PARTIES:	KIM MAREE SHAW
	v
	THE COMMONWEALTH OF AUSTRALIA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT
FILE NO:	No. 611 of 1986
DELIVERED:	Darwin 22 March 1995
JUDGMENT OF:	Kearney J

CATCHWORDS:

DAMAGES - Measure and remoteness - Torts - Personal injuries - Award of damages - Interest - Interlocutory judgment with damages to be assessed - Whether interest form interlocutory judgment or from final judgment qualifying damages - Date of judgment - Supreme Court Act 1979 (NT) s 85 - Supreme Court Rules 1987 (NT) r 59.02(3)

PROCEDURE - Costs - Practice matters - Interest - Interest on costs treated differently from interest on damages - Award of costs creates judgment debt and interest runs from interlocutory judgment

PROCEDURE - Courts and judges generally - Judgments and orders - Amending, varying and setting aside - Slip rule - Whether date of judgment an oversight - Application of the slip rule - Supreme Court Rules 1987 (NT) r 36.07

PROCEDURE - Supreme Court procedure - Judgments and orders - Amending, varying and setting aside - Slip rule - Whether date of judgment an oversight - Application of the slip rule - Supreme Court Rules 1987 (NT) r 36.07

Supreme Court Rules 1987 (NT) r36.07

Thomas v Bunn [1991] 1 AC 362, considered

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. 611 of 1986

BETWEEN:

KIM MAREE SHAW
Plaintiff

AND:

THE COMMONWEALTH OF AUSTRALIA
Defendant

CORAM: KEARNEY J

REASONS FOR JUDGMENT

(Delivered 22 March 1995)

The plaintiff's application

By application under the slip rule, r36.07, of 16 May 1994 the plaintiff sought the following orders:-

(1) that the date of judgment in this action be "corrected" from 9 November 1992 to 14 November 1991;

(2) that the defendant pay interest on both the damages and costs awarded to the plaintiff, calculated from 14 November 1991; and

(3) that the plaintiff have the costs of the application of 16 May 1994.

The prime reason for seeking order (1) was to obtain order (2); that is to say, the essential purpose of the application was to obtain interest on the original award of damages from 14 November 1991 until 9 November 1992; on the additional damages awarded by the Court of Appeal, from 14 November 1991 until 21 January 1994 when it was paid; and on costs, from 14 November 1991 until paid.

Background to the application

In this action, instituted on 14 August 1986, the plaintiff sued the defendant for damages for injuries she received in an accident in August 1974, when she was a schoolgirl. The case was tried before me in November 1991.

On this application the parties were at issue as to whether during the course of final addresses by counsel on 14 November 1991 I had found that the defendant was liable to the plaintiff in negligence for damages to be assessed, with costs.

Written reasons for decision were published on 9 November 1992, when the plaintiff was awarded $214,180 damages, together with nearly all of her costs. Included in the damages award was interest on certain pre-judgment loss, purportedly allowed under the Civil Procedure Act 1833 (UK). This interest was expressed to run from August 1974 "to trial"; the amount was stated as $21,900, based on an allowance for $30,000 pre-judgment loss calculated at 4% for

that period. Simple mathematics show that the period in question was calculated from August 1974 to November 1992. That is to say, for the purpose of calculating interest on pre-judgment loss, the date of "judgment" was taken as 9 November 1992, not 14 November 1991.

On 21 December 1992 pursuant to Rule 60.03(1) the plaintiff drew up and filed the formal judgment. In it the date of the judgment in the action was stated as "9 November 1992". On 30 December 1992 this judgment was authenticated under Rule 60.02(1).

Meanwhile, on 7 December 1992, the plaintiff had appealed against the inadequacy of the amount of damages awarded to her on 9 November 1992. The defendant cross-appealed against the allowing of interest to judgment.

On 24 November 1993, for reasons then published, the Court of Appeal allowed both the plaintiff's appeal and the defendant's cross-appeal; it set aside the award of 9 November 1992, and in lieu thereof substituted an award of $344,578 in favour of the plaintiff. In accordance with Rule 84.26, the formal order of the Court of Appeal was filed by the plaintiff on 22 December 1993 and authenticated by the Registrar on that day; in it, the date of the order of the Court of Appeal was stated as "24 November 1993".

The Court of Appeal, in allowing the cross-appeal, held that no interest could be allowed for pre-judgment loss, because the 1833 Act did not authorize it. It was not until

1979, after the accident, that legislative provision for such interest was made; see s84 of the Supreme Court Act (herein "the Act").

I consider that until the Court of Appeal's decision on 24 November 1993 the plaintiff had no real concern about the question of interest per se, since she had an award of interest on losses from the accident until the judgment of 9 November 1992 (see p2), and s85 of the Act (p4) provided for interest thereafter. Thus there was no hiatus, from 1974, as far as interest was concerned. Once the Court of Appeal held on 24 November 1993 that the plaintiff had no entitlement to interest to judgment, her only entitlement being to post-judgment interest under s85, it became her concern, for the first time, that "the date of the judgment" from which interest ran under s85 be as early a date as possible. That, I think, was the basic reason for this application. I note that in the appeal before the Court of Appeal, the plaintiff's counsel did not seek an order that s85 interest run from 14 November 1991, in the event that the defendant's cross-appeal was allowed (as it eventually was).

The relevant statutory provisions

It is convenient first to set out the relevant provisions of the Act and Rules.

