Bar Speak

with Andrew Lyons

capitulate or be hit with indemnity costs

Litigation Practitioners may need to amend the way in which they draft formal offers to settle under the Uniform Civil Procedure Rules.

Every litigator has received instructions to make formal offers that require the defendant to capitulate and agree to the plaintiff's full claim. For example, such offers are made when the plaintiff seeks payment in full of a debt and interest or specific performance of a contract. The threat is surrender totally now or pay indemnity costs later.

Three single Judge decisions suggest a weakness in this strategy.

In each case, the plaintiff had made a formal offer and obtained a judgement no less favourable than the offer. Strong grounds for the recovery of indemnity costs, one might think?

The defendants said otherwise on the ground that the offer required the defendant to give the plaintiff 100% of the claim. No discount was offered to induce the defendant to compromise.

In the consideration of this contention, a central provision is UCPR r. 360(1) which provides that,

"If –

(a) the plaintiff makes an offer to settle that is not accepted by the defendant and the plaintiff obtains a judgment no less favourable than the offer to settle; and

(b) the court is satisfied that the plaintiff was at all material times willing and able to carry out what was proposed in the offer;

the court must order the defendant to pay the plaintiff's costs calculated on the indemnity basis unless the defendant shows another order for costs is appropriate in the circumstances."

For present purposes, there are two key elements to the provision.

First, the relevant offer must be an "offer to settle" within the meaning of the rule. That expression is defined in r. 352 to mean "an offer to settle made under this part." Such an offer, wrote Ambrose J in **Bruce Mitchell - v - Pacific Dawn Pty Ltd**, will "not include an 'offer' by one party to accept the whole of the relief it seeks in its claim or application, particularly where the nature of relief claimed is such that it will be either granted or refused unconditionally". As the offer in that case in effect "required the complete capitulation of the defendant ... the making of the 'offer' [had] the affect of making the defendant liable for indemnity costs, if it failed, but entitled only to standard costs if he succeeded." The offer was held not to be an offer within the meaning of the relevant rule.

Secondly, r. 360(1) gives the Court discretion as to whether to award indemnity costs, even if there has been a complying offer. In **Bruce Mitchell - v - Pacific Dawn Pty Ltd**, Ambrose J also held that "without something else, it would be inappropriate to make an" award of indemnity costs on the basis of such an offer, even if, contrary to his view, the offer was one that complied with the rules.

This approach has been recently approved by Jones J in **- Millward**. In the District Court, McGill SC DCJ adopted a analysis in **JLG Industries Inc - v - Teetree Pty Ltd** where that "in order to further the objective of encouraging com the rules should only reward with indemnity costs a plain has made an offer which involves some element of comp

Two comments may be made.

1. These decisions are all single Judge decisions. The approach is not one that was applied under the parallel provisions of the former Rules of the Supreme Court. The plaintiff denied indemnity costs in Jones v Millward has obtained leave to appeal on costs. This may lead to appellate guidance on the matter.

2. In the meantime, the prudent approach for offerors is t ensure that they do not take a matter to verdict withou having made a formal offer that does involve an eleme of compromise. In JLG Industries Inc v Teetree Pty Ltd offer involved acceptance of the amount claimed with interest for the 14 month period between accrual of th of action and the making of the offer. The Judge value interest claim at about $12,000 and said that that was s compromise to make it appropriate to award indemnit

In conclusion, plaintiffs only offering to settle on terms that the defendant capitulates completely do so at the risk of being denied indemnity costs. Litigation practitioners should advise and draft accordingly.

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