Civil Procedure NT | BULLETIN

PRESIDIAN LEGAL PUBLICATIONS

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About this bulletin

This bulletin provides a report on procedural aspects of civil cases in the Northern Territory by setting out excerpts of key sections of new content added to *Civil Procedure NT* in the most recent service update. The new content is incorporated under relevant headings to show the provisions or topics to which it relates.

Supreme Court Rules

[5.2.50] 2.02 Originating process

[5.2.53] Operation. Whilst r 2.02 generally provides for relief against the requirement for strict compliance with originating process requirements, it has been held that the rule did not apply in circumstances where a plaintiff failed to make a valid application pursuant to s 459G of the *Corporations Act* by reason of the operation of that Act in conjunction with r 1.3 ("Application of these Rules and other rules of the Court") of the Corporations Law Rules. However, r 1.7(1) of the Corporations Law Rules gave the court a similar discretion to excuse non-compliance: see *TBK Beef Pty Ltd v Ark Mangoes Pty Ltd* [2012] NTSC 44 at [48].

[5.13.100] 13.02 Content of pleading

[5.13.107] Clarity – defamation proceedings.

CASES – *Williams v Melky* [2012] NTCA 5 (sufficient surrounding circumstances identified as to when, where and how matter complained of communicated, and to whom, to enable court to say reasonable person capable of understanding matter complained of to give rise to pleaded imputations).

[5.13.112] Claim for relief.

CASES – *Anderson v Turner* [2013] NTMC 20 (counterclaim claiming set-off against sum claimed by amount owed to defendant failed to disclose, or adequately disclose, suit in equity for account between co-owners).

[5.13.113] Enforcement of/divergence from pleadings. A court will not always strictly enforce the pleadings. Each case falls to be determined by its own circumstances. It is always a matter of determining at what stage the court should "stop a party from digressing too far from the issues raised on the pleadings": see *Anderson v Turner* [2013] NTMC 20 at [55].

CASES – *Anderson v Turner* [2013] NTMC 20 (permissible for defendant to rely upon unpleaded alternative action in equity for account between co-owners, and counterclaim amended accordingly, where pleadings only claimed set off in accordance with s 45 of *Law of Property Act* as: was clear on pleadings that issue was whether defendant was a co-owner

and, if not would not be entitled to relief; evidence would remain same; s 45 reflected equitable principles for account between owners; no prejudice to plaintiff; in interests of justice).

[5.13.100] 13.02 Content of pleading

[5.13.117] Defamation proceedings.

In *Kunoth-Monks*, Master Luppino indicated that whether the defendant has adequate knowledge of what the plaintiff will allege to be the facts will depend on the circumstances. In reference to Hunt J's comments in *Whelan* (see above), Master Luppino stated (at [15]-[16]):

> However this requirement is not rigid. In *Drummoyne*, Gleeson CJ said that because the extent of any attribution of an act or condition will always be able to be further refined the requirement on the plaintiff is to plead matters as best that can be reasonably done in the circumstances and that it is a question of judgment as to when that has been achieved.
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> *Greek Herald Pty Ltd v Nikolopoulos* [(2001) 54 NSWLR 165] neatly summarises the position as follows:-
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> > The pleader's task is to capture the essence of the specific matters imputed in relation to the plaintiff. Necessarily there will be questions of degree and "if a problem arises, the solution will usually be found in considerations of practical justice rather than philology" (per Gleeson CJ in [*Drummoyne*]. In this as in other areas, pleadings serve the ends of justice: they must not be permitted to assume an independent self-referential function. The pleaded imputation remains "the statement which, as the plaintiff alleges, the publication gives the reader or viewer to understand" (per Mahoney JA in *Singleton v Ffrench* (1986) 5 NSWLR 425 at 428). It is not a straightjacket, although the rules of procedural fairness place limits upon judge and jury's capacity to enlarge the issue.
> >
> > The pleaded imputation is itself a statement extrapolating something from the matter complained of. The statement will seldom be found in the very words used (sometimes the matter complained of is only a picture). The imputation will often be implicit in the text …

...

In the Northern Territory "the plaintiff is not bound by his pleading and the pleading is treated as the "high water mark" of his case and as including all imputations of a lesser seriousness than that which he has pleaded": *Penfold v Higgins* [2002] NTSC 65 at [25]. This is different to the position in New South Wales. The position in the Northern Territory was summarised by Master Luppino in *Kunoth-Monks* (at [23]-[24]):

> The Northern Territory position follows that adopted by the High Court in [*Chakravarti v Advertiser Newspapers Limited* (1998) 193 CLR 519] where the members of the Court agreed that although a plaintiff is bound by the pleaded imputations, the plaintiff is not necessarily confined to the precise nuances and shades of meanings of the pleaded imputations. It was recognised that generally the more serious allegation will include the less serious and that a court can attribute a less injurious meaning to an imputation than that specifically attributed in the pleading. This was said to be subject to firstly, that a plaintiff will be held to the precise imputation pleaded if the defendant can show that it has been prejudiced or unfairly disadvantaged by the variance. Secondly, the variance cannot be of such an extent that it amounts to an imputation of a substantially different kind.
>
> Put simply, although pleading of different shades of meanings is permissible, it is not strictly necessary and the failure to do so is not fatal. The exception is where there is a distinct or specific meaning and that meaning must be specifically pleaded. In [*Chakravarti v Advertiser Newspapers Limited*], it was said that one indicator of whether a distinct or specific meaning exists is whether it could be shown that any claimed justification could be substantially different for each meaning.

...

Although the law of defamation in all Australian jurisdictions is regulated by uniform laws, the pleading practice in each jurisdiction is a matter of common law, subject to any specific modifications by the various rules of court. Authorities predating the uniform laws remain relevant on procedural issues but care needs to be taken in applying some authorities by reason of the divergent pleading requirements. This is particularly the case with New South Wales authorities given that, for a considerable time in New South Wales, the imputation, as opposed to the publication, was the cause of action. That law, in combination with some specific pleading requirements in the New South Wales rules of court, resulted in some

pleading authorities which do not readily apply in the Northern Territory: *Kunoth-Monks*, above, at [21].

[5.13.600] 13.07 Matter which must be pleaded

[5.13.606] New issues raised at trial.