Rule 36.07 is the "slip rule", under which this application is made. It is in a standard form and provides:-

> "The Court may at any time correct a clerical mistake in a judgment or order or an error arising in a judgment or order from an accidental slip or omission." (emphasis mine)

Section 9(1) of the Act defines "judgment" as follows:-

> ""Judgment" includes a decree, order, declaration, determination, finding, conviction or sentence, and a refusal to make a decree, order, declaration, determination or finding, whether final or otherwise;" (emphasis mine)

Section 85 of the Act provides for interest on judgment debts, as follows:-

> "Except as provided by any law in force in the Territory, a judgment debt carries interest, from the date of the judgment -
>
> (a) at such rate as is fixed by the Rules; and
>
> (b) until a rate is so fixed, at 8% per annum." (emphasis mine)

Pursuant to s85(a) of the Act, Rules 59.02(3) - (5) provide for the rate of interest on judgments. Rule 59.02(1) provides for the date on which a judgment of the Court takes effect, viz:-

> "(1) A judgment given - - - by the Court shall bear the date of and take effect on and from the day it is given - - - unless the Court otherwise orders." (emphasis mine)

Rule 82.02 makes r59.02(1) applicable to a judgment of the Court of Appeal.

The Act does not specifically provide for interest on an award of costs; contrast, for example, s101(1) of the

Supreme Court Act 1986 (Vic), which provides that interest on costs runs "from the date of the order of the taxing Master stating the result of the taxation", unless the Court fixes another date. However, it is clear that an award of costs creates a "judgment debt" within s85; see, for example, *Taylor v Roe* [1894] 1 Ch. 413. Section 86(2)(c) of the Act provides generally that "the Rules may make provision - - - in relation to costs"; pursuant thereto r63.74 provides for interest on costs to be payable, viz:-

> "(1) At the conclusion of the taxing of a bill, the Taxing Master may, in his discretion, but subject to subrule (2), fix a rate of interest payable in respect of the taxed costs and the date - - - from which that interest shall run.
>
> (2) A rate of interest fixed under subrule (1) shall not exceed the rate from time to time fixed in accordance with rule 59.02 as interest payable on a judgment debt." (emphasis mine)

The factual basis of the plaintiff's application

(a) The "finding" at trial on 14 November 1991

In his affidavit of 16 May 1994 Mr de Silva of counsel for the plaintiff deposed, inter alia, to his own recollection that in the course of counsels' final submissions at trial on 14 November 1991, I found for the plaintiff on the issue of liability and invited the defendant to make an interim payment to the plaintiff, pending assessment of the amount of damages. No interim payment was in fact made.

In her affidavit of 11 May 1994 Ms Kate Gillman, my Associate at the time of trial, deposed that on 14 November 1991 I had found for the plaintiff on the question of liability, with costs, and that she had then contemporaneously noted the Court's "Report of Listing" to that effect, and entered a similar note in her Associate's notebook.

Any doubt in my mind as to what actually occurred on 14 November 1991, as to which no transcript or tape is presently available, is now cleared up from reading my Court notebook for 14 November 1991, Ms Gillman's contemporaneous note, and p19 of the reasons published on 9 November 1992. As a result, I have no doubt that on 14 November 1991 I stated that I found the defendant liable to pay damages to the plaintiff for negligence, and liable to pay the plaintiff's costs of the action. At that time, 14 November 1991, there was a final determination of the right of the plaintiff to recover damages and costs.

(b) <u>The judgment of 9 November 1992</u>

As at 14 November 1991, what remained to be determined was the assessment of the damages payable by the defendant to the plaintiff, and the quantification of her costs by taxation (failing agreement). An award of damages, in the sum of $214,180.00, was made on 9 November 1992; written reasons were then published. This sum was paid to the plaintiff by the defendant on 19 January 1993; pursuant to s85 and Rules 9.02(3)-(5) interest thereon, for the period

9 November 1992 - 19 January 1993, amounting to $3687.03, was paid to the plaintiff by the defendant on 25 March 1993.

(c) The Court of Appeal judgment of 24 November 1993

On 24 November 1993 the Court of Appeal made the orders referred to at p3. The balance damages thereby due and unpaid,($344,578.00 - $214,180.00 = $130,398.00) was paid to the plaintiff by the defendant on 21 January 1994.

The plaintiff's submissions

(a) Interest on damages

Mr de Silva submitted that when on 21 December 1992 the plaintiff's solicitors drew up and filed the formal judgment of the trial court, they had erroneously stated therein the date on which judgment was given as "9 November 1992", instead of "14 November 1991". He explained that the reason was that at that time, 21 December 1992, the fact that there had been a finding on liability of 14 November 1991, had been "overlooked". I consider that 14 November 1991 was then understandably treated as a date of no practical significance to the plaintiff, for the reasons outlined at pp3-4. He submitted that the delay until May 1994 in applying to "correct" the date did not mean that the realization it had been overlooked was an "afterthought"; it had been a mere "oversight" on 21 December 1992. He submitted that any delay which had occurred in making the application of 16 May 1994,

was occasioned by the institution of the appeal and its determination, and should not affect the decision on the application.

The plaintiff now invoked the "slip rule", r36.07, to have her solicitors' "mistake" or "accidental error" of 21 December 1992 corrected, and "14 November 1991" substituted for "9 November 1992" as the date of judgment following trial. Rule 36.07 in its terms (p4) enabled this correction to be made "at any time", and therefore it could not be said that the application of 16 May was made too late, in the sense that the trial Court was now 'functus officio'.

