



# INTEREST ON COSTS

By Peta Solomon

**W**ith the escalation of litigation costs, it is important to consider costs recovery for clients more broadly than merely pursuant to costs orders. Successful litigants who have been deprived of monies utilised to fund litigation, which could otherwise have been utilised or invested, may recover compensation by way of the recoupment of interest on those funds. Litigants who have borrowed monies to fund litigation or otherwise incurred an interest liability may also be able to recoup these expenses.

The loss of the benefit of these funds, or the accrual of an interest liability in respect of costs, can often be substantial, particularly in long-running proceedings. Not only can clients who have paid their costs during the course of the running of the matter obtain compensation, but recovery may also be obtained by clients who have not paid their costs, but incurred a liability for interest on the unpaid costs, either via a litigation funding arrangement or to their solicitors.<sup>1</sup>

In respect of costs that may have been paid up to 1 July 2010, the range of recoverable interest is 9 – 10 per cent. From this date onwards, the rate of interest that applies is 6 per cent above the Reserve Bank Cash Rate target from time to time. From 1 July 2010, the rate has ranged from 10.5 per cent to 10.75 per cent.<sup>2</sup>

In the party:party context, a number of circumstances can arise.

## INTEREST ON COSTS IN THE ORDINARY COURSE

In the ordinary course of events, where a party has been awarded costs on an

'as agreed or assessed' basis, interest on those costs accrues once the Certificate of Assessment, which determines the quantum of the costs liability, has been filed. Interest runs from that date because, without a court order, the judgment takes effect from the date the Certificate has been filed, and the provisions of the *Civil Procedure Act 2005 (NSW)* (CPA) s101 operate to provide for the payment of post-judgment interest:

- '(1) Unless the court orders otherwise, interest is payable on so much of the amount of a judgment (exclusive of any order for costs) as is from time to time unpaid.
- (2) Interest under subsection (1) is to be calculated, at the prescribed rate or at such other rate as the court may order, as from:
  - (a) the date on which the judgment takes effect, or
  - (b) such later date as the court may order.'

UCPR 36.4 (1) provides:

- 'A judgment or order takes effect:
  - (a) as of the date on which it is given or made, or
  - (b) if the court orders that it not take effect until it is entered, as of the date on which it is entered.'

## INTEREST FROM AN EARLIER DATE

Where costs are unpaid but the client incurs interest pursuant to the costs agreement with their solicitor on such costs, that interest is charged by the practitioner and is recoverable as a part of the legal costs on assessment.

Where recoverable fees have been paid, either by the litigant or by another practitioner for disbursements such as counsel's fees which have been reimbursed by the litigant, the litigant may be entitled to interest to compensate them for their inability to

have access to the funds expended on the litigation. However, because the costs have been *paid*, such interest is not charged by the legal practitioner and is not, therefore, recoverable on a party:party assessment before a costs assessor.<sup>3</sup>

In such circumstances, it is necessary to make an application to the court for orders that interest should run from a date prior to the date of filing of the Certificate, including from the date the costs were paid by the client, which could be many years prior to the filing of the Certificate of Assessment. Such an application can be made under s101(4) CPA.

- '(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.'

The recent case of *Lahoud v Lahoud*<sup>4</sup> considered a number of aspects of the operation of an interest on costs order, including whether defined periods of time could be excluded from the period of the order's operation, and whether delays and the reasons for the delays between the entitling orders and the conclusion of the quantification of the costs entitlement (the assessment) could result in periods in which interest might otherwise be excluded. The case merits consideration with respect to whether the conduct of the parties subsequent to the orders (including any appeal and assessment process) could disentitle the client to interest for certain periods. It also demonstrates why care should be

>>

taken when formulating orders for awarding interest on costs, in order to properly protect the party liable from an escalation in the quantum, due to delays on the part of the party entitled, whether intentional or due to unforeseen circumstances.

The case further settles the issue of when the former Schedule 5 UCPR will apply to pre-1 July 2010 interest entitlements, or whether the amendments to UCPR 36.7, effective from 1 July 2010, apply to interest; both pre- and post-1 July 2010.