CASES – *Majindi v NTA* [2012] NTSC 25 (defendant precluded from relying on s 19 of *Personal Injuries (Liabilities and Damages) Act* to prevent award of damages where failed to plead it).

[5.23.100] 23.02 Striking out pleading

[5.23.112] Repetition. A repetitive pleading is embarrassing within the meaning of that term in r 23.02(c). Determining whether two or more imputations are repetitive for this purpose depends on both the literal words used and the defamatory sting of the imputations (*Herald & Weekly Times Limited v Popovic* (2003) 9 VR 1): *Kunoth-Monks v Healy* [2013] NTSC 21 at [11]. In pleading terms, the complaint of repetition is that the repetition renders the offending parts embarrassing: *Williams v Melky* [2011] NTSC 77 [28] (overturned on appeal in *Williams v Melky* [2012] NTCA 5).

[5.23.113] Repetition – defamation proceedings. In *Kunoth-Monks v Healy* [2013] NTSC 21, a case involving defamation proceedings, Master Luppino considered how to assess whether two or more imputations are repetitive for the purpose of determining whether they are embarrassing within the meaning of r 23.02(c). After having stated this depends on both the literal words used and the defamatory sting of the imputations, Master Luppino stated (at [12]-[13]):

> Sometimes the sting is obvious from the published material. In such cases the pleading of the imputation in a form which simply repeats the words used will usually suffice. However if the sting depends on inferences to be drawn from the words used, and/or the context, then it is necessary for a plaintiff to particularise the meaning on which reliance will be placed and then the imputations must be clearly and precisely pleaded.
>
> These requirements stem from the fundamental rule of pleadings that the other parties are entitled to know the case which they are required to answer at trial ...

[5.23.127] Defamation proceedings.

Related content
- [5.13.117] Commentary on requirements of pleadings in defamation proceedings

In *Williams v Melky* [2012] NTCA 5, it was held (at [11]) that to say of a person that he or she did not act with good sportsmanship is different from saying that he or she did not act with good sportsmanship in his or her capacity as an official. Facts which may justify, for example, an imputation of unsportsmanlike behaviour may not justify an imputation of bad sportsmanship as an official. It may be that on the evidence, only one of those two imputations is in fact conveyed.

[5.25.50] 25.02 Discontinuance or withdrawal of proceeding or claim

[5.25.53] Discontinuance – legal principles.

Leave is required on the principle that once a proceeding has reached a certain stage, the plaintiff should not be permitted to abandon the proceeding in order to avoid a contest except upon terms determined by the court (*Fox v Star Newspaper Co Ltd* [1898] 1 QB 636). However, as it is not desirable that a plaintiff should be compelled to litigate against its will, the court will normally allow a plaintiff to discontinue if it wants to, provided no injustice will be caused to the defendant. In granting leave to discontinue, the court will be careful to ensure that the defendant does not lose any advantage which it has gained in the litigation (*Covell Matthews & Partners v French Wools Ltd* [1978] 2 All ER 800): *Dogangun v NTA* [2013] NTMC 12 at [13].

...

Discontinuance is an act of the plaintiff, not of the court: *Dogangun*, above, at [11].

In *Dogangun*, the Local Court outlined relevant considerations in regard to when a plaintiff has lost the right to discontinuance (at [15]-[17]):

> It is clear that where a plaintiff has lost the ability to discontinue proceedings as of right ... the granting of leave to discontinue is within the discretion of the court. There appear to be three guiding principles controlling and structuring the exercise of this discretion:
>
> 1. A plaintiff should not be compelled to proceed unwillingly;
> 2. Would a discontinuance prejudice the opposing party; [Leave is usually granted where a discontinuance would not prejudice the other party]
> 3. Would a discontinuance deprive the other party of a benefit or gain obtained during the course of the litigation.[*Covell*, above]
>
> However, in considering these three guiding principles it is necessary to consider what, if any effect, the factual findings provided to the parties should have on the exercise of the Court's discretion.
>
> The starting point is the status of those factual findings.

In *Dogangun*, the Local Court also noted (at [22]) that there is a public interest in promoting settlement of litigation and, although the earlier the better, settlement can occur any time up until formal judgment.

It has been held by the Local Court that the effect of the filing of a notice of discontinuance, although not expressed in the Local Court Rules, terminates the action but preserves the plaintiff's right to commence another action based on the same complaint. No judgment results from the discontinuance: see *Dogangun,* above, at [12].

CASES (NTMC) - *Dogangun v NTA* [2013] NTMC 12 (leave to discontinue granted where findings of fact relating to one issue, but no final order or judgment, had been made).

[5.26.800] 26.08 Costs consequences of failure to accept

[5.26.806] Rejection by defendant of more favourable offer (sub-r (2)).

CASES – *Spadaccini v Grice* [2012] NTSC 41 (parties had combined costs of around $900,000 – plaintiffs recovered $110,000 by consent judgment – judgment obtained before any evidence called at trial – defendant had constructed wall that encroached around 740 mm into plaintiffs' land – plaintiffs made offers to pay for removal of wall and reconstruction of new fence on boundary – defendant rejected offer and instead offered to purchase land to legitimise encroachment – *Held:* Defendant's refusal to accept plaintiffs' settlement offer unreasonable – for costs orders made, see full case summary at [5.63.214B]).

[5.26.809] Rejection by plaintiff of more favourable offer (sub-r (3)).

CASES – *Spadaccini v Grice* [2012] NTSC 41 (parties had combined costs of around $900,000 – plaintiffs recovered $110,000 by consent judgment – judgment obtained before any evidence called at trial – after several offers and counter-offers, defendant made *Calderbank* offer that, if plaintiffs accepted $52,500 already paid into court (being only half amount to which plaintiffs entitled), it would result in settlement of defendant's counterclaim, including costs – defendant also offered to pay plaintiffs' costs of proceeding on indemnity basis – *Held:* Plaintiffs would have been better off if they had accepted offer as would have ceased to incur legal costs on or about that time – for costs orders made, see full case summary at [5.63.214B]).

