

## *Janet Harris v Sydney Local Health District* (No. 2) [2014] NSWDC 41

### Background

On 28 March 2014, Mahony SC DCJ made orders entering a verdict and judgment for the plaintiff against the defendant in the sum of \$31,057.00. He made further orders that the defendant is to pay the plaintiff's costs of the proceedings and that the parties have liberty to apply for any special costs order sought upon seven days' notice.

On 16 April 2014, the defendant sought an order that Mahony SC DCJ vacate the costs order made and make an order in its favour pursuant to rule 42.15 of the *Uniform Civil Procedure Rules 2005* (NSW) (**UCPR**). The application was made on two bases:

1. Under cover of letter dated 18 December 2013, the defendant made an offer of compromise in the sum of \$30,000.00 (**the First Offer**); and
2. Under cover of letter dated 26 February 2014, the defendant made an offer of compromise in the sum of \$50,000.00 (**the Second Offer**).

The plaintiff had effectively rejected both offers of compromise.

The issue to be determined was whether the purported Offers of Compromise were in the proper form so as to legally constitute Offers of Compromise.

### The Law

The relevant legislation considered in this case was the UCPR.

Rule 42.15 of the UCPR applies in circumstances where the defendant has made an offer which the plaintiff has rejected and the plaintiff has obtained a judgment in its favour no more favourable to the plaintiff than the terms of the offer. In such a case, the defendant would be entitled to an order against the plaintiff for its costs incurred in respect of the claim from the date the offer is made. WA equivalent is order 24A of the *Aupreme Court Rules 1971*.

Pursuant to rule 20.26 of the UCPR, any party may in any proceedings make a written offer to the other party to compromise any claim in the proceedings, wholly or partially. However, certain criteria must be met for this "offer of compromise" to be valid. The criteria that are relevant to the present case are that:

- The offer must bear a statement to the effect that it is made in accordance with the UCPR (subrule 2(d));
- If the offeror has made or been ordered to make an interim payment to the offeree, the offer must state whether or not it is in addition to that interim payment (subrule 2(e));
- The offer must specify the period of time within which it is open for acceptance (subrule 2(f));

- The offeror must have given sufficient particulars of its claim, and copies or originals of such documents available to the offeror, as are necessary to enable the offeree to fully consider the reasonableness of the offer (subrule 4); and
- If the offer is made less than two months before trial, the closing date for acceptance must be reasonable in the circumstances (subrule 5).

## The Defendant's Position

The defendant made two initial submissions.

The first submission was that the plaintiff achieved a more favourable result at trial than the First Offer by only a minimal amount, that is, \$1,057.00. The argument was rejected as the plaintiff had nevertheless obtained a more favourable result at trial.

The second submission was that the defendant submitted the Second Offer, which was clearly higher than the result obtained at trial, and the plaintiff rejected it. Further, the defendant argued that Second Offer complied with rule 20.26. Implicit in that submission was that the Second Offer comprised both the covering letter and the enclosed formal offer of compromise.

In support of the second submission, the defendant further posited that:

- There was no official form for a Notice of Offer of Compromise;
- The Second Offer comprised both the covering letter and the enclosed document titled "Offer of Compromise". When read together, the Second Offer was a valid Offer of Compromise;
- The Second Offer stated that it was open for seven days to be accepted;
- The Second Offer stated that it was made in accordance with rule 20.26;
- Any ambiguity in the form of the Second Offer should be resolved in favour of its validity;
- Its payment of the mediator's fees could not be characterised as an interim payment of damages and therefore it was unnecessary to refer to the payment in the Second Offer; and
- The plaintiff's rejection of the Second Offer was unreasonable. If the plaintiff's solicitors needed more time to confer with the plaintiff, they certainly did nothing to request an extension of time within which to respond to the Second Offer. In any event, given that the Second Offer was made so close to the trial date, the plaintiff and her solicitors were in the best position to consider the Second Offer and to assess the plaintiff's prospects of success at trial. However, this was a case where the plaintiff was informed of the Second Offer and simply failed to respond.

## The Plaintiff's Position

The plaintiff argued that:

- The Second Offer was defective for two reasons:
  - It did not specify the period of time within which the offer is open for acceptance. Furthermore, if found to be defective, the Second Offer could not constitute a Calderbank Offer either as the covering letter did not make that proposition clear; and
  - The defendants' payment of the mediator's fees was an "interim payment" and, as the Offer of Compromise made no reference to it, the Second Offer was in breach of rule 20.26(e).
- Assessed at the time of the making of the offer, it was not unreasonable for the plaintiff to not accept the Second Offer for the following reasons:
  - The Second Offer was open for 7 days and was sent 13 days before trial commenced, which was insufficient time to obtain the plaintiff's instructions;
  - After the Second Offer had already expired, the plaintiff's solicitors received further medical evidence from the defendant's solicitors. The plaintiff's solicitors could not assess the Second Offer without all the medical evidence; and
  - The plaintiff's solicitors preferred to obtain their client's instructions in person. However, in order to leave her rehabilitation centre, several days' notice was required to be given to the centre.

## The Judge's Decision

Mahony SC DCJ held that:

- It was not proper for the Second Offer to constitute the formal offer of compromise and the covering letter. The covering letter makes it clear that it encloses, by way of service, the offer of compromise;
- The sentence that "this Offer of Compromise is open for acceptance for 7 days" gives rise to ambiguity as to the period of time for which the offer is open for acceptance. Namely, whether it is seven days from the date of the letter, or seven days from the date that offer is received by the plaintiff's solicitors;
- The defendants' payment of the mediators costs was not an interim payment; and
- It was unreasonable in the circumstances for the plaintiff not to accept the at the time it was made.

In light of these circumstances, Mahony SC DCJ found that the Second Offer was not in the proper form so as to constitute an offer of compromise and, consequently, the defendant was not entitled to an order setting aside the costs order made in the original proceedings.

## Our Observations

While this decision deals with the NSW rules on offers of compromise, it still serves as a useful reminder to WA practitioners to ensure that Order 24A offers (i.e. the WA equivalent) and Calderbank offers are drafted with sufficient clarity particularly with respect to timing for acceptance of the offer. To avoid the types of difficulties the defendant encountered in this case, offers should, ideally, refer to an actual expiration time/ date (e.g. close of business on 1 January 2015).

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