

## **Interest Awards under the Civil Procedure Act 2005 (NSW).**

The Civil Procedure Act 2005 commenced on 15<sup>th</sup> August 2005.<sup>1</sup> Its main purpose was to simplify and unify the procedure of the four courts which exercise civil jurisdiction in New South Wales, the Supreme, District and Local Courts and the Dust Diseases Tribunal.<sup>2</sup> Prior to the enactment of the CP Act the statutes of each of the four bodies contained their own provisions for pre and post-judgment interest which, although very similar, had some differences.<sup>3</sup> The Civil Procedure Act repeals the interest sections of the individual statutes of the three courts.<sup>4</sup> For some reason it did not affect the interest provisions of the DDT Act which were left to be repealed by the Dust Diseases Amendment (Claims Resolution) Act.<sup>5</sup> The repeals having been effected, the CP Act replaces the interest provisions in all four Acts with just two, and adds a general provision relating to the appropriation of part payments. The CP Act is retrospective in the sense that it applies, subject to any order to the contrary, to pending proceedings.<sup>6</sup>

The discussion which follows is concerned to point up the differences between the CP Act and the repealed interest provisions of the individual statutes of the three courts. It is intended as an addendum to, and not as a replacement of, Part 2 of Interest Awards in Australia.

### **Pre-judgment interest<sup>7</sup>**

The lead provision for pre-judgment interest, although slightly differently expressed, is identical in effect to those which it replaces:

In proceedings for the recovery of money (including any debt or damages or the value of any goods), the court may include interest in the amount for which judgment is given, the interest to be calculated at such rate as the court thinks fit:

- (a) on the whole or any part of the money, and
- (b) for the whole or any part of the period from the time the cause of action arose until the time the judgment takes effect.<sup>8</sup>

This preserves the discretion as to the making of the award and the period over which it is calculated which existed under the old Acts.<sup>9</sup> There is no express provision for a rate to be prescribed for pre-judgment interest but the power to prescribe a rate for post-judgment interest has been used and the rates prescribed for this purpose will ordinarily be used as was the case under the old acts.<sup>10</sup>

Although a judgment may not be enforced until it is entered it takes effect when it is pronounced.<sup>11</sup>

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<sup>1</sup> Gazette 100, 10 August 2005

<sup>2</sup> Section 56.

<sup>3</sup> Supreme Court Act 1970 ss 94 & 95; District Court Act 1983 ss 84A & 85; Local Courts (Civil Claims) Act 1970 ss 39A & 39; Dust Diseases Tribunal Act 1989 ss 15 & 16.

<sup>4</sup> Section 6(2), Schedule 5.

<sup>5</sup> Act No 22 of 2005. The repeal was effective from 17<sup>th</sup> August 2005.

<sup>6</sup> Section 10; Schedule 6, Clause 5(1).

<sup>7</sup> This subject is dealt with in Chapter 7 of Interest Awards in Australia.

<sup>8</sup> Civil Procedure Act 2005 s 100(1).

<sup>9</sup> See [7.2] – discretion; 7.5], 7.6] – period; [7.12] – rates.

<sup>10</sup> See later.

<sup>11</sup> Section 133. And see [8.2].

Section 100(2), again although somewhat differently expressed, is to the same effect of s 94(1A) of the Supreme Court Act and preserves the discretion to award interest where money has been paid after proceedings have been commenced.<sup>12</sup> There is still no provision for statutory interest where money is paid before the commencement of proceedings.

Section 100(3) is identical to s 94(2) of the Supreme Court Act except for the addition of a further paragraph. The requirement for simple interest and the proscription of statutory interest on bills of exchange and where interest is otherwise payable as of right are preserved.<sup>13</sup> It is perhaps unfortunate that the conflict between the general provision for statutory interest and that relating particularly to insurance contracts has not been directly addressed in the same way as is that relating to bills of exchange.<sup>14</sup> The Act constitutes a Uniform Rules Committee and confers power on it to make uniform rules and rules of the individual courts (called local rules).<sup>15</sup> The individual courts retain their rule making powers but in the event of inconsistency the uniform rules prevail.<sup>16</sup>

The additional paragraph in s 100(3) confers on the uniform rules committee power to prescribe in a minimum amount on which statutory interest can be awarded.<sup>17</sup> This has been exercised to prevent interest being awarded by a Local Court on a claim for less than \$1,000.<sup>18</sup> Note that the proscription is tied to the amount *claimed*, not the amount finally awarded – subject perhaps to costs penalties and the overriding discretion a plaintiff could side step the prohibition by claiming more than was due.

Subsection 4 is to much the same effect as s 94(4) of the Supreme Court Act. It provides that:

In any proceedings for damages, the court may not order the payment of interest under this section in respect of the period from when an appropriate settlement sum was offered (or first offered) by the defendant unless the special circumstances of the case warrant the making of such an order.