[5.53.20] 53.01 Application

[5.53.25] Operation. Rule 53.01 operates in respect of the occupation of land adverse to the owner of the land and, in the case where the occupation commenced pursuant to a licence, where the occupation continues beyond the term of the licence: *Linga v C & N Constructions Pty Ltd* [2012] NTSC 08 at [8].

In *Pappas v Bowmark Pty Ltd* (1999) V Con R 54-594, when discussing a provision similar to O 53 contained in the Victorian Supreme Court Rules, Tadgell JA commented that the procedure was designed to enable speedy resolution in favour of the proprietor of land to resume possession from a trespasser where the right to possession was obvious. It was said that significant factual disputes could count against the availability of the procedure under that rule. In that respect, the objective of the rule was similar to an application by a party for summary judgment in that the object was to grant summary relief where the ultimate decision

was obvious without the delay and expense required by the usual litigious process: *Linga*, above, at [9].

CASES – *Linga v C & N Constructions Pty Ltd* [2012] NTSC 08 (defendant builder ordered to yield up possession of land where building contract which granted defendant licence to occupy terminated by plaintiff but defendant challenged validity of such termination and claimed to be entitled to retain possession based on security rights given in contract).

[5.53.29] Termination of licence. A contractual licence is revocable even if given for consideration, whether it is exclusively granted and even if it is specified as being irrevocable. The only exception is where the licence is coupled with a proprietary interest, such as a *profit a prendre* where a right to enter land is granted to remove timber or crops and the possession and interest are inextricably linked. An equitable mortgage or an equitable charge would also constitute a sufficient interest in this regard: see the discussion in *Linga v C & N Constructions Pty Ltd* [2012] NTSC 08 at [12]-[27] and the authorities cited therein.

Determination of a contract which entitles a party to enter land terminates the licence, even if the determination itself was a breach of contract: see, eg, *Porter & Thompson v Hannah Builders Pty Ltd* [1969] VR 673 (cited in *Linga*, above, at [17]).

[5.63.200] 63.03 General rule

[5.63.203] Practice Direction No 6 of 2009 ("Trial Civil Procedure Reforms"). The purpose of the reforms was to maximise the prospect of settling a dispute without incurring the costs of court proceedings. In the event that resort to court proceedings is necessary, the reforms were intended to ensure that each party has a sufficient understanding of its own case and the case against it to accurately assess its prospects of success and the likely time and cost involved in taking the matter to trial and to make a reasonably accurate assessment of the most appropriate settlement offer to make, without prejudice save as to costs: *Spadaccini v Grice* [2012] NTSC 41 at [41].

For commentary on PD6 generally, see [400.295].

[5.63.214B] Exercise of discretion – conduct of parties during proceedings.

CASES – *Spadaccini v Grice* [2012] NTSC 41 (parties had combined costs of around $900,000 – plaintiffs recovered $110,000 by consent judgment before evidence called at trial – plaintiffs pursued grossly excessive damages claim – defendant had constructed wall that encroached into plaintiffs' land – plaintiffs offered to pay for removal of wall and reconstruction of new fence which defendant verbally accepted – several years later, defendant offered to instead purchase land to legitimise encroachment – plaintiffs remade original offer which defendant accepted – terms of agreement drafted by defendant's solicitor inappropriate given generous concessions already made by plaintiffs – plaintiffs refused to agree to proposed agreement and retracted previous offers – plaintiffs demanded defendant remove wall at own cost – defendant offered to contribute $5,000 towards costs or to purchase land to legitimise encroachment, which plaintiffs refused – plaintiffs made final offer to remove wall and for defendant to reimburse them for quoted cost of $3,000 and costs of new fence, but refused by defendant – orders by consent for removal of wall at defendant's cost made on 20 April 2011, with plaintiffs being entitled to $110,000 – plaintiffs failed to comply with Practice Direction No 6 of 2009 ("PD6") by not providing concise details of claim and copies of documents – plaintiffs avoided mediation and procrastinated – defendant proposed mediation on 21 April 2011 – on 7 Oct 2011, defendant made *Calderbank* offer to settle counterclaim if plaintiffs accepted $52,500 already paid into court – defendant also offered to pay plaintiffs' costs of proceeding on indemnity basis – mediation unsuccessful – on 1 Feb 2012, defendant made *Calderbank* offer for judgment in favour of plaintiffs in sum of $110,000 inclusive of interest, counterclaim be dismissed and costs to be determined by court – plaintiffs rejected offer on 2 Feb 2012 and counter-offered, but plaintiffs ultimately agreed on 7 Feb 2012 to settle substantially on terms offered by defendant – *Held:* Mediation would have probably settled dispute, possibly for figure in range for which consent judgment entered – plaintiffs' non-compliance with PD6 led to avoidable costs being incurred – despite plaintiffs' conduct, plaintiffs were throughout entitled to $110,000 and proceedings would have been avoided if defendant had accepted pre commencement offer – defendant's *Calderbank* offer, and absence of any settlement-motivated response by plaintiffs for several months, were significant considerations regarding costs post-24 Oct 2011 – by 24 Oct 2011, plaintiffs'

default under PD6 and its effects overwhelmed effect of defendant's pre-commencement unreasonableness – following orders made: defendant pay 100 per cent of plaintiffs' costs on standard basis from 13 Aug 2010 to 20 April 2011 as defendant unreasonably refused to accept plaintiffs' settlement offers; defendant pay 70 per cent of plaintiffs' costs incurred 21 April 2011 to 24 Oct 2011, as there was some necessity for plaintiffs to litigate but plaintiffs committed significant defaults under PD6; plaintiffs pay 50 per cent of defendant's costs on standard basis incurred 25 Oct 2011 to 2 Feb 2012, as effect of plaintiffs' non-compliance with PD6 manifested itself more fully from 25 Oct as parties incurred costs which might not otherwise have been incurred, and 100 per cent of such costs incurred from 2 Feb 2012 to 5 Feb 2012, as offer of compromise could reasonably have been accepted by plaintiffs during this period).

[5.63.221] Inflated damages claim.

CASES – For a case in which plaintiffs recovered $110,000 by consent judgment but had made a grossly exaggerated claim of ten to sixteen times greater than this amount, see the case summary of *Spadaccini v Grice* [2012] NTSC 41 at [5.63.214B].