The essence of Mr de Silva's submission was that because of the "finding" on 14 November 1991 that the defendant was liable in negligence, the plaintiff had in fact recovered "judgment" as defined in s9(1) of the Act (p4) on that day; and therefore interest ran from that date, because it was "the date of the judgment" in terms of s85, on both the amount of the judgment for the plaintiff of $344,578 (being the damages determined by the Court of Appeal on 24 November 1993), and on the amount of costs (which has not yet been determined).

The Court of Appeal judgment of 24 November 1993 was taken out by the plaintiff on 22 December 1993; it was authenticated on that date. Mr de Silva submitted that the award by that Court on 24 November 1993 should take effect from 14 November 1991, which was "the date of the judgment"

following trial, for the reasons indicated above. He submitted that insofar as the Court of Appeal ordered on 24 November 1993 that :-

> "2. The award made by Kearney J [on 9 November 1992] be set aside and in lieu thereof there be an award - - -"

it should not be implied therein that the relevant date of the substituted award by the Court of Appeal is 9 November 1992, rather than 14 November 1991. I observe that the Court of Appeal spoke of the monetary "award" of 9 November 1992 as being "set aside".

In the Court of Appeal judgment, taken out by the plaintiff's solicitors on 22 December 1993, the date from which that judgment was to take effect was not stated. I do not recall Mr de Silva making any submissions as to the effect of Rules 82.02 and 59.02(1) in that regard. He submitted that it was not necessary for the plaintiff to go to the Court of Appeal under the "slip rule" to have that Court clarify the date from which its substituted award was to take effect. In effect, his submission was that that date was clear: the "finding" on liability of 14 November 1991 was, in terms of s9(1) of the Act, the "judgment" in the trial of the action, a finding never in contest before the Court of Appeal; it was "in lieu" of that "judgment" on that date that the award of the Court of Appeal must be taken to have been ordered by that Court to take effect. He appeared to submit that it lay both

within the jurisdiction of the trial Court, and the jurisdiction of the Court of Appeal, to make order (2) at p1.

Despite the wording of the order sought in (1) on p1, he submitted that the plaintiff was not applying to have the judgment of the trial Court antedated pursuant to r59.02(1); rather, it was sought to correct an error in the form of judgment authenticated on 30 December 1992, pursuant to r36.07.

In summary, Mr de Silva submitted that the effect of s85 of the Act was that the "judgment debt", ascertained on 24 November 1993 to be $344,578, carried interest "from the date of judgment", which was 14 November 1991, the date when the defendant was found liable in negligence to the plaintiff.

(b) Interest on costs

Mr de Silva made a similar submission that interest on costs should run from 14 November 1991; in that respect, he relied on *Tarlington v Hall* (1981) 51 FLR 282 and *Schimmel v The Commonwealth of Australia* (unreported, Master Lefevre, 12 May 1993).

In *Tarlington* (supra) an award of damages was made on 2 December 1977, with costs to be taxed. The plaintiff's bill of costs was taxed on 13 December 1979, the costs being paid on 24 January 1980; no interest was paid on the costs. The plaintiff sought interest on the taxed costs from 2 December 1977 until 24 January 1980. It was held that an

order for costs carries interest under s54 of the Australian Capital Territory Supreme Court Act 1933 (C'th), a provision similar to s85 of the Act though the crucial date is there expressed as "the date as of which the judgment is entered". Kelly J traced the divergent authorities at common law and in equity, as to the date from which interest on costs should run. The essential difference was whether interest ran from the date on which the liability to pay costs was determined (the incipitur principle), or the date on which the amount of those costs was actually determined (the allocatur principle). The common law had favoured the former view, equity the latter. His Honour said at p289:-

> "I think that when an order is made that a party pay the costs of another party, the judgment debt thereby created has the character of a debt owed at the present time although payable in the future (debitum in praesenti, solvendum in futuro)."

He concluded at p292:-

> "In the end, however, I think it is a matter of interpretation and I am satisfied that by the combined effect of ss5 and 54 of the Act, an order for costs carries interest from the date as of which the judgment is entered, namely, in the ordinary course in the absence of a special order from the date of pronouncement of the judgment." (emphasis mine)

In *Schimmel* (supra) the plaintiffs recovered judgment on 23 August 1991, with costs to be taxed. Taxation occurred on 8 May 1992. No claim was made at taxation for interest on the costs. The plaintiffs eventually claimed interest from 23 August 1991 to 8 May 1992. The learned

Master discussed various authorities, including *Zabic v Nabalco Pty Ltd* (1983) 25 NTR 28, and found for the plaintiffs, holding that interest on the taxed costs was payable from the date of judgment. That is, he applied the incipitur principle. He noted that to the extent that r63.74 (p5) was inconsistent with r59.02(3), which fixes the rate of interest on judgment debts "from the date of judgment", it had to be read subject to r59.02(3), since the latter Rule had the force of statute law, under ss6(1) and 7 of the Supreme Court (Rules of Procedure) Act.

