Interest on Costs: Interest-ing!

Date : August 15, 2022

By Anica Cunanan, a Solicitor of Matthews Folbigg Lawyers in our Insolvency, Restructuring and Debt Recovery Group

Are you commencing proceedings and wondering if you can seek interest on costs? What is interest on costs?

The award of interest on costs is dealt with under the *Civil Procedure Act 2001* (NSW) ("**the Act**"), specifically s 101. It is often a matter of discussion as to whether one has the ability to recover interest on costs and if so, under what circumstances.

Prior to 2015, no interest was payable on costs unless the court made such an order. In November 2015, s 101 of the Act was amended to allow for interest to be payable on costs under ss 101(4) and (5). However, an application can still be made under the Act for interest on costs for actions that commenced prior to 24 November 2015.

The Court is also given the general power to award costs pursuant to s 98 of the Act.

The default position for actions commenced on or after 24 November 2015 is that interest on costs will commence from the date of the order at the prescribed rate. However, the Court has the discretion to otherwise make an order (such as ordering the interest to commence at an earlier date).

The principle of making an order for payment of interest on costs is discussed in *Drummond and Rosen Pty Limited v Easey & Ors [No 2]* [2009] NSWCA 331 and is to essentially compensate the party having the benefit of a costs order for being out of pocket in respect of relevant costs which it has paid.

Tjiong v Tjiong (No 2) [2018] NSWSC 1981 involved an application dealing with the law in its pre-November 2015 form and raised a number of issues. One of the pertinent issues considered in this case was delay. Although Parker J accepted that events after the making of a costs order could sometimes be relevant to the exercise of the Court's discretion, the effect on the unsuccessful party must be considered. A successful party with an interest on costs order could simply delay the assessment of costs in the knowledge that interest would accrue in the meantime (as Campbell J acknowledged in *Lahoud v Lahoud* [2006] NSWSC 126). In light of this, when considering making an application for interest on costs, it is important to do so without delay.

The relevant principles set out in Lahoud are still being considered even in more recent cases dealing with interest on costs,. The "Lahoud formula" provides the following way to calculate interest on costs:

"*… ascertain the total of the amounts which the plaintiffs have paid and are liable to pay for costs and disbursements, ascertain the total amount of costs and disbursements allowed on assessment, calculate the percentage which the total amount allowed on assessment bears to the total costs and disbursements which the plaintiffs have paid or are liable to pay, and allow the plaintiffs interest on that percentage of each payment which they have made from time to time on account of costs and disbursements*."

These are just some of the things to consider when dealing with the question of interest on costs. Throughout the years, however, it is clear that it will always be on a case by case basis and not a one size fits all approach as different factors in each case will affect the Court's decision whether to award interest on costs or the calculation of interest on costs.

Matthews Folbigg Lawyers has a specialist team dedicated to Insolvency, Restructuring and Debt Recovery

If you would like more information or advice in relation to insolvency, restructuring or debt recovery law, contact a Principal of the Matthews Folbigg Insolvency, Restructuring & Debt Recovery Group:

Jeffrey Brown on (02) 9806 7446 or jeffreyb@matthewsfolbigg.com.au

Stephen Mullette on (02) 9806 7459 or stephenm@matthewsfolbigg.com.au