[5.63.257] Contractual right to costs. The interrelationship between the court's power to award costs and a party's contractual right to costs was considered by Master Luppino in *Indigenous Business Australia v Kani (No.2)* [2012] NTSC 37. Master Luppino stated (at [7]-[8]):

> There are a number of relevant authorities. The bulk of those decisions relate to the basis of the costs order as opposed to the entitlement to costs or the exercise of the discretion. Nonetheless the principles can equally apply to the question of the entitlement to costs.
>
> The principles which I think can be extracted from the authorities are:-
>
> 1. Where there is a contractual right to costs, the discretion of the Court should generally be exercised in accordance with that contractual term provided that the term is plainly and unambiguously expressed;
> 2. The contractual right stands and has effect independent of any costs order; and
> 3. The contractual term does not override the Court's discretion and the contractual term is merely a factor to take into account in the decision to order costs. (citations omitted)

In *Indigenous Business Australia*, a mortgage agreement provided for the mortgagor to pay to the mortgagee the "amount owing", which was defined in the mortgage as including "[a]ny costs or expenses incurred or payable by us in exercising any rights or powers contained in the mortgage or any agreement covered by the mortgage". It was held (at [6]) that the wording would support an argument that costs were to be paid on an indemnity basis (although, in that case, indemnity costs were not specifically claimed in the originating motion). Further, the mortgagee in that case issued a non-compliant, and therefore ineffectual, notice under s 89(2) of the *Law of Property Act*. Master Luppino held (at [12]) that, regardless of whether the non-compliant notice fell within the meaning of the definition, "the Plaintiff should not be allowed the costs incidental to that. I do not interpret the contractual entitlement to authorise the Plaintiff's recovery of those costs independent of a cost order in the proceedings". The defendant was ordered to pay the plaintiff's costs of and incidental to the proceedings, on a standard basis, save and except for the costs of and incidental to the s 89(2) notice.

[5.63.258] Concession or procedural indulgence.

The usual rule that applies in cases where a party seeks a concession or an indulgence is that the party is ordered to pay the other party's costs of the application. Relief against forfeiture is one of the recognised applications of this principle: *Indigenous Business Australia v Kani (No.2)* [2012] NTSC 37 at [9].

Where, for example, a defendant seeks relief pursuant to s 105 ("Relief against provision for acceleration of payment") of the *Law of Property Act*, such an order is a concession given by a court and only arises when the defendant is already in breach. Any order for relief modifies what would otherwise be a strict legal entitlement to enforcement at the option of the mortgagee. It is the defendant's own breach which makes the application necessary. Accordingly success in such applications is not viewed as success for the purposes of the application of the usual rule that the successful party is awarded costs. In fact, the converse is

true as routinely the order for relief is conditional upon payment of costs by the mortgagor: Indigenous Business Australia, above, at [9].

[5.63.2400] 63.25 Bases of taxation

CASES (GENERAL) – *BAE Systems Australia Ltd v Rothwell* [2013] NTCA 03 (decision of Supreme Court refusing indemnity costs for Work Health Court proceedings despite unreasonable delay in settlement of compensation, on basis court had already awarded costs under s 109(1) of *Workers Rehabilitation and Compensation Act* which included interest for delay, left undisturbed by Court of Appeal).

Local Court Act

[45.14.0] 14. Jurisdiction

[45.14.12] Equitable jurisdiction of Local Court. The Local Court does not have concurrent jurisdiction pursuant to s 14(1)(b) of the *Local Court Act* with the Supreme Court to hear and determine actions in equity for account between co-owners or to hear and determine any other matters of the type prescribed by the *Law of Property Act*. This is in accordance with the statutory interpretation principle of *leges posteriors priores contrarias abrogant*: *Anderson v Turner* [2013] NTMC 20 at [45].

The Local Court does not, pursuant to s 14(1)(b) of the *Local Court Act*, have a jurisdiction in equity to grant relief from forfeiture under the *Tenancy Act*, which operates concurrently with the statutory discretion conferred upon the Supreme Court to grant relief from forfeiture: *CEO (Housing) v Binsaris* [2002] NTSC 9.

Work Health Court Rules

[88.8.20] 8.01 Form and content

[88.8.34] Claim or defence under an Act (r 8.01(1)(d)). In *Millar v ABC Marketing and Sales Pty Ltd* [2012] NTSC 21, the Magistrate in the decision being appealed refused to permit the respondent to argue that the worker's benefits under s 65(2)(b)(ii) of the *Workers Rehabilitation and Compensation Act* reduced the amount which could be claimed because that was a statutory provision upon which the respondent wished to rely and the respondent had not pleaded it. In finding that this was an error, Mildren J stated (at [50]) (decision overturned on appeal in part on other grounds in *ABC Marketing & Sales v Millar* [2012] NTCA 6):

> The respondent was not relying on a defence under an Act within the meaning of that Rule ... [T]he burden of proving the relevant difference between the amounts in s 65(2)(a) and s 65(2)(b) rested on the worker. However, under Rule 8.03 (c) of the Work Health Court Rules, a party who wishes to raise a question of fact which does not arise out of a preceding pleading is required to plead it. Therefore it seems to me that, where an employer wishes to raise as an issue that the most profitable employment reasonably open to the worker is some employment other than that which the worker has asserted in the Statement of Claim, the employer must plead it.

Work Health Administration Act 2011

[96.14.0] 14 Jurisdiction of Court

[96.14.9] Inherent and implied powers. The Work Health Court is a statutory court and, unlike a superior court, has no inherent powers. However, it does have implied powers: *Consolidated Press Holdings Ltd v Wheeler* (1992) 84 NTR 42; [1992] NTSC 102 at [13]; *Robbins v Nominal Insurer* [2010] NTMC 39 at [3]. This is in accordance with the analysis of implied powers in *Grassby v The Queen* [1989] HCA 45; (1989) 87 ALR 618 at 628 where Dawson J said (applied in *Consolidated Press Holdings*, above):

> However, notwithstanding that its powers may be defined, every court undoubtedly possesses jurisdiction arising by implication upon the principle that a grant of power carries with it everything necessary for its exercise ...

Dawson J further considered what might be an implied power and said (at 628):

> Recognition of the existence of such powers will be called for whenever they are required for the effective exercise of a jurisdiction which is expressly conferred but will be confined to so much as can be derived by implication from statutory provisions conferring particular jurisdiction.