The defendant's submissions

Mr Young of counsel for the defendant submitted that in truth "the date of the judgment" in the trial of the action was 9 November 1992, when damages were awarded. It will be recalled (p7) that the defendant had paid interest from 9 November 1992 until 19 January 1993, the date on which it paid the damages awarded at trial. He submitted that if there were any ambiguity as to what was "the date of the judgment" at trial, it had been resolved by the authentication of the judgment taken out by the plaintiff on 21 December 1992, in which that date was stated as "9 November 1992". He referred to the process of drawing up and authenticating judgments as set out in Rules 60.03(1), 60.06(2)-(7), and 60.02(1). He stressed the words emphasized in r36.07 (p4), submitting that there had been no "mistake" or "accidental slip" in the formal

judgment filed following judgment on 9 November 1992, and that that date had been deliberately nominated by the plaintiff's solicitors when filing the formal judgment on 21 December 1992, under r60.03(1). While the plaintiff now submitted that the date of "9 November 1992" in the formal judgment of 21 December 1992 was a "mistake" or an "accidental slip", in reality the plaintiff was now seeking as a recent "afterthought", rather than as the correction of a "mistake" or "accidental slip" flowing from an "oversight" made on 21 December 1992, to obtain an increased amount (by way of interest). In that respect, he submitted, the case was similar to what was found to be the position in *Strand Nominees Pty Ltd v Pennywise Smart Shopping Australia Ltd* (1991) 103 FLR 290.

In *Strand Nominees* (supra) a provisional liquidator sought to rely on r36.07 (p4) to amend a consent order of December 1988, which had extended his powers by enabling him to satisfy a debt of some $1 million claimed by a secured creditor holding a registered debenture, thereby avoiding the threatened appointment of a receiver by that creditor. His solicitor had not sought to have included in the consent order a reservation of certain statutory rights. The basis of the amendment sought under the slip rule was this alleged oversight by the solicitor in December 1988; it can be seen that the nature of that oversight is quite different to the alleged oversight in this case. Asche CJ noted at p294 the

authorities "where it is plainly stated that the slip rule can apply to oversights or omissions of counsel". His Honour said at pp294-5:-

> "Nevertheless, Gibbs CJ delivering the judgment of the High Court in *Gould v Vaggelas* (1985) 157 CLR 215 at 275 remarked that the jurisdiction was to be exercised sparingly.
>
> The borderline is not easy to draw, but it must be there. Despite the emphasis on the surprising width of the rule (per Donaldson MR in *R v Cripps; Ex parte Muldoon* [1984] QB 686 at 695), it cannot be accepted that every oversight of court or counsel can be corrected in this manner. Mr Henwood has drawn my attention to the fact that the cases relied on by Mr McDonald relate to ancillary questions of interest, for example, *Shaddock* and *Tak Ming*, or costs, for example, *Raybos* (supra) and *Inchcape.*
>
> This was also adverted to in the case of *Coppins v Helmers* [1969] 725 R (NSW) 273 at 278, where the Court of Appeal of New South Wales said:
>
> > "However, for the purposes of this appeal it is sufficient to say of all the instances in which a court has corrected an order by including in the original order a provision concerning a matter which was not dealt with at the hearing, that they are cases in which the correction has related, not to the substantial issue between the parties, which has been resolved by the original order, but to the ancillary or consequential matter. The researches of counsel have not brought to light any judicial decision in which a court has exercised its power to correct an order once completed, by varying its determination on the substantial question in issue in a respect which, through inadvertence, was not dealt with at the original hearing."
>
> - - -
>
> Can it be said that the omission of the plaintiff's solicitor to ask for the order in the terms now sought was an accidental slip or omission? I think not. I make it quite clear that no blame can be attached to him. That is the point. He seems to

> have asked exactly what he was instructed to ask. His omission to ask for the terms of the order now sought was not the sort of omission in which it can be seen that what was needed was there at the time, should have been mentioned and was clearly an oversight. That was not so here.
>
> - - -
>
> Omissions to seek costs or interest can be true examples of oversight because they are usually a necessary part of the proceedings, and omission to ask for them at the time when they should be sought can almost invariably be explained in only one way. But a proviso to a substantive order particularly one which was made on 8 December 1988, and the present application being filed on 14 January 1991, hardly stands on the same footing. It stands on the prohibited side of the borderline; because there must be a finis litium and parties cannot continually come back to court to amend orders to include something they have thought of subsequently which would make the order more to their advantage.
>
> - - -
>
> [In this case] this is not an oversight. It is an
>
> afterthought." (emphasis mine)

Mr Young submitted that similarly the application of 16 May 1994 was properly characterized as an "afterthought", because it was not until 26 April 1994 that the plaintiff's solicitors had first suggested that there had been a "slip" in the judgment authenticated on 30 December 1992; see the correspondence at Exhibit D1. I observe, however, that the plaintiff's solicitors appear consistently to have claimed that interest ran from 14 November 1991; they contended that they had overlooked until April 1994 the significance to their claim of the date "9 November 1992" in the authenticated judgment. Further, the passages emphasized in *Strand Nominees*

(supra) show that the matters which gave rise to the present application are quite different to those which were the basis of the application in that case.

Mr Young submitted that once the judgment filed on 21 December 1992 had been authenticated on 30 December 1992, the decision of the trial Court had been perfected and that Court was thereafter 'functus officio' in relation to the judgment, and could not correct it under the slip rule. I consider that there is no substance in that submission. Under r36.07 (p4) the trial Court may correct a mistake or error in its judgment of the type contemplated by the slip rule "at any time". Clearly, in some circumstances an application to correct may be made too late; see *Hatton v Harris* [1892] AC 547 (in which a correction was made some 40 years after a decree) in particular the observations of Lord Herschell at p558. This is not to say that an order under the slip rule is available as a matter of course; prompt action to invoke a slip rule is important - see *L. Shaddock & Associates Pty Ltd v Parramatta City Council (No.2)* (1982) 151 CLR 590 at 597.

