

CITATION: *BJEK Pty Ltd as Trustee for the EL and SL Fogarty Family Trust v Henbury Cattle Co. Pty Ltd (ACN 169 887 629) & Ors* [2024] NTSC 65

PARTIES: BJEK PTY LTD AS TRUSTEE FOR
THE EL AND SL FOGARTY FAMILY
TRUST

v

HENBURY CATTLE CO. PTY LTD,
CROSS COUNTRY FUELS PTY LTD,
ASHLEY ROBERT ANDERSON,
FAR MANAGEMENT PTY LTD,
DAVID ROHAN AND
NEVILLE ANDERSON

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT exercising Territory
jurisdiction

FILE NO: 21631761

DELIVERED: 30 July 2024

HEARING DATE: Written submissions

JUDGMENT OF: Luppino AsJ

CATCHWORDS:

Costs – Interest on costs – Court’s power to award interest on costs –
Discretion to determine the rate of interest and date from which interest is to
run – Determination is to be made on a broad and practical basis –
Appropriate rate determined by averaging Reserve Bank of Australia cash
rate over the relevant period plus an appropriate margin – In general interest

should run from the date of the order for costs – Variation of the commencement date in the case of excessive delay.

Supreme Court Act 1987 (NT) ss 9, 84, 85.

Supreme Court Rules 1987 (NT) rr 59.02(3), 63.51, 63.74.

Federal Court of Australia Act 1976 (Cth) s 52(2)(a).

Federal Court Rules 2011 (Cth) r 39.06.

Cullen v Trappell (1980) 146 CLR 1.

Grincelis v House (1999) 201 CLR 321.

Lahoud v Lahoud [2011] NSWSC 994.

MBP (SA) Pty Ltd v Gogic (1991) 171 CLR 657.

Public Trustee as Administrator of the Estate of Matthew Leonard v Atileo [2023] TASSC 33.

Roussos v Amaca Pty Ltd [2024] NTSC 20.

Schimmel v Commonwealth of Australia (1993) 113 FLR 205.

Shaw v Commonwealth of Australia (1994) 124 FLR 190.

Young v Northern Territory (1992) 107 FLR 264.

Zabic v Nabalco Pty Ltd (1983) 72 FLR 255.

Dal Pont GE, *Law of Costs*, 5th ed, LexisNexis.

REPRESENTATION:

Counsel:

Plaintiff: Written submissions by J Cudmore

Defendant: Written submissions by M Grove

Solicitors:

Plaintiff: CCK Lawyers

Defendant: Ward Keller

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

*BJEK Pty Ltd as Trustee for the EL and SL Fogarty Family Trust v Henbury
Cattle Co. Pty Ltd (ACN 169 887 629) & Ors [2024] NTSC 65*
No. 21631761

BETWEEN:

**BJEK PTY LTD AS TRUSTEE FOR
THE EL AND SL FOGARTY FAMILY
TRUST**

Plaintiff

AND:

HENBURY CATTLE CO. PTY LTD

and

CROSS COUNTRY FUELS PTY LTD

and

ASHLEY ROBERT ANDERSON

and

FAR MANAGEMENT PTY LTD

and

DAVID ROHAN

and

NEVILLE ANDERSON

Defendants

CORAM: Luppino AsJ

REASONS

(Delivered 30 July 2024)

- [1] A costs order was made in this Court on 27 October 2021 following the conclusion of a civil trial which was determined broadly in the Defendants' favour. The Plaintiff was ordered to pay firstly, the Defendants' costs of the proceedings on an indemnity basis and secondly, the Defendants' costs on the counterclaim, on the standard basis up to 8 October 2024 and on the indemnity basis from and after that date.
- [2] It was not until 29 December 2023 that the Defendants filed a Summons for Taxation (Summons) and the Bill of Costs (Bill). The Bill was substantial comprising 1745 items of costs and 209 items of disbursements. Total costs claimed were \$640,309.73 and total disbursements were \$480,571.82.¹
- [3] The Bill made a claim for a separate amount for interest in respect of each item of costs and disbursements. That interest was calculated from the date that each item of costs and disbursements was incurred and at the rate applying from time to time pursuant to rule 59.02(3) of *Supreme Court Rules 1987* (NT) (the Rules). The claims for interest in respect of costs totalled \$283,799.12 and \$207,518.29 for interest on disbursements.
- [4] The Plaintiff filed a Notice of Objection on 25 January 2024. The Plaintiff objected to each and every item of the claim for interest on costs. Although there were other objections, the objection in respect of interest accounted

¹ This was the Bill as originally filed. On 14 May 2024 the Defendants were granted leave to file an amended Bill.

for the bulk of the objections. As a result, when the matter came on for a preliminary mention, owing to the then lack of any decision on interest on costs in recent times,² I thought it appropriate to consider the question in more detail than would ordinarily occur during the taxation. I directed the parties to provide submissions on interest on costs for that purpose.

