Summary assessment of costs payable forthwith

Introduction

The Standard Directions for Australian Patent Proceedings contemplate that the Court may make a specified sum costs order, upon deciding an interlocutory application, to be paid within 14 days of the order being made. To enable the Court to do so, parties are directed to file, at least 1 full business day prior to the hearing of an interlocutory application, *a statement of costs that they claim* for that application in the form annexed to the standard directions. It may be noted that this is not a requirement that they state the costs actually incurred, although the statement must certify that the amount claimed is less than the amount incurred.

Summary costs orders payable forthwith are intended to encourage parties to either resolve or narrow interlocutory disputes due to the immediacy of costs (in contrast to costs of an interlocutory application being taxed or assessed at the conclusion of the proceedings). This also encourages practitioners to be transparent with clients on an ongoing basis about the costs of interlocutory applications, including costs not recoverable on a party-party basis.
The summary costs procedure is being introduced following consultation with a number of practitioners and feedback from members of the judiciary and legal profession in the United Kingdom (**UK**) where a summary assessment procedure has been in place for 25 years.

UK experience

The summary assessment procedure was introduced in England and Wales in 1999 as one of the first reforms to the civil justice system in England and Wales following the Woolfe Report into *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*.

The Woolfe Report noted (chapter 7, paragraph 23) that many respondents had called for:

> *costs sanctions to deal with the tendency of parties at present to make numerous interlocutory applications. These are generally of a tactical nature which may be of dubious benefit even to the party making the application or which may not be warranted by the costs involved. It was agreed that the answer here is for costs orders to be made at the end of interlocutory hearings, to be payable forthwith by the party who has occasioned the hearing. At present such applications are made with impunity because the liability on the loser to pay is usually postponed until the end of the case when it is lost in the overall settlement of costs.*

The UK procedure applies at the conclusion of a Fast Track trial (ie. a final hearing), or, at the conclusion of any other hearing which has lasted not more than one day (eg. an interlocutory hearing).

Each party intending to claim costs must submit a Statement of Costs, broken down by seniority of practitioner and type of work, one day prior to the hearing. Summary assessment is undertaken by the judge hearing the application usually on the day. While experiences vary, it is understood that summary assessment of interlocutory application costs often takes less than 20 minutes, including submissions from counsel. Following summary assessment, the paying party will usually be required to make payment within 14 days of the judgment.

The effectiveness of the summary assessment procedure was considered 10 years after its introduction as part of the Jackson Review into the rules and principles governing the costs of civil litigation. Based on engagement with judges, Court users and other stakeholders, Lord Jackson noted that views on summary assessment and its usefulness were "strongly held and polarised". In addition, the report noted that some judges did not feel comfortable summarily assessing costs at the end of "heavy" applications. The report recommended that if any judge felt that they lacked the time or the expertise to assess the costs of an interim application, then they should not do so.

The summary cost procedure was retained and has stood the test of time in the Courts of England and Wales. It remains a feature of civil litigation today – including in the High Court and in Intellectual Property cases –which suggests the reservations expressed by some judges concerning their lack of experience in assessing costs has ameliorated over time.

Judges have a broad discretion concerning costs, including whether costs are payable, the amount of those costs, and when they are to be paid. The relevant rules provide structure concerning the assessment of the amount of costs and detail how the Court must approach assessments made on a standard or indemnity basis. For example, the Court must not allow costs which have been unreasonably incurred or are unreasonable in amount and, where costs are assessed on a standard basis, must only allow costs which are proportionate to the matters in issue. Costs assessed on the standard basis which are disproportionate may be disallowed or reduced even if they were reasonably incurred. The rules prescribe factors to be considered in determining whether costs are proportionate, including the complexity of the litigation and the additional work generated by the conduct of the paying party.

The UK procedure does not require that a party disclose all costs incurred in relation to an interlocutory application, only the costs that are claimed. It is understood the costs claimed by a party are often less than the costs in fact incurred. This is done with consideration to whether those costs are likely to be viewed by the Court as reasonable and proportionate. It is also understood that this practice encourages frank discussions between lawyer and client concerning the disparity between costs incurred and costs potentially recoverable which in turn creates greater awareness of legal costs as a whole and as the matter progresses.

Federal Court of Australia trial

Judges involved in the Standard Directions proposal, may trial a version of the summary assessment procedure (set out below) in certain patent matters, save in respect of interlocutory applications for urgent injunctive relief at the commencement of proceedings. It is intended that, after consultation with the profession, consideration will be given to whether, prior to implementation, a change in the *Federal Court* ***Rules*** *2011* (Cth) is required.

The purpose of this trial is to encourage parties carefully to consider the filing of interlocutory applications noting that while the right to file such applications is an important part of the court process, parties incur significant time and costs in bringing and contesting interlocutory applications and they also impose a significant burden on the Court in dealing with them. Interlocutory applications and hearings add to the Court's workload and very often increase the time to trial.

A judge of the Federal Court may make an award of costs at any stage in a proceeding, whether before, during or after any hearing or trial, and in a specified sum: sub-ss 43(1) and (3) of the *Federal Court of Australia* ***Act*** *1976* (Cth). Rule 40.12 of the *Rules* provides that, if an order

is made in favour of a party for payment of the party's costs, the costs must be taxed (unless agreed) in accordance with the Rules. Rule 40.13 establishes the ordinary rule that costs of an interlocutory application are not to be taxed immediately.

A summary assessment of interlocutory costs may depart from rr 40.12 (to the extent a summary assessment does not conform to the rules of taxation) and 40.13 (for the summarily assessed costs to be payable forthwith) of the Rules: see rr 1.34 (dispensing with compliance with the Rules) and 1.35 (orders inconsistent with the Rules). The Court has the power to determine the amount of costs itself and the circumstances in which such an order may be made are not closed: *Clipsal Australia Pty Ltd v Clipso Electrical Pty Ltd* [2016] FCA 37 at [9] (per Perram J). The procedure is consistent with and furthers the overarching purpose (s 37M of the Act) and the Court's inherent or incidental power to act effectively to regulate its own proceedings.

The standard directions do not intend to replicate the UK procedure in its entirety. That UK procedure applies broadly to both interlocutory hearings and certain final hearings, and is supported by specific rules, guidelines and 25 years of experience in conducting summary assessments. The trial Australian procedure will only be available for costs of interlocutory applications and will be conducted by the Courts and practitioners by reference to Federal Court practice concerning costs.

Part 40 of the Rules, which sets out procedures on costs, differs from the UK Civil Procedure Rules in that it does not prescribe in detail the approach to be taken in determining the amount of costs to award. The definition in the Rules of "costs as between party and party" (being only the costs that have been fairly and reasonably incurred by the party in the conduct of the litigation) provides high-level guidance only.

Parties will usually seek costs on a party/party basis (by reference to the usual party-party costs principles) although if costs are sought on a different basis (for instance on an indemnity basis) this should be stated. The statement must also note that the relevant party has been advised as to its right to recover costs on the basis (and in the amount) sought.