Mr Young submitted that the Court of Appeal judgment took effect from 24 November 1993, pursuant to Rules 82.02 and 59.02(1); that is, the substituted award of damages took effect from that date, and accordingly it was from 24 November 1993 that interest ran under s85 of the Act, at least as far as concerned the increase in the amount of damages then awarded ($130,398). He submitted that the relevant judgment,

for the purposes of this application, was the Court of Appeal judgment of 24 November 1993. Any correction under the slip rule to the date on which that Court's judgment came into effect, was a matter solely for that Court to determine; this Court had no jurisdiction to correct that date.

As to s85 of the Act (p4), Mr Young submitted that here there was no "judgment debt" until damages were awarded on 9 November 1992.

He referred to various authorities on r36.07, and the limits of the "slip rule". These included *R v Cripps; ex p. Muldoon* [1984] 2 All ER 705 in which the Court of Appeal said at p710:-

> "- - - courts - - - deal with many different and separate proceedings. Questions arise on whether and to what extent the court has finally disposed of each proceeding or issue arising in such a proceeding. When it has, the judge who presided is said to have become functus officio, quoad that issue or those proceedings.
>
> - - -
>
> It is well settled that any judge is fully entitled to reconsider and vary any decision at any time before the order embodying or based on that decision has been perfected (see *Re Suffield and Watts, ex p Brown* (1888) 20 QBD 693 at 697, [1886-90] All ER Rep 276 at 278 per Fry LJ), although in some circumstances he may be under an obligation to give the parties a further opportunity to be heard. At that stage no 'slip rule' power is needed. However, once the order has been perfected, the trial judge is functus officio and, in his capacity as the trial judge, has no further power to reconsider or vary his decisions, whether under the authority of the 'slip rule' or otherwise. The 'slip rule' power is not a power granted to the trial judge as such. It is one of the powers of the court, exercisable by a

> judge of the court who may or may not be the judge who was in fact the trial judge.
>
> - - -
>
> It is surprisingly wide in its scope. Its primary purpose is akin to rectification, namely to allow the court to amend a formal order which by accident or error does not reflect the actual decision of the judge: see *Preston Banking Co V William Allsup & Sons* [1895] 1 Ch 141, [1891-4] All ER Rep 688. But it also authorises the court to make an order which it failed to make as a result of the accidental omission of counsel to ask for it; see *Re Inchcape, Craigmyle v Inchcape* [1942] 2 All ER 157 [1942] 1 Ch 394, approved by the Judicial Committee of the Privy Council in *Tak Ming Co Ltd v Yee Sang Metal Supplies Co* [1973] 1 All ER 569 at 573, [1973] 1 WLR 300 at 304. It even authorises the court to vary an order which accurately reflects the oral decision of the court, if it is clear that the court inadvertently failed to express the decision which it intended; see *Adam & Harvey Ltd v International Maritime Supplies Co Ltd* [1967] 1 All ER 533, [1967] 1 WLR 455. However, it cannot be overemphasised that the 'slip rule' power can never entitle the trial judge or a court to reconsider a final and regular decision once it has been perfected, even if it has been obtained by fraud: see per Lord Halsbury in the *Preston Banking Co* case [1895] 1 CH 141 at 143, [1891-4] All ER Rep 688 at 689." (emphasis mine)

Mr Young observed that in any event now to ante-date the judgment as appeared to be sought in order (1) on p1, (though contrary to Mr de Silva's submission at p10) was a course which faced "formidable obstacles", citing *Shaddock* (supra) at p597. In *Shaddock* (supra), the applicants had failed before the trial judge and the Court of Appeal, but obtained an award of damages from the High Court. Some 3½ years had meanwhile elapsed between the judgment at trial and that of the High Court. Before the High Court, the applicants' counsel had accidentally omitted to seek interest

for that 3½ year period, if their appeal succeeded. They later applied successfully to the High Court under the 'slip rule', for interest on the damages for the 3½ years. The High Court held that the 'slip rule' extended to omissions resulting from the inadvertence of a party's counsel, and this was so whether or not the order had been drawn up, passed and entered. In the circumstances, pursuant to the slip rule, it amended its previous orders to include the interest component sought. However, in the alternative, the applicants had sought under O43 r3 (which is similar to r59.02(1)) to have the Court ante-date its judgment by 3½ years, to the date of the judgment of the trial judge; it was this application which drew the Court's reference to the "formidable obstacles" relied on by Mr Young; the Court cited *Borthwick v The Elderslie Steamship Co Ltd (No.2)*[1905] 2 KB 516 at p519, and *Nitrate Producers Steamship Co Ltd v Short Brothers Ltd* (1922) 127 LT 726.