Workers Rehabilitation and Compensation Act

[97.89.0] 89 Late payment of weekly payments

[97.89.5] Operation.

In *Gutte v Austral Contracting* [2006] NTMC 50, the Work Health Court summarised various principles, based on authorities, regarding the operation of s 89 in the following way (at [107]):

1. Section 89 only applies to weekly payments of compensation whereas section 109 applies to all types of compensation payments.
2. It is possible for an award to be made under both sections.
3. Interest on interest cannot be awarded.
4. An award of interest under the Act is not the same as an award of interest on judgment in civil cases. An award of interest under the Act requires more than just a successful outcome of proceedings.
5. Section 89 does not require a court order as a pre-requisite to a worker's entitlement to interest as the section mandates it whenever a weekly payment is not paid when due.
6. Where an employer disputes liability, a successful outcome for the worker is a pre-requisite to an order for interest as compensation or weekly payments are not due until the Court pronounces a result in favour of the worker.

Section 89 cannot apply to provide for interest on back payments following a successful appeal by a worker against a s 69 cancellation: *Gutte*, above, at [108].

[97.103D.0] 103D Application for and conduct of mediation

[97.103D.3] Operation.

It is not a pre-condition for the operation of s 103D that a statement referred to in s 85(8), setting out reasons for a decision to dispute liability, or s 69(1)(b), relating to a notice of decision, be valid in order to trigger the compulsory mediation process. The reason for that is that many disputes relate to the cancellation or reduction of compensation, including the validity of notices and one of the purposes of the mediation process is to attempt to resolve disputes over notices. The prescribed 90 day period runs from the receipt of either a s 85(8) or s 69(1)(b) notice, whether it is valid or not. The validity or otherwise of a statutory notice is a matter that is to be adjudicated upon by the court once proceedings have been properly commenced in accordance with s 103J, or, where there has been a failure to seek mediation within the prescribed 90 day period, an extension of time has been granted under s 103D(5) to ensure compliance with s 103J: *Reynolds v Don Kyatt Spare Parts Pty Ltd* [2013] NTMC 004 at [13]-[14].

CASES – *Reynolds v Don Kyatt Spare Parts Pty Ltd* [2013] NTMC 004 (worker's application for extension of time refused where worker did not have full understanding of reasons as to why benefits being cancelled due to ambiguous, confusing, misleading and consequently invalid notice of decision but did understand what was being cancelled and understood significance of limitation period).

[97.103J.0] 103J Pre-condition to court proceedings

[97.103J.3] Operation.

Section 103J(3) specifically allows an application for interim determination to be made before a mediation has occurred. The purpose of the section is to allow a worker, who has the balance of convenience on his or her side, the financial relief of interim benefits. A worker who has to make an application for extension of time in relation to the substantive application for benefits should not be excluded from the operation of the section: *Devlin v Darwin Phoenix Hotel* [2006] NTMC 49 at [17], [20].

...

If a worker is successful in his or her application for interim benefits and then does not commence a substantive application for benefits, it is open to the employer to apply for the revocation of the order, pursuant to s 107(1). However, if, prior to the time that an application by the employer for cancellation of benefits is made, the worker files an application for benefits with an application for extension of time then the order may not be cancelled. It is accepted that if an application for benefits is made out of time that the worker is able to apply for an extension of time at the same time that he or she files the application for benefits. The application for extension of time will be dealt with at the beginning of the substantive hearing of the matter. The fact that the worker may need an extension of time is just one of the matters which will be considered when considering the balance of convenience on an application for interim determination: *Devlin*, above, at [16]-[17].

CASES – *Devlin v Darwin Phoenix Hotel* [2006] NTMC 49 (application for interim benefits dismissed where employee in financial difficulties but unlikely to be successful in claim, had not been full and frank in disclosures, had limited ability to repay interim benefits and required extension of time to file substantive application for benefits).

[97.107.0] 107 Interim determination

[97.107.3] Interim payments – legal principles.

The Work Health Court does not have an implied discretion to make an interim determination of a party's entitlement to compensation to be paid in some amount less than that entitlement. The scheme of s 107 is that where the court in its discretion makes an interim determination then the party entitled to the compensation is to receive for a period calculated pursuant to s 107(3) the entitlement to the compensation in question, the amount of such compensation having been determined in accordance with the Act. There is no discretion in the court to order interim payments of compensation in any lesser amount: *Ashly v AEC Environmental Pty Ltd* [2013] NTMC 16 at [20]-[24].

[97.107.15] "Undue hardship" (s 107(6)(a)).

CASES – *Ashly v AEC Environmental Pty Ltd* [2013] NTMC 16 (circumstances whereby, without further interim weekly payments, worker's wife would have had to take on third job to earn enough money to balance household budget did not amount to undue hardship for purposes of s 107(6)(a) as such hardship needed to be to worker, not wife).

[97.107.25] "Otherwise exceptional" (s 107(6)(b)).

CASES – *Ashly v AEC Environmental Pty Ltd* [2013] NTMC 16 (exceptional circumstances existed where, without further interim weekly payments, or some of it, worker's wife would have had to take on third job to earn enough money to balance household budget).

[97.109.0] 109 Unreasonable delay in settlement of compensation

[97.109.3] Operation.

Section 109(2) requires more than mere lateness of payment and if non-payment is due to a genuine dispute about liability or quantum, an order under s 109(2) should not be made. Where weekly payments are not properly terminated, for example without giving the notice required by s 69, then an order under either section can be made. An order under s 109(2) is

appropriate for a contumelious default in payment of a court ordered payment: see *Gutte v Austral Contracting* [2006] NTMC 50 at [107] and the authorities cited therein.

Limitation Act

[285.44.0] 44 Extension of periods

[285.44.36] Exercise of discretion to grant extension of time (sub-s (3)).

In *Bell v McConnel* [2012] NTSC 66, Barr J summarised broad principles relevant to the exercise of the discretion in the following way (at [19]):

> [T]he general case law in relation to extension of time applications establishes some broad principles: that the delay should be satisfactorily explained; that the substantive matter (appeal or otherwise) has merit; and that the respondent would not be prejudiced as a result of the delay in the event that leave were granted (to appeal, or as the case may be) out of time, although the absence of prejudice is not of itself enough to justify the extension.

