PARTIES:	BERND MATZAT
	v
	GOVE FLYING CLUB INCORPORATED AND ORS
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL
FILE NO:	No 234 of 1991
DELIVERED:	19 JUNE 1998
HEARING DATES:	24 April 1998
JUDGMENT OF:	MILDREN J

CATCHWORDS:

Contract – Insurance – Costs – a defendant is liable to pay plaintiff's costs beyond its obligations under a policy of insurance – indemnity limit does not limit total amount costs ultimately payable – s28(2) not operational to effect a limit on costs payable.

Contract – Insurance – Costs – slip rule utilised to provide clarity to order made in original judgment.

Contract – Insurance – Costs – costs payable in relation to case management hearings.

Costs – Interest on Costs – interest payable from date of costs order not date of judgment unless otherwise ordered – no reason to backdate costs order.

Legislation

Supreme Court Rules – r 63.03(1); O63.18; r 46.10; O48; r 59.02(1); O59.02(3)
Law Reform (Miscellaneous Provisions) Act – s28(2); s26(1); s27(1)

Cases

1) *Oshlack v Richmond River Council* (1998) 152 ALR 83 referred

2) *TTE Pty Ltd v Ken Day Pty Ltd* (unreported 29 May 1990 Martin J) referred

3) *Milingimbi Educational and Cultural Association Incorporated v Davies & Ors* (1990) JSCNT 921 referred

4) *Cretazzo v Lombardi* (1975) 13 SASR 4 referred

5) *Green v Anderson* (1996) JSCNT 845 referred

6) *Schimmel & Anor v Commonwealth of Australia* (1993) 113 FLR 205 discussed

7) *Shaw v Commonwealth of Australia* (1995) 124 FLR 190 discussed

8) *Borthwick v Elderslie Steamship Co Ltd (No 2)* [1905] 2KB 516 referred

REPRESENTATION:

Counsel:

Plaintiff:	T Anderson QC
Defendants:	P Rose

Solicitors:

Plaintiff:	Elston & Gilchrist
Defendants:	Dylan Walters

Judgment category classification:	B
Judgment ID Number:	MIL98009
Number of pages:	13

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

No. 234 of 1991
(9112380)

BETWEEN:

BERND MATZAT
Plaintiff

AND:

GOVE FLYING CLUB INC and OTHERS
Defendants

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 19 June 1998)

MILDREN J: On 27 November 1996 I made certain orders and declarations against the Fifth Defendant, Australian Aviation Underwriting Pool Pty. Ltd. (the Pool), and said that I would hear counsel for the plaintiff and for the Pool on the question of costs.

Eventually, in April 1998, I heard submissions on the question of costs.

The principal contention of Mr Anderson QC for the plaintiff is that costs should follow the event, and that I ought therefore to order that the Pool

should pay the whole of the plaintiff's costs from the date the Pool was joined as a defendant to the action, *viz*., 14 October 1993, except for such costs as were incurred by the plaintiff in the action which were attributable solely to the defendants MAF-Air Services Pty Ltd and CE Heath Casualty General Insurance Limited. The principal contention of Mr Rose for the Pool is, unless I have misunderstood him, that the Pool should not be ordered to pay costs beyond its obligations under the policy in respect of which it was found liable, and as it has already been ordered to pay an amount in respect of those costs, no further costs order should be made. A number of alternative submissions were also raised which I will deal with later.

In my opinion, Mr Rose's submission is fallacious. The provisions of the policy between the second defendant, Darwin Aero Club Incorporated (DAC) and the Pool limited the amount of the Pool's liability to DAC, including the amount of the costs awarded against DAC: see Sections 4.2 and 4.3 of the Policy. Had the Pool agreed to indemnify DAC under the policy and defended the proceedings brought against DAC, the Pool could have effectively removed itself from exposure to a costs order in favour of the plaintiff, because it would not have been a party to the proceedings. By denying liability under the policy, it exposed itself to being joined as a party either by DAC or by the plaintiff. If the Pool had been joined by DAC as a third party and DAC had established its right to an indemnity, the Pool could not have avoided a costs order in the action brought by DAC under a third party notice by relying on the terms of the policy. In fact what happened was that the Pool was joined by the plaintiff who was not even insured under the policy. In those circumstances

the limit of indemnity under the policy does not preclude the plaintiff from obtaining a costs order against the Pool which may have the effect of increasing the total amount which the Pool might ultimately have to pay to the plaintiff.