In *Borthwick* (supra) the plaintiff failed at trial in his claim for damages. He succeeded on appeal to the Court of Appeal, the order being that he recover judgment for a sum to be assessed by a referee. That assessment of damages was stood over pending an appeal to the House of Lords, which later affirmed the decision of the Court of Appeal. A dispute later arose as to the date from which interest should run on the amount of damages, the plaintiff claiming interest from the date of judgment at trial, the defendant being willing to pay interest from the time the amount of damages had been

determined (by agreement). On application to the Court of Appeal, where the defendant agreed that interest ran from the date of judgment, but put in issue the date of the judgment under which the plaintiff had recovered damages, it was held that in these circumstances the Court of Appeal judgment did not, as a matter of course, take effect from the date of judgment at trial, but only from the date on which it was given by the Court of Appeal, unless an order by that Court antedating its judgment was made under Order 41 Rule 3, the equivalent of r59.02(1) in this jurisdiction. Collins MR said, at p519:-

> "... though ... the Appeal Court has all the powers of the High Court, including the power to give any judgment and make any order which ought to have been made by the court of first instance, still the judgment of the Court of Appeal is a judgment of the date on which it was given, and it would require the invocation of the powers given by Order XLI, r3 [a rule in similar terms to O43, r3 of the High Court Rules and r59.02(1) in this jurisdiction], if that judgment is to be antedated. The judgment is not ipso facto antedated by reason that it is substituted for the judgment in the court below." The power to antedate ought - - - only to be used on good ground shown - - -."(emphasis mine)

Having found no "good ground" to antedate the judgment of the Court of Appeal, the Master of the Rolls concluded that interest should run from the date of that judgment. Romer LJ was of the same opinion. I note that Collins MR also said at p520:-

> "In [*Caledonian Railway v Carmichael* (1870) LR 2 HL., Sc. 56] there had been long delay in determining the amount payable to the landowner and loss to him arising thereby; but the principle to be gathered from the decision is that till the sum was ascertained there was no exigency on the railway

> company to pay anything, and consequently no sum on which they could be called on to pay interest". (emphasis mine)

In *Nitrate Producers* (supra), the trial judge dismissed the action on 2 April 1919, but assessed damages at £50,000 in case he was reversed. The Court of Appeal affirmed but on 1 July 1921 the House of Lords reversed, ordering that judgment be entered for the plaintiffs for £50,000 and remitting to the Kings Bench Division. The trial judge ordered that judgment be entered in this sum, as of 2 April 1919. The plaintiff had sought this date, in order to obtain interest from the earliest possible time. The trial judge's order was reversed by the Court of Appeal, which was affirmed by the House of Lords, holding that the trial judge had no power to give the judgment any date other than the date it bore (1 July 1921). Lord Buckmaster said at p727:-

> "If - - - it had been desired that the order [of 1 July 1921] should speak as from a different date than the date on which it was pronounced, it was incumbent upon counsel to ask that this should be done". (emphasis mine)

However, his Lordship distinguished the case before him from the situation where a judgment at first instance had been reversed by the Court of Appeal and restored by the House of Lords. In such a case -

> "- - - the judgment of the court of first instance is expressly restored and remains standing as from the date when it was given."

I should say that I accept Mr de Silva's submission that the application of 16 May 1994 is to be dealt with under

the slip rule, r36.07, and is not to be treated as an application to antedate the judgment from 9 November 1992 to 14 November 1991. Accordingly, the "formidable obstacles" to which an application under r59.02(1) to "otherwise order" gives rise, do not arise in this case.

Mr Young submitted that while *Moller v Roy* (1976) 11 ALR 398 appeared to support the plaintiff's submission, that decision had later been doubted by the High Court in *Nicol v Allyacht Spars Pty Ltd* (1988) 81 ALR 272.

In *Moller* (supra) Franki J held that the operation of s37 of the Judiciary Act 1903 (C'th) meant that an award of an increased amount of damages by the High Court on appeal on 7 August 1975 took effect from 4 December 1974, the date of the original Supreme Court judgment. Section 37 of that Act provides that the High Court "may give such judgment as ought to have been given in the first instance". In *Nicol* (supra) the High Court considered that these words in s37 do not mean that the judgment of the appellate court must be regarded for all purposes as if it had been the judgment given by the Judge in the Court below. The Court held that in accordance with O43 r3 of its Rules, which is similar to r59.02(1), its judgment took effect from the date it was pronounced. Their Honours referred to *Borthwick* (supra) and *Nitrate Producers* (supra) and commented at p275 on the distinction

drawn by Lord Buckmaster in *Nitrate Producers* (supra) at p727 (see p21), as follows:-

> "The distinction is of importance if regard is had to *Gould v Vaggelas* (1985) 157 CLR 215; 62 ALR 527. In that case the trial judge, Connolly J, had awarded the plaintiff damages of $1,427,500. On appeal the Full Court of the Supreme Court of Queensland reduced the award to $700,000; on further appeal the High Court restored the judgment of the trial judge. In dealing with the question as to the interest payable on the judgment, the High Court referred to the order of the Full Court that "there be interest at the rate of twelve (12) per cent on the judgment sum from date of judgment ... " and said (CLR at 274; ALR at 530):
>
> > "The order plainly varies the judgment given by Connolly J by substituting a different sum for the figure set out therein. The 'date of judgment' remains 18 September 1981 [the date when Connolly J made his award] and it is from this date that the award of interest at the rate of 12 per cent per annum is to be calculated. That this must be so is demonstrated by the problem that would arise if the order of the Full Court were taken to set a new date of judgment, arguably leaving the original judgment of Connolly J to attract the statutory interest in accordance with s73 of the Act until varied at the later date." (emphasis mine)

I observe that no provision akin to s37 of the Judiciary Act (C'th) was in issue in this case.

Mr Young submitted that in the present case at the hearing of the appeal the attention of the Court of Appeal should have been specifically directed by counsel for the plaintiff/appellant to the question of the date from which interest should run. This had not been done, and accordingly interest on the amount awarded by the Court of Appeal ran from the date on which the judgment of the Court of Appeal was

delivered, 24 November 1993, until the amount was paid to the plaintiff on 21 January 1994. I assume that Mr Young had in mind only the increased amount of $130,398.00 in this submission, as the other $214,180 had been paid to the plaintiff on 19 January 1993.