[5] The net effect of the approach to interest on costs taken by the Defendants was neatly summarised in the Plaintiff's submissions. The claim for interest as made represented an amount equivalent to over 30% of the total costs and disbursements claimed. In many cases the claim for interest on costs for an individual item exceeds by more than 50% the amount claimed in respect of the actual item of costs. That is partly due to the costs being incurred as far back as eight years ago.

[6] Before statutory intervention the options for the date from which interest on costs was to run was based on the application of either the *incipitur* rule or the *allocatur* rule. The former fixed the commencement date as the date of the costs order and the latter as the date of the *allocatur* which, in the case of taxation of costs is the date of the certificate of taxation which is made at the conclusion of the taxation. That has now changed by operation of the *Supreme Court Act 1987* (NT) (the Act) and the Rules. A limit on the

² See *Zabic v Nabalco Pty Ltd* (1983) 72 FLR 255, *Schimmel v Commonwealth of Australia* (1993) 113 FLR 205 and *Shaw v Commonwealth of Australia* (1994) 124 FLR 190 which were decided under a previous version of the Rules where rule 63.74 was subject to rule 59.02(3). Currently rule 63.74 applies despite rule 59.02(3); the decision in *Roussos v Amaca Pty Ltd* [2024] NTSC 20 was subsequently delivered on 13 May 2024.

rate of interest is set by rule 59.02(3) of the Rules. That limit also previously applied to the now repealed rule 63.74(2).

- [7] The statutory sources of the Court’s power to award interest are firstly, section 84 of the Act. That is not applicable in the current case as that applies to interest up to judgment.
- [8] Secondly, section 85 of the Act, which applies broadly to interest on a “*judgment debt*”. That term is not defined in the Act but the term “*judgment*” is defined in section 9 of the Act as including “...*a decree, order, declaration, finding...*”. In the case of costs, although an order for costs can fall within the definition of “*judgment*”, it cannot be a “*judgment debt*” until the costs have been finally allowed,³ hence section 85 of the Act also does not apply in the current matter.
- [9] Thirdly, rule 63.74 of the Rules. That rule was previously subject to rule 59.02(3) which set the rate of interest on judgment debts applying pursuant to section 85 of the Act. Rule 59.02(3) fixes the rate of interest by reference to the rate determined pursuant to section 52(2)(a) of the *Federal Court of Australia Act 1976* (Cth). In turn, that section specifies the rate by reference to rule 39.06 of the *Federal Court Rules 2011* (Cth) which, in broad terms fixes the rate at 6% above the cash rate published from time to time by the Reserve Bank of Australia (RBA). In any case, by reason of rule 63.74 of the Rules, although the rate fixed by rule 59.02(3) of the

³ *Schimmel v Commonwealth of Australia* (1993) 113 FLR 205 at 207.

Rules applies to post judgment interest, it does not apply to interest on costs as rule 63.74 of the Rules applies “..*despite rule 59.02(3)*”.

[10] Rule 63.74 of the Rules confers on the Taxing Master a discretion to fix a rate of interest and the date from which interest runs. That discretion is unfettered, albeit that the discretion must be exercised judicially and having regard to all relevant circumstances.

[11] In *Grincelis v House*⁴ and in *MBP (SA) Pty Ltd v Gogic*⁵ the High Court confirmed that the function of an award of interest is to compensate the party entitled to costs for the loss occasioned by being kept out of their money for the relevant period. It is also the case that the unsuccessful party has benefited from the use of the money ultimately ordered to be paid. That party also has been able to earn interest on that money and has had the use of the money for that party’s own purposes, including indirectly by not needing to borrow funds which would have resulted in an interest liability.⁶

[12] In respect of the date from which interest on costs is to run, I agree with the submissions of the Defendants that there are at least three options. They are firstly, the date the item of costs was incurred; secondly, the date of judgment; lastly, the date of the costs order. I think there are two further options namely, the date or dates that a party paid its costs and lastly, the date of the certificate of taxation.

⁴ (1999) 201 CLR 321 at para 16.

⁵ (1991) 171 CLR 657 at 663.

⁶ Dal Pont GE, *Law of Costs*, 5th ed LexisNexis at 19.15.

[13] I also accept the Defendants' submission that in the ordinary course, a party favoured by a costs order will be entitled to be awarded interest on costs.