Mr Rose's second contention was that s28(2) of the *Law Reform (Miscellaneous Provisions) Act* limited the Pool's liability for costs to that provided for in the contract of insurance. The action brought by the plaintiff against the Pool sought enforcement of a charge over monies payable by the Pool under two policies of insurance pursuant to which DAC was insured, pursuant to ss26(1) and s27(1) of the Act and for declaratory relief. Relief was granted in respect of one policy, Ext P2, but refused in respect of the other policy. S28(2) provides:

> An insurer is not liable under this Part for any greater sum than that fixed by the contract of insurance between himself and the insured.

The charge to which the Act refers, is on all insurance moneys that are or may become payable in respect of the insured's liability to pay any damages or compensation: see s26(1). It is in that context that s28(2) must be read. The Pool's liability to pay costs to the plaintiff does not rest upon Part VIII of the Act, but upon the power of the Court to order costs under the *Supreme Court Act and Rules*. In my opinion s28(2) does not have the effect which was contended.

A similar argument was pressed on the basis that, the plaintiff having succeeded on only one of the two policies, the plaintiff should not recover more than the limits on the policy for which it was found to be liable bore to the actual judgment sum, which in this case is about 51%. This argument was founded upon the same considerations, namely the provisions of Sections 4.2 and 4.3 of the policy, as were advanced by Mr Rose in favour of his principal submission. I reject this argument for the same reasons as expressed above.

Rule 63.03 (1) of the *Supreme Court Rules* provides that subject to the rules and any other law of the Territory, the costs of a proceeding are in the discretion of the Court. Whilst the rule confers upon the Court an absolute and unfettered discretion, the discretion must be exercised judicially, that is, not by reference to extraneous or irrelevant considerations, but upon facts connected with or leading up to the litigation. In order to guide the exercise of discretion, certain principles have been developed by the courts, one of the most important of which is that, generally speaking, a successful party should usually be awarded costs. These principles have not hardened into rules of law, but are designed to guide the decision maker: see generally *Oshlack v Richmond River Council* (1998) 152 ALR 83, at 91-94 per Gaudron and Gummow JJ; at 100-102 per McHugh J; at 120-122 per Kirby J. There are also a number of instances where the courts have developed principles which indicate the circumstances under which the courts may deprive a successful litigant of the whole or part of his costs. In my opinion the terms of the policy to which I have referred are not factually relevant to the exercise of my discretion. What is factually relevant is the fact that the plaintiff sought relief

relating to two policies, but succeeded only on one of them. What is also factually relevant is the role the Pool played in the conduct of this litigation. It is also relevant to take into account that the Pool did not make any payment into Court, or file any offer to compromise. Consequently it does not have the benefit of any protection from a costs order available pursuant to 0.26 of the rules. Nor did it make a *Calderbank* offer (*Calderbank v Calderbank* [1976] Fam 93).

As I have said, Mr Anderson QC admitted that as the Pool was not joined as a defendant until 14 October 1993, four years after the Writ was issued, it would not be proper to order the Pool to pay any of the plaintiff's costs prior to that date. Nor would it be proper for the plaintiff to secure a costs order in respect of its claims against the defendant Gove Flying Club Incorporated, to the extent that the work performed in pursuing that claim is not co-extensive with the work performed in pursuing the claim against DAC. The same considerations apply in respect of the claims against MAF-Air Service Pty. Ltd. and CE Heath Casualty and General Insurance Limited.

Mr Rose submitted that the costs order made against the second defendant DAC required amendment under the slip rule to reflect similar considerations. The order as authenticated reads:

> That the second defendant pay the costs of the proceeding to be taxed in default of agreement.

I was asked to correct this to read "that the second defendant pay the *plaintiff's* costs of the proceeding *against the second defendant* to be taxed in default of agreement".

I doubt if the order as authenticated means that DAC is required to pay the plaintiff's costs against the other defendants where those costs were separately, rather than jointly, incurred. If it does, then it should be amended. So as to make it clear beyond question what my intention was, I will make the order suggested by Mr Rose.

Mr Anderson QC submitted that after joinder the Pool was very much involved in the litigation, played an active role in all interlocutory proceedings, and took an active part in all stages of the trial. In essence his submission was that the plaintiff was entitled to a costs order for the full amount of the plaintiff's costs from the date of joinder, save for those costs which were solely related to other parties. Mr Rose submitted that the Pool was not very much involved, and did not play an active role in interlocutory proceedings, other than a strike out application brought by the Pool. Dealing with that question, this case was a Category C matter and case-flow managed by a Judge from 16 July 1992. One of the purposes of case-flow management is to reduce the number of interlocutory applications that would otherwise be necessary. Another is to enable the Court to put pressure on the parties to ensure that all steps, whether of an interlocutory nature or not, are taken by the parties to bring a matter to trial as expeditiously and efficiently as possible. No doubt there are some occasions when a particular status assessment

meeting, review meeting, or listing conference affected in whole or in part only some parties and not others, but in general terms it was usually necessary for the Pool to attend on all such occasions. I do not consider that the course of these meetings, or conferences was so unusual so far as the Pool is concerned as to require me to make any special allowance on that ground. To the extent that there were occasions when the Pool was either not involved at all, or there was time taken relating to some particular issue which involved only other parties, that is a matter for the taxing officer.