As to awarding interest on costs, Mr Young submitted that this was really a matter to be decided by the Master under r63.74(1), when taxing the costs.

Conclusions

It is, I understand, common ground that if the interest on the damages award is to be calculated from 14 November 1991 the amount of interest thereon due to the plaintiff, bearing in mind what the defendant has already paid by way of interest, is $46,039.25; if it is to be calculated from 9 November 1992, the amount due to the plaintiff is $11,227.89.

I should mention some of the other authorities on the application of the slip rule, to which reference was made. In *Storey and Keers Pty Ltd v Johnstone* (1987) 9 NSWLR 446 at pp449-453, McHugh JA (as he then was) discussed various authorities on the slip rule; they show that sometimes the rule has been construed narrowly, while at other times a more expansive view has been taken. His Honour observed at p449:-

> "The dividing line between a mistake or error which is the result of an accidental slip or omission and a mistake or error which is the product of a

deliberate decision has often been difficult to draw."

He proceeded to state the principles applicable to the slip rule at pp452-3, viz:-

> "If the proposed variation of an order relates to a matter which was in issue in the proceedings or to something which was incidental to such a matter, the court, in my opinion, has power to amend its order if the need for the variation is the result of an accidental omission or mistake. Matters such as costs or interest on a judgment, for example, are almost always incidentally involved in proceedings, and the court has power to deal with them even though they are not specifically raised at the hearing provided, of course, the omission was accidental. No doubt in some cases there will be difficulty in determining whether or not the subject of the proposed variation relates to a matter which was in issue or whether it is to be regarded as a separate and distinct matter which was not in issue.
>
> - - -
>
> When that sort of problem arises, the level of classification of the matter in issue will usually prove decisive. - - - Notwithstanding the decision in *Coppins* [(1969) 72 SR (NSW) 272] or the dictum in *L Shaddock & Associates Pty Ltd v Parramatta City Council (No 2)* [(1982) 151 CLR 590] the cases to which I have referred indicate that amendments under the slip rule are not confined to subsidiary or consequential matters.
>
> The requirement that the proposed amendment must relate to a matter which was in issue in the proceedings or what was incidental thereto merely serves to emphasise that it is only omissions or mistakes which are accidental which can be rectified. It would be contrary to the rationale of the slip rule to allow judgments and orders to be amended to deal with matters which were not in issue in the proceedings. Such matters must be dealt with by way of appeal and in accordance with the principles which govern the raising of new matters on appeal: cf *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 438 and *Piening v Wanless* (1968) 117 CLR 498.

> The need to confine amendments to matters in issue or incidental thereto is necessitated by the fact that an amendment operates from the date of the original order no matter how long a period has elapsed since the original order was made. In *Hatton v Harris* [1892] AC 547 the amendment was made over thirty years after the making of the original decree. It had the effect of retrospectively depriving the creditor of the full extent of his charge over the debtor's land.
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> - - -
>
> The rationale of the slip rule also requires that an omission or mistake should not be treated as accidental if the proposed amendment requires the exercise of an independent discretion or is a matter upon which a real difference of opinion might exist: cf *Brew v Whitlock (No.3)* [1968] VR 584 (at 506). In general the test of whether a mistake or omission is accidental is that applied by Lord Herschell in *Hatton v Harris* (at 558): if the matter had been drawn to the court's attention would the correction at once have been made?
>
> Finally, the court always has a discretion to refuse to make an order under the slip rule "if something has intervened which would render it inexpedient or inequitable that it be made": *L Shaddock & Associates Pty Ltd v Parramatta City Council [No2]* (at 597)." (emphasis mine)

In *Gould v Vaggelas* (supra) the High Court on 6 November 1984 allowed an appeal from the Full Court of the Supreme Court of Queensland, set aside its judgment, and ordered that in lieu thereof the appeal to that Court be dismissed with costs. The effect of the High Court's judgment was to restore the judgment of the trial judge, of 18 September 1981. The appellant later applied to the High Court under the slip rule, seeking interest on the judgment debt from 18 September 1981 until 6 November 1984. The question of interest had not been raised before the High

Court, because of an accidental omission to do so. The High Court said at pp274-6:-

> "Recent decisions of this Court provide illustrations of the injustice that may be caused to litigants by the inadvertence of counsel and the willingness of the Court in appropriate circumstances to grant a remedy: *L. Shaddock & Associates Pty. Ltd. v Parramatta City Council [No 2]* (1982) 151 C.L.R. 590; *The Commonwealth v McCormack* (1984) 155 C.L.R. 273; cf also *Tak Ming Co. Ltd. v Yee Sang Metal Supplies Co.*[1973] 1 W.L.R. 300; [1973] 1 All E.R. 569. Nevertheless, the jurisdiction is one to be exercised sparingly, lest it encourage carelessness by a party's legal representatives and expose to risk the public interest in finality of litigation.
>
> The circumstances of the present case are by no means as compelling as were those in *Shaddock.*
>
> - - -
>
> There are a number of considerations in favour of the application. It does not come as an afterthought. The evidence is that the failure to advert to the question of interest in this Court was an accidental omission on the part of the appellants' legal representatives - - -.
>
> - - - it appears to be fair and just. We see no reason to doubt that had the matter been canvassed at the time of the hearing in this Court the order now sought would have been made. Finally, there has been no undue delay on the part of the appellants in seeking rectification."

