Indemnity costs & offers to settle

Offers to settle are not what they used to be . . . plaintiffs wishing to obtain indemnity costs must now include an element of compromise in any offer to settle under UCPR r360. Andrew Lyons reports.

The Court of Appeal has recently decided that before a plaintiff's offer can be an "offer to settle" within the meaning of UCPR r360, it must reflect a degree of compromise. An offer that does not do this cannot set up an entitlement to indemnity costs.

This requirement is not expressed in terms in Part 9 of the UCPR and needs to be remembered by practitioners when advising clients about offers.

Let us look, sequentially, at the decision at first instance, the CA reasoning and, then, at an analysis of the decision.

At first instance

In *Jones v Millward*,[1] the plaintiffs obtained a declaration that they were entitled to specific performance of a contract for the sale of land. Before trial they offered to settle on the basis that the defendants specifically perform the contract and pay the plaintiff's costs of, and incidental to, the action on a standard basis.

After verdict, the plaintiffs claimed for indemnity costs contending that the judgment was "no less favourable" than the offer and relying upon r360 which says,

> "(1) If –
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> (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
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> (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.
>
> . . . "

The trial judge, Jones J, refused that claim and awarded standard costs. He did so citing Ambrose J in *Mitchell v Pacific Dawn Pty Ltd*[2] and McGill SC DCJ in *JLG Industries Inc v Teetree Pty Ltd*.[3] His Honour gave the plaintiffs leave to appeal on costs.

The Court of Appeal

The CA dismissed the appeal and considered two key issues.

First, the defendants relied upon NSW authorities[4] which require a degree of compromise before an offer under the NSW Supreme Court Rules 1970 could support an award of indemnity costs.

The plaintiffs sought to distinguish those authorities by pointing to the NSW rules' use of the expression "offer of compromise". They contended that the word "compromise" conveyed, and required, that the offer contain a concession while the UCPR expression "offer to settle" did not do so.

Holmes J (with whom McMurdo P. and Jerrard JA agreed) said: "I do not think that the philosophy of the Queensland rules should be regarded as significantly different, notwithstanding the use of the word 'settle' rather than 'compromise'. The purpose of the rules, as rule 5(1) explicates, is to 'facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense'. That aim is hardly promoted by insistence on nothing less than all relief sought together with costs."

Secondly, the plaintiffs argued that to require a degree of compromise before an offer was within the scope of r360 would disadvantage plaintiffs in an all-or-nothing case.

Holmes J rejected that argument, saying: "It is always open to a plaintiff in that situation to offer some concession as to costs or, perhaps, in a specific performance case such as this, to agree to accept something less than the contracted purchase price; and a plaintiff who faces an utterly spurious case is not obliged to make any offer.

"He may still seek indemnity costs in the exercise of the Court's discretion, entirely independent of rule 360. *Colgate Palmolive Co & Anor v Cussons Pty Ltd* (1993) 118 ALR 248 is a clear example of such a circumstance."

One may make four comments upon this decision.

Analysis

First, there were two ways in which the CA could have implemented the philosophy of the UCPR. The first was by construing the expression "offer to settle" in r360 in a way that excluded offers that did not contain a degree of compromise. That was the alternative the court chose.

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Andrew Lyons is a Brisbane barrister. He appeared for the defendants on the appeal.