In *Bell*, the applicant applied for review of a legal costs assessment 89 days out of time under s 352(2)(a) of the *Legal Profession Act*. In that case, Barr J quoted the following observations of McHugh J in *Gallo v Dawson* (1990) 93 ALR 479 at 480 in relation to O 60 r 6 of the Rules of the High Court, which permitted the Court or a Justice to enlarge the time appointed by the rules for doing an act upon such terms, if any, as the justice of the case required:

> The grant of an extension of time under this rule is not automatic. The object of the rule is to ensure that those Rules which fix times for doing acts do not become instruments of injustice. The discretion to extend the time is given for the sole purpose of enabling the court or justice to do justice between the parties: see *Hughes v National Trustees Executors and Agency Co of Australasia Ltd* [1978] VR 257 at 262. This means that the discretion can only be exercised in favour of an applicant upon proof that strict compliance with the rules will work an injustice upon the applicant. In order to determine whether the rules will work an injustice, it is necessary to have regard to the history of the proceedings, the conduct of the parties, the nature of the litigation and the consequences for the parties of the grant or refusal of the application for extension of time ... Where the application is for an extension of time in which to file an appeal, it is always necessary to consider the prospects of the applicant succeeding in the appeal …

In *Gallo*, the applicant had sought an extension of time in which to file a notice of appeal against an order dismissing an action brought in the original jurisdiction of the High Court. The dismissed action was clearly misconceived and had no prospects of success. The application for an extension of time was brought 16 months out of time. The principle of finality of judicial determinations was a relevant consideration. Barr J noted that the observations of McHugh J in that context were not necessarily determinant in *Bell*. Barr J considered possible injustice to the applicant but did not consider that his discretion could only be exercised in favour of the applicant "upon proof that strict compliance with the [time limit] will work an injustice upon the applicant" (at [21]).

CASES – *Bell v McConnel* [2012] NTSC 66 (application for extension of time for review of legal costs assessment 89 days after expiry of 28-day period to apply for such review refused where applicant not aware of time limit but no merit in application for review and no injustice to applicant if time limit enforced).

Corporations Act 2001

[363.109X.0] 109X Service of documents

[363.109X.0] Operation. As service of a document on a company can be made by "leaving it at" a nominated address under s 109X, this means personal service is not required: see *TBK Beef Pty Ltd v Ark Mangoes Pty Ltd* [2012] NTSC 44 at [44].

CASES – For a case in which service of originating process was held by the Local Court to be properly effected under r 6.05(c) of the Local Court Rules where the defendant was served with a statement of claim at an office other than its ASIC listed registered office as required under s 109X, see the case summary of *Atlas Holdings (NT) Pty Ltd v Abode New Homes Pty Ltd* [2011] NTMC 005 at [42.6.203].

Miscellaneous Civil Procedure Law

[400.50.3] Court powers – stay of proceedings (inherent power).

In *MG Lines Pty Ltd t/as Coniston Station v Navi* [2013] NTSC 20, Kelly J outlined considerations relevant to the exercise of the discretion to stay proceedings pending the outcome of other proceedings. Her Honour stated (at [23]) (citing *Sterling Pharmaceuticals Pty Limited v The Boots Company (Australia) Pty Ltd* (1992) 34 FCR 287 at 291):

> Considerations to be taken into account in determining whether to stay one set of proceedings pending the outcome of another include, relevantly:
>
> (a) which proceeding was commenced first;
>
> (b) how far advanced the proceedings are in each court;
>
> (c) whether work already done in preparation on one set of proceedings might be wasted;
>
> (d) whether the determination of one proceeding is likely to have a material effect on the other;
>
> (e) the undesirability of permitting multiplicity of proceedings in relation to similar issues; and
>
> (f) the undesirability of there being contradictory determinations in two different proceedings.

The question of which proceedings were commenced first has been held to not be a significant factor: see *MG Lines*, above, at [24].

Where an application for a stay has been brought at a very late stage in the proceedings that are sought to be stayed, this is remediable by an order for costs thrown away if, as a result of the other proceedings, it becomes no longer necessary to determine the issues in the proceedings sought to be stayed: see *MG Lines*, above, at [27].

It is undesirable for there to be a possibility of inconsistent determinations in two separate sets of proceedings in the Supreme Court. Further, it is not appropriate for the Court to make determinations in one set of proceedings based on assumed facts which may later be found in other proceedings to be untrue when evidence can be called and relevant findings of fact made and a binding determination given on the same issues: *MG Lines*, above, at [29] per Kelly J.

CASES – *MG Lines Pty Ltd t/as Coniston Station v Navi* [2013] NTSC 20 (case stated proceedings, where questions of law were to be answered on basis of assumed facts, stayed where separate common law proceedings relating to same circumstances were to find facts based on evidence and was therefore potential for incompatible determinations).

[400.50.4] Court powers – stay of proceedings (statutory power).

CASES – *Indigenous Business Australia v Kani* [2012] NTSC 24 (stay of proceedings granted under s 105 of *Law of Property Act* where invalid notice of exercise of power of sale served and mortgagee acquiesced in default by refraining to give notice of default for extended period of over 18 months, value of default not excessive and mortgagor had cleared arrears).

[400.50.34] Court powers – Anti-suit injunction. In *Pandolfi v Carlsund* [2012] NTSC 36, Blokland J considered principles relevant to the grant of an anti-suit injunction. In that case, the defendant sought orders restraining the plaintiff from commencing or continuing proceedings in the United Kingdom for damages arising out of a motor vehicle accident that occurred in the Northern Territory and in relation to which proceeding had been commenced in the NT Supreme Court. Blokland J stated (at [4]-[10]):

> Since at least the decision *CSR Ltd v Cigna Insurance Australia Ltd*, it is clear the inherent or implied powers of an Australian court to protect the integrity of its processes extend to the grant of an anti-suit injunction. The remedy is discretionary, directed against the relevant party in person and exercisable when the ends of justice require it.
>
> The equitable jurisdiction in some circumstances may provide an alternative basis enabling the grant of relief to similar effect, however equity is not relied on by the applicant/defendant. *CSR Ltd v Cigna* confirms an injunction may be granted by a court in its equitable jurisdiction to restrain proceedings in another court if the bringing of those proceedings involves unconscionable conduct, or is vexatious or oppressive.
>
> ...