In *Raybos Australia Pty Ltd v Tectran Corporation Pty Ltd* (1987-88) 77 ALR 190 the successful party, having neglected to ask for costs, later applied for costs under the slip rule. In granting the application Toohey J said at p191:-

> "In many cases the slip rule or its equivalent is invoked when, through error or oversight, a judgment or order fails to express correctly the intention of

> the court at the time when the judgment or order was announced. But it is clear that this power of correction extends to cases where a matter, through inadvertence, was not dealt with at the hearing. In that case the purpose of correction is not to give expression to the intention of the court at the time the judgment or order was pronounced: *Coppins v Helmers & Brambles Constructions Pty Ltd* [1969] 2 NSWR 279. That is the situation which has arisen here." (emphasis mine)

I also note *Thomas v Bunn* [1991] 1 AC 362, which was not originally cited. In that case the plaintiffs recovered interlocutory judgments for damages to be assessed. The amounts of the damages were later assessed, the trial judge awarding interest, pursuant to s17 of the Judgments Act 1838 (UK) from the date of the interlocutory judgments. On appeal, the House of Lords held that the word "judgment" in s17 clearly contemplated a single, final judgment for a quantified sum, rather than an interlocutory judgment which merely established liability; and accordingly interest should run from the date of the judgment in which damages are assessed. Section 17 of the 1838 Act provides:-

> "Every judgment debt shall carry interest - - - from the time of entering up the judgment - - - until the case shall be satisfied - - -."

Lord Ackner observed at p374:-

> "Until there is a quantified sum which the judgment debtor is obliged by the terms of the judgment to pay, there is no judgment which he is able to satisfy."

See the observation by Collins MR in *Borthwick* (supra) to the same effect, at p20. His Lordship noted at p375 the anomalous position established by a long line of authorities -

> "- - - that interest on awards of costs ran from the date on which judgment was pronounced (the incipitur rule) and not from the date upon which the taxation of costs was thereafter completed by the issue of the taxing master's certificate (the allocatur rule)."

His Lordship stated at p380:-

> "- - - the appellants argue that there is no logical reason why the same rules should apply to damages as apply to costs, the assessment of damages being a different exercise from the taxation of costs. All that the taxing master is required to do is from his own experience to decide whether costs, *which have already been incurred*, have been reasonably incurred and then to put a reasonable figure on such costs as at the date of the incipitur, or earlier. The costs having all been incurred by the date of the inciputur, the amount at which they will be taxed will be the same whenever the taxation takes place. In contra-distinction, a judge in assessing damages has to assess, not merely the damages suffered before the date of the interlocutory order or interim judgment, but also the damages suffered between then and the date of assessment and the further damages to be suffered in the future. There is no warrant for the fine distinctions arising out of the *Borthwick* ([1905] 2 KB 516) and the *Ashover* ([1911] 2 Ch 355) decisions.
>
> I accept that it is an anomaly that an order for payment of costs to be taxed is construed for the purpose of section 17 as a judgment debt, even though, before taxation has been completed, there is no sum for which execution can be levied. However the courts have accepted since its enactment that section 17 does apply to such an order and - - - the balance of justice favours continuing so to treat such an order."

His Lordship referred to *Garner v Briggs* (1858) 27 L.J. Ch.

483 at pp485-6 per Kindersley V.C., and concluded at p381:-

> "I accordingly take the view [as regards interest on damages that] the judgment referred to in section 17 of the Judgments Act 1838 does not relate to an interlocutory or interim order or judgment establishing only the defendant's liability. The judgment contemplated by that section is the

> judgment which quantifies the defendant's liability, the judgment which has been referred to in the course of these appeals as "the damages judgment". The artificial distinction drawn in the *Borthwick* case [1905] 2 K.B. 516 based on the precise terms in which damages are ordered to be assessed can no longer stand."

In the result, I refuse to grant the relief sought by the plaintiff at (1) on p1. It is clear to my mind that the form of judgment filed by the plaintiff's solicitors on 21 December 1992 accurately stated the judgment date as 9 November 1992. That was the date on which the damages were quantified and awarded; and, as is clear from the mathematics relating to the calculation of pre-judgment interest (p2), it was regarded by the trial Court as the date of judgment. For this reason, I also refuse to order that the defendant pay interest on the damages awarded to the plaintiff on 9 November 1992, with effect from 14 November 1991.

However, the question of interest on costs appears to stand on a somewhat different footing. It is clear that the plaintiff was awarded the costs of the action on 14 November 1991. Applying the incipitur principle, it follows that interest would run on those costs, when assessed, from 14 November 1991. Rule 63.74(1) - see p5 - leaves "the date - - - from which that interest [on taxed costs] shall run" for the Taxing Master to fix, in his discretion. However, I agree with the Master in *Schimmel* (supra) - see pp11-12 - that r63.74(1) must be read subject to r59.02(3) which provides that a "judgment debt carries interest from the

date of judgment", at a specific rate. I consider that r59.02(3) governs the situation, and interest on costs should accordingly run from 14 November 1991, applying the incipitur principle.

As to the question of the date from which interest should run on the increase in the award of damages by the Court of Appeal, that is entirely a matter for that Court to decide, on an appropriate application to it under the slip rule; see *Nitrate Producers* (supra) at p20. It would be wrong for me to express any opinion thereon.

Orders accordingly. I will hear the parties on costs, as the plaintiff has been successful as to that part of the relief sought relating to interest on costs.
