have power to make an order for interest on costs where the application was not made within 14 days of the entry of final costs orders.

Given the uncertainty in relation to this issue, it is recommended that, where possible, practitioners should make an application for interest at the time that the final costs orders are made, or within 14 days thereafter, although an application after this time may still succeed if *Zepinic*[21] is not followed. Practitioners should also ensure that appropriate evidence as to the amount of costs which have been paid by their clients and the dates of payment are included in the application, as failure to include this evidence may lead to the application being questioned[22] or refused.[23] ■

Notes: **1** *Zepinic v Chateau Constructions (Australia) Ltd (No. 2)* [2013] NSWCA 227 (18 July 2013). **2** *Kirkpatrick v Kotis* [2005] NSWSC 178 (9 March 2005). **3** *Roads and Traffic Authority v Cremona (No. 3)* [2005] NSWCA 13 (11 February 2005). **4** *Australian Development Corporation Pty Ltd v White* [2002] NSWSC 280 (5 April 2002). **5** *Grogan v Thiess Contractors Pty Limited & Anor* [2000] NSWSC 1101 (22 December 2002). **6** *Lucantonio v Kleinert (Costs)* [2011] NSWSC 1642 (at [26]) per Brereton J (23 December 2011). **7** *Timms & Ors v Commonwealth Bank of Australia & Ors (No. 3)* [2004] NSWCA 25 (19 February 2004). **8** *Zepinic*, above, n 1. **9** *Drummond & Rosen Pty Ltd v Easey & Ors* [2009] NSWCA 74 per Handley AJA (16 April 2009). **10** *Spedding v Nobles; Spedding v McNally (No. 2)* [2007] NSWCA 87 (16 April 2007). **11** *Flower & Hart v White Industries (Qld) Pty Ltd* [2001] FCA 370. **12** *Short v Crawley (No. 45)* [2013] NSWSC 1541 (23 October 2013). **13** *Spedding*, above n 10. **14** *Timms*, above n 7. **15** *Short*, above n 12, at [73]. **16** *Timms*, above n 7. **17** *Zepinic*, above n 1. **18** *Drummond*, above n 9. **19** *Zepinic*, above n 1. **20** *Short*, above n 12, at [77]. **21** *Zepinic*, above, n 1. **22** *Drummond*, above n 9, at [36]. **23** *Puntoriero v Water Administration Ministerial Corporation* [2001] NSWSC 1071 (23 November 2001).

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