[14] Many of the remaining submissions of the Defendants are relevant more to the question of whether indemnity costs should be ordered and not the question of interest on costs. Those submissions included that the Plaintiff's substantive claim was brought on an untrue basis and that the matter required considerable resources and time on the part of the Defendants to uncover the falsity of the claim. The submission that the Defendants have paid their legal costs during the course of the proceeding (although there is no evidence as to when those costs were paid) and have been held out of those funds since payment, is more relevant to the fact of the award of interest on costs, not necessarily the rate of, or commencement date for, interest on costs. Lastly, the submission that the Plaintiff did not avail itself of the mechanism in rule 63.51 of the Rules⁷ I think inappropriately attempts to shift the blame for the delay on the Plaintiff. The delay was something which the Defendants had the primary and main ability to control i.e., by filing the Summons in a more timely fashion.

[15] On the other hand, the Plaintiff's position is based on the obvious fact that an order for interest can only be made on conclusion of the taxation. The

⁷ That provides a mechanism for the party liable to pay costs to apply for an order fixing the date for the filing of a summons for taxation.

Plaintiff says that until an amount of each item has been taxed the Court cannot consider the question of interest. The Plaintiff further submits that the wording of rule 63.74 of the Rules confirms that the approach of the Defendants to claim interest from the date an item of cost was incurred is inappropriate. I cannot agree with that second submission. The discretion conferred by rule 63.74 of the Rules is unfettered and would enable me, if I thought that appropriate, to allow interest from the date that each individual item of costs was incurred.

[16] The better submission of the Plaintiff is that, as an award of interest on costs is a compensating award, that award should not be made in a way that would unfairly confer an advantage on the Defendants. What the Plaintiff refers to there is that the combination of the Defendants' claim of interest on every item of costs from the date that each item was incurred, coupled with the delay in filing the Summons, is unfairly advantageous to the Defendants. With that, and in cases where there is a significant delay, I broadly agree.

[17] The Plaintiff complains of the absence of an explanation for the delay in filing the Summons, albeit accepting that some time would be required to prepare the Bill of Costs in the ordinary course. Likewise the Plaintiff complains of a lack of explanation of necessary background facts namely, details of payments by the Defendants of their costs. That is true. It is trite to say that issues are decided on the evidence and if some evidence which is necessary for the case of a party is not provided by that party, in the

normal course that will work against that party. In the current case, that would prevent me from appointing the date of payment of costs as the date from which interest on costs was to run, assuming I considered such an order appropriate.

[18] The Plaintiff argued that it would be unfair to be penalised by an award of interest on costs running from a date before the order for costs was made. This was argued on the basis that it would then have no knowledge that costs would be awarded against it, or on what basis. I do not accept that rationale, nor do I accept that as a general principle. However, for the reasons discussed below, I consider that generally, interest on costs should not run from a date preceding the date of the order for costs.

[19] In the end, the Plaintiff submitted that the commencement date for calculation of interest on costs should be the date when the Bill was served, 14 January 2024 in the current case. I also reject that as that has no regard to established principles and makes no allowance for the time required to prepare a bill, an allowance which the Plaintiff accepted as appropriate.

[20] I agree that calculating costs from the date that each individual item of costs and disbursements was incurred is inappropriate. It is cumbersome and complicated and would greatly extend the time required for taxations, especially in a matter such as this where there is a sizeable bill of costs extending to costs incurred over a period of many years. As Southwood J

observed in *Roussos v Amaca Pty Ltd*⁸ (*Roussos*), citing *Cullen v Trappell*,⁹ the overarching principle is that an award of interest, which I take to include also its calculation, is to be approached in a broad and practical way and should not be allowed to assume disproportionate importance. The Defendants' approach offends against that principle.

[21] As to the rate of interest, the Plaintiff submits that if there is to be an award of interest on costs, the rate should be referable to the RBA cash rate plus an appropriate margin. Although I am not bound by the rate applying pursuant to rule 59.02(3) of the Rules, that is in effect what currently occurs pursuant to that rule. The RBA cash rate for the period spanning the range from the commencement to the end dates of items of costs in the Bill was mostly lower than that claimed by the Defendants in the Bill.

[22] For the majority of the period from the date of the first item of costs in the Bill namely, 6 July 2016 to the date of the last item in the Bill namely, 29 December 2023, interest rates have been at historical lows. The RBA cash rate was as low as 0.1% per annum from 4 November 2020 to 3 May 2022. As at the date of these reasons, the cash rate is 4.35% per annum. Bearing in mind the object of an order for interest on costs,¹⁰ having regard to the rate that would be earned by investing those moneys, and having regard to

8 [2024] NTSC 20 at p112.

9 (1980) 146 CLR 1 at 22.

10 See para 11.

the rate which someone borrowing funds from commercial lenders would be charged, the rate claimed is excessive.