> In *CSR Ltd v Cigna*, the inherent power to grant an anti-suit injunction was said to be capable of being exercised when the administration of justice demands or when necessary for the protection of the court's own proceedings or processes.
>
> ... Any proceedings in another Court now taken on the same subject matter in complete correspondence with the relief sought here, would tend to interfere with the proceedings pending in this Court. There are parallels with the power of a Court to exercise the discretion to stay proceedings for abuse of process, however the unusual context of the possibility of two sets of proceedings in two different courts requires particular considerations not always present in abuse of process applications. In *CRS Ltd v Cigna* the availability of anti-suit injunctions was described as a counterpart power to abuse of process to protect the integrity of the Courts processes once set in motion.
>
> ...
>
> I am confident the inherent power of this Court authorises the grant of the orders sought. Additionally s 69 *Supreme Court Act* provides a general legislative basis for granting injunctive relief. Further, the granting of such an order in my view does not go beyond what is reasonable protection or enforcement of the jurisdiction invoked. The order is necessary to enable the Court to effectively exercise its jurisdiction. (citations omitted)

CASES – *Pandolfi v Carlsund* [2012] NTSC 36 (plaintiff restrained from commencing or continuing proceedings in UK for damages arising out of motor vehicle accident in Northern Territory where plaintiff had received advice higher level of damages could be recovered in UK).

[400.70.5] Interlocutory vs final application/order.

Reasons for judgment are not of themselves judgments: *Ah Toy v Registrar of Companies* (1985) 1985 FCR 280 at 286 (applied in *Dogangun v NTA* [2013] NTMC 12 at [13]). Accordingly, factual findings made by a court are not judgments as they do not qualify even as reasons for judgment because they do not purport to underpin, explain or justify a final order or judgment of the court: *Dogangun*, above, at [20].

[400.85.5] Statutory notices. *Hunter v Hunter* [1936] AC 222 is authority for the proposition that the pre-conditions to the exercise of a power of sale specified in a mortgage should be strictly complied with in regard to both form of notice and service requirements: *Indigenous Business Australia v Kani* [2012] NTSC 24 at [15], [26].

The case of *Mobil Oil Australia Ltd v Kosta* (1992) 14 FLR 343 concerned service of a notice exercising an option. The terms of the option specified that it was to be exercised by serving the notice by registered post. The pleadings in that case did not allege service by registered post. The decision was in respect of an application to strike out the statement of claim and dismiss the proceedings on the basis that it did not disclose a cause of action given that it did not plead that service had been effected by registered post. Having noted that there was an absence of authorities which rendered service by ordinary post to be as equally effective as registered post, Blackburn J held that the pleading was lacking for that reason. In *Indigenous Business Australia v Kani* [2012] NTSC 24, Master Luppino held that there was no reason why the principle could not equally apply to a notice under s 89(2) of the *Law of Property Act*. Master Luppino did, however, note that in *Mobil* it was not clear whether there was any evidence that established the party had actually received the notice as the case was an interlocutory application for a procedural order.

CASES – *Reynolds v Don Kyatt Spare Parts Pty Ltd* [2013] NTMC 004 (notice of decision issued under s 69 of *Workers Rehabilitation Compensation Act* invalid as was ambiguous, confusing and misleading and failed to provide sufficient detail to enable worker to fully understand why amount of compensation previously paid being cancelled); *Indigenous Business Australia v Kani* [2012] NTSC 24 (statutory notice of default with correct statement of nature of default but with reference to incorrect clause in mortgage document did not result in failure to comply with relevant statutory provision as object of notice, to protect mortgagor where default could be remedied, still achieved; however, notice of exercise of power of sale not validly served where ordinary post used in lieu of registered post as required under Act); *Websdale v S & JD Investments Pty Ltd* (1991) 24 NSWLR 573 (NSWCA) (statutory notice which obviously misstated nature and extent of mortgagor's default in payment of interest and which incorrectly alleged default in respect of repayment of principal did not comply with relevant statutory provision).

[400.290.5] Dux litis.

The Latinism "*dux litis*" appears to be peculiar to the legal language of South Australia and the Northern Territory: see *Kyrpeos v Nalbalco* [1999] NTSC 60; *Shepheard v NTA* [2013] NTMC 013 at [13], fn 4.

...

Principles and authorities relating to *dux litis* were considered at length by the Work Health Court in *Shepheard*. In that case, Dr John Lowndes stated (at [13]-[17]):