In March 2006, the court made an order that the unsuccessful party should pay interest on costs from the date/s upon which the costs had been paid by the successful party. The formula for calculating interest, such that interest would be payable only on the party:party component of each tranche of the paid costs, was set out in *Joseph Lahoud v Victor Lahoud*.<sup>5</sup>

#### RATE OF INTEREST APPLICABLE

An issue arose as to the rate of interest that would apply over the period in which interest was payable. During the course of the period over which interest was payable, amendments had been made to UCPR 36.7, which took effect on 1 July 2010. Prior to that date, the rates were prescribed by Schedule 5 UCPR. The issue was whether all or part of the interest was to be calculated at Schedule 5 rates or in accordance with the amendments to UCPR 36.7. The court held that, notwithstanding that the quantification of both interest and costs were yet to be completed; the judgment regarding interest on costs had *taken effect* as a binding determination of rights within the meaning of UCPR 36.4. As such, the right to interest arose at the time the order was made. The court held that there was no intention that the amendments to UCPR 36.7 were to be applied retrospectively. Accordingly, the rate of interest that would apply would be the rate prescribed by Schedule 5 UCPR until 1 July 2010 and, thereafter, interest would be calculated in accordance with the formula prescribed by UCPR 36.7 (as amended).

#### THE EFFECT OF DELAY

Although the entitling costs orders were made in March 2006, the parties were unable to agree the costs and the quantification thereof was ultimately required to proceed to assessment. The assessment was delayed due to a number of factors. The judgment in the substantive proceedings was handed down on 30 May 2005 and an appeal was filed. Subsequently, an Application for Special Leave was filed, which was dismissed in April 2007.

The party entitled to the benefit of the costs orders began preparing a bill of costs for the purposes of costs assessment shortly before the Application for Special Leave was dismissed. The assessment process, including subsequent review and an appeal in relation to same, was protracted and ran for a number of years.

The court held that any order disentitling a party to interest on costs should be considered only in the context that an order for interest is a compensatory order, and that the type of delay must be delay that *'makes it just for the successful parties not to receive that compensation for a particular period of time'* [59]. Further, the court held that the onus was upon the party liable to establish that there had been undue delay.

#### FOUR DELAY PERIODS

Four delay periods were identified. The delays concerned the preparation of the bill of costs; the finalisation of the bill; service and lodgement of the application for assessment; and the conduct of the party entitled in the assessment process during the course of the assessment, subsequent review and appeal.

#### Delay in preparation of the bill of costs for assessment

This circumstance arises frequently where the substantive proceedings proceed on appeal/s in circumstances where there is no stay on the costs orders at first instance. In *Lahoud*, the party entitled did not commence the preparation of the bill of costs for assessment until shortly prior to the application for Special Leave

being dismissed. The party entitled was concerned that if the appeal and subsequent application for Special Leave were successful and the costs orders below overturned, the costs of preparation of a bill of costs would be wasted and not recoverable.

In these circumstances, the court held that the delay in commencing the bill of costs was not such as to justify excluding the entitlement to interest for the period up to the dismissal of the Special Leave application. Considerations included the substantial task involved in preparing a bill that was ultimately 600 pages long and the fact that the costs and work involved in its preparation would be substantial and wasted if the party liable had succeeded in its appeal.

#### Delay in finalising and service of the bill of costs

The court also considered whether, once the bill was prepared by a costs consultant, the period taken by the solicitors to settle and finalise the bill and delays in service (in all, a period of four or up to seven months) amounted to disentitling conduct. The court was not prepared to find that there was *undue* delay in advancing the assessment.

#### Delays in the course of costs assessment and review

The third and fourth periods concerned delays occasioned during the course of costs assessment and review. It was alleged by the party liable that the assessment of costs was delayed on account of the party entitled's failure to provide costs agreements to the respondents and to promptly and accurately respond to enquiries concerning the entitlement to an input credit for GST. It was alleged that there were further delays by the party entitled in the provision of costs orders and accurate information to the assessor.

The court found that the arguments with respect to all the alleged periods were not made out. Nevertheless, the case does indicate that solicitors whose clients either have the benefits of such orders, or who may seek to apply for interest on costs orders after the

conclusion of assessment, must ensure that the assessment of costs is not unreasonably delayed by either their, or their client's, conduct.

