

# A Full Court Decision on Rule 33 and interest on costs

By Bill Ericson, Chairman, Law Society Costs Committee

## PINTER v NEWMAN [2012] SASCFC 18

On 8 March 2012, the Full Court (Justices Gray, Kourakis and Blue) unanimously dismissed an appeal from a decision of a Judge of the District Court refusing an application by the plaintiff for solicitor/client costs and interest on costs from the beginning of the proceedings, founded largely on an alleged failure of the defendant to properly respond to an alleged Rule 33 pre-action notice served on the insurer only and not on the insured.

Insofar as pre-judgment interest on costs was claimed, the Full Court held that as the plaintiff accepted that his solicitors had not billed him for their fees until after delivery of judgment and that they had not charged interest on their fees, there was no basis for the plaintiff to claim interest as this would amount to a windfall to the plaintiff. As to Rule 33, the Full Court held that the purported Rule 33 notice did not qualify as one in that it did not contain an offer capable

of acceptance and it left some significant damages matters unresolved. It was also held that in general, service of the Rule 33 notice on the insurer alone and not on the insured, would not constitute valid service under the rule, although the possibility was left open that there might be in some cases a course of conduct between the plaintiff's solicitors and the insurer implicitly authorising such service.

Accordingly, it would seem that a plaintiff's solicitor should serve the Rule 33 notice on the insured unless the insurer waives this requirement beforehand. Further, it was held that the defendant's response, which did not admit liability and gave some reasons for this, was a sufficient response to comply with the defendant's obligation under Rule 33.

The Full Court also reaffirmed the general principle that party/party costs are the normal costs award, and a party seeking to obtain solicitor/client costs will have to point to some special circumstances justifying this. They found that given the failure of the Rule 33 points, there was nothing in the

defendant's conduct which could be regarded as unreasonable so as to be the basis for a solicitor/client costs order.

Whilst in general the decision is favourable to defendants, it should be noted that the Full Court did contemplate that a Rule 33 notice, which only departed in minor circumstances from the requirements of Rule 33, might have that non-compliance dispensed with nunc pro tunc under Rule 117, so that an immaterial technical deficiency in a Rule 33 notice might not preclude it being used as a basis for seeking solicitor/client costs if such a dispensation should be obtained. Accordingly, a defendant who receives a Rule 33 notice which is possibly invalid, would be well advised to send a letter back which both objects to the notice as being invalid, and also provides an appropriate response under that Rule.

This case is now the leading authority on Rule 33 notices, and litigation solicitors, particularly those involved in personal injury litigation, would do well to read it. **B**



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