[23] The various rates of interest on judgment debts covering the period from the date of the first item in the Bill to date and determined in accordance with rule 59.02(3) are:-

Period	%
1/7/2016 – 31/12/2016	7.75
1/1/2017 – 30/6/2017	7.50
1/7/2017 – 31/12/2017	7.50
1/1/2018 – 30/6/2018	7.50
1/7/2018 – 31/12/2018	7.50
1/1/2019 – 30/06/2019	7.50
1/7/2019 – 31/12/2019	7.00
1/1/2020 – 30/6/2020	6.75
1/7/2020 – 31/12/2020	6.25
1/1/2021 – 30/6/2021	6.10
1/7/2021 – 31/12/2021	6.10
1/1/2022 – 30/6/2022	6.10
1/7/2022 – 31/12/2022	6.85
1/01/2023 – 30/06/23	9.10
1/7/2023 – 31/12/2023	10.1
1/1/2024 – 30/06/2024	10.35
1/7/2024 – 31/12/2024	10.35

[24] I respectfully agree with and adopt the approach of Southwood J in *Roussos* that where the rate determined to apply fluctuates during the period involved, the appropriate method of determining the rate is to

determine a fair average over the whole period.¹¹ That is consistent with taking a broad and practical approach to the award of interest.¹²

[25] The rates in paragraph 23 are based on the RBA cash rate and the various RBA cash rates applicable over the period from the date of the first item in the Bill to date are:-

Period	%
4/05/2016 – 02/08/2016	1.75
3/08/2016 – 04/06/2019	1.50
5/06/2019 – 02/07/2019	1.25
3/07/2019 – 01/10/2019	1.00
2/10/2019 – 03/03/2020	0.75
4/03/2020 – 19/03/2020	0.50
20/03/2020 – 03/11/2020	0.25
4/11/2020 – 03/05/2022	0.10
4/05/2022 – 07/06/2022	0.35
8/06/2022 – 05/07/2022	0.85
6/07/2022 – 02/08/2022	1.35
3/08/2022 – 06/09/2022	1.85
7/09/2022 – 04/10/2022	2.35
5/10/2022 – 01/11/2022	2.60
2/11/2022 – 06/12/2022	2.85
7/12/2022 – 07/02/2023	3.10
8/02/2023 – 07/03/2023	3.35
8/03/2023 – 02/05/2023	3.60
3/05/2023 – 06/06/2023	3.85
7/06/2023 – 07/11/2023	4.10
8/11/2023 – Present	4.35

¹¹ *Roussos v Amaca Pty Ltd* [2024] NTSC 20 at p112, citing *Young v Northern Territory* (1992) 107 FLR 264 at 278 and *Public Trustee as Administrator of the Estate of Matthew Leonard v Atileo* [2023] TASSC 33 at para 368.

¹² See para 20.

[26] The delay by the Defendants in commencing the taxation process does operate unfairly in the Defendants' favour where interest on costs is ordered to run from the date of the order for costs, and even more so if ordered to run from the date that each item of costs was incurred or the date that costs were paid. An adjustment can be simply made to offset any unfair advantage in the former case but not in the latter without individual re-calculations in respect of each item of costs. Such re-calculations would be onerous in their own right and would also contribute to a protracted taxation process. In my view that alone would render inappropriate the exercise of the discretion to set the date of each individual item of costs as the date from which interest is to run.

[27] In the current case, the delay is two years and two months. Although a reasonable time must be allowed for a bill of costs to be prepared, and although regard must also be had to the size of the bill for that purpose, the time taken in this case is excessive. I consider that a reasonable time for that purpose would be six months. That is a relevant consideration in terms of the fixing of the date from which interest is to run, something which is pre-empted by the approach taken by the Defendants to claim interest from the date that each cost item was incurred.

[28] The Defendants submitted that any allowance for delay should have regard to the decision in *Lahoud v Lahoud*¹³ where Campbell JA said in relation to alleged delay:

“The type of delay that is relevant is delay that makes it just for the successful parties not to receive that compensation for a particular period of time.”¹⁴

I agree and the order that I propose to make as to when interest is to run from takes that into account.

[29] I consider that the appropriate rate of interest should be determined by reference to the RBA cash rate from time to time plus an appropriate margin. I consider that the rates fixed pursuant to rule 59.02(3) are a useful guide. The better approach to interest on costs in my view is to find a suitable average rate and to then apply that broadly to the final amount of costs as assessed. I have regard to the rates in paragraphs 23 and 25. I also note that in *Roussos* an appropriate average rate was determined to be 7.5% when applied to a period approximately two years shorter than in the current case. According to the rates above, during that two years the RBA cash rate was lower. All things considered I think an appropriate rate in this case is 7% per annum.

[30] To address the delay by the Defendants in filing the Summons, if the Summons had been issued within what I have determined to be a reasonable time I would have awarded interest from the date of the costs

13 [2011] NSWSC 994.

14 [2011] NSWSC 994 at para 59.

order. Instead, interest is to run from six months before the filing of the Summons namely, from 29 June 2023.