On a few occasions, costs orders were made at interlocutory hearings. On 18 March 1994, for example, the plaintiff was ordered to pay the Pool's costs. To the extent that particular costs orders have already been made, any order now made will not affect those orders. The practice of this Court is not to make costs orders at interlocutory hearings unless there are special reasons for doing so: see O63.18 which provides that each party is to bear their own costs of an interlocutory or other application in a proceeding unless the court otherwise orders. The reason for this rule, and some guidance as to the circumstances under which the court may depart from this rule was explained by Martin J, as he was then, in *TTE Pty Ltd v Ken Day Pty Ltd* (unreported, 29 May 1990), followed and applied by Kearney J in *Milingimbi Educational and Cultural Association Incorporated v Davies & Ors* (1990) JSCNT 921. The policy behind r63.18 acknowledged that ultimately it was likely that in the ordinary course of events each side would have obtained and been obliged to comply with interlocutory orders, to discourage unnecessary interlocutory applications to comply with court orders and to promote agreement. The

previous system, before r63.18 was passed, usually resulted in both parties obtaining costs orders against each other which frequently cancelled each other out. These orders frequently resulted in further costs being wasted on unnecessary taxations. This rule was drafted at a time when litigation was driven not by the Court but by the parties. Consequently, in the usual course, interlocutory applications were brought because a party had either failed to comply with a rule of court or an order previously made consequentially upon such a failure. However, in 1992 the system changed, and O48 was amended to introduce a form of case-flow management by the Court. The system was not a complete system of case-flow management, because much was still left to the rules of court and to the parties, but in general the system envisaged a series of meetings before a Judge or the Master or Registrar for the giving of directions. Although these might be called 'interlocutory' hearings, the system did not require a party to make an interlocutory application by summons pursuant to O46. The language of r63.18, when it refers to "an interlocutory or other application in a proceeding", mirrors the language of r46.01, and it is plain, in my opinion, both from the language of the rule and the history of the rules that r63.18 does not apply to meetings called under O48. Consequently, to the extent that applications were made under O46, the position will be governed by r63.18 and whether or not any costs orders were made at the time, and if so, what orders. To the extent that there were directions meetings or conferences under O48, the costs of those meetings or conferences, unless some order was made at the time, will be governed by the costs order made at the end of the trial by the trial judge, and by the discretion of the taxing officer.

Mr Rose also submitted that the Pool's role at the trial was not so extensive as counsel for the plaintiff submitted. In this case, although there was a proper division of labour between counsel for the various defendants where there were common interests, (so far as cross-examination of the plaintiff's witnesses were concerned), so as to ensure that the trial proceeded in an expeditious fashion, this is not a case where the Pool left the question of liability to the other defendants, and then put submissions strictly limited to the provisions of the policies. Mr Rose not only cross-examined the plaintiff's witnesses called to show that the pilot was negligent, but called expert evidence on that subject. The plaintiff was called upon to prove (a) that the plaintiff was injured as a result of the negligence of the pilot (b) that DAC was legally responsible for that negligence (c) that DAC was entitled to indemnity under the policy for damages awarded against it for that negligence and (d) the quantum of the plaintiff' loss. The Pool actively contested the first three issues, and had an obvious interest in the fourth issue. I do not consider the way the litigation was conducted at trial by the Pool gives rise to any factors relevant to the exercise of my discretion.

Another submission made by Mr Rose was that on the issue of DAC's liability for the pilot's negligence, that issue was not determined in favour of the plaintiff either on the basis that the pilot was an employee of DAC, nor on the basis that the pilot was DAC's servant *pro hac vice*, but rather on the basis that the pilot was a sub-agent. It is true that sub-agency was not pleaded until about half way into the trial, but in this case all the facts were relevant

regardless of the legal character which those facts produced. Although some time was obviously spent discussing the need for the amendment and canvassing the law relating to whether the facts should result in a characterisation of the relationship into one category or another, this was not the plaintiff's fault. The difficulty the plaintiff faced is that he did not know, and could not know, what the precise relationship between the pilot, the Gove Flying Club, and DAC really was. It was only after an exhaustive hearing that the true character of the relationship emerged, and the plaintiff faced considerable opposition in putting to the Court relevant material throwing light on that relationship. In those circumstances I do not consider that I should make any allowance in favour of the Pool for any time litigating the issues of whether or not the pilot was an employee or servant *pro hac vice* of DAC.