There are several points to note about this provision:

- Unlike the section which it replaces, it applies only in actions for damages. In claims for debt the ordinary discretion applies which no doubt could be used to restrict an award of interest if an offer of settlement had been rejected.<sup>19</sup>
- No formalities are prescribed for the offer of settlement – it need not be an offer of compromise or contained in a Calderbank letter. It could even be oral, though that might give rise to issues of fact. It could be contained in a letter of demand written before the proceedings were commenced.
- The judgment sum which is applied in the formula includes such interest as has accrued up to the date of the offer. Take as an example a plaintiff who is injured on 1 September 2003, an offer of \$100,000 is made on 1 September 2004 and at trial

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<sup>12</sup> See [7.9].

<sup>13</sup> See [7.11] – simple interest; [7.5] – interest payable as of right and under other statutes; [9.3] – bills of exchange.

<sup>14</sup> See [9.2].

<sup>15</sup> Section 9.

<sup>16</sup> Section 11.

<sup>17</sup> Section 100(3)(c).

<sup>18</sup> Rule 36.7(2). Query whether this provision is valid – Section 100(3)(c) does not authorise the rules to discriminate between courts.

<sup>19</sup> See [7.3].

on 1 September 2005 recovers a verdict, excluding interest of \$100,000. Interest over the whole period would be \$18,000. The judge would calculate the notional amount of interest for the period before the offer as \$9,000. The total of \$109,000, not being more than \$110,000, the plaintiff would only recover a judgment for \$109,000. But had the verdict been for \$105,000 the notional interest to the date of offer would give a figure of \$114,450 and the judgment would be for \$123,990.

- The only condition precedent for the making of an otherwise order is that there be special circumstances. Until this is established interest must be refused; once it is the ordinary discretion applies.<sup>20</sup> One special circumstance would be the lack of particulars either of negligence or damages from which the defendant could decide how much to offer, another might be perhaps be the lateness of the offer. It is suggested that cases on the provision of the MAC Act, though as pointed out above it is somewhat different, would be of relevance on this issue.<sup>21</sup>
- Query whether only the first offer is to be considered – that seems to be the natural meaning of the words used. If so the early provision by the plaintiff of adequate particulars would be important.

### **Post judgment interest<sup>22</sup>**

Although somewhat differently expressed s 101 of the Civil Procedure Act is to the same effect as s 95 of the Supreme Court Act. Sub-section 1 provides:

Unless the court orders otherwise, interest is payable on so much of the amount of a judgment (exclusive of any order for costs) as is from time to time unpaid.

Since pre-judgment interest, when it is awarded, forms part of the judgment, the principal for the purpose of calculating post-judgment interest will include the pre-judgment interest.<sup>23</sup> Subject to this post-judgment interest is simple interest.<sup>24</sup>

There is power to prescribe a rate from which the court may depart in a particular case.<sup>25</sup> The Uniform Civil Procedure Rules, which are contained in a schedule to the Act, have been used for this purpose. Schedule J of the Supreme Court Rules appears, unaltered, as Schedule 5 of the new rules. Under it the prescribed rate is, at the time of writing, 9%. All the uniform rules, though they are part of the Act, may be amended by the Uniform Rules Committee from time to time.<sup>26</sup> This power will no doubt be used to vary the rate as market rates change.

Interest is payable from the date on which the judgment takes effect or such later date as the court may order.<sup>27</sup> Interest will not be payable if the judgment is fully satisfied within 28 days.<sup>28</sup> If the judgment is only partly satisfied within that time interest may run from the

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<sup>20</sup> See [7.3].

<sup>21</sup> See [11.8].

<sup>22</sup> This subject is dealt with in Chapter 8 of Interest Awards in Australia.

<sup>23</sup> See [8.2].

<sup>24</sup> Section 101(6).

<sup>25</sup> Section 101(2),(7).

<sup>26</sup> Section 9(3).

<sup>27</sup> Section 10(2)(a),(b). As to when a judgment takes effect see above.

<sup>28</sup> Section 101(3).

date the judgment on the whole of the judgment and from the date of the part payment on the balance.<sup>29</sup>

Post-judgment interest is automatic in the sense that s 101 operates without the necessity for an order. However there is power to depart from the prescribed rate, both upwards and downwards, and to vary the 28 day amnesty upwards.<sup>30</sup> For that is to be done an application will be required.

Sub-section 4 confers a discretion to order interest on costs from the when they were paid or such later date as the court may order.<sup>31</sup> Thus there will be no jurisdiction to compensate a solicitor who has taken the case on a speculative basis for the time between the work being done and the receipt of the costs for it.<sup>32</sup>

The act substitutes for the capacity of the parties to appropriate a payment to principal or interest a power in the court to do so.<sup>33</sup> Absent an otherwise order payments are to be applied first to the judgment debt, including pre –judgment interest, and then to post-judgment interest.<sup>34</sup>

D I Cassidy QC.  
6<sup>th</sup> September 2005.

#### Liability limited by a scheme under professional standards legislation

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<sup>29</sup> See [8.2].

<sup>30</sup> Sub-section 1 – rate. And see [8.2]. Sub-section 3 – time for payment.

<sup>31</sup> Section 101(4),(5).

<sup>32</sup> See [12.4].

<sup>33</sup> See [12.7].

<sup>34</sup> Section 136.