> The question as to which party should be *dux Litis* – that is to say who should begin, or proceed first, at the substantive hearing – is a matter of practice and procedure; and any ruling in relation to the matter is of a discretionary nature [*Edwards v Airpower Pty Ltd* [1995] NTSC 117 per Mildren J]. Usually, for sound practical reasons, the order of adducing evidence and addressing is "left in wide terms to the discretionary decision of the court of trial, with any indicative general rules being subject to any directions given by that court: see for example, the structure of r 49.01 of the Supreme Court Rules (NT)" [*Kypreos*].
>
> In *June D'Rozario and Associates Pty Ltd v Makrylos* [1993] 112 FLR 314 Thomas J dealt with the question of *dux Litis* in a civil suit for monies due and owing for work done by the plaintiff for the defendant:
>
> > The court may give directions as to the order of evidence and generally as to the conduct of the trial. Order 49.01 of the Supreme Court Rules.
> >
> > In the absence of a direction the plaintiff begins if the plaintiff has the burden of proof on a question and the defendant begins if the defendant has the burden of proof on all questions. Order 49.02 (a) and (b) of the Supreme Court Rules.
> >
> > The long standing rule of procedure is that, where the plaintiff bears the legal onus of proof on any question, the plaintiff has the benefit and burden of going first: *Mercer v Whall* (1845) 5 QB 447; 114 ER 1318; *Brown v Lethbridge* (1876) 14 SCR NSW 315; *Portelli v Port Waratah Stevedoring Co Pty Ltd* (1959) VR 195.
> >
> > One of the tests to be applied in deciding the order of evidence is to ask who has the onus of establishing the central affirmative proposition in the proceedings: *Harris v AGC (Insurances) Ltd* (1984) 38 SASR 303 per Olsson J at 308. It is not necessary to have regard to the substance of the issues and not to technical form.
> >
> > In this matter the plaintiff's claim is for monies due and owing by the defendant for work done by the plaintiff ... The defendant has admitted liability but disputes the quantum of the claim.
> >
> > In his counterclaim the defendant claims:
> >
> > 1. The plaintiff was, through its agent, negligent in its advice to the defendant.
> > 2. The plaintiff is liable for damages for the loss sustained.
> >
> > The plaintiff disputes liability and quantum on the defendant's claim.
> >
> > I consider that the plaintiff should be *dux Litis* in these proceedings for the following reasons.
> >
> > There are obviously a number of issues for decision in the substantive hearing. However, one of the central affirmative propositions in the proceedings is the quantum of the plaintiff's claim, the onus of which lies upon the plaintiff. The defendant bears the onus of proof on the question of negligence alleged by the defendant and the quantum of damages for any loss sustained as a result of any such negligence on the part of the plaintiff.
> >
> > Counsel for the plaintiff argues that the defendant should proceed *dux Litis* so that the plaintiff will be able to answer the claim for alleged negligence. I am not persuaded that is a reason to depart from the well established practice that the plaintiff is *dux Litis* where the plaintiff bears the legal onus of proof on any question, in this case the quantum of the plaintiff's claim.
> >
> > Nor am I persuaded that in the context of this case the correct test to apply is that set out in *Abrath v Northern Eastern Railway Company* (1883) 11 QBD 440 Bowen LJ at 456. That is who will succeed if no evidence is called by either party at the outset of the trial.
> >
> > Finally, there is no evidence, or circumstances, which suggest that the plaintiff will be unfairly prejudiced if the plaintiff proceeds *dux Litis*.
> >
> > The established principles and the rules of this court provide that the plaintiff will proceed first where the burden of proof on a question rests on the plaintiff.
> >
> > I do not consider there is reason in this case to depart from the established principle.

> A similar approach was taken by Kearney J in *Kypreos and Nalbalco Pty Ltd* [1999] NTSC 60, which relevantly concerned proceedings in the Work Health Court.
>
> > The question of who should be "*dux Litis*" in an action, or in a particular issue in an action, is intimately linked with the identification of the central proposition in issue, and of the party on whom the legal burden of proving that proposition lies. See, for example, *June D' Rozario & Associates Pty Ltd v Makrylos* (1993) 112 FLR 31 at 315. Generally, but not always, the person against whom a verdict would be given if no evidence were called on either side, is entitled and bound to begin. To determine who is to be "*dux Litis*" the question should always be: what is the fairest and most effective method of resolving the issues in question? A court of trial needs to have discretion in deciding this question. Various practices have developed in determining who is to be "*dux Litis*" in worker's compensation cases in other jurisdictions: see *Simpson Ltd v Arcipreste* (1989) 53 SASR 9 at 13, 22 -23; and *Harris v AGC (Insurances) Ltd* (1984) 38 SASR 303 at 308. These cases show that there is no general rule that the worker must always be "*dux Litis*"; and that usually the party bearing the onus of proof of the central proposition has the right and duty to begin.
>
> This approach was also taken by Southwood J in *Robertson v TIO* [2005] NTSC 74.
>
> In *Edwards* ... Mildren J had occasion to consider the question of *dux Litis* in proceedings brought in the Work Health Court. (citations omitted)

The only fetter on the exercise of the discretion on a ruling on *dux litis* is that it must be legitimate and reasonable. It cannot result in a substantial wrong or be unreasonable or plainly unjust: *Edwards*, above (applied in *Shepheard*, above, at [31]).

In regard to where there are multiple issues and a party only has the onus of proof in relation to some of them, Pollock CB stated in *Shaw v Beck* (1853) 8 Exchequer 392 at 398; 155 ER 1401 at 1403 (quoted with approval in: *Edwards*, above, per Mildren J; *Shepheard*, above, at [26]):

> Where there are several issues, some of which are upon the plaintiff and some upon the defendant, the plaintiff may begin by proving only those which are upon him, leaving it to the defendant to give evidence in support of those issues upon which he intends to rely; and the plaintiff may then rebut the facts upon which the defendant has adduced in support of his defence.

However, in Edwards, Mildren J emphasised that the rule was not immutable:

> The practice is based on general convenience; it depends upon the issues raised as set out in the pleadings, and as Singleton LJ pointed out in *Beavis v Dawson* (1957) 1 QB 195 at 204:
>
> > … the question arises as to what is the most convenient way of dealing with the matter in the interests of justice, in the interests of the parties and from the point of view of the court. Those interests are really all the same. If, after hearing submissions, the Judge decides that one course is preferable to another, his decision should in general be treated as final.

Mildren J indicated that in considering the question of convenience, the court will usually give great weight to whether the applicant is called upon to prove a negative.

An employer is *dux litis* in an appeal against an employer's decision to cancel benefits under s 69 of the *Workers Rehabilitation and Compensation Act*: *Shepheard*, above (citing *J H Constructions Pty Ltd v Davis* (unreported, SCNT, Asche CJ, 3 November 1989); *Northern Cement Pty Ltd v Ioasa* (unreported, SCNT, Martin CJ, 17 June 1994)).

CASES – *Shepheard v NTA* [2013] NTMC 13 (employer held to be *dux litis* in appeal by worker against decision to cancel benefits as, among other factors, burden of proof would only shift to worker if employer discharged its burden).

[400.295.15] Practice Direction No 6 of 2009 ("Trial Civil Procedure Reforms") – Mediation.

CASES – *Spadaccini v Grice* [2012] NTSC 41 (plaintiffs' avoidance of mediation on basis was futile for mediation to proceed while issue of costs of a summons on originating motion yet to be determined by court amounted to non-compliance with spirit of Part 2 of PD6; plaintiffs' subsequent delaying of mediation indefinitely, despite order for mediation having been made, on grounds they had not quantified their own claimed losses also amounted to non-compliance with spirit of Part 2 of PD 6).

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