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LEGAL COSTS UPDATE: AUGUST 2016

Maximum Costs and Pre-Judgment Interest

The New South Wales Court of Appeal has determined that pre-judgment interest should not be taken into account in determining whether costs are capped under the maximum costs provisions. In *State of New South Wales v Avery*[1], the Court dismissed an application for judicial review brought by the State of New South Wales in respect of the decision of Delaney ADCJ that the plaintiff's costs were not capped by s338(1) *Legal Profession Act* 2004 (NSW) ("LPA). Section 338(1) provides:

> *'(1) If the amount recovered on a claim for personal injury damages does not exceed $100,000, the maximum costs for legal services provided to a party in connection with the claim are fixed as follows:*
>
> *(a) in the case of legal services provided to a plaintiff-maximum costs are fixed at 20% of the amount recovered or $10,000, whichever is greater'*

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[1] *State of New South Wales v Avery* [2016] NSWCA 147 (27 June 2016)

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The plaintiff recovered $101,800 being general damages of $90,000, punitive damages of $10,000 and $1,800 in interest on the award of general damages. The Costs Assessor held the plaintiff's costs were capped at $20,000 plus GST pursuant to s338(1) LPA. The Costs Assessor considered the amount recovered on the claim did not exceed $100,000 by virtue of s343(2) LPA which provides:

> *'(2) In determining the amount recovered on a claim for personal injury damages, no regard is to be had to any part of the amount recovered that is attributable to costs or to the addition of interest.*

After deducting the interest, the Costs Assessor considered that the amount recovered by the plaintiff did not $100,000 and determined that the costs were capped at $20,000 plus GST.

The plaintiff appealed the determination with Delaney ADCJ finding that the costs were not capped on the basis the expression "the addition of interest" in s343(2) LPA referred only to post-judgment interest. Delaney ADCJ set aside the determination and remitted the matter back to the Costs Assessor.

The State of New South Wales then sought judicial review by the Court of Appeal pursuant to s69 *Supreme Court Act 1970* (NSW). Sackville AJA (McColl and Simpson JJA agreeing) confirmed that the award of interest levied at 2% on half the general damages obtained by the plaintiff was an exercise of power pursuant to s100(1) *Civil Procedure Act* 2005 (NSW). His Honour noted Delaney ADCJ had cited *Haines v Bendall*[2] in support of the proposition that this was an "integral element in the attainment of the object of damages, namely, to compensate a plaintiff for injury sustained", and considered "an award of interest on past general damages is in the nature of damages and part of the compensation to which a plaintiff is entitled".[3] Delaney ADCJ also considered the fact that s343(2) referred to "costs" before the "addition of interest" to support the plaintiff's position and that if s343(2) covered by pre- and post-judgment interest, a plaintiff who receives a settlement which does not differentiate between damages and interest would have an advantage over a plaintiff who obtains a judgment for the same amount which differentiates between the components. His Honour considered that s343 should be construed in such a way

[2] *Haines v Bendall* [1991] 172 CLR 60 at 66 (Mason CJ, Dawson, Toohey and Gaudron JJ)

[3] *State of New South Wales v Avery* [2016] NSWCA 147 (27 June 2016) per Sackville AJA at [32]

that is in conformity with the broader purpose of the statute, to prevent a plaintiff deliberately delaying recovery of the amount of a judgment so as to increase it about the figure of $100,000 by the addition of post-judgment interest.

In considering the application Sackville AJA rejected the plaintiff's submission that "the amount recovered on the claim" refers to the amount actually paid to the plaintiff as distinct from the amount of any judgment entered by the court in favour of the plaintiff and held that the "amount recovered" refers to the amount of judgment or order in favour of the plaintiff[4]. Sackville AJA held that s343(2) operates not to ensure that any pre-judgment interest is deducted from the "amount recovered" but "to ensure that post-compromise interest paid to a plaintiff is deducted from what would otherwise be the amount recovered"[5]. Interestingly His Honour also opined that "perhaps post-judgment" interest paid to a plaintiff should be similarly disregarded.[6] Does this leave open an argument that s343(2) may not require the addition of post-judgment interest to be deducted from the "amount recovered" on the claim?

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[4] *State of New South Wales v Avery* [2016] NSWCA 147 (27 June 2016) per Sackville AJA at [69]

[5] *State of New South Wales v Avery* [2016] NSWCA 147 (27 June 2016) per Sackville AJA at [78]

[6] *State of New South Wales v Avery* [2016] NSWCA 147 (27 June 2016) per Sackville AJA at [80]

The Court considered the primary Judge had not erred in law in construing s343(2) LPA not to require the interest included in the District Court judgment to be disregarded in determining the "amount recovered" for the purposes of s338(1) LPA and the application was dismissed.

If you have any costs queries please contact Peta Solomon at petas@costspartners.com.au