

CASE NOTE

Interest On Costs In The Land And Environment Court

The Minister Administering the Environmental Planning and Assessment Act 1979 v Carson

Unreported, Court of Appeal (NSW), Kirby P, Priestley JA and Young AJA, 6 October 1994

This was an appeal from a decision of Bignold J in which he had determined that interest on costs should be assessed as from the date of judgment even though the amount of costs upon taxation (on which interest is to be calculated) is determined at a later date.

Facts:

In May 1987 the Minister compulsorily resumed a parcel of land previously owned by Mr Carson. Mr Carson commenced Class 3 proceedings in the Land and Environment Court (LEC) in August 1987 claiming compensation. His claim was heard by Hemmings J who, on 29 June 1990, assessed compensation at \$3.7 million, costs on that date being reserved. Finally, on 25 July 1990, Hemmings J ordered the Minister "to pay [Mr Carson's] costs of the proceedings, including two counsel".

Mr Carson filed a bill of costs claiming more than \$1 million plus interest. The Minister contested the bill of costs and in February 1992 taxation of the bill of costs commenced before a Registrar of the LEC. Costs were finally assessed by the Registrar at \$767,041.56 in August 1992, whereupon a notice of motion was filed by Mr Carson seeking to have the Registrar include an amount for interest on costs. The Minister objected to the Registrar's power to determine the interest on the taxed costs as claimed. The notice of motion was heard and determined by Bignold J in March 1994. To the issues raised by the motion Bignold J determined that power to order interest on costs was conferred by s 69A of the *Land and Environment Court Act 1979* (LECA) and that the power was only exercisable by a judge of the LEC.

Bignold J treated Mr Carson's notice of motion as an application for interest on costs. He granted the application and in so doing ordered that interest was payable from the day that the costs order was first made by Hemmings J on 25 July 1990.

The Decision:

No objection was taken on the appeal to Bignold J's determinations that there existed power in the LEC to order interest on costs pursuant to s 69A of the LECA nor that the power was only exercisable by a judge of the LEC. The only issue raised by the appeal was the correctness of Bignold J's determination that the interest on costs was payable from 25 July 1990 (the date of Hemmings J's costs order) or from a date in August 1992 (the date when the Registrar completed the taxation of the bill of costs).

Section 69A of the LECA provides:

"69A(1) If an order is made by the Court for the payment of money, interest is payable at the prescribed rate from the date the order takes effect on so much of the money as is from time to time unpaid, unless the Court otherwise orders."

Furthermore, Part 13 rule 3 of the Land and Environment Court Rules provides:

"Unless otherwise ordered by the Court, a final decision, judgment or order disposing of any proceedings takes effect when it is given or made."

Essentially, therefore, the Court of Appeal was required to determine the meaning to be attached to the words "from the date the order takes effect" appearing in s 69A. Kirby P identified the two contending constructions as:

- (1) that the payment of interest on costs would date from the day that the costs order was first made by Hemmings J in 1990 (the *incipitur* rule); or
- (2) from the date of the certificate of taxation which ascertained and specified the money to be paid by the Minister after August 1992 (the *allocatur* rule).

The various members of the Court of Appeal approached the construction of the statutory phrase from two different angles: firstly by recourse to history and the historical obligation of an unsuccessful party in litigation to pay costs; and secondly by recourse to a literal construction of the words as appearing in the LECA.

Young AJA, who undertook a comprehensive analysis of the history of costs, concluded that it was clear from the decisions of the courts of common law that interest was to run

"from the moment when it was officially recorded that the plaintiff was entitled to judgment including costs to be taxed even though for other purposes the judgment was not complete until the amount of costs had been written in.": at p 14.

this result reflecting a "policy decision" made for reasons of fairness. Thus, as a matter of legal history, Young AJA concluded that the *incipitur* rule was embodied in s 69A of the LECA.

Kirby P, while recognising the historical background as outlined by Young AJA, ultimately rested his decision on a literal construction of the statutory text. Thus, he determined, s 69A of the LECA when read in conjunction with Part 13 rule 3 of the Land and Environment Court Rules compels the result that the order for costs takes effect when it is "given or made", with the result that the order for costs takes effect from the time of the making of the order for costs, not when a certificate of taxation on those costs is concluded. Both Priestley JA and Young AJA reached the same conclusion upon the basis of a straightforward approach of interpreting the costs provisions.

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