SECURING INDEMNITY COSTS IN THE COURT OF APPEAL

By Phillipa Alexander

While *Ettingshausen*[1] established that an offer of compromise made before trial can have costs consequences on appeal, recent decisions by the NSW Court of Appeal provide guidance as to when such costs will be awarded.

INDEMNITY COSTS FOR THE ENTIRE APPEAL

Where a formal offer of compromise is made under the *Uniform Civil Procedure Rules* (UCPR) 20.26 after the appeal has commenced, and the plaintiff obtains an order or judgment no less favourable than the terms of the offer, an entitlement to indemnity costs from the day following service of the offer arises under UCPR 42.14. However, in *Leda Pty Limited v Weerden (No. 2)*,[2] indemnity costs were also awarded for the period prior to service of the offer of compromise during the appeal. Offers of compromise had been made at first instance and on appeal, and both offers had been rejected. In exercising its discretion, the Court held that 'where there had been a similar offer of compromise at first instance, and where the offer of compromise in relation to the appeal was lodged at an early stage of the appeal',[3] costs on an indemnity basis should be awarded for the entire appeal.

OFFER NOT RENEWED

Although the Court of Appeal maintains that offers of compromise made prior to trial that are neither renewed nor varied on appeal are relevant to the exercise of its general discretion as to costs, indemnity costs have not recently been awarded in these circumstances. An indemnity costs order was refused in *Ethe Late J J Virgona by its Executors v De Lautour (No. 2)*,[4] on the basis that the offer of compromise had not been renewed, the length of time since the initial offer had been made, the fact that the respondent had succeeded at trial, and taking into account the time that had elapsed between the trial and the appeal.

Similarly, in *Ainger v Coffs Harbour City Council (No. 2)*,[5] the fact that the plaintiff did not make another offer of compromise after trial did not 'foreshadow that she intended to rely upon the offer to seek an indemnity costs order in relation to the appeal costs'.[6] Nor did it demonstrate that the opponent had acted unreasonably or delinquently. Accordingly, indemnity costs were not awarded. However, it is interesting to note the comment regarding reliance upon the offer, given that the offer had in fact expired before the trial.

Indemnity costs were also refused on appeal in *Coombes v Roads and Traffic Authority (No. 2)*,[7] where the court considered the failure of a successful defendant to accept a lapsed offer made prior to trial. This failure was not necessarily unreasonable, since the defendant was entitled to rely on the judgment in its favour.

NO ENTITLEMENT FOR LAPSED OFFER

Notwithstanding the comment in *Ainger*[8] above, regarding reliance on a lapsed offer, the NSW Court of Appeal has indicated that any formal offer of compromise or a '*Calderbank*' offer made before the trial has lapsed 'will play no part in the court's discretion to order indemnity costs in regard to the appeal'.[9]

CALDERBANK OFFERS

Can a *Calderbank* offer, which is expressed to be inclusive of costs, result in indemnity costs being awarded? There have been a number of first-instance decisions that regard an informal offer on a costs-inclusive basis to be insufficiently precise to give rise to special consideration in relation to costs.[10]

However, in *Elite Protective Personnel Pty Ltd v Salmon*,[11] Beazley JA held that the court's discretion to award indemnity costs could not be fettered by a rule that limited the exercise of the discretion solely to costs-exclusive offers, and did 'not agree that an offer which is inclusive of costs cannot ever be the basis upon which the court exercises its discretion to award indemnity costs ... there are authorities of this Court that an offer of compromise which is inclusive of costs may form the basis upon which the court awards indemnity costs.' However, her Honour noted the difficulties of such an application.

One aspect identified by Basten JA in *Elite* is that the offer needs to remain open for a reasonable time so that a party has time to 'ask its lawyers' how far the sum offered will go in meeting its costs up to that time.[12] Further, if a plaintiff obtains a sum in excess of, or very close to, the offer, then obviously the offer has been bettered and an order for indemnity costs may be warranted. However, there may be uncertainty where judgment is below the total costs-inclusive offer but arguably above the damages component of it.[13]

While Beazley JA considered 'that the proper approach to any such offer of compromise is to consider it according to its terms and determine

whether, in all the circumstances, the court should exercise its discretion to award indemnity costs',[14] a costs-inclusive *Calderbank* offer would seem to be a problematic method of recovering indemnity costs.

CONCLUSION

Offers of compromise are routinely considered and served at first instance; however, they are often overlooked on appeal. To secure the best possible costs outcome for a client on appeal, in appropriate circumstances practitioners should serve a formal offer of compromise (under UCPR 20.26, in similar terms to the offer made at first instance), at an early stage of the appeal if it is intended to rely upon these offers with respect to the costs of the appeal. ■

Notes: **1** *Ettingshausen v Australian Consolidated Press* (1995) 38 NSWLR 404 per Gleeson CJ and Priestley JA. **2** *Leda Pty Limited v Weerden (No. 2)* [2007] NSWCA 283 (15 October 2007) per Hodgson JA, McColl LJA and Handley AJA. **3** *Ibid*, at [5]. **4** *Ethe Late J J Virgona by its Executors v De Lautour (No. 2)* [2007] NSWCA 323 (19 November 2007) per Ipp JA, Hodgson JA and Young CJ in Eq. **5** *Ainger v Coffs Harbour City Council (No. 2)* [2007] NSWCA 212 (16 August 2007) per McColl JA, Mason P and Hunt AJA. **6** *Ibid*, at [41]. **7** *Coombes v Roads and Traffic Authority (No. 2)* [2007] NSWCA 70 (29 March 2007) per Beazley JA, Ipp JA and Basten JA. **8** *Ainger*, see note 5 above, per McColl JA at [41]. **9** *Trustee for the Salvation Army (NSW) Property Trust v Becker (No. 2)* [2007] NSWCA 194 (10 August 2007), per Ipp JA at [9] and confirmed in *Ethe Late J J Virgona by its Executors v De Lautour (No. 2)* [2007] NSWCA 323 (19 November 2007), per Ipp JA, Hodgson JA and Young CJ in Eq. **10** For example, see *Baulderstone Hornibrook Engineering Pty Limited v Gordian Runoff Limited (Formerly GIO Insurance Limited)* [2006] NSWSC 583; and *White v Baycorp Advantage Business Information Services Ltd* [2006] NSWSC 910. **11** *Elite Protective Personnel Pty Ltd v Salmon* [2007] NSWCA 322 (14 November 2007) per Beazley JA at [5]-[6]. **12** *Ibid*, per Basten JA at [143]. **13** *Ibid*, per Basten JA at [144]-[145]. **14** *Ibid*, per Beazley JA at [7].

Phillipa Alexander *is a specialist in legal costs with Costs Partners.*
PHONE 902) 9006 1033
EMAIL Phillipa@costspartners.com.au.

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