Mr Rose also submitted that because the plaintiff sought relief in respect of two policies and succeeded on only one, and that the Pool was justified in defending all issues because it succeeded on the second policy, no order for costs should be made. It is true that the plaintiff failed in respect of the second policy, but the reasons for this were very narrow and were confined to questions of construction of the policy: see pps65-66 of the judgment of 27 November 1996, and occupied very little of the court's time. Nevertheless the Pool did succeed on this issue, and this gives rise to a discretion as to whether I should deprive the plaintiff of part of his costs or order the plaintiff to pay some of the Pool's costs; see generally *Cretazzo v Lombardi* (1975) 13 SASR 4 at 12 per Bray CJ and *Green v Anderson* (1996) JSCNT 845 where

I reviewed the relevant authorities and principles. The amount of money at stake if the plaintiff had succeeded on the second policy was very considerable. No doubt this meant that the Pool's legal advisers were required to consider the Pool's possible exposure, and advise the Pool about that exposure. I consider that I ought to deprive the plaintiff of the costs of a day's hearing time to take into account all of the relevant factors on this issue, which I fix at $3,000.

Finally, Mr Anderson QC submitted that I ought to make any costs order retrospective to the date of judgment so that it will bear interest. It has been held that a costs order takes effect from the date of judgment: *Schimmel & Anor v Commonwealth of Australia* (1993) 113 FLR 205, per Master Le Fevre. That case was followed by Kearney J in *Shaw v Commonwealth of Australia* (1995) 124 FLR 190. Mr Rose submitted that I should not follow *Schimmel*. I do not consider that the decision in *Schimmel* was wrongly decided. In *Schimmel* the court had ordered judgment to be entered with costs to be taxed. The effect of *Schimmel* is that interest is payable on the costs, once taxed, from the date of the judgment, because of the effect of r59.02. However, that is not this case, as no order for costs has yet been made. The position in *Shaw* was also different. In that case the plaintiff obtained an order for the defendant to pay his costs on 14 November 1991, although judgment was not entered until 21 December 1992. Kearney J held, following the reasoning in *Schimmel* that interest on costs ran from 14 November 1991. This shows that interest on costs runs from the date of the costs order. This is clearly correct. R59.02(1), provides that a judgment or order takes effect from the date on

which it is given or made, unless the Court otherwise orders, and r59.02(3) provides that a judgment debt carries interest from the date of judgment. In *Shaw* at 193, Kearney J held that an award of costs creates a judgment debt. Consequently, interest was held to run on the award of costs from the date they are ordered to be paid, unless, pursuant to r59.02(1) the court "otherwise orders". The submission of the plaintiff that, whatever date I make an order for costs will form part of the judgment given on 27 November 1996 is therefore incorrect.

Mr Anderson QC submitted that I should back-date the order to the date of judgment, and Mr Rose submitted that I should not. Obviously a discretion exists, but before departing from the usual rule the power to antedate should "only be used on good ground shown", to borrow an expression used by Lord Collins MR in *Borthwick v Elderslie Steamship Co Ltd (No 2)* [1905] 2 KB 516 at 519. Over 18 months has now passed since the judgment was originally pronounced. There has been no explanation offered for the delay. The plaintiff contends that costs are primarily intended to indemnify the successful party, and that unless interest is awarded from the date of the judgment, the plaintiff will not recover the full indemnity to which he is entitled. There is no evidence before me that the plaintiff has already paid his solicitors or counsel, and nor have I been made aware of any arrangement that would impose any obligation upon the plaintiff to pay interest to his legal advisers. There is simply no factual basis for my ante-dating the costs order.

Accordingly, I make the following orders:

1. Order that the Fifth Defendant pay the plaintiff's costs incurred from 14 October 1993 to be taxed, such costs to exclude:

   (a) such of the plaintiff's costs as are solely attributable to the plaintiff's actions against the 1st, 3rd, 4th and 6th defendants; and

   (b) the costs of any interlocutory applications made pursuant to r46.01 in respect of which a costs order has not been made in favour of the plaintiff against the 5th defendant, (but not so as to exclude any costs order where the question of costs has been reserved)

   less the sum of $3,000;

2. that the Fifth Defendant pay the plaintiff's costs of and incidental to this application and order, save and except for the costs of the written submissions relating to interest on costs;

3. that paragraph 3 of the judgment authenticated on 3 April 1997 be amended by substituting therefore the following:

   3. That the second defendant pay the plaintiff's costs of the proceeding against the second defendant to be taxed in default of agreement;

4. I certify fit for senior counsel.