

## LEGAL COSTS UPDATE: NOV 2016

### Interest on Costs Regimes

There are now two regimes which govern the awarding of interest on costs under the *Civil Procedure Act 2005* (NSW) ("CPA").

#### **Proceedings commenced on or after 24 Nov 2015**

For proceedings commenced on or after 24 November 2015, ss101(4) and (5) CPA provide:

*(4) Unless the court orders otherwise, interest is payable on an amount payable under an order for the payment of costs.*

*(5) Interest on an amount payable under an order for the payment of costs is to be calculated, at the prescribed rate or at any other rate that the court orders, as from the date the order was made or any other date that the court orders.*

This means that in the absence of a court order to the contrary, interest will automatically accrue from the date of the costs order in accordance with the rate prescribed by the Uniform Civil Procedure Rules 2005 (UCPR) r36.7.



**costs**  
**partners**

Costs Partners Pty Limited ABN 71 107 790 456  
Level 20, Tower 2 Darling Park, 201 Sussex Street, Sydney NSW 2000  
t 02 9006 1033 f 02 9006 1400 DX 115 Sydney www.costspartners.com.au

The current rate is 6% above the cash target rate published by the Reserve Bank of Australia.

When negotiating settlement of costs, practitioners should include a claim for the interest component from the date of the costs order to the date the claim for costs is made together with a daily rate which will continue to apply until full payment of the costs is made. This provision may also act as an incentive for costs respondents to settle claims more quickly or at least make partial payment of the outstanding costs to avoid the incurring of interest at the UCPR 36.7 rate.

If the costs cannot be settled, a claim for interest should be included in the Application for Assessment of Costs. Section 70 of the Legal Profession Uniform Law Application Act 2014 (NSW), which applies to assessments of costs where the proceedings were commenced after 1 July 2015, authorises a costs assessor to include interest payable under s101 CPA in the certificate of determination.

A party may still seek an additional order for interest on costs pursuant to s101(5) whereby interest may accrue from the date/s on which the client has paid their solicitor own client costs during the course of the proceedings as discussed further below.

## **Proceedings commenced prior to 24 November 2015**

For proceedings commenced prior to 24 November 2015, the savings provisions incorporated into Schedule 6 CPA at Part 8 apply. Part 8 provides:

*Part 8 - Provisions consequent on enactment of  
Courts and Other Justice Portfolio Legislation  
Amendment Act 2015*

*21 Pending proceedings*

*The amendments made to this Act by Schedule 1.2  
to the Courts and Other Justice Portfolio Legislation  
Amendment Act 2015 do not extend to proceedings  
commenced before the commencement of that  
Subschedule and those proceedings may continue  
as if those amendments had not been enacted.*

The former wording of ss101(4) and (5) therefore applies as follows:

*(4) The court may order that interest is to be paid on any amount payable under an order for the payment of costs.*

*(5) Interest under subsection (4) is to be calculated, at the prescribed rate or at such other rate as the court may order, as from:*

*(a) the date or dates on which the costs concerned*

*were paid, or*

*(b) such later date as the court may order.*

Under this regime, a costs applicant must demonstrate an entitlement to interest which is usually fairly straightforward to do. In *Doppstadt Australia v Lovick & Son Developments*<sup>1</sup>, Gleeson JA (Ward and Emmett JJA agreeing) stated:

*Thus in the absence of any countervailing discretionary factor, it is appropriate that an order for interest on costs be made to compensate the party having the benefit of a costs order for being out of pocket in respect of relevant costs which it had paid. There is no requirement to establish that the circumstances of the case are out of the ordinary: Drummond and Rosen Pty Ltd v Easey & Ors (No 2) [2009] NSWCA 331 at [4] per Macfarlan JA (Tobias JA agreeing) citing Lahoud v Lahoud [2006] NSWCA 126 at [82] - [83] per Campbell J.*

Countervailing factors may include vacated hearing dates, unsuccessful interlocutory arguments, or other factors resulting in adverse costs orders, disproportion between the costs and quantum of the claim and costs

---

<sup>1</sup> *Doppstadt Australia v Lovick & Son Developments* [2014] NSWCA 158 at [403]

incurred in respect of matters which were abandoned or unsuccessful.

While it is recommended that evidence of the amounts paid on account of costs be available for provision to the court to avoid argument on this issue, in *Rothe v Scott* (No. 5)<sup>2</sup> Gibson DCJ recently held:

*While I note that actual evidence of payment was provided in *Doppstadt Australia v Lovick & Son Developments* at [404]), it is not necessary for the court to receive actual evidence that payments of costs have been made, or that the costs have been “fructifying in the wrong pocket”: *Polias v Ryan* (No. 2) [2015] NSWSC 1 at [63] to [65] per Rothman J. Nor is it necessary for me to set out the details of when any such payments occurred in the interest on costs order that I propose to make, as any dispute as to quantum on assessment of costs can be dealt with by the costs assessor on the basis of the statements to this effect in this judgment.*

---

<sup>2</sup> *Rothe v Scott* (No. 5) [2016] NSWDC 225

This view mirrors that of Rothman J in *Polias v Ryan* (No. 2)<sup>3</sup> wherein His Honour stated:

*... a party who obtains a costs order will ordinarily - in the absence of any countervailing discretionary factor - also obtain an order for interest on those costs, if it seeks one, and evidence of payment of the costs is not required; nor is evidence explaining the course of the proceedings ...*

If you have any costs queries please contact Peta Solomon at [petas@costspartners.com.au](mailto:petas@costspartners.com.au)

---

<sup>3</sup> *Polias v Ryan* (No. 2) [2015] NSWSC 1 at [66]