The case also highlights the importance of carefully considering the form of orders that should be sought. Where the application is made at the conclusion of the proceedings, consideration should be given as to whether leave should be sought to seek a further order in order to protect a party that may be liable for interest from delays that subsequently occur in respect of the assessment of costs. In *Lahoud*, although the orders provided that interest would run until such time as the costs had been paid or 'any further order relating to interest on costs in these proceedings' [4], the motion to exclude defined periods was filed after all the relevant delays had occurred. The court held that even if it were determined that there had been undue delay in any of the defined periods, the form of the order was such that the court could only make an order that affected the future running of interest. Accordingly, such a form of order would permit the court to deal with interest entitlement only in the future – that is, from the date the further order was made.

In *Lahoud*, the parties agreed that the application could be modified

such that the court could make orders into the future, which would achieve the same result in arithmetical terms, but it was clear that the order in the form made could not permit any order having retrospective effect to be made.

An order for interest on costs under s101(4) CPA may be made after the assessment of costs is concluded, as in *Optus Networks Pty Ltd and Ors v Leighton Contractors Pty Limited and Ors*.<sup>6</sup> The court is not *functus* in this regard, and the quantum could be determined at the same time if the orders were granted. Where this is intended, it is essential that the assessment process be expeditiously managed and prompt and accurate responses to requisitions be provided, in order to avoid any undue delay that could result in the client being disentitled for any period.

Practitioners acting for parties who may be exposed to such an application or orders should similarly ensure that their client's potential exposure is limited; should seek to have periods in which undue delay has been caused by the party seeking to order excised from the operation of such an order, if granted; and/or should give consideration to part payment of costs, where appropriate.

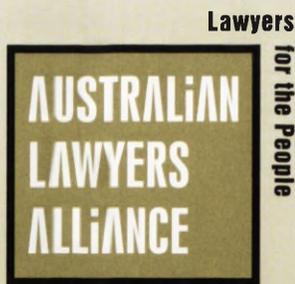
If it is intended to make an application for interest to run from a date earlier than the date that the

Certificate of Assessment was filed, it is essential *not* to file the Certificate before such an application is made. If the Certificate is filed, your clients will lose their rights to make that application. An application for a discretionary order for interest on costs is not a separate cause of action and *must* be made and determined before the entry of judgment for costs – that is, the filing of the costs assessor's certificate of determination, or the claim for interest will merge with the judgment for costs.<sup>7</sup> ■

**Notes:** **1** See *Woods v Woods* [2001] NSWSC 1108. **2** See *Uniform Civil Procedure Rules 2005* (NSW) (UCPR) 36.7(1). **3** See Rothman J in *Abraham As Tutor for Abraham v St Marks Orthodox Coptic College (No. 3)* [2008] NSWSC 1027 (22 September 2008). **4** *Lahoud v Lahoud* [2011] NSWSC 994. **5** *Joseph Lahoud v Victor Lahoud* [2006] NSWSC 126. **6** *Optus Networks Pty Ltd and Ors v Leighton Contractors Pty Limited and Ors* [2005] NSWSC 156 (9 March 2005). **7** *Timms & Ors v Commonwealth Bank of Australia & Ors* [No. 3] NSWCA 25 (19 February 2004).

**Peta Solomon** is the principal of *Costs Partners Pty Ltd*.

EMAIL [petas@costspartners.com.au](mailto:petas@costspartners.com.au)



## Advertise here

For information and bookings contact:

**Renée Harris**

Publications Manager

T +61 2 9258 7700

F +61 2 9258 7777

E [renee@lawyersalliance.com.au](mailto:renee@lawyersalliance.com.au)

For top quality Legal Costing Services at competitive rates, contact:

## SEABEACH COSTING PTY LIMITED Legal Costs Consultants

1/32 Seabeach Avenue, Mona Vale, NSW, 2103

Tel: (02) 9999 6924 Email: [seabeachcosting@gmail.com](mailto:seabeachcosting@gmail.com)

- We have quick turnaround times so that you can maintain your cash flow in your litigation matters.
- We deal with all types of costing matters.
- Our services are available for costs matters in the Federal Court, Family Court, Supreme Court, District Court and Local Court.

Call us today on (02) 9999 6924 and tell us what you need to be done and we'll be happy to email to you our List of Costing Services and Charges and start work on your matter as soon as we receive your instructions.